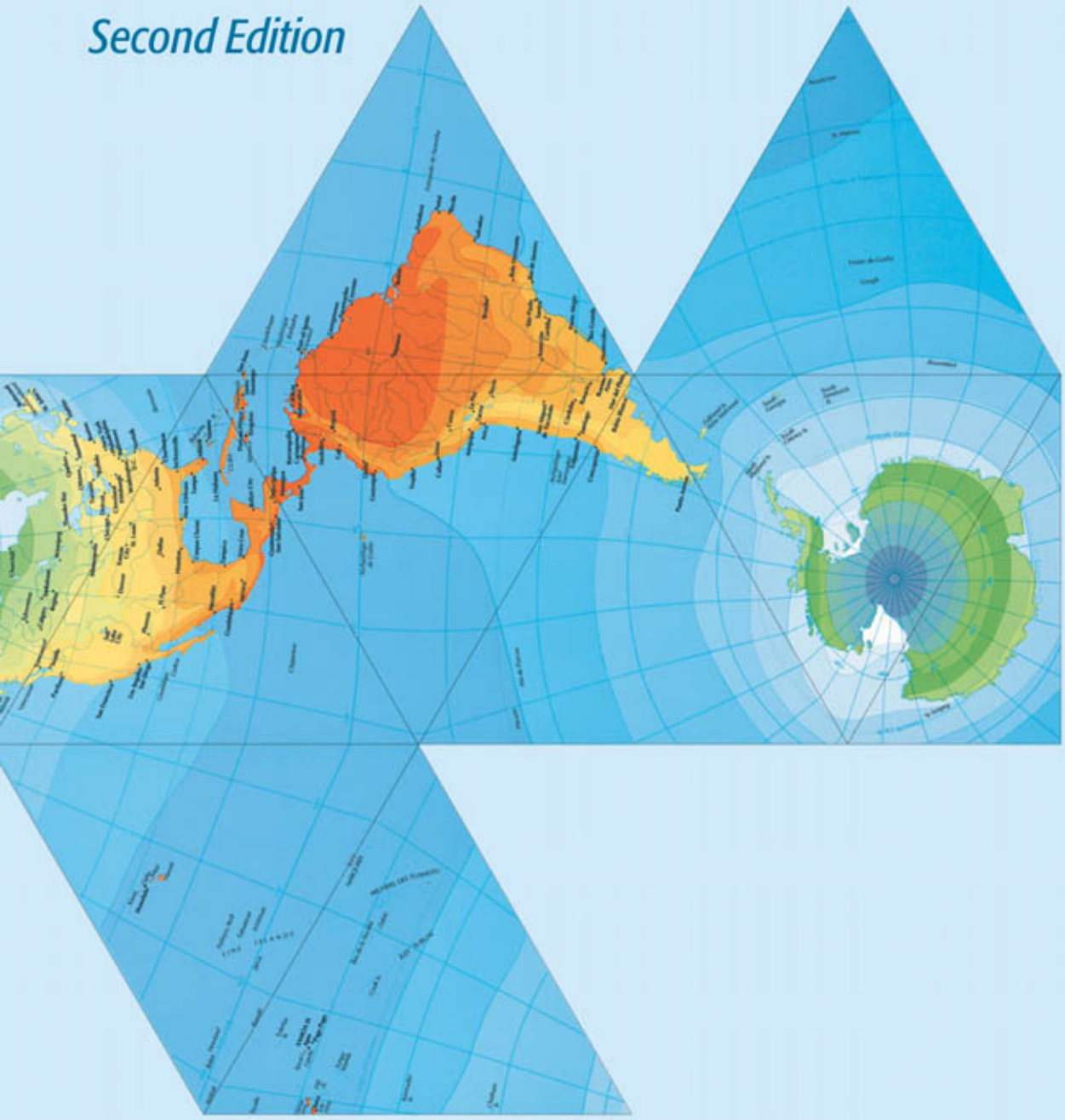
OXFORD

# The Creation of States in International Law

*Second Edition*



JAMES CRAWFORD

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# The Creation of States in International Law

SECOND EDITION

JAMES CRAWFORD

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CLARENDON PRESS • OXFORD

OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford OX2 6DP
Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in
Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto
With offices in
Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
South Korea Switzerland Thailand Turkey Ukraine Vietnam
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Published in the United States
by Oxford University Press Inc., New York
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Database right Oxford University Press (maker)
First published 2006
First published in paperback 2007
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British Library Cataloguing in Publication Data
Data available
Library of Congress Cataloging in Publication Data
Data available
Typeset by Newgen Imaging Systems (P) Ltd., Chennai, India
Printed in Great Britain
on acid-free paper by
Antony Rowe Ltd., Chippenham, Wiltshire
ISBN 978–0–19–826002–8 (Hbk.) 978–0–19–922842–3 (Pbk.)
1 3 5 7 9 10 8 6 4 2

# *Preface to the Second Edition*

The first edition of this book was based on a thesis, supervised by Ian Brownlie, which was submitted in 1976 for the degree of Doctor of Philosophy in the University of Oxford. At around 180,000 words the thesis was almost too long to be examined; it was also too long to be published in full. An abbreviated version, updated as far as possible to 31 December 1977, was published by Oxford University Press in 1979. It was awarded the American Society of International Law's Certificate of Merit in 1981.

Since the first edition much has happened in international relations and international law, not least in relation to the subject matter of this book. If its argument—that the creation of States is a matter in principle governed by international law and not left to the discretion of individual States—is now widely accepted, the illustrations and the specific instances that could be used to substantiate and illustrate that argument have multiplied. Some outstanding disputes then pending (South-West Africa (Namibia); Southern Rhodesia (Zimbabwe); the 'divided States', especially Germany; the micro-States; East Timor; Hong Kong, the Baltic States) have been more or less resolved. With a few exceptions (Palestine and Western Sahara the most significant) decolonization has been largely achieved. But new situations have arisen, especially those resulting from the dissolution of States in Central and Eastern Europe. The case law is still not rich but there have been major additions to it. Although the first edition remained the only comprehensive treatment of statehood in international law in the English language and although there were frequent requests for a reprint, this did not seem appropriate when so much had changed and when so much new material was available. I also came to regret some of the suppressions from the original thesis.[1] Given complete latitude by the Press in terms of the length of a second edition I have taken the opportunity of restoring some of the material and of updating and revising all of it.

At one level, this was easier to do because I still maintain the basic argument. I do not see how international law can coherently leave these issues to be decided as a matter of discretion by individual States, as the rhetoric of recognition implies. I believe that international law is, at least to this minimal extent, a

[1] For example a whole section on Palestine was omitted, producing puzzlement among reviewers who reasonably expected to find it among the cases studied. See now Crawford, 'Israel (1948–49) and Palestine (1998–99): Two Studies in the Creation of States' in Goodwin-Gill and Talmon (eds), *Reality of International Law*, 95–124, and Chapter 9 below.

coherent system. Moreover, the values that international law in this context represents—self-determination, non-annexation of territory by force, fundamental human rights—cannot be protected if the only basis for statehood is 'effectiveness', if power grows, irrespective, out of the barrel of some or many guns. For international law to concede that its most fundamental concept is purely a question of fact would amount to a form of unilateral disarmament, given its now-parallel profession that these basic values are peremptory.

At another level it has been a major exercise, because so much has happened and so much more has been written. The result of the revision is a much longer book than the first edition, even if one still faithful to its main themes and arguments. I also hope this edition corrects some of the faults of the first edition. A fellow Australian, Hedley Bull (who I regret never meeting) commented in his *Times Literary Supplement* review of the first edition that it was infuriatingly indecisive. I agree, and I have tried to come off some of the fences on which the young scholar rather awkwardly sat. But some might now complain that even longer discussions of past problems are unnecessary in an era of universal United Nations membership, where formal equality is the order of the day and all the forms of dependence are now expressed in different, mostly extra-legal ways. Why go at length, it may be asked, into the status of special entities such as Transkei or Berlin or Danzig or Tangier or the British Dominions whose like we will never see again? Here I disagree. There is a wealth of historical experience which is, in the first place, interesting in itself. The periods of colonization and decolonization, of Great Power world-making and remaking, of the dissolution of Empires and Cold War-waging were expressed in a variety of specific forms, and the conflicts over them cannot be understood if their actual expression is ignored. The past was experienced—and experienced as present—not in swathes but in particulars, and a careful account of the particulars still carries useful lessons even if we believe our circumstances to be new ones. And anyway we are more likely to fall into errors of the past if we are ignorant of it. When the government of the United States sought to detain aliens without trial on the 'perpetual leasehold' of Guantanamo Bay, it was helpful to be reminded of the English Court of Appeal's decision in 1960 that for habeas corpus what matters is present territorial administration, not the location of residual sovereignty.[2] Thus the old law of protectorates re-emerged in the brave new world of the 'war against terror'.

[2] 'Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of "the extent and nature of the jurisdiction or dominion exercised in fact by the Crown".' *Rasul v Bush* 124 S Ct 2686, 2696–7 (Stevens J) (2004), quoting *Ex parte Mwenya* [1960] 1 QB 241, 303; 28 ILR 48, 79–1 (CA) (Lord Evershed MR); and see Chapter 7.

So while I repent indecisions and equivocations, I defend the history. But I recommend starting with the index for those seeking their way to, or around, particular questions. The basic argument of the thesis is contained, as it was from the beginning, in the first three chapters.

So far as possible the work is current as at 30 June 2005.

James Crawford
Lauterpacht Centre for International Law
University of Cambridge
1 August 2005

# *Acknowledgements*

I am immensely grateful to those who assisted in the task of preparing this edition. In particular I owe a special debt of gratitude to my former doctoral student, Dr Tom Grant, who has combined constant support, extraordinary knowledge of the field and meticulous attention to detail. Without his dedication and persistence this edition could not have been completed.

In addition, much help was given by the following students, former students and colleagues: Catherine Bidart, Simon Connal, Angelos Dimopoulos, Catherine Dobson, Shauna Gillan, Edward Guntrip, Jocelynn Liu, Jana McLean, Vipin Narang, Samuel Ollunga, Kate Parlett, Professor Ryszard Piotrowicz; Assistant Professor Michael Reynolds; Christine Ruest, Mark Searl, Elizabeth Stark, Dr Christian Tams, Sue Anne Teo, Dr Ralph Wilde, Marcus Wischik, Sir Michael Wood and Anastasios Xeniadis. Thanks also to William Noblett, Head of Official Publications, University Library, Cambridge and David Wills and his staff at the Squire Law Library for repeated assistance.

# *From the Preface to the First Edition*

Since the development of the modern international system, statehood has been regarded as the paramount type of international personality; indeed, in doctrine if not in practice, States were for a time regarded as the only international persons. This is no longer so; but the political paramountcy of States over other international actors, with whatever qualifications, continues, and statehood remains the central type of legal personality. Problems of definition, and of application of the definition, of statehood thus occupy an important place in the structure of international law. Nonetheless, the topic of statehood has been rather neglected by writers. There is an abundance of practice, a surprising volume of case law, and a large number of studies of particular instances or problems of territorial status. The general treatises all contain the mandatory section on statehood and legal personality, and some of these treatments are of a high order. But, apart from Marek's study on identity and continuity of States (published in 1954 and reissued in 1968), and various accounts of recognition of States in books on recognition generally, there is, to the writer's knowledge, no monograph dealing with the topic of statehood as such, in the light of the substantial modern practice in that field. This observation is not, of course, original: the writer's interest in the topic was engaged by observations in two leading works to this effect.[3] This study attempts to deal with the representative modern doctrine and practice in relation to the public international law of statehood and territorial status; and thus, however inadequately, to contribute to filling the void mentioned by Professors Jennings and Brownlie.

Perhaps the most controversial issue in this area is the relationship between statehood and recognition. The view that recognition is constitutive of State personality derives historically from the positive theory of international obligation. However, this view does not correspond with State practice; nor is it adopted by most modern writers. On the other hand, in this as in other areas, relevant State practice—including recognition practice, especially where recognition is granted or withheld on grounds of the status of the entity in question—is of considerable importance. Against this background, this study examines the criteria for statehood in international law, and the various ways in which new States have been created in the period since 1815.

[3] Jennings, *Acquisition of Territory*, 11–12; Brownlie, *Principles* (2nd edn), 74.

Traditionally, the criteria for statehood have been regarded as resting solely on considerations of effectiveness. Entities with a reasonably defined territory, a permanent population, a more or less stable government and a substantial degree of independence of other States have been treated as States. Other factors, such as permanence, willingness to obey international law and recognition, have usually been regarded as of rather peripheral importance. To some extent this represents the modern position. However, several qualifications are necessary.

In the first place, this standard view is too simple. Much depends on the claims made by the entities in question, and on the context in which such claims are made. In some circumstances, criteria such as independence or stable government may be treated as flexible or even quite nominal; in other cases they will be strictly applied. Apart, however, from the necessary elaboration of the criteria for statehood based on effectiveness, a serious question arises whether new criteria have not become established, conditioning claims based on effectiveness by reference to fundamental considerations of legality. Practice in the field of self-determination territories is the more developed, but the same problem arises in relation to entities created by illegal use of force. These criteria, taken together, are on the whole reflected in United Nations practice; they also provide a flexible but generally applicable standard against which to consider the status of the numerous unusual or 'anomalous' territorial entities (Taiwan, the Holy See, Andorra and so on).

Problems of the creation of States have commonly been regarded as matters 'of fact and not of law'. This view was again simplistic, since it assumed the automatic identification of States, whether by recognition or the application of criteria based on effectiveness. In practice, identification and application of the criteria to specific cases or problems raise interesting and difficult problems, some of which are dealt with in Part II of this study. These problems do not of course occur in isolation; they are classifications, rather than exclusive mandatory 'modes' of the creation of States. However, the problems discussed in each context (dependent States, devolution, secession and so on) have common features that justify such separate classification.

Superimposed on these classifications of the methods of the creation of States are the various more overtly international competences or authorities affecting the creation of States: these are dealt with in Part III. The problem of international powers of disposition has attracted a good deal of practice since 1815. More specifically, the development of self-government of colonial territories under the Mandate and Trusteeship systems, and pursuant to Chapter XI

of the Charter (non-self-governing territories) has attracted a substantial body of practice.

Finally, certain incidents of the creation of States, such as commencement or acquisition of territory by new States, and certain related problems (identity, continuity, reversion and extinction) are discussed in a concluding section.

Whereas the States of the world form a community governed by international law . . .

*Draft Declaration on Rights and Duties of States*, preambular paragraph 1,
annexed to GA Resolution 375 (IV), 6 December 1949

# *Contents—Summary*

*Table of Cases* xxix
*Select Table of Treaties and Other Instruments* xlix
*Select List of Abbreviations* lxvii

PART I: THE CONCEPT OF STATEHOOD IN INTERNATIONAL LAW 1

1. **Statehood and Recognition** 3
2. **The Criteria for Statehood: Statehood as Effectiveness** 37
3. **International Law Conditions for the Creation of States** 96
4. **Issues of Statehood Before United Nations Organs** 174
5. **The Criteria for Statehood Applied: Some Special Cases** 196

PART II: MODES OF THE CREATION OF STATES IN INTERNATIONAL LAW 255

6. **Original Acquisition and Problems of Statehood** 257
7. **Dependent States and Other Dependent Entities** 282
8. **Devolution** 329
9. **Secession** 374
10. **Divided States and Reunification** 449
11. **Unions and Federations of States** 479

PART III: THE CREATION OF STATES IN INTERNATIONAL ORGANIZATIONS 501

12. **International Dispositive Powers** 503
13. **Mandates and Trust Territories** 565
14. **Non-self-governing Territories: The Law and Practice of Decolonization** 602

PART IV: ISSUES OF COMMENCEMENT, CONTINUITY AND EXTINCTION 649

**15. The Commencement of States** 651

**16. Problems of Identity, Continuity and Reversion** 667

**17. The Extinction of States** 700

**Conclusions** 718

Appendices:

1. List of States and Territorial Entities Proximate to States 727
2. League Mandates and United Nations Trusteeships 741
3. The United Nations and Non-Self-Governing Territories, 1946 to 2005 746
4. Consideration by the International Law Commission of the Topic of Statehood (1996) 757

*Select Bibliography* 760

*Index* 851

# *Contents*

*Table of Cases* xxix
*Select Table of Treaties and Other Instruments* xlix
*Select List of Abbreviations* lxvii

PART I: THE CONCEPT OF STATEHOOD IN INTERNATIONAL LAW 1

**1. Statehood and Recognition** 3
1.1 Introduction 4
1.2 Statehood in early international law 6
(1) Doctrine 6
(2) Statehood in early international law: aspects of State practice 10
1.3 Recognition and Statehood 12
(1) The early view of recognition 12
(2) Positivism and recognition 13
(3) Statehood in nineteenth-century international law 14
1.4 Recognition of States in modern international law 17
(1) Recognition: the great debate 19
(i) The constitutive theory 19
(ii) The declaratory theory 22
(2) Conclusions 26
1.5 Certain basic concepts 28
(1) International personality 28
(2) The State 31
(3) Sovereignty 32
(4) State and government 33
(5) State continuity and State succession 35

**2. The Criteria for Statehood: Statehood as Effectiveness** 37
2.1 Introduction 37
2.2 The classical criteria for statehood: *ex factis jus oritur* 45
(1) Defined territory 46
(2) Permanent population 52
(3) Government 55

(4) Capacity to enter into relations with other States 61
(5) Independence 62
(i) Formal independence 67
(a) Situations not derogating from formal independence 67
(b) Situations regarded as derogating from formal independence 71
(ii) Real or actual independence 72
(a) Situations not derogating from actual independence 72
(b) Situations regarded as derogating from actual independence 74
(iii) The relation between formal and actual independence 88
(6) Sovereignty 89
(7) Other criteria 89
(i) Permanence 90
(ii) Willingness and ability to observe international law 91
(iii) A certain degree of civilization 92
(iv) Recognition 93
(v) Legal order 93

**3. International Law Conditions for the Creation of States** 96

3.1 Legality and statehood 97
(1) Development of the concept of peremptory norms 99
(2) Effects of peremptory norms on situations other than treaties 102
(3) Status of entities created by treaties 105
(4) Legality and statehood: general conclusions 106
3.2 Statehood and self-determination 107
(1) Self-determination in modern international law 108
(i) Self-determination before 1945 108
(ii) Self-determination under the United Nations Charter 112
(iii) Identifying the units of self-determination 115
(a) The mandate and trusteeship systems 116
(b) Non-self-governing territories 116
(c) Application to particular territorial disputes or situations 117
(d) Criteria for self-determination territories 117

(e) The 'safeguard clause' 118
(iv) The consequences of self-determination 121
(v) Conclusions 122
(2) Statehood and the operation of the principle of self-determination 128
3.3 Entities created by the unlawful use of force 131
(1) The relation between self-determination and the use of force 134
(i) Assistance to established local insurgents 138
(ii) Military intervention to procure self-determination 139
(2) Conclusions 147
3.4 Statehood and fundamental human rights 148
(1) General considerations 148
(2) Democracy as a continuing condition for statehood 150
(3) *Apartheid* and the bantustan policy 155
(4) Conclusions 155
3.5 Other cases 155
(1) Entities not claiming to be States 156
(2) Puppet States and the 1949 Geneva Conventions 156
(3) Violation of treaties providing for independence 157
3.6 Collective non-recognition 157
(1) Collective non-recognition and territorial status 158
(2) Consequences of collective non-recognition 162
(i) The *Namibia* Opinion 162
(ii) The ILC Articles on State Responsibility, Articles 40 to 41 168
(iii) Subsequent consideration by the International Court 168
(iv) Conclusion 173

**4. Issues of Statehood Before United Nations Organs** 174
4.1 General considerations 174
4.2 League of Nations and United Nations membership 176
(1) Membership practice under the League of Nations 176
(2) The United Nations: original membership 177
(3) The United Nations: admission to membership 179
(i) The criteria for membership: Article 4 in theory and practice 179
(ii) The micro-State issue and the move to universality of membership 182

(iii) Renewed controversy during the 1990s: the former Yugoslavia 186
(iv) Conclusions 189
4.3 Statehood for other United Nations purposes 190
(1) Statehood and dispute settlement: Articles 32 and 35(2) 190
(2) Claims to be parties to the Statute of the International Court of Justice 191
(3) Other cases 192
4.4 UN observer status 193

**5. The Criteria for Statehood Applied: Some Special Cases** 196
5.1 General considerations 197
5.2 Entities unrecognized as separate states: Taiwan 198
(1) Historical background 198
(2) The international relations of Taiwan 200
(3) Judicial decisions 205
(4) The legal status of Taiwan 206
(5) Development of a Taiwanese claim to statehood 212
(i) Amendments to the law of Taiwan 212
(ii) Statements respecting international policy 216
(6) Conclusion 219
5.3 Entities recognized as States 'for special reasons': The Vatican City and the Holy See 221
(1) The international status of the Vatican City 222
(2) The international status of the Holy See 225
(3) The relation between the Holy See and the Vatican City 226
5.4 'Internationalized Territories': the Free City of Danzig and some modern analogues 233
(1) The concept of 'internationalized territory' 233
(2) The Free City of Danzig 236
(3) Trends in internationalization since 1945: Cyprus 241
5.5 Transitional autonomous entities: Hong Kong and Macao 244
(1) Historical outline 245
(2) Arrangements for the government of the HKSAR 246
(3) The status of Hong Kong 248
(4) Relations between Hong Kong and China 250
5.6 Conclusion 252

PART II: MODES OF THE CREATION OF STATES IN INTERNATIONAL LAW 255

**6. Original Acquisition and Problems of Statehood** 257

6.1 General Considerations 257
6.2 The status of indigenous communities 260
(1) Statehood of indigenous communities 260
(2) Legal personality of indigenous communities not regarded as States 263
6.3 Acquisition of territory from indigenous communities 268
(1) Status of aboriginal treaties of cession 268
(2) Legal effects of aboriginal treaties 269
(3) Grants of territory to private persons 270
(4) Conclusions 271
6.4 Original occupation of territory by a new State 274
(1) Liberia 274
(2) The Boer Republics 275
(3) The Free State of the Congo 276
(4) Israel 277
(5) Taiwan 277
6.5 Original acquisition and indigenous rights 278

**7. Dependent States and Other Dependent Entities** 282

7.1 General principles 282
7.2 Protectorates and protected States 286
(1) Protected States 288
(2) International protectorates 294
(3) Colonial protectorates 299
(4) Legal effects of protectorates 303
(i) Protectorates and domestic jurisdiction 303
(ii) Relations between protectorate and protecting State 305
(iii) Opposability of protectorate arrangements 307
(iv) Protectorates and State succession 307
(v) Cession of protected territory 310
(vi) International responsibility 314
(vii) Treaty-making power with respect to protectorates 315
(viii) Belligerency and protectorates 316
(ix) Nationality in protectorates 317
(x) Protectorates and State immunity 318
(xi) Protectorates and international organizations 318
(xii) Termination of protected status 318

7.3 Other Cases 320
(1) Special treaty relations 320
(2) Vassal States and suzerainty 321
(3) Autonomy and residual sovereignty 323
(4) Spheres of influence 327

**8. Devolution** 329
8.1 Introduction 330
8.2 Explicit grants of independence 330
(1) Granting partial or incomplete independence 332
(2) Grants in violation of self-determination 333
(i) Grants to minority or unrepresentative governments within self-determination units 333
(ii) Grants disruptive of the territorial integrity of a self-determination unit 335
(3) Grants of independence in furtherance of fundamentally unlawful policies: the bantustans 338
(i) Origins of the bantustan policy 338
(ii) Denationalization through State creation 340
(iii) The status of the bantustans under international law 341
(iv) Dismantling the bantustan system 345
(4) Colonial enclaves and rights of pre-emption 348
(5) Derogations from grants of independence 348
8.3 Relinquishment of sovereignty without grant 349
8.4 The gradual devolution of international personality 349
(1) The 'unitary State' theory 351
(2) General principles of the status of devolving entities 353
(3) The principles applied: devolution of States within the British Commonwealth 358
(i) The self-governing Dominions 358
(ii) British India 366
(iii) Subsequent cases of Commonwealth independence 368
(iv) Southern Rhodesia pre-1965 368
(v) The elimination of post-Imperial links 371
(a) Canada 371
(b) Australia 371
(c) New Zealand 372
(4) Other cases of devolution 372
(i) The Ottoman Empire 372

(ii) The Philippines 372
(iii) The French and Netherlands Unions 373

**9. Secession** 374

9.1 Secession as a method of the creation of States 375
9.2 The traditional approach: secession and recognition 1815 to 1945 376
(1) The relevance of recognition 376
(i) Metropolitan recognition 376
(ii) Recognition by third States 379
(iii) Recognition of belligerency 380
(2) The traditional test of independence in a secessionary situation 382
9.3 Independence and secession in modern international law 383
(1) The secession of a self-determination unit 384
(i) Secession in furtherance of self-determination 384
(ii) Secession in violation of self-determination 388
(2) Secession outside the colonial context 388
(i) Cases of secession or dismemberment post-1945 391
(a) Senegal 392
(b) Singapore 392
(c) Bangladesh 393
(d) The Baltic States 393
(e) Successor States to the USSR 395
(f) Successor States to the SFRY 395
(g) Czechoslovakia 402
(h) Eritrea 402
(ii) Unsuccessful attempts at secession 403
(a) The Faroes 404
(b) Katanga 404
(c) Biafra 406
(d) Republika Srpska 406
(e) Kosovo 407
(f) Chechnya 408
(g) Quebec 411
(h) Somaliland 412
(iii) Summary of post-1945 practice 415
9.4 Certain incidents of secession in international law 418
(1) Belligerency and insurgency in secession struggles 418

(2) Application of international humanitarian law in internal conflicts 420
(3) Military and civil aid to seceding regimes 421
(4) Problems of continuity and commencement 421
9.5 The Former Palestine Mandate: Israel and Palestine 421
(1) Historical introduction 421
(i) The Mandate for Palestine 422
(ii) The abandonment of the Mandate and its aftermath 424
(2) The creation of the State of Israel 425
(i) The validity of the Mandate for Palestine 428
(ii) Validity and legal effects of the Partition Resolution 430
(iii) The creation of Israel (1948–9) 432
(3) The creation of the State of Palestine (1988–) 434
(i) Palestine prior to the Oslo Accords: the 1988 Declaration 435
(ii) Alternative conceptions of statehood: Montevideo and other criteria 436
(iii) The authority of the General Assembly 440
(iv) The position of dissenting or opposing States 442
(v) The road to Palestinian statehood since 1993 442
(vi) Conclusion 446

**10. Divided States and Reunification** 449
10.1 The category of 'divided States' 449
10.2 The two Germanies 452
(1) The quadripartite government of Germany 452
(2) The creation of the Federal Republic of Germany 454
(3) The creation of the German Democratic Republic 455
(4) Residual quadripartite authority over 'Germany as a whole' 458
(5) The status of Berlin 459
(6) Conclusions 465
10.3 Other cases of 'divided States' 466
(1) Korea after 1947 466
(2) Vietnam after 1945 472
(3) China after 1948 477
10.4 Conclusions 477

**11. Unions and Federations of States** 479
11.1 The classification of political unions 479

11.2 Federation, confederation and other forms of political union 481
(1) Real and personal unions 482
(2) Federations and confederations 483
(3) Unusual formations 489
(4) 'Remedial federation': federal solutions in conflict situations 490
(i) Cyprus 490
(ii) Bosnia and Herzegovina 491
(5) Associated States 492
11.3 Unions of States in international organizations 492
(1) The United Nations organization 493
(2) The European Union 495
11.4 Regional devolution in previously unitary States 500

PART III: THE CREATION OF STATES IN INTERNATIONAL ORGANIZATIONS 501

**12. International Dispositive Powers** 503
12.1 Introduction 504
12.2 Territorial dispositions by multilateral treaty 505
(1) Dispositions in treaties of peace 505
(i) The nineteenth-century practice 505
(a) The Congress of Vienna, 1815 505
(b) The Concert of Europe, 1815 to 1848 506
(c) The Treaty of Paris, 1856 506
(d) The Congress of Berlin, 1878 508
(e) The Conference of Berlin, 1884 to 1885 509
(f) The International Government of Crete, 1897 to 1913 509
(g) The Act of Algeciras, 1906 510
(h) The Treaty of London, 1913 and the creation of Albania 510
(i) The nineteenth-century Congresses and the principle of consent 512
(ii) The World War I settlements 516
(iii) The World War II settlements 518
(a) The re-establishment of annexed or conquered States 519

(b) Internationalized territories 522
(c) Poland, 1939 to 1946 522
(d) Other dispositions 522
(iv) Peace settlements since 1945 523
(a) Germany, 1990 523
(b) Cambodia, 1991 526
(c) Bosnia and Herzegovina, 1992 to 1995 528
(2) Dispositions anticipatory of peace treaties 530
(3) Dispositions delegated to groups of States 531
(i) The Conference of Ambassadors and Albania 532
(ii) The Principal Allied and Associated Powers after 1918 533
(a) The Mandate system 533
(b) Danzig 534
(c) Memel 534
(d) Fiume 534
(e) Luxembourg 535
(iii) The Allied Powers 1945 to 1955 535
(4) Conclusion: powers of disposition pursuant to multilateral treaties 535
12.3 The exercise of dispositive power through collective recognition 539
(1) The concept of 'collective recognition' 539
(i) Greece, 1822 to 1830 540
(ii) Belgium, 1830 to 1839 542
(iii) Albania, 1913 to 1921 544
(iv) New States in the former Soviet Union and the dissolution of Yugoslavia, 1990 to 1995 544
(2) Collective recognition within international organizations 544
(3) Collective conditional recognition 545
12.4 Territorial dispositions by international organizations 546
(1) General principles 546
(2) The Concert of Europe 547
(3) The League of Nations 548
(4) The United Nations and territorial dispositions 549
(i) General principles: delegated and inherent authority 549
(a) The General Assembly 551

(b) The Security Council 552
(ii) Functions pursuant to the peace treaties 553
(a) Trieste 553
(b) Disposition of Italian colonies in Africa 554
(iii) Functions pursuant to the Mandate and Trusteeship systems 555
(iv) Other cases 555
(a) West Irian 555
(b) Namibia 556
(c) Eastern Slavonia, Baranja and Western Sirmium 556
(d) Kosovo 557
(e) East Timor 560
(f) Iraq 562
(g) Jerusalem 563
(v) Conclusion 564
12.5 The notion of 'international dispositive powers' 564

**13. Mandates and Trust Territories** 565
13.1 Mandates and Trust territories in historical perspective 566
13.2 Sovereignty over Mandates and Trust Territories 568
(1) Sovereignty and 'A' Mandates 569
(2) Sovereignty and other mandated and trust territories 570
(3) Legal personality of mandated and trust territories 574
13.3 Termination of Mandates and Trusteeships 574
(1) Termination of Mandates 575
(i) During the period of the League 575
(ii) After the dissolution of the League 580
(iii) By transfer to Trusteeship 580
(2) Termination of Trusteeships 581
(3) Legal effects of termination 584
13.4 Revocation of Mandates and Trusteeships 586
(1) Revocation of Mandates during the League period 586
(2) Revocation of Trusteeships 590
(3) Revocation of Mandates by United Nations organs 591
(4) Post-revocation action of the United Nations concerning Namibia 595
13.5 Post-independence claims 596
(1) Namibia 597

(2) Nauru 598
(3) Trust Territory of the Pacific Islands 599
13.6 The Future of Trusteeship? 600

**14. Non-self-governing Territories: The Law and Practice of Decolonization** 602
14.1 Introduction 603
14.2 The development in practice of Chapter XI of the Charter 606
(1) The definition of 'non-self-governing territories' 606
(2) Competence to determine whether a territory falls under Chapter XI 607
(3) The scope of Chapter XI in practice 608
(4) Possible extension of Chapter XI beyond colonial territories 610
14.3 The international status of non-self-governing territories 613
(1) Sovereignty and non-self-governing territories 613
(2) The use of force and non-self-governing territories 616
(3) The legal personality of dependent peoples 617
(4) Standards for assessing the wishes of a dependent people 620
14.4 Termination of non-self-governing status: the forms of self-government 621
(1) Termination of non-self-governing status: criteria for self-government 621
(2) Determination of cessation of non-self-governing status 621
(3) The forms of self-government 623
(i) Independence 623
(ii) Incorporation in another State 623
(iii) Association 625
(a) Association arrangements in practice since 1952 626
(b) The international legal status of associated States 632
(4) Remaining non-self-governing territories 634
(5) Claims by third States against non-self-governing territories 637

PART IV: ISSUES OF COMMENCEMENT, CONTINUITY AND EXTINCTION 649

**15. The Commencement of States** 651

15.1 The problem of commencement 651
(1) Problems of commencement in national courts 652
(2) Problems of commencement at the international level 653
(3) 'Illegal entities' and problems of commencement 657
15.2 States *in statu nascendi* 658
15.3 New States and the acquisition of territorial sovereignty 664
(1) The acquisition of statehood as a 'mode of acquisition' of territory 664
(2) Claims to the entire territory of a new State 665

**16. Problems of Identity, Continuity and Reversion** 667

16.1 Identity and continuity of States: general considerations 667
16.2 Some applications of the concept of continuity 672
(1) Territorial changes 673
(2) Changes in population 678
(3) Changes in government 678
(4) Changes in international status 680
(5) Belligerent occupation 688
(6) Continuity and illegal annexation 689
(7) Identity without continuity 690
(8) Multiple changes and State continuity: the case of Poland after 1945 692
16.3 Reversion to sovereignty 695
(1) Rights of reversion by treaty 696
(2) Reversion of territorial enclaves 696
(3) *Postliminium* 696
(4) Reversion to sovereignty 697

**17. The Extinction of States** 700

17.1 General principles 700
17.2 Extinction and illegal annexation 702
17.3 State extinction and the possibility of prescription 703
17.4 Extinction, merger and the creation of new States 705
(1) Voluntary absorption: the German Democratic Republic 705
(2) Extinction by merger: Yemen 705

(3) Extinction by voluntary dissolution: the Czech and Slovak Federal Republic 706
(4) Extinction by involuntary dissolution: the SFRY and its successor States 707
17.5 International law and the survival of States 715

**Conclusions** 718

Appendices:
1. List of States and Territorial Entities Proximate to States 727
2. League Mandates and United Nations Trusteeships 741
3. The United Nations and Non-Self-Governing Territories, 1946 to 2005 746
4. Consideration by the International Law Commission of the Topic of Statehood (1996) 757

*Select Bibliography* 760
*Index* 851

# *Table of Cases*


*A/S Tallinna Laevauhisus & Ors v Tallinna Shipping Co* (1945) . . . . . .80
*AB v MB* (1951) . . . . . .53, 434
*Abu Dhabi Arbitration* (1951) . . . . . .269
*Achievers Investments, Inc v Karalekas* (1996) . . . . . .343, 348
*Achikian v Bank of Athens* (1923) . . . . . .701
*Acquisition of Polish Nationality* (1923) . . . . . .545
*Administration des Douanes v Société Cafés Jacques Valore* (1975) . . . . . .498
*Administration of Papua and New Guinea v Guba & Doriga* (1973) . . . . . .270
*Administrative Decision No 1 (US-Austrian-Hungarian Claims Commission)* (1927) . . . . . .483
*Administrative Tribunal of the ILO* (1956) . . . . . .495
*Administrator of Customs v Dewulf, Caillert & Sons* (1934) . . . . . .237
*Admissibility of Applications 71916/01, 71917/01 and 10260/02 von Maltzan & ors v Germany* (2005) . . . . . .685
*Admissibility of Hearings of Petitioners by the Committee on South West Africa* (1956) . . . . . .574, 592
*Admissions Case* (see *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* )
*Aegean Sea Continental Shelf* (1978) . . . . . .579
*Afghan Citizens Case* (2000) . . . . . .653
*AG for Canada v AG for Ontario* (1937) . . . . . .359, 486
*AG of Israel v El-Turani* (1952) . . . . . .426
*AG v Goralschwili* (1925) . . . . . .570
*AG v Sheng Fu Shen* (1959) . . . . . .219
*Agarwala v Union of India* (1980) . . . . . .299
*Agency of Canadian Car and Foundry Co Ltd v American Can Co* (1919) . . . . . .679
*Al Odah v United States* (2003) . . . . . .642
*Alabama Arbitration* (1872) . . . . . .381, 388–89
*Al-Adsani v United Kingdom* (2002) . . . . . .101
*Åland Islands Case (Commission of Jurists)* (1920) . . . . . .24, 58–59, 108–10, 383, 391, 536–37, 657
*Åland Islands Case (Commission of Rapporteurs)* (1921) . . . . . .58–59, 110–12, 658
*Albanian Frontier Case* (see *Monastery at St Naoum (Albanian Frontier)* )
*Andrew Allen Case* (1799) . . . . . .654
*Anglo Iranian Oil Co Case (First Phase)* (1955) . . . . . .495
*Anglo-French Continental Shelf Case* (1977) . . . . . .351
*Antarctic Legal Status Case* (1991) . . . . . .266

*Antolok v United States* (1989) .....600
*Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion)* (1988) .....195
*Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia), Preliminary Objections (Yugoslavia v Bosnia and Herzegovina)* (2003) .....189, 708, 710, 711–14
*Application of Reyes* (1956) .....572
*Aradnas v Hogan* (1957) .....572
*Arizona v California* (1983) .....486
*Arrest Warrant Case* (see *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Provisional Measures)* )
*Artukovic v Boyle* (1952) .....692
*Asakura v City of Seattle* (1924) .....486
*Assanidze v Georgia* (2004) .....83
*Assessment of Aliens for War Taxation* (1965) .....101
*Asylum Case* (1950) .....42
*Atlantic Mutual Inc v Northwest Airlines* (1992) .....206
*Attorney General for Fiji v House* (1989) .....152
*Attorney-General for British Honduras v Bristowe & Hunter* (1880) .....302
*Attorney-General v Wellington Newspapers Ltd* (1988) .....482
*Austrian Citizens (Entitlement to Compensation) Case* (1960) .....459
*Austro-German Customs Union Case* (1931) .....19, 45, 63–66, 69, 283, 537–38
*Autocephalous Greek-Orthodox Church of Cyprus v Goldberg & Feldman Fine Arts Inc* (1990) .....17
*Avena* (see *Case Concerning Avena and Other Mexican Nationals (Mexico v United States)* )

*Badinter Commission Opinions—*
*Opinion 1* (1991) .....24, 396–97, 401
*Opinion 2* (1992) .....397, 401, 406–07, 644
*Opinion 3* (1992) .....397
*Opinion 4* (1992) .....397, 398
*Opinion 5* (1992) .....397–98
*Opinion 6* (1992) .....68, 397, 398
*Opinion 7* (1992) .....397
*Opinion 8* (1992) .....24, 399–400
*Opinion 10* (1992) .....24
*Baer Claim* (1959) .....91
*Baltzoudis v Souliotis* (1920) .....314
*Bank of China v Wells Fargo Bank & Union Trust Co* (1953) .....17

*Bank of Ethiopia v National Bank of England & Liguori* (1937) .....652
*Bank of Hawaii v Balos* (1988) .....572
*Banque de l'Union Parisienne v Jaudon* (1933) .....679
*Barber v Gonzales* (1954) .....373
*Barcelona Traction, Light and Power Company, Ltd (Preliminary Objections)* (1964) .....592
*Barcelona Traction, Light and Power Company, Ltd (Second Phase, Judgment)* (1970) .....101, 103–04, 116, 283, 702
*Baronci v Ospedale del Bambino Gesu* (1957) .....223
*Baxter v Commissioner of Taxation* (1907) .....370
*Bayetto v Administration d'Enregistrement* (1946) .....293
*Belgium/Netherlands* (see *Case Concerning Sovereignty over Certain Frontier Land*)
*Bishwanath Singh v Income Tax, Central & United* (1942) .....284
*Blackburn v AG* (1971) .....33
*Blankard v Galdy* (1692) .....258
*Boguslawski v Gdynia-Ameryka Linie* (1953) .....653, 657
*Bolivar Ry Co Claim* (1903) .....658
*Bosnian Genocide Case* (see *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* )
*Botswana/Namibia* (see *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)* )
*Bradford v Chase National Bank* (1938) .....373
*Brčko Award* (see *Federation of Bosnia and Herzegovina v Republika Srpska (Final Award)* )
*Brehm v Acheson* (1950) .....454
*Bremen (Hansa City of) v Prussia* (1925) .....486
*Bridgeway Corp v Citibank* (1999) .....275
*British Coal Corporation v The King* (1935) .....363
*Brunell v United States* (1948) .....572
*Buck v Attorney General* (1965) .....331–32, 585
*Bulamu Arbitration* (see *Island of Bulamu Arbitration*)
*Burnet v Chicago Portrait Co* (1932) .....43
*Buttes Gas and Oil Co v Hammer* (1982) .....292

*Cabet de Chambine v Bessis* (1951) .....317
*Caglar v HM Inspector of Taxes* (1996) .....17
*Calder v AG of British Columbia* (1973) .....270
*Calvin's Case* (1608) .....258
*Cameroon v Nigeria* (see *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)* )
*Campaign for Nuclear Disarmament v Prime Minister and Secretaries of States* (2002) .....562

*Campbell v Hall* (1774) .....353
*Caribtan Corp v OSHRC* (1974) .....626
*Carl Zeiss Stiftung v Rayner & Keeler Ltd (no 2)* (1967) .....17, 91, 343, 455, 456
*Case Concerning Acquisition of Polish Nationality* (1923) .....53–54
*Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Provisional Measures)* (1993) .....100, 131–32, 189, 707
*Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Preliminary Objections)* (1996) .....25, 133, 189, 487, 662–63
*Case Concerning Avena and Other Mexican Nationals (Mexico v United States)* (2004) .....489
*Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* (1992) .....169, 192, 270, 363, 567, 597, 598–99, 663
*Case concerning Certain Property (Liechtenstein v Germany) (Preliminary Objections)* (2005) .....681
*Case Concerning East Timor (Portugal v Australia)* (1995) .....101, 103, 116, 168–72, 560–62, 617
*Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)* (1999) .....99, 311, 328, 464, 596, 615, 704
*Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain)* (2001) .....291, 310
*Case Concerning Right of Passage over Indian Territory (Portugal v India)* (1960) .....47, 108, 259, 261, 268, 536, 614–15, 616, 697–98
*Case Concerning Sovereignty over Certain Frontier Land (Belgium/Netherlands)* (1959) .....47, 544
*Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipidan (Indonesia/Malaysia)* (2002) .....296, 640–41, 752
*Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Provisional Measures)* (2000) .....42
*Case Concerning the Constitutionality of the Maastricht Treaty* (1994) .....495
*Case concerning the Gabčíkovo-Nagymoros Project (Hungary/Slovakia)* (1997) .....100, 447, 679, 707
*Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (1994) .....50, 328
*Case No 1550 v China (ILO)* (1990) .....251
*Case No 1652 v China (ILO)* (1993) .....251
*Case No 1952 HK Confederation of Trade Unions v HKSAR (ILO)* (1998) .....251
*Case of Gold Looted by Germany from Rome in 1943* (1953) .....520
*Cayuga Indians Cases* (1926) .....263, 267, 270, 488, 597
*Ceara (State of) v D'Archer de Montgascon* (1932) .....484

*Ceara (State of) v Dorr* (1928) .....484
*CEAT v Società Hungaria* (1951) .....236
*Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (1962) .....405–06, 495, 550, 608
*Certain German Interests in Polish Upper Silesia* (1926) .....19, 349, 657, 661
*Certain Phosphate Lands in Nauru* (see *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* )
*Chagos Islanders v Attorney-General* (2003) .....337
*Cham Kam Nga v Director of Immigration* (1999) .....252
*Chen Li Hung v Tong Lei Mao* (2000) .....18, 221, 251
*Cherokee Nation v Georgia* (1831) .....273–74
*Chief Tschekedi Khama v Ratshosa* (1931) .....318
*Chisholm v Georgia* (1793) .....485
*City of Sherrill, NY v Oneida Indian Nation of New York* (2005) .....270
*Civil Aeronautics Administrations v Singapore Airlines Ltd* (2004) .....205, 219
*Civil Air Transport Inc v Central Air Transport Inc* (1953) .....199, 653
*Civil Air Transport Inc v Chennault & Willauer* (1952) .....199
*Claimants of the Brig General Armstrong v United States* (1858) .....41
*Clement v Agent Judicaire du Trésor Public* (1961) .....453
*Clipperton Island Arbitration* (1932) .....269
*Coe v Commonwealth* (1978) .....265
*Coe v Commonwealth of Australia* (1979) .....272
*Colony of the Belgian Congo v Lehideux* (1933) .....277, 509
*Colorado v New Mexico* (1982) .....486
*Commission of the European Communities v Hellenic Republic (interim measures)* (1994) .....68
*Commission v Austria & others (Re the 'Open Skies' Agreements with the USA)* (2003) .....499
*Commission v Council (AETR)* (1971) .....499
*Commonwealth v Queensland* (1975) .....482
*Community Competence to Conclude Certain International Agreements* (1994) .....61
*Competence of the ILO to regulate, incidentally, the work of the Employer* (1926) .....42
*Competence of the ILO with respect to Agricultural Labour* (1922) .....42
*Concordat (Germany) Case* (1957) .....681
*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (1948) .....42, 174, 179, 180, 318, 546
*Congo v Belgium* (see *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Provisional Measures)* )
*Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* (1935) .....239
*Constitutionality of Treaty Relations (FRG)* (1973) .....459
*Cooper v Stuart* (1889) .....265

*Corfu Channel Case* (1949) .....6, 135, 154
*Costa v ENEL* (1964) .....497
*Costa v Military Service Commission of Genoa* (1939) .....673
*Couvertier v Gil Bonar* (1999) .....43
*Cuculla v Mexico* (1868) .....23
*Customs Union Case* (see *Austro-German Customs Union Case*)
*Cyprus v Turkey* (2001) .....81–82, 133, 146, 147, 167

*Dabrai v Air India Ltd* (1953) .....367
*Danube Commission* (see *Jurisdiction of the European Commission of the Danube between Galatz and Braila*)
*Danzig and the ILO* (1930) .....318, 359
*Danzig Legislative Decrees* (see *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*)
*Danzig Pension Case* (1929) .....240
*Danzig Railway Officials Case* (1928) .....28
*Date of Entry into Force of Versailles Treaty (Germany) Case* (1961) .....53
*Delagoa Bay Arbitration* (1875) .....258
*Delgamuukw v British Columbia* (1997) .....270
*Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)* (1923) .....48, 483, 514, 532
*Democratic Republic of the Congo v Belgium* (see *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* )
*Deutsch Continental Gas Gesellschaft v Polish State* (1929) .....24, 49–50, 531, 656
*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* (1999) .....43
*Director of Immigration v Chong Fung Yuen* (2001) .....252
*Ditzler, Reith & Buess v Customs Administration* (1940) .....293
*Dix Claim* (1903) .....658
*Doe v Bush* (2003) .....562
*Dubai-Sharjah Border Arbitration* (1981) .....486
*Duff Development Co v Government of Kelantan* (1924) .....17, 72, 76–78, 318
*Dupire v Dame DuPire-Constantinoff* (1937) .....354
*DuToit v Strategic Minerals Corp (re Gur Corporation)* (1991) .....343

*East Timor Case* (see *Case Concerning East Timor (Portugal v Australia)* )
*Eastern Carelia Opinion* (1923) .....41
*Eastern Greenland Case* (1933) .....267–68
*Ecoffard v Cie Air France* (1964) .....316
*Efrat Ungar v Palestine Liberation Organization* (2004) .....17, 62, 148, 434
*El Caso de Belice* (1993) .....638, 665

*El Kharbutli v Minister of Defence* (1949) ....434
*Eritrea-Ethiopia Claims (Civilian Claims) (Eritrea's Claims: Partial Award)* (2004) ....54–55, 654–55
*Eritrea-Yemen Arbitration, Phase I Award* (1998) ....644, 645
*Eshugbayi Eleko v Officer Administering the Government of Nigeria* (1928) ....302
*Etablissements Allart Rousseau et Cie v FRG* (1959) ....460
*Ethiopia v South Africa* (see *South West Africa Cases*)
*European Commission of the Danube* (see *Jurisdiction of the European Commission of the Danube between Galatz and Braila*)
*Ex parte Crow Dog* (1883) ....273
*Ex parte Mwenya* (1960) ....vi, 302–03
*Ex parte O'Dell and Griffen* (1953) ....362
*Ex parte Sekgome* (1910) ....302
*Exchange of Greek and Turkish Populations* (1925) ....69
*Executive Council of the Western Cape Legislature v President of the Republic of South Africa* (1995) ....346
*Expenses Opinion* (see *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* )
*Ex-Rajah of Coorg v East India Co* (1860) ....269, 323

*Falco Claim* (1959) ....91
*Falla-Nataf v Germany* (1927) ....317
*Federation of Bosnia and Herzegovina v Republika Srpska (re Brčko) (Final Award)* (1999) ....529
*Ffrost v Stevenson* (1937) ....571
*Fijian Land Claims (Burt Claim)* (1923) ....270
*Fisheries Jurisdiction (United Kingdom v Iceland)* (1974) ....42, 114
*Fogarty v O'Donague* (1926) ....658
*Forester v Secretary of State* (1872) ....323
*Foster v Globe Venture Syndicate Ltd* (1900) ....262
*France v Commission (re EC-US Anti-Trust Agreement)* (1994) ....499
*Francis v Queen* (1956) ....272
*Free City of Danzig and the ILO* (1930) ....181, 239, 240, 539
*Free Zones Case* (1932) ....517
*Fubini Claim* (1959) ....91
*Furundžija Case* (see *Prosecutor v Furundžija*)

*Gabčíkovo-Nagymaros Project* (see *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) )
*Gale v Andrus* (1980) ....572, 655
*Gastaldi v Lepage Hemery* (1929) ....673
*German Inter-Zonal Trade Case* (1965) ....459

*Germany v Reparations Commission (13th Question)* (1924) .....51, 656
*Germany v United States of America* (see *LaGrand Case*)
*Gibbons v Salii* (1986) .....583
*Gilmore Steel Corp v Dep't of Revenue* (1982) .....43
*Go Man Ei v Municipality of Tokyo* (1961) .....470
*Golovitschiner v Dori* (1923) .....679
*Gosalia v Agarwal* (1981) .....132, 697–98
*Government of Morocco v Laurens* (1930) .....295, 318
*Government of Spain v Chancery Lane Safe Deposit Ltd* (1939) .....34–35
*Guaranty Trust Co of NY v US* (1938) .....653
*Gugenheim v State of Vietnam* (1955) .....476
*Gur Corporation v Trust Bank of Africa Ltd* (1987) .....343

*Hagi-Salad v Ashcroft* (2004) .....414, 722
*Haitian Centers Council v McNary* (1992) .....642
*Harris v Rosario* (1980) .....627
*Harris v The Minister of the Interior* (1952) .....33
*Harshaw Chemical Patent Case* (1964) .....470
*Hartje v Yugoslva Military Mission* (1954) .....460, 684
*Hearings of Petitioners Case* (see *Admissibility of Hearings of Petitioners by the Committee on South West Africa (1956)* )
*Heintschel v Heinegg* (1992) .....337
*Heller v US* (1985) .....32–33
*Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* (1977) .....17–18, 147
*HKSAR v Ma Wai Kwan* (1997) .....252
*HKSAR v Ng Kung Siu* (1997) .....252
*Hoani Te Heuheu Tukino v Aotea District Maori Land Board* (1941) ....265, 269, 272
*Hodgson v UESP* (1974) .....626
*Hoogstraten v Low Lum Seng* (1934) .....316
*Hopkins Claim* (1927) .....23, 167
*Hunt v Gordon* (1883) .....92
*Hunt v The Queen (no 2)* (1882) .....92
*Huttinger v Upper Congo Ry Co & Ors* (1934) .....277
*Hyacinth Pellat Case* (1929) .....488

*Icelandic Fisheries Case (First Phase)* (1973) .....131
*ICI Ltd v Commission of the European Communities* (1972) .....498–99
*Idler v Venezuela* (see *Jacob Idler v Venezuela*)
*Igartúa de la Rosa v United States* (2000) .....627
*Ilascu v Moldova and Russia* (2004) .....83
*Ilse Hess v UK* (1975) .....685
*In re Abdouloussen* (1936) .....308

*In re Al-Fin Corporation's Patent* (1970) ....470
*In re Bowoon Sangsa Co* (1983) ....572
*In re Cassèque & Cot* (1929) ....570
*In re Dalla Torre* (1936) ....224
*In re Dirks' Patent* (1957) ....681
*In re Fouad Baddoura* (1927) ....570
*In re G* (1945) ....81
*In re G* (1997) ....83
*In re Grange & LeGlay* (1932) ....295
*In re James* (1977) ....130
*In re Kraussman* (1955) ....454, 460
*In re Kruger* (1951) ....240
*In re Labrador Boundary* (1927) ....360
*In re M (Danzig Conviction Case)* (1933) ....240
*In re Moriggi* (1939) ....222
*In re Nepogodin's Estate* (1955) ....79
*In re Nix* (1951) ....240
*In re petition of S* (1957) ....679
*In re Savini* (1927) ....701
*In re Schwinn Bicycle Co* (1995) ....206
*In re Société des Phosphates Tunisiens* (1929) ....295
*In re Southern Rhodesia* (1919) ....270, 586
*In re Tamasese* (1929) ....363
*In re Ungarische Kriegsproduktien AG* (1920) ....483, 675
*In re Wong Hon* (1959) ....642
*In re YMA* (2003) ....43
*Indonesia/Malaysia* (see *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* )
*Insas BHD v Cumaraswamy* (2000) ....43
*International Fruit Co NV v Produktschap voor Groeten en Fruit (No 3)* (1975) ....496
*International Registration of Trade Mark (Germany) Case* (1959) ....456
*International Status of South-West Africa (Advisory Opinion)* (1950) ....117, 122, 197, 430, 435, 441, 504, 537, 550, 566, 517, 573, 574, 592
*Internazionale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* (1974) ....495–96
*Interpretation of Peace Treaties (Second Phase)* (1950) ....41
*Interpretation of the Statute of the Memel Territory* (1932) ....237–38
*Interpretation of the Treaty of Lausanne* (1925) ....48, 549, 588, 590
*Iraq Airways Company and the Republic of Iraq v Kuwait Airways Corporation (No 1)* (2002) ....162
*Irish Free State v Guaranty Safe Deposit Co* (1927) ....658
*Island of Bulamu Arbitration* (1870) ....258

*Island of Lamu Arbitration* (1889) . . . . . .262
*Island of Palmas* (1928) . . . . . .46, 62, 258, 263–64, 267, 286, 299, 353, 486, 644

*Jacob Idler v Venezuela* (1885) . . . . . .654
*Jamar v Kersten* (1934) . . . . . .277
*Jani v Jani* (1952) . . . . . .299
*Jaworzina Case* (see *Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)* )
*Jayan Nath Sathu v Union of India* (1960) . . . . . .360
*Johnson & Graham's Lessee v McIntosh* (1823) . . . . . .258, 270, 273
*Jolley v Mainka* (1933) . . . . . .359, 363
*JP Morgan Chase Bank v Traffic Stream (BVI) Infrastructure Ltd* (2002) . . . . . .17
*Juda v United States* (1987) . . . . . .581, 600
*Jurisdiction of the Courts of Danzig* (1928) . . . . . .239
*Jurisdiction of the European Commission of the Danube between Galatz and Braila* (1927) . . . . . .14–15, 42, 69, 514–16

*Kaefer and Procacci v France* (1990) . . . . . .624
*Kanda v State of Japan* (1961) . . . . . .469
*Kansas v Colorado* (2001) . . . . . .486
*Kasikili/Sedudu Case (Botswana/Namibia)* (see *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)* )
*Katrantsios v Bulgaria* (1926) . . . . . .316, 357
*Katz & Klump v Yugoslavia* (1925) . . . . . .692
*Kawasaki Kisn Kabashiki Kaisha of Kobe v Bantham Steamship Co Ltd* (1939) . . . . . .17
*King* (see *R*)
*Kletter v Dulles* (1953) . . . . . .570
*Klinghoffer v Achille Lauro* (1991) . . . . . .438
*Knox v Palestine Liberation Organization* (2004) . . . . . .148
*Koowarta v Bjelke-Petersen* (1982) . . . . . .486
*KPMG Peat Marwick v Davison* (1996) . . . . . .630
*Kunstsammlungen zu Weimar v Elicofon* (1973) . . . . . .458
*Kuster v Regierungsrat des Kantons Schwyz* (1975)

*L & JJ v Polish State Rys* (1948) . . . . . .241
*LaGrand Case (Germany v United States of America) (Merits)* (2001) . . . . . .489
*LaGrand Case (Germany v United States of America) (Provisional Measures)* (1999) . . . . . .44, 488–89
*Laguna del Desierto (Chile-Argentina)* (1994) . . . . . .241
*Lamu Arbitration* (see *Island of Lamu Arbitration*)

*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening) (Merits)* (2002) .....311–14, 328, 464, 644, 702
*Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening) (Preliminary Objections)* (1998) ....615
*Land Registry of Waldsassen v Towns of Eger (Cheb) and Waldsassen* (1965) .....679, 692
*Larsen v Hawaiian Kingdom* (2001) .....262, 623
*Lau Kong Yung v Director of Immigration* (2001) .....252
*Lazard Bros v Midland Bank Ltd* (1933) .....652, 679
*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (1971) .....113, 116, 117, 122–23, 162–68, 336, 430, 431, 435, 439–40, 441, 493, 494, 536, 551–52, 567, 573, 580, 586, 587, 591–96, 604–05
*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (2004) .....105, 113, 116, 172–73, 420–21, 423, 444–45
*Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1996) ...42, 104
*Legality of Use of Force (NATO Cases)* (2004) .....708, 712–14
*Lehigh Valley RR Co v State of Russia* (1927) .....653
*Lei Wei Fang v Kennedy* (1963) .....219
*Les Verts Case* (1986) .....496
*Levantesi v Governor of Rome* (1940) .....224
*Levi Claim* (1957) .....91
*Liberia v South Africa* (see *South West Africa Cases)*
*Libyan Arab Jamahiriya/Chad* (see *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* )
*Liechtenstein v Germany* (see *Case concerning Certain Property (Liechtenstein v Germany)* )
*Lighthouses Arbitration* (1956) .....357
*Lighthouses in Crete and Samos* (1937) .....354–57
*Ligitan and Sipadan* (see *Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipidan (Indonesia/Malaysia)* )
*Littleton's note* (1640) .....258
*Liyanage v R* (1967) .....331
*Loizidou v Turkey* (1997) .....146–47
*Loizidou v Turkey (Merits)* (1996) .....81–82, 162
*Lone Wolf v Hitchcock* (1903) .....269, 274
*Lord Gray's Motion* (2002) .....676
*Lotus* (see *The Lotus*)

*Louisiana v Mississippi* (1984) .....486
*Lovelace v Canada* (1981) .....624
*Lowinsky v Receiver in Bankruptcy* (1932) .....679
*Lubicon Lake Band* (see *Ominayak & Lubicon Lake Band*)
*Luigi Monta of Genoa v Ceckofracht Ltd* (1956) .....17, 219
*Luther v Sagor* (1921) .....17, 652

*M v ONU & Etat Belge* (1966) .....494
*Maastricht Urteil* (see *Case Concerning the Constitutionality of the Maastricht Treaty*)
*Mabo v Queensland (No 2)* (1992) .....92, 259, 268, 278, 281, 676
*Madaha Resena v Independent State of Papua New Guinea* (1991) .....270
*Madzimabamuto v Lardner-Burke* (1968–9) .....130, 358, 362, 369–70
*Magher Singh v Principal Secretary of the Jammu & Kashmir Government* (1953) .....284
*Maharaja Bikram Kishore of Tripura v Province of Assam* (1948) .....322
*Maharajah of Tripura v Province of Assam* (1948) .....284
*Mangope v Van der Walt* (1994) .....347
*Matimak Trading Co v Khalily* (1997) .....17
*Matthews v UK* (1999) .....624
*Mavrommatis Palestine Concessions* (1924) .....429–30
*McDonough's Executors v Murdoch* (1853) .....275
*Mellenger v New Brunswick Development Corporation* (1971) .....485, 486
*Ménier v PLM Ry Co* (1938) .....295
*Metropolitan Chapter in Poznán v State Treasury* (1963) .....693
*Mexico v United States* (see *Case Concerning Avena and Other Mexican Nationals (Mexico v United States)* )
*Mighell v Sultan of Johore* (1894) .....78, 318
*Milirrpum v Nabalco Pty Ltd* (1971) .....266, 270
*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (1986) .....40, 41, 69–70, 154
*Millen Industries Inc v Coordination Council for N American Affairs* (1988) .....18, 205
*Mingtai Fire and Marine Insurance Co Ltd v United Parcel Service* (1999) .....205–04
*Ministière Public v Nicoleau* (1950) .....295
*Ministry of Finance v Association of Italian Knights of the Order of Malta* (1978) .....232
*Ministry of Immigration & Multicultural Affairs v Haji Ibrahim* (2000) .....414, 722
*Ministry of Immigration & Multicultural Affairs v Jama* (1999) .....414, 722
*Minquiers & Ecrehos Case* (1953) .....321, 351
*Mizrihi v Republic of Cyprus* (1963) .....242
*Mohegan Indians v Connecticut* (1705, 1743, 1773) .....268
*Mokotso v HM King Moshoeshoe II* (1989) .....357
*Monastery at St. Naoum (Albanian Frontier)* (1924) .....48, 511, 514, 549

*Monetary Gold removed from Rome in 1943* (1954) .....41, 169, 520, 585
*Montefiore v Belgian Congo* (1955) .....277
*Moore v Attorney General* (1935) .....362
*Mordovici v General Administration of Posts & Telegraphs* (1929) .....518
*Morgan Guaranty Trust Co v Republic of Palau* (1986) .....572
*Morgan Guaranty Trust v Republic of Palau* (1991) .....583, 655
*Morocco Case (France v USA)* (see *Rights of Nationals of the United States of America in Morocco (France v United States)* )
*Muller v Rockling Bros* (1923) .....234
*Murarka v Buckrack Bros* (1954) .....367–68
*Murray v Parkes* (1942) .....54
*Muscat Dhows Arbitration* (1904) .....315, 321
*MV Nonsuco Inc v IRC* (1956) .....373

*Namibia Opinion* (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution* 276 (1970) )
*Nankive v Omsk All Russian Government* (1932) .....701
*Nanni v Pace & Sovereign Order of Malta* (1935) .....44, 231, 233
*Naqara v Minister of the Interior* (1953) .....52
*National Bank of Egypt v Austria-Hungary Bank* (1924) .....317
*National Bank of Egypt v German Government* (1925) .....317
*Nationality (Secession of Austria) Case* (1954) .....54
*Nationality Decrees in Tunis and Morocco* (1923) .....197, 267, 284, 303–04, 307
*NATO Cases (Preliminary Objections)* (2004) .....189
*Nauru v Australia* (see *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* )
*Ndlwana v Hofmeyr* (1934) .....353
*Nebraska v Wyoming & Colorado* (1993) .....486
*New Jersey v Delaware* (1934) .....486
*New Jersey v New York* (1998) .....486
*New York Chinese TV Programs Inc v UE Enterprises Inc* (1992) .....18, 205
*New York v United States* (1992) .....488
*New Zealand Maori Council v Attorney-General* (1987) .....272
*Newfoundland and Labrador/Nova Scotia Awards* (2001–2) .....486
*Ng Fung Hong Ltd v ABC* (1998) .....250
*Ng Ka Ling v Director of Immigration* (1999) .....252
*Nicaragua Case* (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* )
*Nissan v AG* (1970) .....243, 494
*Nolan v Minister for Immigration and Ethnic Affairs* (1988) .....482
*North Atlantic Coast Fisheries Case* (1910) .....536

*North Charterland Exploration Co v R* (1931) .....302
*North Sea Continental Shelf Cases* (1969) .....50
*Northern Cameroons (Cameroons v United Kingdom)* (1963) .....429, 567, 584, 596–97, 618, 661–62
*Nottebohm Case (Second Phase)* (1955) .....6, 52
*NV Algemeine transport- en Expeditie Ondernenning Van Gend en Laos v Nederlandse Tariefrommissie* (1963) .....499
*NY Hanseatic Corporation v FRG* (1960) .....460
*Nyali Ltd v AG* (1955) .....302

*O'Conner v United States* (1986) .....642
*O'Reilly v Fox Chapel Area School District* (1987) .....43
*Occidental Exploration & Production Co v Republic of Ecuador* (2005) .....29
*Oetjen v Central Leather Co* (1918) .....652
*Officier van Justitie v Kramer & ors* (1976) .....499
*Ol Le Ngojo v AG* (1913) .....269
*Ominayak & Lubicon Lake Band v Canada* (1990) .....279
*'Open Skies' Case* (see *Commission v Austria & others (Re the 'Open Skies' Agreements with the USA)* )
*Oscar Chinn Case* (1934) .....277, 538
*Oseri v Oseri* (1952) .....434
*Ottoman Debt Arbitration* (1925) .....676

*Pablo Najera Claim* (1928) .....317
*Padri Benedetti v Nunzi* (1957) .....222
*Panavezys-Saldutiskis Railway* (1939) .....51
*Parent v Singapore Airlines Ltd* (2003) .....201, 205, 219–20
*Parounak v Turkish Government* (1929) .....288
*Pauling v McElroy* (1958) .....600
*Peinitsch v Germany* (1923) .....90
*Pellegrini v Italy* (2002) .....232
*People of Saipan v United States Department of Interior* (1973) .....572
*Phosphates in Morocco* (1938) .....285, 295, 314, 315
*Piccoli v Association of Italian Knights of the Order of Malta* (1978) .....232
*Pinochet Case* (see *R v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex part Pinochet Ugarte (No 3)* )
*Polish Postal Service in Danzig* (1925) .....240
*Polish Upper Silesia Case* (see *Certain German Interests in Polish Upper Silesia*)
*Polish War Vessels in the Port of Danzig* (1931) .....41, 240
*Polish-Czechoslovakian Frontier* (see *Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)* )
*Ponce v Roman Catholic Apostolic Church* (1907) .....226
*Porter v United States* (1974) .....572

*Portugal v Australia* (see *Case Concerning East Timor (Portugal v Australia)* )
*Portugal v India* (see *Case Concerning Right of Passage over Indian Territory (Portugal v India)* )
*Posadas v National City Bank of New York* (1936) .....373
*Poznanski v Lentz & Hirschfeld* (1925) .....53, 656
*Prince Hans-Adam II of Liechtenstein v Germany* (2001) .....685
*Princess Paley Olga v Weisz* (1929) .....653
*Principality of Monaco v Mississippi* (1934) .....485
*Printz v United States* (1997) .....488
*Prosecutor v Furundžija* (1998) .....101
*Prosecutor v Rajíc (Trial Chamber)* (1996) .....83, 134
*Prosecutor v Simic* (1999) .....43
*Prosecutor v Tadić (Jurisdiction)* (1995) .....560
*Prosecutor v Tadić (Trial Chamber)* (1997) .....82
*Prosecutor v Tadić (Appeals Chamber)* (1999) .....82, 528

*Qatar v Bahrain* (see *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain)* )
*Quebec Secession Reference* (1998) .....119–20, 376, 389, 411–12
*Queen* (see *R*)
*Queensland v Commonwealth (Daintree Forest)* (1989) .....486
*Questech v Ministry of National Defence of the Islamic Republic of Iran* (1985) .....673, 679

*R (Bancoult) v Foreign Secretary* (2001) .....125, 303, 337, 646
*R v Bottrill ex parte Kuechenmeister* (1947) .....453
*R v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex part Pinochet Ugarte (No 3)* (2000) .....101
*R v Burgess ex parte Henry* (1936) .....486
*R v Christian* (1924) .....571, 587
*R v Graham Campbell, ex p Moussa* (1921) .....287
*R v IRC ex parte Caglar* (1994) .....162
*R v Ketter* (1940) .....570
*R v Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouri) Ltd and others* (1994) .....146
*R v Secretary of State for Foreign and Commonwealth Affairs ex parte Indian Association of Alberta* (1982) .....274, 371, 482
*R v Symonds* (1847) .....262
*Rabang v Boyd* (1957) .....373
*Radio-Orient Company Case* (1940) .....570
*Railway Pension (Austria) Case* (1923) .....675
*Railway Traffic Between Lithuania and Poland* (1931) .....51

*Rainoldi v Ministero della Guerra* (1946) . . . . . .91
*Rajah Salig Ram v Sec of State* (1872) . . . . . .323
*Rajíc Case* (see *Prosecutor v Rajíc*)
*Randall v Randall* (2003) . . . . . .43
*Rann of Kutch Arbitration* (1968) . . . . . .267, 306–07, 322
*Rasul v Bush* (2004) . . . . . .vi, 72, 303
*Re an Inquiry by the Ministry of Foreign Affairs* (1958) . . . . . .563–64
*Re Boedecker & Ronski* (1962) . . . . . .197
*Re Companie des Eaux d'Hanoi* (1963) . . . . . .476
*Re Delacher* (1962) . . . . . .459
*Re Esposito* (1899) . . . . . .222
*Re Hamou* (1955) . . . . . .295
*Re Ho* (1975)
*Re ILO Convention 170 on Chemicals at Work* (1993) . . . . . .499
*Re Jackson & Roos* (1990) . . . . . .689
*Re Resolution to Amend the Constitution* (1981) . . . . . .371
*Re the European Road Transport Agreement* (see *Commission v Council (AETR)* )
*Re the OECD Understanding on a Local Cost Standard* (1976) . . . . . .499
*Re WTO Agreements* (1994) . . . . . .499
*Recidivism (Soviet Zone of Germany) Case* (1954) . . . . . .454
*Reel v Holder* (1981) . . . . . .205
*Reference re Newfoundland Continental Shelf* (1984) . . . . . .359, 701
*Reference re Secession of Quebec* (see *Quebec Secession Reference*)
*Reg v Governor of Belmarsh Prison* (2001) . . . . . .43
*Rendition of Suspected Criminal (Saar Territory) Case* (1955) . . . . . .234
*Reparation for Injuries Suffered in the Service of the United Nations* (1949) . . . . . .29–30, 32, 43, 438, 493–94, 536
*Reparations Commission v German Government* (1924) . . . . . .675
*Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA* (1993) . . . . . .413
*Republic of Transkei v Immigration and Naturalization Service* (1991) . . . . . .343
*Republic of Vietnam v Pfizer, Inc* (1977) . . . . . .477, 715
*Republic v Felsenstadt* (1922) . . . . . .691
*Republic v Pantol* (1922) . . . . . .691
*Republic v Weisholc* (1919) . . . . . .691
*Restitution of Household Effects belonging to Jews deported from Hungary* (1965) . . . . .87–88
*Revision of the Judgment of 11 July 1996* (see *Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia), Preliminary Objections (Yugoslavia v Bosnia and Herzegovina)* )
*Richardson v Forestry Comm* (1988) . . . . . .486
*Right of Passage Case* (see *Case Concerning Right of Passage over Indian Territory (Portugal v India)* )

*Rights of Nationals of the United States of America in Morocco (France v United States)* (1952) .....192, 296, 267, 295–96, 262, 308, 305–06, 307, 308, 316, 510, 538–39
*Robert E Brown Claim* (1926) .....276
*Rodriguez v Popular Democratic Party* (1982) .....627
*Rogers v Lu* (1958) .....219
*Romania v Cheng* (1997) .....18
*Roselius & Co v Karsten & Turkish Republic* (1926) .....676
*Rudolf Hess Case* (1980) .....685
*Russian Government v Lehigh Valley Railroad Co* (1919) .....679
*Russian Roubles (Attempted Counterfeiting) Case* (1919) .....679

*S v Carracelas & ors (2)* (1992) .....595
*S v Marwane* (1982) .....343
*Sabally & N'Jie v Attorney-General* (1965) .....332
*Saipan Stevedore v Office of Workers' Compensation Programs* (1998) .....655
*Sale v Haitian Centers Council* (1993) .....642
*Salimoff v Standard Oil Co* (1933) .....17
*Santovincenzo v Egan* (1931) .....486
*Sauser-Hall Arbitration* (see *Case of Gold Looted by Germany from Rome in 1943*)
*Scarfo v Sovereign Order of Malta* (1957) .....223, 233
*Sec of State in Council for India v Kamachee* (1859) .....323
*Sechter v Minister of the Interior* (1924) .....518
*Secretary of State for India v Sardar Rustam Khan* (1941) .....272, 327
*Shehadeh v Commissioner of Prisons* (1947) .....680
*Shtraks v Government of Israel* (1964) .....564
*Simic Case* (see *Prosecutor v Simic*)
*Simon v Taylor* (1975) .....681
*Singh v State of Vinhya Pradesh* (1953) .....284
*Single German Nationality (Teso) Case* (1987) .....681–82, 687
*Sirkar v Subramania Iyen* (1946) .....284
*Smith v Attorney-General, Bophuthatswana* (1984) .....343
*Smith v US* (1991) .....43
*Sobhuza II v Miller* (1926) .....262, 287, 302
*Soc Immobiliare Roma-Trieste v Stabilimento Tipografico Triestino e Soc Editrice del 'Piccolo'* (1952) .....236
*Società ABC v Fontana and Della Rocca* (1954) .....572
*Società Teatro Puccini v Commissioner-General of the Government for the Territory of Trieste* (1961) .....235–36
*Socony Vacuum Oil Co Claim* (1954) .....79–80
*Sokoloff v National City Bank* (1924) .....17
*South West Africa (Status)* (see *International Status of South West Africa (Advisory Opinion)* (1950) )

*South West Africa (Hearings of Petitioners)* (see *Admissibility of Hearings of Petitioners by the Committee on South West Africa* (1956) )
*South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (First Phase/Preliminary Objections)* (1962) .....103, 587, 597
*South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Second Phase/Merits)* (1966) .....103, 108, 345, 359, 532, 580, 581, 587, 594, 597
*Southern Cross Overseas Agencies, Inc v Wah Kwong Shipping Group Ltd* (1999) ....17
*Sovereign Order of Malta v Brunelli, Tacali & Ors* (1931) .....232
*Sovereign Order of Malta v Soc An Commerciale* (1954) .....232, 233
*Sovereignty over Pulau Ligitan and Pulau Sipadan* (see *Case concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan*)
*Spanish Civil War Pension Case* (1978) .....35
*Spanish Zone of Morocco Claims* (1928) .....305, 308, 315
*State of Missouri v Holland* (1920) .....486
*State of Spain v Chancery Lane Safe Deposit Ltd* (1939) .....34–35
*State v Banda and 194 others* (1989) .....342–43
*State v Dosso* (1958) .....679
*State v Hynes* (1961) .....359
*Statham v Statham & Gaekwar of Baroda* (1912) .....318, 321
*Status of the Saar Territory Case* (1930) .....234
*Status Opinion (South West Africa)* (see *International Status of South-West Africa (Advisory Opinion) (1950)* )
*Statute of the Saar Territory* (1955) .....234
*Studer Claim* (1925) .....315
*Sue v Hill* (1999) .....482
*Sultan of Johore v Abubakar* (1952) .....318
*Suspine v CTC* (1941) .....373

*Tadić Case* (see *Prosecutor v Tadić*)
*Taiwan v United States District Court* (1997) .....206
*Tangiora v Wellington District Legal Services Committee* (1999) .....44
*Tasmania v Commonwealth (Tasmanian Dams)* (1983) .....486
*Tee-Hit-Ton Indians v US* (1955) .....270, 274
*Temple Case* (1962) .....261
*Territorial Jurisdiction of the Oder Commission* (1929) .....42
*Territory (Trade Marks) Case* (1934) .....233–34
*Teso Case* (see *Single German Nationality (Teso) Case)*
*Texas v New Mexico* (1987) .....486
*The Arantzazu Mendi* (1939) .....17
*The Bathori* (1934) .....236
*The Blonde* (1921) .....240
*The Case of Tanistry* (1608) .....278, 676

*The Fjeld* (1950) ..... 434
*The Flying Trader* (1950) ..... 434
*The Helena* (1801) ..... 92–93
*The Holy See v Star Bright Sales Enterprises Inc* (1994) ..... 227
*The Indian Chief* (1801) ..... 327
*The Ionian Ships* (1855) ..... 316
*The Jupiter (No 3)* (1927) ..... 653
*The Laconia* (1863) ..... 301
*The Lotus* (1927) ..... 41–42, 240, 595
*The Madonna del Burso* (1802) ..... 262
*The Magellan Pirates* (1853) ..... 262
*The Sapphire v Napoleon III* (1871) ..... 679
*The Wimbledon* (1923) ..... 69, 536
*Theodore v Duncan* (1919) ..... 359
*Thome Guadalupe v Assoc Italiana di S Cecilia* (1937) ..... 221–22
*Thomson v Thomson* (1994) ..... 486
*Tinoco Arbitration* (1923) ..... 23, 388, 680
*TP Sankara Rao v Municipal Council of Masulipatam* (1957) ..... 367
*Trafficante v Ministry of Defence* (1961) ..... 572
*Trawnik v Lennox* (1985) ..... 685
*Treatment of Polish Nationals in Danzig* (1932) ..... 239, 240
*Trenta v Ragonesi* (1935) ..... 222
*Trésor Public v Air Laos* (1960) ..... 476
*Treves Claim* (1956) ..... 91
*Trial of Gauleiter Artur Greiser* (1946) ..... 241
*Trinh v Citibank* (1988) ..... 476
*Tunis and Morocco Nationality Decrees* (see *Nationality Decrees in Tunis and Morocco*)

*Underhill v Hernandez* (1897) ..... 652
*United States ex rel Zeller v Watkins* (1948) ..... 240
*United States Nationals in Morocco* (see *Rights of Nationals of the United States of America in Morocco (France v United States)* )
*United States v Alaska* (1997) ..... 486
*United States v Guerrero* (1993) ..... 582, 655
*United States v Kagama* (1886) ..... 269, 274
*United States v Krupp* (1949) ..... 101–02
*United States v Lara* (2004) ..... 486
*United States v Murff* (1959) ..... 219
*United States v Palestine Liberation Organization* (1988) ..... 195
*United States v Pink* (1942) ..... 545, 653
*United States v Quinones* (1985) ..... 626
*United States v Sanders* (1956) ..... 468
*United States v Shaughnessy* (1954) ..... 219

*United States v Shell* (1957) ..... 468
*United States v Tiede* (1979) ..... 642
*United States v Valentine* (1968) ..... 633
*United States v Vargas* (1974) ..... 626
*United States v Wheeler* (1978) ..... 273

*Valk v Kokes* (1950) ..... 702
*Vearncombe, Herbst, Clemens, Spielhagen v UK and Federal Republic of Germany* (1989) ..... 684–85
*Veysi Dag v Secretary of State for the Home Dept* (2000) ..... 167
*Victoria v Commonwealth* (1996) ..... 486
*Voting Procedure Case* (1955) ..... 113, 550–51, 588, 594
*Vozneac v Autonomous Admn of Posts & Telegraphs* (1931) ..... 518

*Wall Case* (see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* )
*Wandeweghe v BCI* (1973) ..... 496
*Warman v Francis* (1958) ..... 269–70
*Weber v USSR* (1942) ..... 679
*Webster Claim* (1925) ..... 270
*West Rand Central Gold Mining Co v R* (1905) ..... 276
*Western Sahara (Advisory Opinion)* (1975) ..... 41, 60, 116, 123–24, 237, 258, 259, 262, 265, 266–67, 384, 432, 479, 567, 602, 605, 613, 615, 616–17, 620, 621, 639–40, 644, 646, 698
*White v McLean* (1890) ..... 265
*Wildermann v Stinnes* (1924) ..... 53, 518
*Williams v Bruffy* (1877) ..... 652
*Williams v Lee* (1959) ..... 273
*Winterbottom v Vardan & Sons Ltd* (1921) ..... 265
*Wiparata v Bishop of Wellington* (1877) ..... 265–66
*Witrong & Blany* (1674) ..... 278, 676
*Worcester v State of Georgia* (1832) ..... 269, 273–74, 300
*Wulfsohn v RSFSR* (1923) ..... 17, 23
*Wurttemberg & Prussia v Baden* (1927) ..... 486
*Yrisarri v Clement* (1825) ..... 17

*Zander Claim* (1851) ..... 658
*Zannoni v Sbisà* (1920) ..... 236
*Ziat Claim* (1924) ..... 315
*Ziv v Gubernik* (1948) ..... 434

# *Select Table of Treaties and Other Instruments*


| CE | | | Page Reference |
|---|---|---|---|
| **1373** | 16 Jun | Treaty of Alliance with Portugal (Great Britain–Portugal) | 676 |
| **1713** | 17 Jul | Treaty of Utrecht (Great Britain–Spain) | 348, 643 |
| **1763** | 10 Feb | Definitive Treaty of Peace (France–Great Britain–Spain) | 377, 411 |
| **1774** | 10 Jul | Treaty of Kuçuk Kainardji (Russia–Turkey) | 507 |
| **1778** | 6 Feb | Treaty of Amity and Commerce (France–USA) | 377 |
| **1779** | 10 Mar | Treaty of Ainchi–Kavak (Russia–Turkey) | 507 |
| | 4 May | Treaty of Poona (Portugal–Mahratta Empire) | 615 |
| **1782** | 4 Oct | Treaty of Amity and Commerce (USA–Netherlands) | 377 |
| | 30 Nov | Preliminary Articles of Peace (Great Britain–USA) | 377 |
| **1792** | 9 Jan | Treaty of Jassy (Austria–Russia) | 507 |
| **1812** | 16 May | Treaty of Bucharest (Russia–Turkey) | 507 |
| **1814** | 30 May | Treaty of Paris (Austria–Great Britain–Portugal–Prussia–Russia–Sweden–France) | 285 |
| **1815** | 9 Jun | Final Act of the Congress of Vienna (Austria–France–Great Britain–Portugal–Prussia–Russia–Sweden) | 505–6, 542 |
| | 20 Nov | Definitive Treaty of Peace (Austria, Great Britain, Prussia and Russia–France) | 734 |
| **1817** | 7 Nov | Treaty of Protection (Monaco–Sardinia) | 734 |
| **1818** | 15 Nov | Protocol of the Conference at Aix-la-Chapelle (Austria–France–Great Britain–Prussia–Russia) | 543, 547, 548 |
| **1826** | 4 Apr | St. Petersburg Protocol (Russia–Great Britain) | 541 |
| | 25 Sep | Treaty of Akkerman (Russia–Turkey) | 507 |
| **1827** | 6 Jul | Treaty for the Pacification of Greece (France–Great Britain–Greece) | 541 |
| **1829** | 14 Sep | Treaty of Adrianople (Russia–Turkey) | 507, 541 |

| CE | | | Page Reference |
|---|---|---|---|
| **1830** | 3 Feb | Protocol respecting independence of Greece (France–Great Britain–Russia) | 542 |
| **1831** | 15 Nov | Treaty for the definitive separation of Belgium from Holland (Austria–France–Great Britain–Prussia–Russia–Belgium) | 543 |
| **1839** | 19 Apr | Treaty between Belgium and the Netherlands relative to the separation of their respective territories (Belgium–Netherlands) | 544 |
| **1840** | 6 Feb | Treaty of Waitangi (Great Britain–New Zealand) | 265, 268–9, 272 |
| **1842** | 29 Aug | Treaty of Nanking (China–Great Britain) | 245 |
| **1846** | 15 Apr | Convention between Austria, Prussia and Russia for the Definitive Incorporation of Cracow in Austria (Austria–Prussia–Russia) | 234 |
| **1849** | 10 Apr | Articles between Russia and Turkey for the more effective protection of the immunities and privileges of the principalities of Moldavia and Wallachia (Treaty of Balta–Liman) | 507 |
| **1852** | 20 Nov | Treaty relative to the Succession to the Crown of Greece (Great Britain–Bavaria–Russia–France–Greece) | 542 |
| **1854** | 28 Mar | British Declaration of the Causes of War against Russia | 506 |
| **1856** | 30 Mar | Treaty of Paris (General Treaty for the Re-establishment of Peace) (Great Britain–Austria–France–Prussia–Russia–Sardinia–Turkey) | 14, 507–8, 514, 536 |
| **1862** | 22 Mar | Convention of Good Neighbourship (Italy–San Marino) | 736 |
| **1865** | 7 May | International Telegraph Union | 493 |
| **1867** | 11 May | Treaty relative to the Grand Duchy of Luxembourg (Austria, Belgium, France, Great Britain, Italy, Netherlands, Prussia, Russia) | 733 |
| **1871** | 13 Mar | Treaty for the revision of the stipulations of the Treaty of 30 March 1856 (Navigation of the Black Sea and Danube) (Austria–Hungary, France, Germany, Great Britain, Italy, Prussia, Russia, Turkey) | 508 |
| | 22 Dec | Treaty of Commerce (US–Orange Free State) | 276 |

| CE | | | Page Reference |
|---|---|---|---|
| **1874** | 1 Apr | Treaty of Friendship, Establishment & Commerce (Belgium–Orange Free State) | 276 |
| | 9 Oct | Treaty of Berne (General Postal Union) | 493 |
| **1878** | 3 Mar | Treaty of San Stefano (Russia–Turkey) | 508–9 |
| | 13 Jul | Treaty of Berlin (Treaty for the Settlement of Affairs in the East) (Great Britain, Austria–Hungary, France, Germany, Italy, Russia, Turkey) | 504, 509, 514, 285, 508, 735 |
| **1881** | 3 Aug | Convention between Great Britain and the Transvaal Burghers | 276, 690 |
| **1883** | 10 Mar | Treaty relative to the navigation of the Danube (Treaty of London) (Austria–Hungary, France, Germany, Great Britain, Italy, Russia, Turkey) | 514–5 |
| **1884** | 27 Feb | Convention for the Settlement of the Transvaal Territory (Convention of London) (Great Britain–South African Republic) | 276, 690 |
| **1885** | 26 Feb | General Act of the Conference respecting the Congo | 301, 307, 509 |
| **1888** | 17 Sep | Protectorate Agreement (Great Britain, Datus and Chiefs of Rembau (Malay States) ) | 297–8 |
| **1892** | 22 Mar | Treaty Between Great Britain and the Chief of Bahrain | 291 |
| **1895** | 17 Apr | Treaty of Shimonoseki (China–Japan) | 198, 207 |
| **1900** | 18 May | Treaty of Amity (Tonga–United Kingdom) | 290 |
| **1903** | 23 Feb | Agreement for Coaling and Naval Stations (Cuba–USA) | 642 |
| | 22 May | Treaty between Cuba and the United States determining their relations | 72 |
| | 18 Nov | Convention for the Construction of a Ship Canal) (Isthmian Canal Convention) (Panama–USA) | 642 |
| **1905** | 17 Nov | Protectorate Agreement (Japan–Korea) | 466 |
| **1906** | 7 Apr | General Act of the International Conference at Algeciras relating to the Affairs of Morocco | 285, 294, 510 |
| | 27 Apr | Convention between Great Britain and China (relating to Tibet) | 324 |
| **1907** | 31 Aug | Convention between Great Britain and Russia relating to Persia, Afghanistan, and Thibet | 324, 327 |

| CE | | | Page Reference |
|---|---|---|---|
| **1908** | 20 Apr | Agreement of 1908 amending Trade Regulations in Tibet between Great Britain, China and Tibet | 324 |
| **1910** | 22 Aug | Treaty of Annexation (Japan–Korea) | 466 |
| **1912** | 30 Mar | Treaty for the Organisation of the Protectorate (Treaty of Fez) (France–Morocco) | 294–6, 307, 734 |
| | 27 Nov | Convention Respecting Relations in Morocco (France–Spain) | 734 |
| **1913** | 30 May | Treaty of Peace (Bulgaria, Greece, Montenegro, Servia and Turkey) | 357, 510, 727 |
| | 17 Dec | Protocol of Florence (Albania–Greece–Serbia) | 511 |
| **1914** | 3 Jul | Simla Convention (China–Great Britain–Tibet) | 325 |
| **1915** | 26 Apr | Treaty of London (Secret Treaty of London) (France–Great Britain–Italy–Russia) | 511, 516, 532, 541 |
| **1916** | 16 May | Sykes–Picot Agreement (France–Great Britain) | 422 |
| **1917** | 2 Nov | Balfour Declaration | 361–2, 364, 366, 422–3 |
| **1918** | 3 Mar | Treaty of Brest–Litovsk (Austria–Hungary, Bulgaria, Germany, Turkey, Russia) | 518 |
| | 17 Jul | Treaty of Protective Amity (Monaco–France) | 292–3, 517 |
| **1919** | 28 Apr | Covenant of the League of Nations | |
| | | art 1(2) | 176–7 |
| | | art 4 | 545 |
| | | art 5 | 545 |
| | | art 16(4) | 587 |
| | | art 22 | 116, 422, 425–6, 428–9, 436, 441, 519, 533–4, 566, 568–70, 597, 574–5, 579, 587–8, 604–6 |
| | 28 Jun | Treaty of Versailles | 237–8, 240, 360–1, 363–4, 515–7, 520–1, 531, 533–5, 537, 545, 665, 692, 742–3 |
| | 8 Aug | Treaty of Peace (Afghanistan–Great Britain) | 727 |

| CE | | | Page Reference |
|---|---|---|---|
| | 10 Sep | Treaty of St Germain-en-Laye (Principal Allied and Associated Powers and Austria) | 63–4, 517, 531, 535, 538, 549, 665, 675, 728 |
| | 13 Oct | Paris Convention for the Regulation of Aerial Navigation | 365 |
| | 27 Nov | Treaty of Neuilly-sur-Seine (Principal Allied and Associated Powers and Bulgaria) | 516–7, 531 |
| **1920** | 9 Feb | Treaty concerning the Archipelago of Spitsbergen (Norway–USA–Denmark–France–Italy–Japan–Netherlands–Great Britain–Sweden) (Svalbard Treaty) | 266 |
| | 4 Jun | Treaty of Trianon (Principal Allied and Associated Powers and Hungary) | 516–7, 531, 534–5, 549, 665, 675 |
| | 10 Aug | Treaty of Sèvres (Principal Allied Powers and Turkey) | 422–3, 516–7, 533 |
| | 25 Sep | Treaty of Sib (Muscat–Oman) | 325–6 |
| | 14 Oct | Treaty of Peace between Finland and Russia (Treaty of Dorpat) | 531 |
| | 28 Oct | Treaty of Paris (respecting Bessarabia) (Romania and the Principal Allied Powers) | 518 |
| | 9 Nov | Treaty of Paris (Danzig–Poland) | 239 |
| | 12 Nov | Treaty of Rapallo (Italy–Yugoslavia) | 534 |
| **1921** | 24 Jun | Resolution of the League of Nations (approving Agreement between Sweden and Finland relative to special rights in the Åland Islands) | 111 |
| | 23 Jul | Definitive Statute of the Danube | 515 |
| | 25 Jul | Treaty for Customs Union between Luxembourg and Belgium | 535 |
| | 24 Aug | Treaty of Peace (Austria–USA) | 516 |
| | 25 Aug | Treaty of Peace ( Germany–USA) | 516 |
| | 29 Aug | Treaty of Peace (Hungary–USA) | 516 |
| | 20 Oct | Convention relating to the Status of the Åland Islands (neutrality provisions and League guarantee) (British Empire, Denmark, Esthonia, Finland, France, Germany, Italy, Latvia, Poland, Sweden) | 111 |
| | 6 Dec | Articles of Agreement for a Treaty between Great Britain and Ireland | 331 |
| | 6 Dec | Irish State Treaty (Great Britain–Ireland) | 356, 363 |

| CE | | | Page Reference |
|---|---|---|---|
| **1922** | 24 Jul | Mandate Agreement (France in Lebanon and Syria) | 570 |
| | 24 Jul | Palestine Mandate (Great Britain in Palestine) | 570 |
| | 4 Oct | Protocol of Geneva (respecting Austro–German political union) | 63–4, 537–8 |
| | 10 Oct | Treaty of Alliance (Great Britain–Iraq) | 575 |
| **1923** | 2 Mar | Halibut Fisheries Treaty (Canadian–United States) | 360 |
| | 24 Jul | Treaty of Peace with Turkey (Treaty of Lausanne) | 288, 354, 364–5, 423, 430, 516–7, 531, 534, 588–9, 741 |
| **1924** | 27 Jan | Treaty respecting Fiume (Italy–Yugoslavia) | 534–5 |
| | 8 May | Convention Concerning the Territory of Memel (British Empire, France, Italy, Japan and Lithuania) | 237 |
| | 27 Sep | Decision of the Council of the League (confirming Mandate of Great Britain in Iraq) | 569, 575 |
| **1925** | 5–16 Oct | Treaties of Locarno (Belgium–Czechoslovakia–Germany–Great Britain–France–Poland) | 364 |
| **1926** | 13 Jan | Treaty amending the Treaty of Alliance of 1922 (Great Britain–Iraq) | 569 |
| | 22 Jun | Boundary Agreement (South Africa–Portugal) | 568 |
| **1928** | 20 Feb | Agreement between the United Kingdom and Transjordan respecting the Administration of the Latter (United Kingdom–Transjordan) | 423, 578 |
| | 20 Feb | Treaty between Great Britain and Emir Abdullah (respecting Transjordan) | 571, 578 |
| | 27 Aug | Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy (Kellogg–Briand Pact) | 519 |
| **1929** | 11 Feb | Treaty between the Holy See and Italy establishing the Vatican State (Lateran Treaty) | 222–5 |
| | 12 Oct | Convention for the Unification of certain rules regarding International Transport (Warsaw Convention) | 206, 316 |

| CE | | | Page Reference |
|---|---|---|---|
| **1930** | 30 Jun | Treaty of Alliance (Great Britain–Iraq) | 73, 575, 741 |
| **1932** | 9 Dec | International Telecommunications Convention | 493, 570 |
| **1933** | 26 Dec | Convention on the Rights and Duties of States (Montevideo Convention) | 46, 436–40, 484 |
| **1934** | 29 May | Treaty of Relations (United States–Cuba) | 642 |
| **1936** | 9 Sep | Treaty of Alliance (France–Syria) | 570, 741 |
| | 13 Nov | Treaty of Alliance (France–Lebanon) | 570, 742 |
| **1939** | 31 Mar | Treaty of Friendship and Bon Voisinage (Italy–San Marino) | 289 |
| | 23 Aug | Secret Protocol to the Non-Aggression Pact (Germany–USSR) | 522 |
| **1941** | 14 Aug | Atlantic Charter (UK–USA) | 112, 519 |
| **1942** | 29 Jan | Tripartite Treaty of Alliance (UK–USSR–Iran) | 86 |
| **1943** | 30 Oct | Moscow Declaration (UK–USA–USSR) | 520 |
| **1944** | 12 Sep | Protocol on the Zones of Occupation in Germany and the Administration of 'Greater Berlin' (UK–USA–USSR) | 452, 459, 461 |
| **1945** | 4 Jun | Berlin Declaration (France–UK–USA–USSR) | 453, 457, 523 |
| | 26 Jun | Charter of the United Nations | 157, 170, 172, 504, 523, 545, 551, 677 |
| | | art 1 | 639 |
| | | art 1(2) | 112, 114 |
| | | art 2(4) | 6, 131–47, 147 |
| | | art 2(7) | 304 |
| | | art 3 | 177 |
| | | art 4 | 174, 179–80, 190, 192 |
| | | art 11 | 405 |
| | | art 11(2) | 175 |
| | | art 17 | 550 |
| | | art 17(2) | 405, 557 |
| | | art 23(1) | 705 |
| | | art 24 | 164 |
| | | art 25 | 164 |
| | | art 32 | 129, 175, 190–1, 385 |

| CE | | Page Reference |
|---|---|---|
| 26 Jun | Charter of the United Nations (*cont.*) | |
| | art 33 | 220 |
| | art 35 | 326 |
| | art 35(2) | 175, 190–1, 323 |
| | art 39 | 405, 522 |
| | art 42 | 552 |
| | art 51 | 131, 475 |
| | art 55 | 112, 114, 639 |
| | art 73 | 116–7, 603–6, 608, 611–3, 621 |
| | art 73(b) | 114, 621 |
| | art 73(c) | 621, 631 |
| | art 73(e) | 117–8, 607–11, 622, 627, 746 |
| | art 74 | 606–7, 611 |
| | art 76(b) | 114, 116, 566, 584 |
| | art 77(2) | 117 |
| | art 77(1)(c) | 117, 589, 600 |
| | art 78 | 601, 611 |
| | art 79 | 581 |
| | art 80 | 428–9, 436, 441–2 |
| | art 81 | 494 |
| | art 82 | 581, 590 |
| | art 85 | 590 |
| | art 85(1) | 581 |
| | art 87(b) | 574 |
| | art 93(1) | 191 |
| | art 93(2) | 175, 191–2 |
| | art 105 | 494 |
| | art 108 | 601 |
| | Chapter VI | 527 |
| | Chapter VII | 160, 162, 190, 403, 405, 494, 527, 557–8, 560, 563, 666, 689 |
| | Chapter IX | 606 |
| | Chapter XI | 113, 116–8, 125, 127, 129, 142, 169, 249, |

| CE | | | Page Reference |
|---|---|---|---|
| | | Chapter XI (*cont.*) | 373, 390, 573, 603, 604–5, 606–12, 622, 624, 626, 632–4, 637, 642, 644–6, 750 |
| | | Chapter XII | 113, 117, 390, 560, 566, 591, 600, 604, 611–2, 614, 622 |
| | | Chapter XIII | 116, 560, 566, 600, 622 |
| | 9 Jul | Agreement on the Zones of Occupation in Austria and the Administration of the City of Vienna (USA–USSR–UK–France) | 521 |
| | 14 Aug | Treaty of Alliance and Friendship (China–USSR) | 199 |
| **1946** | 6 Mar | Franco–Vietnamese Preliminary Convention and Annex (France–Vietnam) | 472 |
| | 22 Mar | Treaty of Alliance (United Kingdom–Transjordan) | 423–4, 578, 741 |
| | 11 Jun | Headquarters Agreement between the United Nations and Switzerland | 185 |
| | 28 Jun | Agreement on the machinery of control in Austria (UK–USA–USSR–France) | 521 |
| | 26 Jul | Agreement regarding amendments to the Protocol of 12 September 1944 on the zones of occupation in Germany and the administration of 'Greater Berlin' (USA–USSR–UK–France) | 452 |
| **1947** | 10 Feb | Treaty of Peace with Italy | 81, 235, 327, 519–20, 522, 535, 550, 553–4, 657, 744 |
| | 10 Feb | Treaty of Peace with Bulgaria | 519 |
| | 10 Feb | Treaty of Peace with Finland | 519 |
| | 10 Feb | Treaty of Peace with Hungary | 519 |
| | 10 Feb | Treaty of Peace with Roumania | 519, 522 |
| | 2 Apr | Trusteeship Agreement for the former Japanese Mandated Islands (USA–Security Council) | 530, 581–3, 589–91 |
| | 30 Oct | General Agreement on Tariffs and Trade | 251 |

| CE | | | Page Reference |
|---|---|---|---|
| | 31 Oct | Agreement between the United States and the United Nations Regarding the Headquarters of the United Nations | 194 |
| | 29 Nov | Future Government of Palestine, GA Res 181(II) (Partition Resolution) | 424–36 |
| **1948** | 24 Jan | Franco–Lebanese Agreement (France–Lebanon) | 577 |
| | 4 Feb | Protocol to Specify the Line of the State Boundary between the People's Republic of Romania and the Union of Soviet Socialist Republics | 178 |
| | 5 Jun | Declaration Regarding the Independence of Viet-Nam | 739 |
| | 10 Dec | Universal Declaration on Human Rights, GA res 217(III) | 491, 604 |
| **1949** | 7 Feb | Franco–Syrian Financial Agreement (France–Syria) | 577 |
| | 4 May | Agreement relating to the removal of restrictions on communication, transportation and trade between Berlin and the Eastern and Western Zones of Germany (France–UK–USA) | 459 |
| | 14 May | Principles Governing the relationship between the Allied Kommandatura and Greater Berlin | 460 |
| | 8 Aug | Treaty of Friendship (Bhutan–India) | 289 |
| | 12 Aug | Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War | 82, 156–7, 233, 420, 440, 470, 476, 495, 721 |
| | 12 Aug | Geneva Convention relative to the Protection of Civilian Persons in Time of War | 172–3, 562 |
| | 2 Nov | Round Table Conference Agreement (Netherlands–Indonesia) | 384 |
| | 22 Nov | Protocol relating to the incorporation of Germany into the European Community of Nations | 454 |

| CE | | | Page Reference |
|---|---|---|---|
| **1950** | 6 Jul | Agreement concerning the demarcation of the established and existing Polish–German State frontier (Poland–GDR) (Treaty of Görlitz) | 525, 682 |
| | 4 Nov | European Convention on Human Rights | 491 |
| | 2 Dec | Trusteeship Agreement (Italian Somaliland) | 572 |
| **1951** | 12 Jan | Convention on the Prevention and Punishment of the Crime of Genocide | 663 |
| | 2 Feb | Treaty of Cession of the Territory of the Free Town of Chandernagore (France–India) | 748 |
| | 18 Apr | Treaty Establishing the European Coal and Steel Community | 496–7 |
| | 23 May | Agreement on Administration of Tibet (China–Tibet) | 325 |
| | 8 Sep | Treaty of Peace with Japan | 78–9, 199–200, 207–11, 277, 468, 470, 477, 519–20, 522, 530, 589, 744 |
| **1952** | 28 Apr | Treaty of Peace (China–Japan) | 200, 220 |
| | 26 May | Convention on Relations between the Three Powers and the FRG (France–UK–USA–FRG) | 454–5 |
| | 26 May | The Quadripartite Declaration on Berlin (France–UK–USA–USSR) | 460 |
| **1954** | 21 Jul | Final Declaration of the Geneva Conference (accepted by France, UK, USSR, Cambodia, Laos, China, North Vietnam (DRVN) ) | 474 |
| | 5 Oct | Memorandum of Understanding regarding the Free Territory of Trieste (Italy–UK–USA–Yugoslavia) | 235–6 |
| | 11 Nov | Trade and Payments Agreement (Great Britain–Poland) | 693 |
| | 2 Dec | Mutual Defence Treaty (USA–China) | 200, 220 |
| **1955** | 15 May | State treaty for the re-establishment of an independent and democratic Austria (Austria–France–USSR–UK–USA) | 33, 65, 106, 519, 521, 728 |
| | 20 Sep | Treaty concerning relations between the USSR and the GDR | 455, 459 |
| **1956** | 28 May | Treaty ceding French Establishments in India (France–India) | 748 |
| | 19 Oct | Joint Declaration (USSR–Japan) | 200 |

| CE | | | Page Reference |
|---|---|---|---|
| **1957** | 25 Mar | Treaty Establishing the European Economic Community | 293, 351, 461, 496–7, 499 |
| | 25 Mar | Treaty Establishing the European Atomic Energy Community | 496–7 |
| **1960** | 29 Jun | Treaty of Friendship, Assistance and Co-operation (Belgium–Congo) | 56, 659 |
| | 16 Aug | Treaty of Guarantee (Cyprus–Greece–Turkey–UK) | 28, 106, 143–5, 242–3, 490 |
| | 16 Aug | Treaty of Alliance (Cyprus–Greece–Turkey–UK) | 242–3, 490 |
| | 14 Dec | Declaration on the Granting of Independence to Colonial Countries and Peoples, GA res 1514 (XV) | 604, 638–9 |
| **1963** | 31 Jul | Manila Accord (Singapore–Sarawak–Sabah–Malaysia) | 640 |
| **1964** | 12 Jun | Treaty of Friendship, Mutual Assistance and Co-operation (USSR–GDR) | 455, 463 |
| **1965** | 15 Nov | Convention on the service abroad of judicial and extrajudicial documents in civil and commercial matters | 206, 250 |
| | 4 Dec | Agreement establishing the Asian Development Bank | 203 |
| | 21 Dec | International Convention on the Elimination of all Forms of Racial Discrimination | 345 |
| **1966** | 16 Dec | International Covenant on Economic, Social and Cultural Rights | 112, 125, 491 |
| | 16 Dec | International Covenant on Civil and Political Rights | 112–3, 120–1, 125, 157, 248, 491 |
| **1969** | 23 May | Vienna Convention on the Law of Treaties | |
| | | art 3 | 487 |
| | | arts 34–7 | 661 |
| | | arts 40–1 | 102 |
| | | art 44 | 105 |
| | | art 52 | 131 |
| | | art 53 | 100–2, 131 |
| | | art 59 | 102 |
| | | art 64 | 155 |
| | | arts 65–6 | 101 |
| | | art 71 | 105 |

| CE | | | Page Reference |
|---|---|---|---|
| **1970** | 12 Aug | Non-Aggression Treaty (FRG–USSR) | 458 |
| | 24 Oct | Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Friendly Relations Declaration) | 335, 418, 450, 622, 636 |
| | 7 Dec | Treaty of Warsaw (Poland–FRG) | 525 |
| **1971** | 3 Sep | Quadripartite Agreement and Associated Arrangements (France–UK–USA–USSR) | 461–3, 525 |
| **1972** | 3 Jun | Final Quadripartite Protocol respecting Berlin (France–UK–USA–USSR) | 461 |
| | 4 Jul | Joint Communiqué on Basic Principles of National Unity (North Korea–South Korea) | 471 |
| | 21 Dec | Treaty on the Basis of Intra-German Relations (FDR–GDR) | 458–9, 681 |
| **1973** | 27 Jan | Paris Peace Agreement (United States–Vietnam) | 474–6 |
| | 30 Nov | International Convention on the Suppression and Punishment of the Crime of Apartheid | 345 |
| **1974** | 14 Mar | Protocol on the Exchange of Permanent Missions (FRG–GDR) | 458 |
| | 26 Aug | Agreement Granting Independence (Portugal, Guinea-Bissau) | 181, 386 |
| | 31 Dec | Treaty on recognition of India's sovereignty over Goa, Daman, Diu, Dadra and Nagar Haveli and related matters (India–Portugal) | 138 |
| **1975** | 15 Feb | Covenant of the Commonwealth of the Northern Mariana Islands with the United States | 582–3 |
| | 1 Oct | Treaty of Osimo (Italy–Yugoslavia) | 236 |
| **1977** | 8 Jun | Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts | 136, 420–1 |
| | 7 Sep | Panama Canal Treaty (USA–Panama) | 642 |
| **1978** | 23 Aug | Vienna Convention on Succession of States in Respect of Treaties | 36, 132, 671 |
| | | art 2(1)(b) | 39 |
| | | art 8 | 660 |
| | | art 15 | 481, 673 |

| CE | | | Page Reference |
|---|---|---|---|
| | 23 Aug | Vienna Convention on Succession of States in Respect of Treaties (*cont.*) | |
| | | art 16 | 310 |
| | | arts 16–33 | 481 |
| | | art 34(1) | 714 |
| | | arts 34–5 | 391 |
| | | arts 35–8 | 481 |
| **1979** | 7 Jan | Treaty of Friendship and Cooperation (Brunei–UK) | 320 |
| | 5 Aug | Peace Treaty Between the Polisario Front and the Islamic Republic of Mauritania | 647 |
| | 13 Nov | Convention on Long-Range Transboundary Air Pollution | 463 |
| **1981** | 19 Jan | Claims Settlement Declaration (USA–Iran) | 679 |
| | 27 Jun | African Charter on Human and People's Rights | 125–6 |
| | 14 Nov | Agreements on a Proposed Confederation (Senegal–Gambia) | 490 |
| | 17 Dec | Agreement concerning the Establishment of a Senegambia Confederation | 490 |
| | 17 Dec | Protocols Concerning the Establishment of a Senegambia Confederation | 490 |
| **1982** | 10 Dec | United Nations Convention on the Law of the Sea | 47 |
| **1983** | 7 Apr | Vienna Convention on Succession of States in Respect of State Archives, Property and Debts | 36, 671 |
| | | art 11 | 348 |
| | | art 14 | 481 |
| | | art 15 | 481 |
| | | art 16 | 481, 673 |
| | | art 17 | 391, 481, 714 |
| | | art 18 | 391, 481, 741 |
| | | art 27 | 481, 673 |
| | | art 28 | 481 |
| | | art 29 | 481 |
| | | arts 30–1 | 481, 714 |
| | | art 37 | 481, 673 |
| | | art 38 | 481 |
| | | art 39 | 481 |
| | | arts 40–1 | 481, 714 |

| CE | | | Page Reference |
|---|---|---|---|
| **1984** | 13 Aug | Libya–Morocco Federation Agreement | 490 |
| | 19 Dec | Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong | 246–9, 642 |
| **1986** | 21 Mar | Vienna Convention on the Law of Treaties Between States and International Organizations or between International Organizations | 101 |
| **1988** | 15 Dec | Question of Palestine, GA res 43/177 | 435–6, 440 |
| **1989** | 27 Jun | ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries | 121, 280–1 |
| | 11 Dec | Treaty on the Zone of Cooperation in an area between the Indonesian Province of East Timor and Northern Australia, Timor Sea (Australia–Indonesia) | 169–70 |
| **1990** | 22 Apr | Agreement on the Establishment of the Republic of Yemen (North Yemen–South Yemen) | 706 |
| | 18 May | Treaty Establishing a Monetary, Economic and Social Union (FRG–GDR) | 523, 525, 687 |
| | 28 Aug | Framework for a Comprehensive Political Settlement of the Cambodia Conflict | 527 |
| | 31 Aug | Treaty on the Establishment of German Unity (FRG–GDR) | 523–4, 526, 686–8 |
| | 12 Sep | Treaty on the Final Settlement with Respect to Germany (FRG–GDR–UK–France–USA–USSR) | 524, 685–8 |
| | 25 Sep | Agreement on the Settlement of Certain Matters Relating to Berlin (FRG–France–UK–USA) | 525, 685 |
| | 14 Nov | Agreement in Relation to Ratification of the Border Between Them (FRG–Poland) | 526 |
| | 19 Nov | Treaty on Conventional Armed Forces in Europe | 409 |
| **1991** | 15 Apr | Headquarters Agreement of 15 April 1991 between UK and European Bank for Reconstruction and Development | 30 |

| CE | | | Page Reference |
|---|---|---|---|
| | 3 Jun | Treaty Establishing the African Economic Community | 493 |
| | 23 Oct | Agreement on a Comprehensive Political Settlement of the Conflict in Cambodia | 527, 600 |
| **1992** | 7 Feb | Treaty on European Union (Maastricht Treaty) | 496–7 |
| | 18 Dec | Declaration on Rights of Persons Belonging to National or Ethnic and Religious and Linguistic Minorities, GA res 47/135 | 492 |
| **1993** | 10 May | Convention for the Conservation of Southern Bluefin Tuna | 220 |
| | 25 Jun | Vienna Declaration and Programme of Action (United Nations World Conference on Human Rights) | 118 |
| | 13 Sep | Declaration of Principles on Interim Self-Government Arrangements (Israel–PLO) | 444 |
| **1994** | 15 Apr | Marrakesh Agreement Establishing the World Trade Organization | 250 |
| | 26 Oct | Treaty of Peace (Israel–Jordan) | 424, 578 |
| **1995** | 10 Nov | Agreed Principles for the Interim Statute for the City of Mostar | 529 |
| | 21 Nov | General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement) (Bosnia and Herzegovina–Croatia–FRY) | 25, 106, 400, 407, 491, 528–9, 600 |
| | 21 Nov | Agreement on Military Aspects of the Peace Settlement (Dayton Agreement Annex 1-A) | 529 |
| **1996** | 23 Aug | Agreement on the Normalization of Relations between the Federal Republic of Yugoslavia and the Republic of Croatia | 529, 690–1 |
| | 31 Aug | Joint Declaration and Principles for Determining the Fundamentals for Mutual Relations between the Russian Federation and the Chechen Republic | 409 |
| **1998** | 5 May | Nouméa Accord (New Caledonia) | 334, 632 |
| | 23 Oct | Wye River Memorandum (Israel–PLO) | 444 |
| **1999** | 5 May | Agreement between the Republic of Indonesia and the Portuguese Republic on the question of East Timor (Indonesia–Portugal) | 561 |

| CE | | | Page Reference |
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| | 9 Jun | Military Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia (KFOR–Yugoslavia–Serbia) | 558–9 |
| | 7 Dec | Statute of the Brčko District of Bosnia and Herzegovina | 529 |
| **2000** | 10 Feb | Exchange of Notes constituting an Agreement between Australia and UNTAET concerning the continued Operation of the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia (UNTAET–Australia) | 562 |
| | 11 Jul | Constitutive Act of the African Union | 493 |
| | 15 Oct | Townsville Peace Agreement (respecting Solomon Islands) | 490 |
| | 7 Dec | Charter of Fundamental Rights of the European Union | 496 |
| | 12 Dec | Articles on Nationality of Natural Persons in Relation to Succession of States | 714 |
| **2001** | 26 Feb | Treaty of Nice amending the Treaty on European Union, the Treaties Establishing the European Communities and certain related acts | 496 |
| | 20 Jun | Framework Agreement on the Status of Western Sahara (proposed by UN Secretary-General but rejected by Polisario) | 647 |
| | 29 Jun | Agreement on Succession Issues (Bosnia and Herzegovina–Croatia–Macedonia–Slovenia–FRY) | 710 |
| | 12 Dec | Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) | |
| | | art 4 | 480, 488 |
| | | art 8 | 63 |
| | | art 10 | 659 |
| | | art 11 | 63 |
| | | arts 14, 15 | 481 |
| | | arts 16, 17, 18 | 63, 481 |

| CE | | | Page Reference |
|---|---|---|---|
| | | arts 19–24 | 481 |
| | | art 25 | 481, 704–5 |
| | | art 26 | 101, 481 |
| | | arts 27–32 | 481 |
| | | art 33 | 44, 481, 495 |
| | | arts 34–7 | 481 |
| | | art 40 | 101, 168 |
| | | art 41 | 168 |
| | | art 48 | 597, 663, 704–5 |
| | | art 50(1)(d) | 101 |
| | | art 57 | 495 |
| **2002** | 24 Oct | Treaty Intended to Adapt and Confirm the Relations of Amity and Cooperation between the French Republic and the Principality of Monaco | 328 |
| **2004** | 14 Apr | Council of Europe Parliamentary Assembly Opinion No 250 (relating to application of Monaco for membership) | 328 |
| | 29 Oct | Treaty Establishing a Constitution for Europe | 497 |
| | 2 Dec | Convention on Jurisdictional Immunity of States and Their Property | 485 |

# *Select List of Abbreviations*

| | |
|---|---|
| AdV | *Archiv des Völkerrechts* |
| AFDI | *Annuaire Français de Droit International* |
| AJ | *American Journal of International Law* |
| *AJ Supp* | *American Journal of International Law, Supplement* |
| Akehurst, *Modern* | M Akehurst, *A Modern Introduction to Introduction Law* (London, 6th edn, 1993) |
| Al-Baharna | H Al-Baharna, *The Legal Status of the Arabian Gulf States* (2nd edn, 1975) |
| *ALJ* | *Australian Law Journal* |
| ALR | *Australian Law Reports* |
| *Am Pol Sc R* | *American Political Science Review* |
| *Annuaire* | *Annuaire de l'Institut de Droit International* |
| Arangio-Ruiz | G Arangio-Ruiz, *L'État dans le sens de droit des gens et la notion du droit international* (Bologna, 1975; and in (1975) 26 *OzföR* 3, 265) |
| ARSIWA | International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts |
| *ASCL* | *Annual Survey of Commonwealth Law* |
| *BFSP* | *British and Foreign State Papers* |
| *Bibl Viss* | *Bibliotheca Visseriana, Dissertationum Ius Internationale Illustrantium* |
| *BPIL* | *British Practice in International Law* |
| Brierly, *Collected Papers* | (ed H Lauterpacht and CHM Waldock, Oxford, 1958) |
| Brierly, *Basis of Obligation* | JL Brierly, *The Basis of Obligation in International Law* |
| Briggs, *Law of Nations* | HW Briggs, *The Law of Nations. Cases, Nations Documents and Notes* (2nd edn, NY, 1952) |
| Brownlie, *Principles* | Brownlie, *Principles of Public International Law* (Oxford, 6th edn, 2003) |
| Brownlie, *Use of Force* | Brownlie, *International Law and the Use of Force by Force States* (Oxford, 1963) |
| *BY* | *British Yearbook of International Law* |
| *California WJIL* | *California Western Journal of International Law* |
| *Can BR* | *Canadian Bar Review* |
| *Can YIL* | *Canadian Yearbook of international Law* |
| CFSP | Common Foreign and Security Policy |
| Charpentier | J Charpentier, *La Reconnaissance internationale et l'évolution du droit des gens* (Paris, 1956) |

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|---|---|
| Chen, *Recognition* | TC Chen, *The International Law of Recognition* (ed LC Green, London, 1951) |
| *CILSA* | *Comparative and International Law Journal of Southern Africa* |
| CMLR | Common Market Law Reports |
| *CMLR* | *Common Market Law Review* |
| *Col JTL* | *Columbia Journal of Transnational Law* |
| Crawford, *Selected essays* | J Crawford, *International Law as an Open System: Selected essays* (London, Cameron May, 2002) |
| Crawford, (2002) | J Crawford (ed), *The International Law Commission's articles on state responsibility: introduction, text, and commentaries* (Cambridge, 2002) |
| CTS | *Consolidated Treaty Series* |
| DDR | German Democratic Republic |
| *Dir Int* | *Diritto Internazionale* |
| DPRK | Democratic People's Republic of Korea |
| DRVN | Democratic Republic of Vietnam |
| *DSB* | *Department of State Bulletin* |
| Duursma, *Microstates* | JC Duursma, *Fragmentation and the International Relations of Micro-States: Self-determination and Statehood* (Cambridge, 1996) |
| ECJ Rep | European Court of Justice, *Reports of the Jurisprudence of the Court* |
| *EJIL* | *European Journal of International* Law |
| EPLF | Eritrean People's Liberation Front |
| Fawcett, *British Commonwealth* | JES Fawcett, *The British Commonwealth in international law* (London, 1963) |
| For Aff | *Foreign Affairs* (Washington) |
| FRG | Federal Republic of Germany |
| FRY | Federal Republic of Yugoslavia |
| FYROM | Former Yugoslav Republic of Macedonia |
| *GAOR* | *General Assembly Official Records* |
| GDR | German Democratic Republic |
| *Grotius ST* | *Transactions of the Grotius Society* |
| *Grotius SP* | CH Alexandrowicz, ed, *Grotius Society Papers* |
| Hackworth, *Digest* | GH Hackworth, *Digest of International Law* (15 vols, Washington, 1940–4) |
| *HR* | Académie de Droit International, *Recueil des cours* |
| *HC Deb* | *House of Commons Debates* (5th series unless otherwise stated) |
| *HL Deb* | *House of Lords Debates* |
| Higgins, *Development* | R Higgins, *The Development of International Law through the Political Organs of the United Nations* (London, 1963) |

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| ICJ Rep | International Court of Justice, *Reports of Judgements, Advisory Opinions and Orders* |
| *ICJ Rev* | *Review of the International Commission of Jurists* |
| ICTY | International Criminal Tribunal for the Former Yugoslavia |
| *ICLQ* | *International and Comparative Law Quarterly* |
| IFOR | Implementation Force |
| ILC | International Law Commission |
| INTERFET | International Force in East Timor |
| *HKLJ* | *Hong Kong Law Journal* |
| *ILC Ybk* | *Yearbook of the International Law Commission* |
| ILM | *International Legal Materials* |
| *ILQ* | *International Law Quarterly* |
| ILR | International Law Reports |
| *Indian JIL* | *Indian Journal of International Law* |
| *Indian YIA* | *Indian Yearbook of International Affairs* |
| *Int Aff* | *International Affairs* (London) |
| *Int Conc* | *International Conciliation* |
| *Int Org* | *International Organization* |
| IR | Irish Reports |
| *Is Yb HR* | *Israeli Yearbook of Human Rights* |
| *JDI* | *Journal du Droit International (Clunet)* |
| Jennings, *Acquisition* | RY Jennings, *The Acquisition of Territory in International Law* (Manchester, 1963) |
| JNA | Yugoslav National Army |
| Kamanda, *Legal* | AM Kamanda, *A Study of the legal status of Status of Protectorates protectorates in public international law* (Geneva, 1961) |
| *Keesing's* | *Keesing's Contemporary Archives* |
| Kelsen, *Principles* | Hans Kelsen, *Principles of International Law* (2nd edn, rev RW Tucker, NY, 1966) |
| Kiss, *Pratique* | AC Kiss, *Repertoire de la pratique française en matière de droit intentional public* (7 vols, Paris, 1962–72) |
| KLA | Kosovo Liberation Army |
| Lauterpacht, *Papers* | E Lauterpacht, ed., *International Law. Being the Collected Papers of Hersch Lauterpacht* (Cambridge, vols 1–5, 1970–2004) |
| Lauterpacht, *Recognition* | H Lauterpacht, *Recognition in International Law* (Cambridge, 1948) |
| Lauterpacht, *Development* | H. Lauterpacht, *Development of International Law by the International Court* (London, 1958) |
| LNOJ | League of Nations *Official Journal* |
| LNTS | League of Nations *Treaty Series* |

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|---|---|
| *LQR* | *Law Quarterly Review* |
| Marek, *Identity* | K. Marek, *Identity and Continuity of States in Public International Law* (Geneva, 1954) |
| Mendelson | MH Mendelson, 'Acquisition of Membership in Selected International Organizations' (Oxford, M.S.D. Phil d 5229, 1971) |
| *MLR* | *Modern Law Review* |
| Moore, *Digest* | JB Moore, *A Digest of International Law* (Washington, 8 vols, 1906) |
| Moore, *IA* | JB Moore, *International Arbitrations* |
| Moore, *Int Adj* | JB Moore, *International Adjudications (Modern (MS) Series)* |
| *NILR* | *Netherlands International Law Review* |
| *NRG* | GF de Martens, *Nouveau Recueil Général de Traités* |
| *NYIL* | *Netherlands Yearbook of International Law* |
| *NYUJILP* | *New York University Journal of International Law and Politics* |
| *NZULR* | *New Zealand Universities Law Review* |
| OAS | Organization of American States |
| OAU | Organization of African Unity |
| O'Brien, *New Nations* | WV O'Brien, ed, *The New Nations in International Law and Diplomacy* (NY, 1965) |
| O'Brien & Goebel, 'Recognition' | WV O'Brien & J Goebel, 'U.S. Recognition Policy and the New Nations', in O'Brien, ed, op. cit. 98–228 |
| O'Connell, *State Succession* | DP O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, 2 vols, 1967) |
| Oppenheim | L Oppenheim, *International Law—A Treatise* (1st edn, London, 1905; Vol I, 8th edn (ed Lauterpacht), 1955; Vol II, 7th edn, 1952; Vol I (9th edn, 1992)) |
| *OZföR* | *Österreichische Zeitschrifi fur öffentliches Recht* |
| PA | Palestine Authority |
| *PAS* | *Proceedings of the American Society of International Law* |
| PLO | Palestine Liberation Organization |
| PRC | People's Republic of China |
| PRK | People's Republic of Kampuchea |
| *RDI* | *Revue de Droit International (de la Pradelle)* |
| *Rdi* | *Rivista di Diritto Internazionale* |
| *RDILC* | *Revue de Droit International et de Legislation Comparée* |

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|---|---|
| *RDISDP* | *Revue de Droit International, de Sciences Diplomatiques et Politiques* |
| *Répertoire suisse* | P Guggenheim, ed, *Répertoire suisse de droit international public (1914–1939)*, I–IV (Basle, 1975) |
| *Rep MA T* | *Reports of Decisions of Mixed Arbitral Tribunals* |
| *Restatement 2nd* | American Law Institute, *Restatement, Second. Foreign Relations Law of the United States* (1965) |
| *Restatement 3rd* | American Law Institute, *Restatement, Third. Foreign Relations Law of the United States* (1987) |
| *RGDIP* | *Revue Général de Droit International Public* |
| RIAA | *Reports of International Arbitral Awards* |
| *RJPIC* | *Revue Juridique et Politique Indépendance et Cooperation* |
| ROC | Republic of China |
| ROK | Republic of Korea |
| Rollet | H Rollet, *Liste des engagements bilatéraux et multilatéraux au 30 juin 1972; accords et traités souscrits par la France*. (Paris, 1973) |
| Rousseau, *DIP* II | Charles Rousseau, *Droit international public*, Tome II *Les sujets de droit* (Paris, 1974) |
| RVN | Republic of Vietnam |
| SAR | Special Administrative Region |
| Schwarzenberger, *International Law* | G Schwarzenberger, *International Law as applied by International Courts and Tribunals* (3 vols, London, 1957–1976) |
| Schwarzenberger, *Manual* | G Schwarzenberger, *A Manual of International Law* (6th edn, London, 1976) *SCOR Security Council Official Records* |
| SFRY | Socialist Federal Republic of Yugoslavia |
| Smith, *GB & LN* | HA Smith, *Great Britain and the Law of Nations* (2 vols, London, 1932) |
| SNC | Supreme National Court |
| SNM | Somali National Movement |
| Sørensen, *Manual* | M Sørensen, ed, *Manual of Public International Law* (London, 1968) |
| SWAPO | South West African People's Organization |
| Talmon, *Recognition* | S Talmon, *Recognition of Governments* (2001) |
| TTPI | Trust Territory of the Pacific Islands |
| UDI | Unilateral Declaration of Independence |
| UNAMET | United Nations Mission in East Timor |
| UNAMI | United Nations Assistance Mission for Iraq |

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| *UNCIO* | *United Nations Conference on International Organization, San Francisco, 1945* |
| United Nations, *Repertory* | *Repertory of Practice of United Nations Organs* |
| *UN Jur Ybk* | United Nations *Juridical Yearbook* |
| *UNMC* | *United Nations Monthly Chronicle Repertory* |
| UNMIK | United Nations Interim Administrative Mission in Kosovo |
| UNTAC | United Nations Transitional Authority in Cambodia |
| UNTAET | United Nations Transitional Administration in East Timor |
| UNTAG | United Nations Transitional Assistance Group |
| UNTEA | United Nations Temporary Executive Authority |
| UNTS | *United Nations Treaty Series* |
| *US Digest* | *Digest of United States Practice in International Law* |
| *USFR* | *Papers Relating to the Foreign Relations of the United States* |
| *U Tol LR* | *University of Toledo Law Review* |
| Verhoeven, *Reconnaissance* | J Verhoeven, *La Reconnaissance internationale dans la pratique contemporaine: les relations publiques internationales* (Paris, 1975) |
| Whiteman, *Digest* | MM Whiteman, *Digest of International Law* (Washington, 15 vols, 1963–1973) |
| *Ybk AAA* | *Association des Auditeurs et Anciens Auditeurs de l'Académie de Droit International de la Haye, Annuaire* |
| *YBWA* | *Yearbook of World Affairs* |
| *ZaöRV* | *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* |

# PART I

# THE CONCEPT OF STATEHOOD IN INTERNATIONAL LAW

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# Chapter 1

# STATEHOOD AND RECOGNITION


| | | |
|---|---|---|
| **1.1** | **Introduction** | 4 |
| **1.2** | **Statehood in early international law** | 6 |
| | (1) Doctrine | 6 |
| | (2) Statehood in early international law: aspects of State practice | 10 |
| **1.3** | **Recognition and statehood** | 12 |
| | (1) The early view of recognition | 12 |
| | (2) Positivism and recognition | 13 |
| | (3) Statehood in nineteenth-century international law | 14 |
| **1.4** | **Recognition of states in modern international law** | 17 |
| | (1) Recognition: the great debate | 19 |
| | (i) The constitutive theory | 19 |
| | (ii) The declaratory theory | 22 |
| | (2) Conclusions | 26 |
| **1.5** | **Certain basic concepts** | 28 |
| | (1) International personality | 28 |
| | (2) The State | 31 |
| | (3) Sovereignty | 32 |
| | (4) State and government | 33 |
| | (5) State continuity and State succession | 35 |


The formation of a new State is . . . a matter of fact, and not of law.[1]

[T]he existence of a State is a question of fact and not of law. The criterion of statehood is not legitimacy but effectiveness . . .[2]

[N]otre pays s'est toujours fondé, dans ses décisions de reconnaissance d'un État, sur le principe de l'effectivité, qui implique l'existence d'un pouvoir responsable et indépendent s'exerçant sur un territoire et une population.[3]

[1] Oppenheim (1st edn), vol 1, 264, §209; (8th edn), vol 1, 544, §209. See also 9th edn) vol 1, 677, §241.

[2] Foreign Minister Eban (Israel), arguing against a request for an advisory opinion of the International Court on the status of Palestine: *SCOR* 340th mtg, 27 July 1948, 29–30.

[3] President Mitterand (France), with respect to Palestinian statehood, reported in *Le Monde*, 24 November 1988, 7, col 1.

## 1.1 Introduction

At the beginning of the twentieth century there were some fifty acknowledged States. Immediately before World War II there were about seventy-five. By 2005, there were almost 200—to be precise, 192.[4] The emergence of so many new States represents one of the major political developments of the twentieth century. It has changed the character of international law and the practice of international organizations. It has been one of the more important sources of international conflict.

But the fact that some development is of importance in international relations does not entail that it is regulated by international law. And it has long been asserted that 'The formation of a new State is . . . a matter of fact, and not of law.'[5] This position was supported by a wide spectrum of legal opinion. For example, one of the most common arguments of the declaratory theory (the theory that statehood is a legal status independent of recognition) is that, where a State actually exists, the legality of its creation or existence must be an abstract issue: the law must take account of the new situation, despite its illegality.[6] Equally, so it is said, where a State does not exist, rules treating it as existing are pointless, a denial of reality. The criterion must be effectiveness, not legitimacy. On the other hand, according to the constitutive theory (the theory that the rights and duties pertaining to statehood derive from recognition by other States), the proposition that the existence of a State is a matter of fact seems axiomatic. If 'a State is, and becomes, an International Person

[4] That is to say, 191 UN Members plus the Vatican City. This does not include Taiwan, Palestine or various claimant entities discussed in Chapter 9. See Appendix I, p 725 for a complete list.

[5] Oppenheim (1st edn), vol 1, 264, §209(1); cf Erich (1926) 13 *HR* 427, 442; Jones (1935) 16 *BY* 5, 15–16; Marston (1969) 18 *ICLQ* 1, 33; Arangio-Ruiz (1975–6) 26 *OzföR* 265, 284–5, 332. See also the formulation in Willoughby, *Nature of the State*, 195: 'Sovereignty, upon which all legality depends, is itself a question of fact, and not of law.' See also Oppenheim (8th edn), vol 1, 544, §209; and the somewhat different formulation in Oppenheim (9th edn), vol 1, 120–3, §34.

[6] Cf Chen, *Recognition*, 38 ('a State, if it exists in fact must exist in law'). This proposition is a tautology, and the problem of separate non-State entities was not in issue in the passage cited. Elsewhere Chen accepts the view that statehood is a legal concept not a 'physical existence' (ibid, 63), as well as the possibility of the illegality of the creation or existence of a 'State' (ibid, 8–9). Cf Charpentier, *Reconnaissance*, 160–7. Lauterpacht's formulation is preferable: 'The guiding juridical principle applicable to all categories of recognition is that international law, like any other legal system, cannot disregard facts and that it must be based on them provided they are not in themselves contrary to international law' (*Recognition*, 91). But in view of the gnomic character of this proposition, it can hardly be regarded as a 'guiding juridical principle'. For Lauterpacht's interpretation of the formula that the existence of a State is a matter of fact only see ibid, 23–4. 'To predicate that a given legal result is a question of fact is to assert that it is not a question of arbitrary discretion . . . The emphasis . . . on the principle that the existence of a State is a question of fact signifies that, whenever the necessary factual requirements exist, the granting of recognition is a matter of legal duty'.

through recognition only and exclusively',[7] and if recognition is discretionary, then rules granting to an unrecognized community a 'right to statehood' are excluded.

Neither theory of recognition satisfactorily explains modern practice. The declaratory theory assumes that territorial entities can readily, by virtue of their mere existence, be classified as having one particular legal status: it thus, in a way, confuses 'fact' with 'law'.[8] For, even if effectiveness is the dominant principle, it must nonetheless be a *legal* principle. A State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices.[9] And the declaratory theorist's equation of fact with law also obscures the possibility that the creation of States might be regulated by rules predicated on other fundamental principles—a possibility that, as we shall see, now exists as a matter of international law. On the other hand, the constitutive theory, although it draws attention to the need for cognition, or identification, of the subjects of international law, and leaves open the possibility of taking into account relevant legal principles not based on 'fact', incorrectly identifies that cognition with diplomatic recognition, and fails to consider the possibility that identification of new subjects may be achieved in accordance with general rules or principles rather than on an ad hoc, discretionary basis.

Fundamentally the question is whether international law is itself, in one of its most important aspects, a coherent or complete system of law.[10] According to predominant nineteenth-century doctrine there were no rules determining what were 'States' for the purposes of international law; the matter was within the discretion of existing recognized States.[11] The international law of that

[7] Oppenheim (1st edn), vol 1, 109, §71; (8th edn), vol 1, 125–7, §71 (modified with emphasis on limits to the discretion of the recognising State). Cf Jennings and Watts, *Oppenheim*, 130–1, §40.

[8] Cf Lauterpacht, *Recognition*, 45–50 for an effective critique of the 'State as fact' dogma. His dismissal of the declaratory theory results in large part from his identifying the declaratory theory with this dogma.

[9] Cf Kelsen (1929) 4 *RDI* 613, 613. Waldock (1962) 106 *HR* 5, 146 correctly describes the problem as a 'mixed question of law and fact'.

[10] Cf Chen, *Recognition*, 18–19: 'to argue that a State can become a subject of international law without the assent of the existing States, it is necessary to assume the existence of an objective system of law to which the new State owes its being.' The point is that if the State owes its existence to a system of law, then that existence is not, or not only, a 'fact'.

[11] Cf Oppenheim (1st edn), vol 1, 108, §71; *contra* (8th edn), vol 1, 126, §71: 'Others hold the view that it is a rule of International Law that no new State has a right towards other States to be recognized by them, and that no State has the duty to recognize a new State . . . [A] new State before its recognition cannot claim any right which a member of the Family of Nations has as against other members.' Cf the heavily qualified statement in the 9th edn, vol 1, 132–3, §40.

period exhibited a formal incoherence that was an expression of its radical decentralization.[12]

But if international law is still, more or less, decentralized in terms of its basic structures, it is generally assumed that it is a formally complete system of law. For example this is taken to be the case with respect to the use of force[13] and nationality,[14] fields closely related to the existence and legitimacy of States. This work investigates the question whether, and to what extent, the formation and existence of States is regulated by international law, and is not simply a 'matter of fact'.

## 1.2 Statehood in early international law

### (1) Doctrine[15]

It is useful to review the changing opinions on the topic since the seventeenth century. Grotius, for example, defined the State as 'a complete association of free men, joined together for the enjoyment of rights and for their common interest'.[16] His definition was philosophical rather than legal: the existence of States was taken for granted; the State, like the men who compose it, was automatically bound by the law of nations which was practically identical with the law of nature: 'outside of the sphere of the law of nature, which is also frequently called the law of nations, there is hardly any law common to all nations.'[17] So the existence of States as distinct subjects of that universal law posed no problem. Much the same may be said of Pufendorf, who defined the State as 'a compound moral person, whose will, intertwined and united by the pacts of a number of men, is considered the will of all, so that it is able to make use of the strength and faculties of the individual members for the common peace and security.'[18] Pufendorf agreed both with Grotius and Hobbes[19] that natural law and the law of nations were the same:

Nor do we feel that there is any other voluntary or positive law of nations which has the force of law, properly so-called, such as binds nations as if it proceeded from a

[12] The same incoherence has been noted in respect of the legality of war: Lauterpacht, *Recognition*, v–vi, 4–5; and the discretionary character of nationality: Brownlie (1963) 39 *BY* 284, 284; *Principles* (2nd edn), 73; (6th edn), 69. Cf Briggs (1950) 44 *PAS* 169, 172.

[13] Cf Charter Art 2(4); *Corfu Channel Case*, ICJ Rep 1949 p 4, 35.

[14] Cf *Nottebohm Case*, ICJ Rep 1955 p 4.

[15] Cf Guggenheim (1971) 3 *U Tol LR* 203.

[16] *De Iure Belli ac Pacis* (1646), Bk I, ch I, §xiv.

[17] Ibid. Grotius excepts certain regional customs. For discussion of State sovereignty in Grotius see Dickinson, *Equality of States*, 55–60; Kennedy (1986) 27 *Harv ILJ* 1, 5; Tuck, *Rights of War and Peace*, 82–96.

[18] *De Iure Naturae et Gentium Libri Octo*, Bk VII, ch 2, §13, para 672.

[19] *De Cive*, ch 14, paras 4–5.

superior . . . [Convergences of State behaviour] belong either to the law of nature or to the civil law of different nations . . . But no distinct branch of law can properly be constituted from these, since, indeed, those laws are common to nations, not because of any mutual agreement or obligation, but they agree accidentally, due to the individual pleasure of legislators in different states. Therefore, these laws can be and many times are changed by some people without consulting others.[20]

By contrast Vitoria, lecturing a century earlier, gave a definition of the State much more legal in expression and implication than either Grotius or Pufendorf, though one still based on scholastic argument:

A perfect State or community . . . is one which is complete in itself, that is, which is not a part of another community, but has its own laws and its own council and its own magistrates, such as is the Kingdom of Castile and Aragon and the Republic of Venice and the like . . . Such a state, then, or the prince thereof, has authority to declare war, and no one else.[21]

Here we can detect the criteria of government and independence. Moreover, Vitoria is writing not a general moral–theological treatise but one with a specific purpose; his definition is also for a purpose, that is, to determine which entities may declare war. Nevertheless, it is fair to say that the writers of the naturalist school were not concerned with the problem of statehood: any ruler, whether or not independent, was bound by the law of nations, which was merely the application of the natural law to problems of government.

The same may be said, although with some reservations and for different reasons, of the writers of the early positivist period, of which Vattel was the most influential. His *Le Droit des gens, ou principles de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains* is an extraordinary amalgam of earlier views with deductions from the sovereignty and equality of States that tended to overturn those views. For Vattel, 'Nations or States are political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security.'[22] The basic criterion is that such nations be 'free and independent of one another'.[23] But a distinction is now drawn between States, as defined, and 'sovereign States', even if the difference is still largely terminological:

Every Nation which governs itself, under whatever form, and which does not depend on any other Nation, is a *sovereign State*. Its rights are, in the natural order, the same as those of every other State. Such is the character of the moral persons who live together

[20] Bk II, ch 3, §156.

[21] *De Indis ac de Iure Belli Relectiones* (publ 1696, ed Simon); *De Iure Belli*, para 7, §§425–6.

[22] *Le Droit des Gens* (1758), vol I, Introduction, §1; ch I, §I. [23] Introduction, §15.

in a society established by nature and subject to the law of Nations. To give a Nation the right to a definite position in this great society, it need only be truly sovereign and independent; it must govern itself by its own authority and its own laws.[24]

The novel element in this definition is the wide-reaching implications Vattel draws from the notion of the equality of States, the effect of which is to make each State the sole judge of its rights and obligations under the law of nations. Thus, 'the Law *of Nations* is in its origin merely the *Law of Nature applied to Nations* . . . We use the term *necessary Law of Nations* for that law which results from applying the natural law to Nations . . .'[25] Although the positive law of nations may not, in principle, conflict with this necessary law, the latter is 'internal' to the State while the positive law is 'external', and other sovereigns are only entitled and able to judge the actions of other independent States by this external standard: 'A Nation is . . . free to act as it pleases, so far as its acts do not affect the perfect rights of another Nation, and so far as the Nation is under merely obligations without any *perfect external* obligation. If it abuses its liberty it acts wrongfully; but other Nations can not complain, since they have no right to dictate to it.'[26] Here a deduction from 'sovereignty' overturns what has previously been held to be the basis of the law of nations. But as yet, no further deduction is drawn from this independence or sovereignty to deny the juridical existence of new States; sovereignty is inherent in a community and is thus independent of the consent of other States: 'To give a Nation the right to a definite position in this great society, it need *only* be truly sovereign and independent . . .'[27]

The link between these earlier views and the nineteenth-century positivist view of statehood may be illustrated from Wheaton's classic *Elements of International Law*. Under the influence of Hegel,[28] he came to regard statehood for the purposes of international law as something different from actual independence:

Sovereignty is acquired by a State, either at the origin of the civil society of which it is composed, or when it separates itself from the community of which it previously

[24] Introduction, Bk I, ch I, §4. But he subsequently states that authority and laws are not enough for sovereignty where there is no control over foreign affairs (treaties, making war, alliances): ibid, §11.

[25] Introduction, §§6–7 (original emphasis). The 'necessary Law of Nations' was thus peremptory, i.e. permanent and imprescriptible (§9).

[26] Ibid, §20.

[27] Ibid, Bk I, ch I, §4 (emphasis added).

[28] *Grundlinien der Philosophie des Recht*, vol VIII; Hegel, Werke (1854) VIII, Pt 3, para 331; cited by Alexander (1958) 34 *BY* 176, 195: In Nisbet's translation the passage reads: 'The state has a primary and absolute entitlement to be a sovereign and independent power *in the eyes of others*, i.e. *to be recognized* by them. At the same time, however, this entitlement is purely formal, and the requirement that the state should be recognized simply because it is a state is abstract. Whether the state does in fact have

formed a part, and on which it was dependent. This principle applies as well to internal as to external sovereignty. But an important distinction is to be noticed . . . between these two species of sovereignty. The internal sovereignty of a State does not, in any degree, depend upon its recognition by other States. A new State, springing into existence, does not require the recognition of other States to confirm its internal sovereignty . . . The external sovereignty of any State, on the other hand, may require recognition by other States in order to render it perfect and complete . . . [I]f it desires to enter into that great society of nations . . . such recognition becomes essentially necessary to the complete participation of the new State in all the advantages of this society. Every other State is at liberty to grant, or refuse, this recognition . . . [29]

As was to be expected, this view was combined with a denial of the universality of international law[30] and of the law of nature as its foundation.[31]

It will be noted that, although Wheaton reproduces Vattel's 'internal/external' terminology, he puts it to a different use. For Vattel the 'internal' law was the law of nature, the necessary though imperfect element of the law of nations. Wheaton, having dispensed with the law of nature, means by 'internal' those aspects of the government of a State confined to its own territory and distinguished from 'foreign affairs'.[32] By Wheaton's time the positive law of nations was concerned essentially with the latter; nor could there be any

being in and for itself depends on its content—on its constitution and condition; and recognition, which implies that the two [i.e. form and content] are identical, also depends on the perception and will of the other state. Without relations with other states, the state can no more be an actual individual than an individual can be an actual person without a relationship with other persons. [On the one hand], the legitimacy of a state, and more precisely—in so far as it has external relations—of the power of its sovereign, is a purely *internal* matter (one state should not interfere in the internal affairs of another). On the other hand, it is equally essential that this legitimacy should be *supplemented* by recognition on the part of other states . . . When Napoleon said before the Peace of Campo Formio "the French Republic is no more in need of recognition than the sun is," his words conveyed no more than that strength of existence which itself carries with it a guarantee of recognition, even if this is not expressly formulated.' Hegel, *Elements* (1991), 366–67.

[29] *Elements* (3rd edn, 1846), Pt I, ch II, §6. For his earlier hesitations see the 1st edn (1836), Pt I, ch II, §§15–18.

[30] Ibid, Pt I, ch I, §11: 'The law of nations or international law, as understood among civilized, christian nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent.' In the 3rd edition (1846), the definition was retained, as §14, but with the qualification 'christian' omitted. This is consonant with treaty practice involving the Ottoman Empire in the 1840s, which Wheaton discussed in the 3rd edition, Pt I, ch I, §13.

[31] Ibid, Pt I, ch 1, §5 (quoting Hobbes on the law of nature and international law). There was no change between the 1836 and 1846 editions.

[32] Vattel made the same distinction, although it is not developed and is inconsistent with other elements of his work. For Vattel's influence see Ruddy, *International Law in the Enlightenment*, 119–44; Tourmé-Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique*, 319–40.

*necessary* obligations owed to States by virtue of their mere 'political existence'. The law of nations was becoming an artificial system studied in basically consensual areas of inter-State relations such as treaties, diplomatic relations and commerce. Basic relations between States as such (in particular, the legality of resort to war, and the very existence and survival of the State) were excluded from its scope.[33]

## (2) Statehood in early international law: aspects of State practice

Despite its claims to universality, the early law of nations had its origins in the European State-system, which existed long before its conventional date of origin in the Peace of Westphalia (1648), ending the Thirty Years' War.[34] The effect of the Peace of Westphalia was to consolidate the existing States and principalities (including those whose existence or autonomy it recognized or established) at the expense of the Empire, and ultimately at the expense of the notion of the *civitas gentium maxima*—the universal community of mankind transcending the authority of States.[35]

Within that system, and despite certain divergences, writers of both naturalist and positivist schools had at first little difficulty with the creation of States. New States could be formed by the union of two existing States. More common was the linking of States in a personal union under one Crown (for example, Poland and Lithuania in 1385; Aragon and Castile in 1479; England and Scotland in 1603); such unions often became permanent. Equally, it was agreed that princes or rulers could create new States by division of existing ones. In Pufendorf's words, '[A] king can convert one of his provinces into a kingdom, if he separates it entirely from the rest of the nation, and governs it with its own administration, and one that is independent from the other.'[36] New States could also be formed by revolution, as when Portugal (1640–8) and

[33] Thus international law abandoned the 'just war' doctrine and left the question whether to wage war to the domestic jurisdiction of States. Hall, *Treatise* (8th edn), 82: 'International law has . . . no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation'; Röling, in Miller and Feindrider, *Nuclear Weapons and the Law*, 181; Dinstein, *War, Aggression and Self-Defence* (3rd edn), 71.

[34] On competing views as to the starting point of the European States system, see Koskenniemi (1990) 1 *EJIL* 4.

[35] On the Peace of Westphalia see Nussbaum, *Concise History of the Law of Nations*, 115–18; Rapisardi-Mirabelli (1929) 8 *Bib Viss* 5; Gross (1948) 42 *AJIL* 20; Braubach, *Acta pacis Westphalicae*; Harding and Lim, *Renegotiating Westphalia*, 1; Steiger (1999) 59 *ZaöRV* 609; Ziegler (1999) 37 *Archiv der Völkerrechts* 129. For the conventional view, see, e.g., Schrijver (1999) 70 *BY* 65, 69; Osiander (2001) 55 *Int Org* 251.

[36] Cf Pufendorf, *De jure Naturae et Gentium*, Bk VII, ch 3, §9, para 690.

the Netherlands (1559–1648)[37] broke away from Spain. What was unclear was whether the revolutionary entity could be treated as an independent State before its recognition by the parent State. Pufendorf thought not, on the grounds that '... if a man who, at the time, recognized the sovereignty of another as his superior, is to be able to become a king, he must secure the consent of that superior who will both free him and his dominions from the bond by which they were tied to him.'[38] Vattel was less categorical: a subject remained bound to the sovereign 'without other conditions than his observance of the fundamental laws', and thus, in most cases, secession was contrary to the basic compact that was the foundation of the State. However, if a sovereign refused to come to the aid of part of the nation, it might provide for its own safety by other means.

> It was for [this] reason that the Swiss as a body broke away from the Empire, which had never protected them in any emergency. Its authority had already been rejected for many years when the independence of Switzerland was recognized by the Emperor and by all the German States in the Treaty of Westphalia.[39]

The Swiss cantons, referred to by Vattel, retained tenuous links with the Empire until their complete independence was recognized at the Peace of Westphalia. Part IV of the Treaty of Osnabrück stated:

> And whereas His Imperial Majesty ... did, by a Particular Decree ... declare the said city of *Bazil*, and the other *Swiss* Cantons to be in possession of a *quasi*-full Liberty and Exemption from the Empire, and so no way subject to the Tribunals and Sentences of the said Empire, it has been resolved that this same Decree shall be held as included in this Treaty of Peace ...'[40]

In practice other States tended to conduct relations on an international plane with the entity in revolt before its recognition by the parent State. The point was clearly established in this sense following the breakaway of the South American provinces from Spain in the 1820s.[41]

[37] See Blok and Vetter (1986) 34 *Zeitschrift für Geschichtswissenschaft* 708; Borschberg, *Hugo Grotius 'Commentaries in theses XI'* (1994), 180–1.

[38] Pufendorf, *De jure Naturae et Gentium* (1688), Bk VII, ch 3, §9, para 690.

[39] *Le Droit des Gens*, Bk I, ch 17, §202; cf Gentili, *On the Law of War* (1612), Bk I, ch XXIII, §§185–7.

[40] 1 CTS 119. Cf the unconditional reference to the Netherlands in Art 1: 'Premièrement declare ledit Seigneur Roy et reconnoit que lesdits Seigneurs États Generaux des Pays-Bas Unis, et les Provinces d'iceux respectivement avec leurs Pays associeés, Villes et Terres y appartenants sont libres et Souverains États ...'.

[41] See Frowein (1971) 65 *AJ* 568; Smith, *GB & LN*, vol I, 115–70; Bethell (ed), *The Independence of Latin America*. See also de Martens, *Nouvelles Causes celebre du droit des gens* (1843), vol 1, 113–209, 370–498 (American War of Independence). Cf Wheaton, *Principles*, Pt I, ch II, §26.

The impression given by this brief review is that, despite the limited amount of State practice, nothing in early international law precluded the solution of the legal problems raised by the creation and existence of States. That impediment, as we shall see, arose later with the application by nineteenth-century writers of a thoroughgoing positivism to the concept of statehood and the theory of recognition.

## 1.3 Recognition and statehood

### (1) The early view of recognition

Although the early writers occasionally dealt with problems of recognition, it had no separate place in the law of nations before the middle of the eighteenth century. The reason for this was clear: sovereignty, in its origin merely the location of supreme power within a particular territorial unit (*suprema potestas*), necessarily came from within and did not require the recognition of other States or princes. As Pufendorf stated: '... just as a king owes his sovereignty and majesty to no one outside his realm, so he need not obtain the consent and approval of other kings or states, before he may carry himself like a king and be regarded as such ... [I]t would entail an injury for the sovereignty of such a king to be called in question by a foreigner.'[42] The doubtful point was whether recognition by the parent State of a new State formed by revolution from it was necessary, and that doubt related to the obligation of loyalty to a superior, which, it was thought, might require release: the problem bore no relation to constitutive theory in general. The position of recognition towards the end of the eighteenth century was as stated by Alexandrowicz: 'In the absence of any precise and formulated theory, recognition had not found a separate place in the works of the classic writers whether of the naturalist or early positivist period ...'.[43]

When recognition did begin to attract more detailed consideration, about the middle of the eighteenth century, it was in the context of recognition of monarchs, especially elective monarchs: that is, in the context of recognition of governments. Von Steck[44] and later Martens[45] discussed the problem and reached similar conclusions. Recognition, at least by third States in the case of secession from a metropolitan State, was either illegal intervention or it was

[42] *De Iure Naturae et Gentium*, Bk VII, ch 3, §9, para 689.
[43] (1958) 34 *BY* 176, 176.
[44] *Versuche über verschiedene Materien politischer und rechtlicher Kenntnisse* (1783).
[45] *A Compendium of the Law of Nations* (1789), 18 ff.

unnecessary.[46] As one writer put it, '. . . in order to consider the sovereignty of a State as complete in the law of nations, there is no need for its recognition by foreign powers; though the latter may appear useful, the *de facto* existence of sovereignty is sufficient.'[47] Thus, even after the concept of recognition had become a separate part of the law, the position was still consistent with the views held by the early writers.

> The writers of the early period of eighteenth century positivism, whenever faced with the eventuality of recognition as a medium of fitting the new political reality into the law, on the whole rejected such a solution, choosing the solution more consistent with the natural law tradition. Even if the law of nations was conceived as based on the consent of States, this anti-naturalist trend was not yet allowed to extend to the field of recognition.[48]

## (2) Positivism and recognition

But this was a temporary accommodation. According to positivist theory, the obligation to obey international law derived from the consent of individual States. If a new State subject to international law came into existence, new legal obligations would be created for existing States. The positivist premiss seemed to require consent either to the creation of the State or to its being subjected to international law so far as other States were concerned. It would be interesting to trace the evolution of international law doctrine from the essentially declaratory views of Martens and von Steck to the essentially constitutive ones of Hall and Oppenheim.[49] The important point, however, is that the shift in doctrine did happen, although it was a gradual one, in particular because, while States commonly endorsed the positivist view of international law, their practice was not always consistent with this profession. Thus unrecognized States and native peoples with some form of regular government were given the benefit of, and treated as obliged by, the whole body of international law.[50] The problem was largely doctrinal, but doctrine was, nonetheless, influential. For if one starts from the premiss that 'Le droit des gens est un droit contractuel entre des États',[51] the conclusion as to recognition and statehood seems inevitable:

> . . . le droit international, qui est contractuel et qui a par conséquent la liberté immanente de s'étendre aux partenaires de son choix, comprend tels États dans sa communauté et

[46] Alexandrowicz (1958) 34 *BY* 176, 180 ff and authorities there cited.

[47] Saalfeld, *Handbuch des positivism Voikerrechts*, 26; cited by Alexandrowicz, (1958) 34 *BY* 176, 189.

[48] Ibid, 191. Cf also Alexandrowicz (1961) 37 *BY* 506.

[49] Wheaton's view that the 'external' sovereignty of a State is, but its 'internal' sovereignty is not dependent upon recognition may be taken as an intermediate point.

[50] Smith, *GB & LN* vol I, 14–18; Davidson (1994) 5 *Canterbury LR* 391. See also Chapter 6.

[51] Redslob (1934) 13 *RDI* 429, 430.

n'y acceuille pas tels autres . . . [L]a reconnaissance est un accord. Elle signifie l'extension de la communauté de droit international à un nouvel État.[52]

## (3) Statehood in nineteenth-century international law

It is useful to attempt a summary of the position with regard to statehood and recognition in the late nineteenth century. There was of course no complete unanimity among text-writers: nevertheless what we find is an interrelated series of doctrines, based on the premiss of positivism, the effect of which was that the formation and even the existence of States was a matter outside the accepted scope of international law. Oppenheim's *International Law* provides the clearest as well as the most influential expression of these interrelated doctrines.

The main positions relevant here were as follows:

(1) International law was regarded as the law existing between civilized nations. In 1859 the British Law Officers spoke of international law 'as it has been hitherto recognized and now subsists by the common consent of Christian nations'.[53] Members of the society whose law was international law were the European States between whom it evolved from the fifteenth century onwards and those other States accepted expressly or tacitly by the original members into the society of nations[54]—for example the United States of America and Turkey.[55]

As the basis of the Law of Nations is the common consent of the civilized States, statehood alone does not imply membership of the Family of Nations. Those States which are

[52] Redslob (1934) 13 *RDI*, 431. The essential problem related to the duties of the new State rather than its rights. Existing States could consent to the rules of law in respect of yet-to-be-created States, but those States could not for their part so consent (e.g., Anzilotti, *Corso di Diritto Internazionale* (3rd edn), vol I, 163–6 cited Jaffé, *Judicial Aspects of Foreign Relations*, 90n) and mutuality was required, as in any contract. Cf, however, Lauterpacht, *Recognition*, 2. See further Devine (1984) 10 *S Af YBIL* 18, Hillgruber (1998) 9 *EJIL* 491, 499–502.

[53] Cited by Smith, *GB & LN*, vol I, 12, 14.

[54] Oppenheim (1st edn), vol 1, 17, §12; (8th edn), 18, §12: 'New States which came into existence and were through express or tacit recognition admitted into the Family of Nations thereby consented to the body of rules for international conduct [1st edn: 'in existence'; 8th edn: 'in force'] at the time of their admittance.' The 9th edition treats the matter as follows: 'Thus new states which come into existence and are admitted into the international community thereupon become subject to the body of rules for international conduct in force at the time of their admittance.' Ibid, vol 1, 14, §5; see also ibid, vol 1, 29, §10.

[55] On Turkey's 'membership' see General Treaty between Great Britain, Austria, France, Prussia, Russia, Sardinia and Turkey for Re-establishment of Peace, Paris, 30 March 1856, 46 BFSP 12, esp para VII, in which the allied monarchs 'déclarent la Sublime Porte admise à participer aux avantages du droit public et du concert Européens.' See also Smith, *GB & LN*, vol I, 16–17; Hall, *International Law* (2nd edn), 40; Wood (1943) 37 *AJ* 262; Hillgruber, *Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft*, 394. In *European Commission of the Danube*, PCIJ ser B no 14 (1927), 40,

members are either original members because the Law of Nations grew up gradually between them through custom and treaties, or they are members as having been recognized by the body of members already in existence when they were born.[56]

(2) States as such were not necessarily members of the society of nations. Recognition, express or implied, made them members and bound them to obey international law.[57] States not so accepted were not (at least in theory) bound by international law, nor were the 'civilized nations' bound in their behaviour towards them, as was implied by their behaviour with regard to Africa and China.[58]

(3) Only States then, or rather only those entities recognized as States and accepted into international society, were bound by international law and were international persons. Individuals and groups were not subjects of international law and had no rights as such under international law. 'Since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of International Law'.[59]

(4) The binding force of international law derived from this process of seeking to be recognized and acceptance.

Thus new States which come into existence and are admitted into the international community thereupon become subject to the body of rules for international conduct in force at the time of their admittance.[60]

International Law does not say that a State is not in existence as long as it is not recognized, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes an International Person and a subject of International Law.[61]

Art VII of the Treaty of Paris was said to have effected 'the elevation of the position of Turkey in Europe'. Among the enormous literature on the extension of international law beyond Europe see Andrews (1978) 94 *LQR* 408; Grewe (1982) 42 *ZaöRV* 449; Fisch, *Die europäische Expansion und das Völkerrecht*; Sinha, *Legal Polycentricity and International Law*; Onuma (2000) 2 *J Hist IL* 1. On international law in relation to specific regions and States, see, e.g., Eick, *Indianerverträge in Nouvelle-France: ein Beitrag zur Völkerrechtsgeschichte*; Ziegler (1997) 35 *Archiv des Völkerrechts* 255; Ando (ed), *Japan and International Law*.

[56] Oppenheim (1st edn), vol 1, 17, §12; (8th edn), vol 1, 125, §71. See also 9th edition, vol 1, 14, §5.

[57] Oppenheim (1st edn), vol 1, 17, §12, 108, §71; (9th edn), vol 1, 14, §5, 128, §39.

[58] Oppenheim (1st edn), vol 1, 34, §28; (8th edn), vol 1, 50, §28. Lauterpacht omitted the sentence 'It is discretion, and not International Law, according to which the members of the Family of Nations deal with such States as still remain outside that family' and characterized 'the question of membership of the "Family of Nations" . . . a matter of purely historical interest.' Cf ibid (9th edn), vol 1, 87, §22.

[59] Oppenheim (1st edn), vol 1, 18 (§12). By 'States' Oppenheim presumably meant 'recognized States'.

[60] Oppenheim (1st edn), vol 1, 17, §12; (9th edn), 14, §5.

[61] Oppenheim (1st edn), vol 1, 110, §71. The second sentence only is in the 8th edn, vol 1, 125, §71. US Secretary of State Webster put it as follows: 'Every nation, on being received at her own request, into the circle of civilized governments, must understand that she not only attains rights of

This satisfied the positivist canon that could discover the obligation to obey international law only with the consent of each State.

(5) Accordingly how an entity became a State was a matter of no importance to international law, which concentrated on recognition as the agency of admission into 'civilized society'—a sort of juristic baptism, entailing the rights and duties of international law. Unrecognized entities had not consented to be bound by international law, and neither had the existing community of recognized States accepted them or agreed to treat them as such. Nascent States (States '*in statu nascendi*') were not international persons. How they acquired territory, what rights and duties they had or owed to others as a result of events before they were recognized, these were irrelevant to international law: they were matters 'of fact and not of law'.

The formation of a new State is, as will be remembered from former statements, a matter of fact, and not of law. It is through recognition, which is a matter of law, that such new States become a member of the Family of Nations and subject to International Law. As soon as recognition is given, the new State's territory is recognized as the territory of a subject of International Law, and it matters not how this territory is acquired before the recognition.[62]

Likewise Phillimore: 'The question as to the origin of States belongs rather to the province of Political Philosophy than of International Jurisprudence.'[63]

Hence the acquisition of territory by a new State was not regarded as a mode of acquisition of territory in international law, though revolt was a method of losing territory. 'Revolt followed by secession has been accepted as a mode of losing territory to which there is no corresponding mode of acquisition.'[64]

sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws and usages which have obtained currency among civilized states . . .'. Letter to Mr Thompson, Minister to Mexico, 15 April 1842. *Moore's Digest*, vol I, s 1, 5–6.

[62] Oppenheim (1st edn), vol 1, 264, §209; (8th edn), vol 1, 544, §209. In the 9th edition, vol 1, 677, §241, the position is reformulated thus: 'When a new state comes into existence, its title to its territory is not explicable in terms of the traditional "modes" of acquisition of territory . . . The new state's territorial entitlement is more to do with recognition; for, as soon as recognition is given, the new state's territory is recognised as the territory of a subject of international law; although, questions of succession and of the legal history of the territory may also be involved where particular boundaries, or the precise extent of the territory, are doubtful or disputed.' See also ibid (9th edn), vol 1, 120, §34: 'A state proper is in existence when a people is settled in a territory under its own sovereign government.'

[63] Phillimore, *Commentaries on International Law* (2nd edn), vol I, 79.

[64] Oppenheim (1st edn), vol 1, 297–8, §246; (9th edn), vol 1, 717, §276. See also ibid (9th edn), vol 1, 717, §276, to similar effect but with the following qualification: 'It is perhaps now questionable whether the term revolt is entirely a happy one in this legal context. It would seem to indicate a particular kind of political situation rather than a legal mode of the loss of territorial sovereignty. If a revolt as a matter of fact results in the emergence of a new state, then this matter is the situation discussed [under the category 'acquisition'].'

## 1.4 Recognition of States in modern international law

It is against this background that the modern law of statehood and its relation with recognition must be examined. The effect of positivist doctrine was to place all the emphasis, in matters of statehood, on the question of recognition. Indeed the courts of many States still refuse to determine for themselves any questions of statehood, even where the matter is between private parties,[65] on the ground that status is necessarily determined by executive recognition.[66] They will sometimes be able to avoid the harmful effects on private rights of the political act of recognition by means of construction.[67] The executive may leave the matter for the courts to decide.[68] But as a matter of the common law, at least, where the international status of any entity is squarely in issue executive certification is binding.[69]

This has led courts to seek to distinguish between the 'external' and 'internal' consequences of non-recognition. In *Hesperides Hotels*, Lord Denning asked

[65] And even where the results are unfortunate: the Second Circuit of the US Court of Appeals held that, absent recognition, notified to the court by the executive branch, Hong Kong could not be treated as a State for jurisdictional purposes, and a corporation organized under the laws of Hong Kong, thus 'stateless', was unable to maintain an action in US federal court. *Matimak Trading Co v Khalily*, 118 F 3d 76 (2nd Cir, 1997, McLaughlin, CJ). The Third Circuit took the view that Hong Kong corporations could be treated as UK subjects and the problem thus avoided: *Southern Cross Overseas Agencies, Inc v Wah Kwong Shipping Group Ltd*, 181 F 3d 410 (3rd Cir 1999, Becker, CJ). The Supreme Court resolved the matter in favour of federal jurisdiction: *JP Morgan Chase Bank v Traffic Stream (BVI) Infrastructure Ltd*, 536 US 88, 122 S Ct 2054 (Souter J 2002).

[66] This was not always so: *Yrisarri v Clement* (1825) 2 C & P 223, 225. For an illuminating discussion of the cases in which Lord Eldon laid down the orthodox common law rule see Bushe-Foxe (1931) 12 *BY* 63; (1932) 13 *BY* 39. See also Jaffé, *Judicial Aspects of Foreign Relations*, 79.

[67] *Luigi Monta of Genoa v Cechofracht Co Ltd* [1956] 2 QB 522 (term 'government' in a charter party); *Kawasaki Kisn Kabashiki Kaisha of Kobe v Bantham Steamship Co Ltd* [1939] 2 KB 544 ('war'), 9 ILR 528. For an extreme case of 'construction' see *The Arantzazu Mendi* [1939] AC 256, 9 ILR 60, criticized by Lauterpacht, *Recognition*, 288–94.

[68] *Duff Development Co v Kelantan Goverment* [1924] AC 797, 825 (Lord Sumner); and cf the certificate in *Salimoff v Standard Oil Co*, 262 NY 220 (1933) just before US recognition of the Soviet government.

[69] *Luther v Sagor* [1921] 3 KB 532; but cf *Carl Zeiss Stifftung v Rayner and Keeler Ltd* (No 2) [1967] 1 AC 853, 953–4 (Lord Wilberforce), 43 ILR 23. For more recent cases, see, e.g., *Caglar v HM Inspector of Taxes*, 1996 *Simon's Tax Cases* 150; 108 ILR 150. The American position was historically less rigid: *Wulfsohn v RSFSR*, 234 NY 372 (1923); *Sokoloff v National City Bank*, 2 ILR 44, 239 NY 158 (1924); *Bank of China v Wells Fargo Bank & Union Trust Co*, 209 F2d 467 (1953). US courts often defer to executive determinations (e.g., *Autocephalous Greek-Orthodox Church of Cyprus v Goldberg & Feldman Fine Arts Inc*, 917 F 2d 278, 291–3 (Ind, 1990) 108 ILR 488; Smith, (1992) 6 *Temple ICLJ* 169, 178–90) , but not always: *Efrat Ungar v Palestine Liberation Organization*, 402 F3d 274, 280 (1st Cir, 31 March 2005, Selya, CJ) (slip op), 14: '[T]he lower court's immunity decision neither signaled an official position on behalf of the United States with respect to the political recognition of Palestine nor amounted to the usurpation of a power committed to some other branch of government. After all, Congress enacted the [Anti-Terrorism Act], and the President signed it. The very purpose of the law is to allow the courts to determine questions of sovereign immunity under a legal, as opposed to a political, regime.'

whether the law of the 'Turkish Federated State of Cyprus' could be applied to a tort claim even though the Foreign and Commonwealth Office had certified that the United Kingdom did not recognize that entity as a State:

> The executive is concerned with the *external* consequences of recognition, vis-à-vis other states. The courts are concerned with the *internal* consequences of it, vis-à-vis private individuals. So far as the courts are concerned, there are many who hold that the courts are entitled to look at the state of affairs actually existing in a territory, to see what is the law which is in fact effective and enforced in that territory, and to give such effect to it—in its impact on individuals—as justice and common sense require: provided always that there are no considerations of public policy against it.

The distinction has also been expressed as one between private international law and the law or practice of foreign relations:

> [P]rivate international law is designed to find the most appropriate law . . . and it is not concerned with adjusting the mutual relationship of sovereigns. Therefore, foreign law applied under private international law principles should not be limited to the law only of a recognized State or Government; effectiveness of foreign law should not depend on recognition.[70]

Indeed legislation has sometimes had to be passed authorizing courts to treat unrecognized entities as 'law areas' for various purposes, in order to separate non-recognition from its consequences.[71]

However desirable it may be that the courts of a State should speak on matters of statehood with the same voice as the government of that State, in the international sphere the intimate connection established by nineteenth-century doctrine between recognition and statehood has done much harm. A tension is thereby created between the conviction that recognition is at some level a legal act in the international sphere,[72] and the assumption of political

[70] District Court of Kyoto, Judgment of 7 July 1956, quoted in Peterson, *Recognition of Governments*, 149, 243 n 77.

[71] See, e.g., the extended definition of 'foreign state' in the Foreign Enlistment Act 1870 (UK). See also Foreign Corporations Act 1991 (UK); Foreign Corporations (Application of Laws) Act 1989 (Cth). These Acts, though general in terms, were passed to deal with the situation of Taiwan, an issue dealt with by the US through special legislation, the Taiwan Relations Act, 22 USC §3301. See *New York Chinese TV Programs, Inc v UE Enterprises, Inc*, 954 F 2d 847 (2d Cir 1992), *cert denied*, 506 US 827 (1992); *Millen Industries Inc v Coordination Council for N American Affairs*, 855 F 2d 879 (1988), 98 ILR 61. Other jurisdictions have simply accepted Taiwan acts and laws without legislative mandate: *Romania v Cheng*, 1997 Carswell NS 424 (Nova Scotia SC); *Chen Li Hung v Tong Lei Mao* [2000] 1 HKC 461. On Taiwan see further Chapters 5 and 10.

[72] E.g., among earlier writers, Kelsen (1941) 35 *AJ* 605; Schwarzenberger, *International Law*, vol I, 127–36, 134; Lauterpacht, *Recognition*, 6 ff.

leaders that they are, or should be, free to recognize or not to recognize on grounds of their own choosing.[73] If this is the case, the international status and rights of whole peoples and territories will seem to depend on arbitrary decisions and political contingencies.

## (1) Recognition: the great debate

Before examining State practice on the matter, it is necessary to refer again to the underlying conflict over the nature of recognition. A further effect of nineteenth-century practice has been to focus attention more or less exclusively on the act of recognition itself, and its legal effects, rather than on the problem of the elaboration of rules determining the status, competence and so on of the various territorial governmental units.[74] To some extent this was inevitable, as long as the constitutive position retained its influence, for a corollary of that position was that there could be no such rules. Examination of the constitutive theory is, therefore, first of all necessary.

### *(i) The constitutive theory*[75]

The tenets of the strict constitutive position, as adopted by Oppenheim and others, have been referred to already. Many of the adherents of that position are also positivist in outlook.[76] On the other hand, it is possible to reconcile the declaratory theory with some versions of positivism, and many writers have adhered both to positivism and the declaratory theory.[77] Moreover, Lauterpacht, who was not a positivist, was one of the more subtle proponents

[73] Cf the statements of Sir Percy Spender, Australian Minister for Foreign Affairs, cited in O'Connell (ed), *International Law in Australia*, 32; and US Ambassador Warren Austin, SCOR 3rd yr 294th mtg, 16. See also MJ Peterson (1982) 34 *World Politics* 324.

[74] Cf Bot, *Non-Recognition and Treaty Relations*, 1.

[75] Constitutive writers include the following: Le Normand, *La Reconnaissance Internationale et ses Diverses Applications*; Jellinek, *Allgemeine Staatslehre* (5th edn), 273; Anzilotti, *Corso di Diritto Internazionale* (3rd edn); Kelsen (1941) 35 *AJ* 605; Lauterpacht, *Recognition*; Schwarzenberger, *International Law* (3rd edn), vol I, 134; Patel, *Recognition in the Law of Nations*, 119–22; Jennings (1967) 121 *HR* 327, 350; Verzijl, *International Law*, vol II, 587–90 (with reservations); Devine [1973] *Acta Juridica* 1, 90–145. Hall's position is of interest: 'although the right to be treated as a state is independent of recognition, recognition is the necessary evidence that the right has been acquired': *International Law* (8th edn, 1924, Higgins ed), 103. Cf also the German argument in the *Customs Union Case*, PCIJ ser C no 53, 52–3. Schachter argues that Secretariat practice (in one case, the Democratic Republic of Vietnam in 1947) is implicitly constitutive: 25 *BY* (1948) 91, 109–15. This is doubtful. It is also argued that the Permanent Court adopted a constitutive position in *Certain German Interests* in *Polish Upper Silesia*, PCIJ Ser A No 7 (1926), 27–9, but this was in the context of the belligerency of the Polish National Committee, not the existence of Poland as a State.

[76] Lauterpacht, *Recognition*, 38–9; but cf Jaffé, 80–1.

[77] Cf Chen, *Recognition*, 18 n 41.

of a form of the constitutive position.[78] He expressed the most persuasive argument for that position in the following way:

> [T]he full international personality of rising communities . . . cannot be automatic . . . [A]s its ascertainment requires the prior determination of difficult circumstances of fact and law, there must be *someone* to perform that task. In the absence of a preferable solution, such as the setting up of an impartial international organ to perform that function, the latter must be fulfilled by States already existing. The valid objection is not against the fact of their discharging it, but against their carrying it out as a matter of arbitrary policy as distinguished from legal duty.[79]

In other words, in every legal system some organ must be competent to determine with certainty the subjects of the system. In the present international system that can only be done by the States, acting individually or collectively. Since they act in the matter as organs of the system, their determinations must have definitive legal effect.

It should be stressed that this argument is not generally applicable in international law. Determining the legality of State conduct or the validity of the termination of a treaty often involves 'difficult circumstances of fact and law', but it has never been suggested that the views of particular States are 'constitutive'. If individual States were free to determine the legal status or consequences of particular situations and to do so definitively, international law would be reduced to a form of imperfect communications, a system for registering the assent or dissent of individual States without any prospect of resolution. Yet it is, and should be, more than this—a system with the potential for resolving problems, not merely expressing them.

It may be argued that determining the subjects of international law is so important that, exceptionally, there must exist some method of conclusive determination for this purpose. Yet there is nothing conclusive or certain (as far as other States were concerned) about a conflict between different States as to the status of a particular entity, and there is no reason why they should be bound either by the views of the first State to recognize or of the last to refuse to do so. Does the fact that Belize was not recognized by Guatemala,[80] Macedonia by

[78] Lauterpacht, *Recognition*, 2 distinguishes two assertions of orthodox constitutive theory: viz 'that, prior to recognition, the community in question possesses neither the rights nor the obligations which international law associates with full statehood; [and] . . . that recognition is a matter of absolute political discretion as distinguished from a legal duty owed to the community concerned.' He adopts the first but not the second of these. In fact neither is distinctly positivist: what is so is their combination. cf Kunz (1950) 44 *AJ* 713; Higgins, *Development*, 136.

[79] *Recognition*, 55 (emphasis in original). Cf Kelsen, (1941) 35 *AJ* 605, 606–7.

[80] See (1992) 63 *BY* 633–4; 243 *HC Debs*, vol 243, WA, col 5, 9 May 1994.

Greece[81] or Liechtenstein by Czechoslovakia and its successors[82] mean that these entities did not exist, were not States, had no rights at the time?

Moreover, questions of status do not seem qualitatively different, either in theory or practice. International law has relatively few subjects, and the status of most of them is not open to doubt. By contrast problems relating, for example, to the legality of the use of force occur frequently and are often difficult and controversial. It is not suggested that individual State pronouncements on that subject are 'constitutive' of legality, for the recognizing State or more generally.

Two further arguments add decisive support to the rejection of the constitutive position. First, if State recognition is definitive then it is difficult to conceive of an illegal recognition and impossible to conceive of one which is invalid or void. Yet the nullity of certain acts of recognition has been accepted in practice, and rightly so;[83] otherwise recognition would constitute an alternative form of intervention, potentially always available and apparently unchallengeable. Lauterpacht himself allowed the possibility of an *invalid* act of recognition,[84] but if that is the case then the test for statehood must be extrinsic to the act of recognition. And that is a denial of the constitutive position.

A second difficulty with the constitutive position is its relativism. As Kelsen points out, it follows from constitutivist theory that '. . . the legal existence of a state . . . has a relative character. A state exists legally only in its relations to other states. There is no such thing as absolute existence.'[85] No doubt international relations are full of contingency, but to those who do not share Kelsen's premisses this seems a violation of common sense.[86] Lauterpacht, who accepts the relativity of recognition as inherent in the constitutive position, nevertheless refers to it as a 'glaring anomaly',[87] a 'grotesque spectacle' casting 'grave

[81] Even after the Former Yugoslav Republic of Macedonia (known as FYROM) was admitted to the UN (GA res 225, 8 April 1993) it remained for a time unrecognized by Greece. See Riedel (1996) 45 *Südöst-Europa* 63; Craven (1995) 16 *AYIL* 199; Pazartzis (1995) 41 *AFDI* 281.

[82] For the Czech position, see Statement by the Czech Republic in reply to the Statement by the Principality of Liechtenstein, Plenary meeting of the 10th OSCE Economic Forum, 29 May 2002; for the Liechtenstein position, see Review of the Implementation of OSCE Commitments in the Economic and Environmental Dimension, Statement to Agenda Point OSCE document EF.DEL/12/04, 4 June 2004.

[83] See *Restatement (Third) Foreign Relations Law of the US*, §202, Comment f, 'Unlawful recognition or acceptance', and further Chapter 3.

[84] *Recognition*, 234 n3 (Italian and German recognition of the Franco regime 'illegal *ab initio*'); cf ibid, 95 n2.

[85] Kelsen (1941) 35 *AJ* 605, 609. On Kelsen's position see Pauly, in Diner and Stolleis (eds), *Hans Kelsen and Carl Schmitt*, 45, 46–7.

[86] Cf Verhoeven, *Reconnaissance*, 714–15. Kelsen himself was previously a declaratist: (1929) 4 *RDI* 613, 617–18: 'en présence des règles positives incontestables du droit international, [on] ne peut nier que l'État nouveau ait des droits et des obligations internationales avant même d'être reconnu par les anciens États.'

[87] *Recognition*, 67.

reflection upon international law'.[88] Moreover, in his view '[i]t cannot be explained away . . . by questionable analogies to private law or to philosophical relativism.'[89] But if a central feature of the constitutive position is open to such criticism the position itself must be flawed.[90]

Aside from other objections,[91] Lauterpacht's own position is dependent on a straightforward assertion about State practice:

> . . . much of the available evidence points to what has here been described as the legal view of recognition. Only that view of recognition, coupled with a clear realization of its constitutive effect, permits us to introduce a stabilizing principle into what would otherwise be a pure exhibition of power and a negation of order . . .[92]

But State practice demonstrates neither acceptance of a duty to recognize,[93] nor a consistent constitutive view of recognition. Moreover, Lauterpacht's argument, which in the passage cited was plainly *de lege ferenda*,[94] assumes the insufficiency of the declaratory view of recognition.

### *(ii) The declaratory theory*

According to the declaratory theory, recognition of a new State is a political act, which is, in principle, independent of the existence of the new State as a subject of international law.[95] In Charpentier's terminology, statehood is opposable to non-recognizing States.[96] This position has the merit of avoiding the logical

[88] *Recognition*, 78.

[89] Ibid. Lauterpacht proposed the collectivization of recognition as a solution. Developments in that direction are addressed in Chapters 4 and 12, below.

[90] A hybrid position would be to require recognition by one or some States as a prerequisite: e.g., Green, *International Law*, 34: 'Unless recognized by at least one State, the entity will have no claim to be considered as a subject of international law.' But why should any one State be allowed to change the legal position of others by an isolated and perhaps aberrant act of recognition? And what should the first recognizing State do, if it is seeking to act in accordance with international law? On Green's view, the first State to recognize acts unlawfully—in which case the origins of every State must be illegitimate.

[91] E.g., the difficulty of a duty to recognize an entity that has, prior to recognition, *ex hypothesi* no rights: see *Recognition*, 74–5, 191–2. In Lauterpacht's view the duty is owed to the society of States at large: that society is 'entitled to claim recognition', but this is an unenforceable or imperfect right. This is a mere construct, bearing no relationship to State practice or general legal opinion. Cf Chen, *Recognition*, 52–4.

[92] *Recognition*, 77–8. But cf ibid, 78: 'We are not in a position to say . . . that there is a clear and uniform practice of States in support of the legal view of recognition . . .'.

[93] The United Kingdom alone seems to have accepted a duty to recognize: (1951) 4 *ILQ* 387–8, and even its statement is not an assertion of the constitutive theory. Cf Verhoeven, *Reconnaissance*, 576–86; Rich (1993) 4 *EJIL* 36.

[94] Cf *Recognition*, 78.

[95] See Chen, *Recognition*, for a full discussion of this position. Green's annotations to the published edition are consistently constitutivist: in this respect Green follows Schwarzenberger rather than Chen.

[96] Charpentier, *Reconnaissance*, 15–68, 160–7.

and practical difficulties involved in constitutive theory, while still accepting a role for recognition as a matter of practice. It has the further, essential, merit of consistency with that practice, and it is supported by a substantial body of opinion. The following passage of Taft CJ's in the *Tinoco Arbitration* is frequently cited as the classic statement of the declaratory position:

> The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by enquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned . . . Such non-recognition for any reason . . . cannot outweigh the evidence disclosed . . . as to the *de facto* character of Tinoco's government, according to the standard set by international law.[97]

But this was a case of recognition of governments, and it is arguable that while recognition of governments may be declaratory in effect, recognition of new States goes further. Where an authority in fact exercises governmental functions within an area already accepted as a State, there seems to be nothing for recognition to constitute, at least at the level of international personality. But the establishment of a new State involves the demarcation of a certain area as a 'State-area' for the purposes of international relations, with consequent legal effects. In such a case it might be argued that recognition, at least in the non-formal sense of 'treating like a State', is central rather than peripheral to international capacity.[98]

[97] (1924) 18 *AJ* 147, 154; cf also *Hopkins Claim* (1927) 21 *AJ* 160, 166. The matter was put even more strongly by Commissioner Wadsworth in *Cuculla v Mexico*, Mex-US Cl Com (1868), in respect of the premature and unauthorized recognition by the US Minister of the Zuloaga Government as the *de facto* Government of Mexico: 'Where then, is the evidence of the de facto government? The possession of the capital will not be sufficient, nor recognition by the American minister with or without the appraisal of his government. Recognition is based upon the pre-existing fact; does not create the fact. If this does not exist, the recognition is falsified . . . If, therefore, the Zuloaga movement in Mexico was the government *de facto*, it was because the facts existing at the time made it so. If it was a government, the government in Mexico, it was because it claimed and possessed the sovereignty over that independent nation we call 'the Republic of the United Mexican State.' Moore, *IA* III, 2873, 2876–7. See also *Wulfsohn v RSFSR*, 138 NE 24, 25 (1923); app diss 266 US 580 (1924): 'The result we reach depends upon more basic considerations than recognition or non-recognition by the United States. Whether or not a government exists clothed with the power to enforce its authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, able to enforce its claims by military force, is a fact not a theory. For its recognition does not create the state although it may be desirable.'

[98] See Le Normand, 268, cited by Chen, *Recognition*, 14 n 1.

But neither legal opinion nor State practice draws from this the conclusion that the several acts of recognition by other States constitute the entity being recognized or are conclusive as to its status. As a German–Polish Mixed Arbitral Tribunal stated in reference to the existence of the new State of Poland: '... the recognition of a State is not constitutive but merely declaratory. The State exists by itself and the recognition is nothing else than a declaration of this existence, recognized by the States from which it emanates.'[99] Less well known in this context is the Report of the Commission of Jurists on the Åland Islands. The passage of the Report dealing with the independence of Finland enumerated the various recognitions given to Finland, but went on to say that:

> these facts by themselves do not suffice to prove that Finland, from this time onwards, became a sovereign State ... [T]he same legal value cannot be attached to recognition of new States in war-time, especially to that accorded by belligerent powers, as in normal times ... In addition to these facts which bear upon the external relations of Finland, the very abnormal character of her internal situation must be brought out. This situation was such that, for a considerable time, the conditions required for the formation of a sovereign State did not exist.[100]

Evidently the Commission, while accepting the legal value of recognition as evidence, were not prepared to accept it as conclusive, but instead referred to the 'conditions required for the formation of a sovereign State'.[101]

On this matter the Arbitration Commission established to advise the European Peace Conference on Yugoslavia was categorical. In its first opinion, on 29 November 1991, the Commission stated that 'the effects of recognition by other States are purely declaratory.'[102] This was reiterated in further opinions.[103] It has, however, been suggested that the actual practice of States respecting the dissolution of Yugoslavia may have been constitutive in effect;

[99] *Deutsch Continental Gas Gesellschaft v Polish State* (1929) 5 ILR 11, 13.

[100] LNOJ, Sp Supp 4 (1920), 8.

[101] The Report of the Commission of Rapporteurs is less explicit. Certain passages are at least capable of a constitutivist interpretation: e.g., 'The recognition of the Finnish State by the Powers gave her admission into the community of nations, as fulfilling the conditions necessary for this official confirmation of an independent existence, one of the most important of which is the possession of frontiers which are sufficiently determined.'

LN Council Doc B7: 21/68/106 (1921), 23. But the crucial element in the Rapporteurs' argument was the continuity between the independent State of Finland after 1917, and the autonomous State of Finland before 1917. This continuity was regarded as a continuity of legal personality, despite absence of recognition of pre-1917 Finland: cf the reference to 'an autonomous Finland which ... on the 6th December 1917, proclaimed her full and entire independence of Russia, detached herself from the latter by an act of her own free will, and became thereafter herself a sovereign State instead of a dependent State' (ibid, 22).

[102] Opinion 1, Badinter Commission, 29 November 1991, 92 ILR 165.

[103] Opinions 8 and 10: 92 ILR 201 (4 July 1992); ibid, 206–8 (4 July 1992).

indeed debate continues to rage between those who attribute the troubles of Yugoslavia to premature recognition and those who blame European governments for not intervening earlier and more decisively.[104] It is difficult to reach a conclusion on this without examining in detail the bases for some of the particular claims to statehood, a matter addressed in Chapters 12 and 17. But overall the international approach to the dissolution of Yugoslavia, unhappy as it has been, does not support the constitutive theory,[105] still less demand that we adopt it as a general matter. The International Court in the *Bosnian Genocide case*, though not addressing the matter of recognition directly,[106] may be seen, by implication, to have favoured the view that statehood and its attendant rights exist independently of the will of other States. The Federal Republic of Yugoslavia (FRY) had argued that the Court was not competent to adjudicate questions under the Genocide Convention, because the FRY and Bosnia-Herzegovina had not recognized one another at the time proceedings were instituted. The Court dismissed this argument on the basis that (as mutual recognition had subsequently been given in the Dayton Accord)[107] any defect was merely procedural and could be repaired simply by refiling the claim, which would relate back to alleged acts of genocide occurring prior to 1995.[108] The result is consonant with the declaratory view: the rights of Bosnia-Herzegovina (under the Genocide Convention or otherwise) were opposable to the FRY from the time the former became a State, whether or not the FRY had yet recognized it as such.

Among writers the declaratory doctrine, with differences in emphasis, predominates. Brownlie states the position succinctly: 'Recognition, *as a public act of state*, is an optional and political act and there is no legal duty in this regard. However, in a deeper sense, if an entity bears the marks of statehood, other states put themselves at risk legally, if they ignore the basic obligations of state relations.'[109]

[104] On recognition of constituent entities emerging from the former SFRY see Hillgruber (1998) 9 *EJIL* 491; Warbrick and Lowe (1992) 41 *ICLQ* 473, Craven (1995) 66 *BY* 333, Crawford, *Selected Essays*, 213–21.

[105] Thus Macedonia was not recognized for some years (due to political problems with Greece), yet it was treated by all as a State. Serbia and Montenegro was not recognized as the continuation of the old SFRY, and most States had limited diplomatic relations with it as a result. But its statehood was never in doubt.

[106] 'For the purposes of determining its jurisdiction in this case, the Court has no need to settle the question of what the effects of a situation of non-recognition may be on the contractual ties between parties to a multilateral treaty.' ICJ Rep 1996 p 595, 613.

[107] General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, 35 ILM 75.

[108] ICJ Rep 1996 p 595, 612–13.

[109] *Principles* (2nd edn), 94; (6th edn), 89–90 (emphasis in original); see also cf (2nd edn), 90–3; (6th edn), 86–8. Among older authorities, those supporting the declaratory position include: Erich

Moroever States do not in practice regard unrecognized States as exempt from international law;[110] indeed failure to comply with international law is sometimes cited as a justification for non-recognition. And they do in fact carry on relations, often substantial, with such States, extending even to joint membership of inter-State organizations such as the United Nations.[111] Recognition is usually intended as an act, if not of political approval, at least of political accommodation.[112]

## (2) Conclusions

It is sometimes suggested that the 'great debate' over the character of recognition has done nothing but confuse the issues, that it is mistaken to categorize recognition as either declaratory or constitutive in accordance with some general theory. According to Brownlie:

in the case of 'recognition', theory has not only failed to enhance the subject but has created a *tertium quid* which stands, like a bank of fog on a still day, between the observer and the contours of the ground which calls for investigation. With rare exceptions the theories on recognition have not only failed to improve the quality of thought but have deflected lawyers from the application of ordinary methods of legal analysis.[113]

(1926) 13 *HR* 427, 457–68; Jaffé, *Judicial Aspects* of *Foreign Relations*, 97–8; Borchard (1942) 36 *AJ* 108; Brown (1942) 36 *AJ* 106; Kunz (1950) 44 *AJ* 713; Chen, *Recognition*; Marek, *Identity and Continuity*, 130–61; Charpentier, *Reconnaissance*, 196–200; Lachs (1959) 35 *BY* 252; Waldock (1962) 106 *HR* 147–51; Brierly, *Law of Nations* (6th edn), 139; Higgins, *Development*, 135–6; Starke, *Studies in International Law*, 91–100; O'Connell, *International Law* (2nd edn), vol I, 128–34; Fawcett, *The Law of Nations* (2nd edn), 49, 55; Akehurst, *Modern Introduction* (3rd edn), 60–3. See also the *Resolutions of the Institut du Droit International* (1936): 'La reconnaissance a un effet déclaratif. L'existence de l'État nouveau avec tous les effets juridiques qui s'attachent à cette existence n'est pas affectée par le refus de reconnaissance d'un ou plusieurs États': Wehberg (ed), *Institut de Droit International, Table Général des Résolutions 1873–1956*, ii; and cf Brown [1934] *Annuaire* 302–57. Among more recent writers see Davidson (1980) 32 *NILQ* 22; Menon, (1989) 67 *RDISDP* 161, 176; Weston, Falk and D'Amato, *International Law and World Order* (2nd edn), 847; Verhoeven (1993) 39 *AFDI* 7; Warbrick, in Evans (ed), *Aspects of Statehood and Institutionalism in Contemporary Europe*, 9; Emanuelli, *Droit international public*, 189 (para 385). See also *Restatement* 3rd, §202, Reporters' Note 7 (1987): 'This section tends towards the declaratory view . . .'; and, ibid, §202, comment b: 'An entity that satisfies the requirements of §201 is a state whether or not its statehood is formally recognized by other states.'

110 Cf the Protocol of the London Conference, 19 February 1831: 18 BFSP 779, 781 (concerning Belgium); Marek, *Identity and Continuity*, 140. Non-recognition of North Korea and of Israel was not regarded as precluding the application of international law rules to the Korean and Middle East wars: Brownlie, *Use of Force*, 380. See also Briggs (1949) 43 *AJ* 113, 117–20; Charpentier, *Reconnaissance*, 45–8, 56–8; Whiteman, 2 *Digest*, 604–5.

111 See Bot, *Non-Recognition and Treaty Relations*; Whiteman, 2 *Digest*, 524–604, and for the older practice see Moore, 1 *Digest*, 206–35; Hackworth, 1 *Digest*, 327–63.

112 Cf Lachs (1959) 35 *BY* 252, 259; Higgins, *Development*, 164–5; Verhoeven, *Reconnaissance*, 721.

113 Brownlie (1982) 53 *BY* 197, 197.

Some continental writers, following de Visscher, have tended to regard recognition as combining both declaratory and constitutive elements.[114] One can sympathize with these views, but at a fundamental level a choice has to be made. The question is whether the denial of recognition to an entity otherwise qualifying as a State entitles the non-recognizing State to act as if it was not a State—to ignore its nationality, to intervene in its affairs, generally to deny the exercise of State rights under international law. The answer must be no, and the categorical constitutive position, which implies a different answer, is unacceptable.

But this does not mean that recognition does not have important legal and political effects.[115] Recognition is an institution of State practice that can resolve uncertainties as to status and allow for new situations to be regularized. That an entity is recognized as a State is evidence of its status; where recognition is general, it may be practically conclusive. States, in the forum of the United Nations or elsewhere, may make declarations as to status or 'recognize' entities the status of which is doubtful:[116] depending on the degree of unanimity and other factors this may be evidence of a compelling kind.[117] Even individual acts of recognition may contribute towards the consolidation of status: in Charpentier's terms, recognition may render the new situation opposable to the recognizing State.[118]

In some situations, the term 'recognition' may also be used to describe acts that are properly speaking constitutive of a particular State; for example, a multilateral treaty establishing a new State will at the same time extend the

[114] De Visscher, *Problems d'interpretation judiciaire en droit international public*, 191; de Visscher, *Théories et Réalités* (4th rev edn), 258; Salmon, *La Reconnaissance d'État*, 19 ff. Cf Charpentier, *Reconnaissance*. Verhoeven, *Reconnaissance*, 548 refers in the same vein to a 'dialectical relationship' between recognition and the criteria for statehood, although his basic position remains declaratist: ibid, 545, 714–15, 720, esp 547–8: 'Force est en effet de convenir que pareille aptitude n'est originellement q'une virtualité qui doit être impérativement présumée dés l'instant où sont réunis les critères traditionnels de l'État, sans reserve d'une verification de la "viabilité" de l'Etat, sous reserve d'une verification de la proposition illustre néanmoins indirectement cette caractéristique fondamentale de l'effectivité étatique, d'être principalement une effectivité par rapport à autrui, qui privilégie autant qu'elle problématise l'autorité "externe" par rapport à l'autorité interne. Cette effectivité par rapport á autrui introduit une relation dialectique entre l'effectivité purement matérielle et la reconnaissance qu'elle conditionne, qui complique singulièrement la vérification de celle-lá. Il n'est en effet guère douteux que dans la réalité des rapports internationaux la reconnaissance comme *fait* a fréquemment une portée constitutive et devient l'élément d'une effectivité qui théoriquement la conditionne.'

[115] Cf *Restatement 3rd*, §202, comment c.

[116] E.g., GA res 195 (III) declaring the Republic of Korea and its government to be representative of the State of Korea.

[117] Admission to the United Nations is a strong form of 'collective recognition': see Chapter 4.

[118] Charpentier, *Reconnaissance*, 217–25.

signatories' recognition of that State.[119] But the constitutive acts here are those involving the establishment of the State, the stipulation of its constitution, the definition of its borders, etc. Collective recognition is ancillary and is not a substitute for action by the competent authorities.[120]

The conclusion must be that the status of an entity as a State is, in principle, independent of recognition, although the qualifications already made suggest that the differences between declaratory and constitutive schools are less in practice than has been depicted. But this conclusion assumes that there exist in international law and practice workable criteria for statehood. If there are no such criteria, or if they are so imprecise as to be practically useless, then the constitutive position will have returned, as it were, by the back door.[121] The question whether such criteria exist will be discussed in the next chapter.

## 1.5 Certain basic concepts

Certain basic concepts—personality, sovereignty, the state/government distinction, continuity and succession—recur throughout this work and need some brief initial explanation.

### (1) International personality[122]

The term 'international personality' has been defined as 'the capacity to be bearer of rights and duties under international law'.[123] Such definitions only tend to obscure: any person or aggregate of persons has the capacity to be given rights and duties by States,[124] and in an era of human rights, investment protection and international criminal law, everyone is at some level 'the bearer of rights and duties' under international law.[125] Yet there is evidently a distinction

[119] E.g., the recognition of Cyprus by the Treaty of Guarantee, Art II, 16 August 1960, 382 UNTS 3.

[120] For collective action in the creation of States see further Chapter 12.

[121] Cf Anzilotti, *Corso di Diritto Internationale* (3rd edn), vol I, 163–6.

[122] See, e.g., Kelsen, *Principles of International Law* (2nd edn), 573–4; Barberis, *Festschrift für Hermann Mosler*, 25; Cassese, *International Law in a Divided World*, 74–104; Jennings and Watts, *Oppenheim* (9th edn), 119–20 (§33), 330–1 (§103); Hickey (1997) 2 *Hofstra LPS* 1; Charlesworth and Chinkin, *The Boundaries of International Law*, 124–5; Shinoda, *Re-examining Sovereignty*, 17–18; Raič, *Statehood and the Law of Self-Determination* (2002), 10–18; Brownlie, *Principles* (6th edn), 648–50 (respecting personality of international organizations); Shaw, *International Law* (5th edn), 175–201.

[123] Schwarzenberger, *Manual*, 53.

[124] Cf *Danzig Railway Officials*, PCIJ ser b No 15 (1928) 17–18.

[125] See Crawford, *Selected Essays*, 17, 26–9; Brownlie, *Principles* (2nd edn), 73, (6th edn), 69: 'The state is a type of legal person recognized by international law. Yet, since there are other types of legal person so recognized . . . the possession of legal personality is not in itself a sufficient mark of statehood.'

between being a beneficiary of rights or a bearer of duties, on the one hand, and being an active participant on the international level, on the other. Individuals and companies can bring claims in international forums established by treaty (and not only as the delegates of the States parties to these treaties[125a]). But it remains true that these forums are created and ultimately controlled by States or by intergovernmental organizations, and it is these entities that remain the gatekeepers and legislators of the international system.[126]

As an aspect of the developments in doctrine and practice in the late nineteenth and early twentieth centuries, international legal personality came to be regarded as synonymous with statehood.[127] For example, it was never definitively settled whether the League of Nations had international personality.[128] The question arose with respect to the United Nations soon after its foundation: could the United Nations bring a claim for injury (a) to itself and (b) to its agents caused by the conduct of a non-member State? In the *Reparations* Opinion the International Court gave an affirmative answer in both respects. It reformulated that question in the following terms:

> . . . whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. *In other words*, does the Organization possess international personality? This is no doubt a doctrinal expression, which has sometimes given rise to controversy. But it will be used here to mean that if the Organization is recognized as having that personality, it is an entity capable of availing itself of obligations incumbent upon its Members.[129]

As to whether the United Nations might claim reparations for injury to its agents committed by nationals of a non-Member state, the Court gave an affirmative answer, stating that '. . . fifty States, representing the vast majority of the members of the international community, had the power, in conformity

[125a] See *Occidental Exploration & Production Co v Republic of Ecuador*, 'the investor is given direct standing to pursue the state.' [2005] EWCA Civ 1116, *Times*, 23 Sept 2005 (Mance LJ), para 16.

[126] See Oppenheim (9th edn), 119–20, §33; Malanczuk, in Weiss et al (eds), *International Economic Law With a Human Face*, 64; Brownlie, in Evans (ed), *Aspects of Statehood and Institutionalism in Contemporary Europe*, 5; Virally (1985) 183 *HR* 9, 71–2.

[127] Crawford, *Selected Essays* (2002) 17, 19; Nijman, in *State, Sovereignty, and International Governance*, 109.

[128] Williams, *Some Aspects of the Covenant of the League of Nations*, 38, 43; Zimmern, *The League of Nations and the Rule of Law 1918–1935*, 277–85; Brierly (1946) 23 *BY* 83, 85.

[129] *Reparations Case*, ICJ Rep 1949, p 174, 178 (emphasis added). On the legal personality of international organizations generally, see Menon (1992) 70 *RDI* 61; Bederman (1996) 36 *Va JIL* 275; Seidl-Hohenveldern and Loibl, *Das Recht der Internationalen Organisationen*, (6th edn), 43; Lim, in Harding (ed), *Renegotiating Westphalia*, 53, Amerasinghe, *Principles of the International Law of International Organizations* (2nd edn), ch 3. Regarding the legal personality of particular organizations, Bernhardt (1982) 18 *Europarecht* 199; Khodakov (1993) 7 *Emory ILR* 13; Head (1996) 90 *AJ* 214, 221; Packer and Rukare (2002) 96 *AJ* 365.

with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims'.[130] A distinction is thus drawn between 'objective international personality' and personality recognized by particular States only. It would appear that the former exists wherever the rights and obligations of an entity are conferred by general international law, and the latter where an entity is established by particular States for special purposes.[131] States clearly are included in the former category: the Order of St. John of Jerusalem, Rhodes and Malta is an example of the latter.[132] The Court held that, by virtue of the importance of its functions and the extent of its membership, the United Nations was also in the former category, an 'objective' legal person.[133]

There is thus a distinction between 'general' (or 'objective') and 'special' (or 'particular') legal personality. General legal personality arises against the world (*erga omnes*): particular legal personality binds only consenting States. But no further implications may be drawn from the existence of legal personality: the extent of the powers, rights and responsibilities of any entity is to be determined only by examination of its actual position.[134] And, as with other

[130] ICJ Rep 1949 p 174, 185.

[131] There does not appear to be any general practice of recognition by States of the legal personality of international organizations. The USSR sought for years (and unavailingly) to deny the existence of the European Communities; that episode does not seem to have generated imitators. Distinguish, however, headquarters agreements between international organizations and host countries, e.g., Headquarters Agreement of 15 April 1991 between UK and European Bank for Reconstruction and Development, UKTS No 45 (1991), (1991) 62 *BY* 576 and the position respecting the European Union. *HC Debs*, vol 240, *WA*, col 291, 23 March 1994; *Parl Papers* 1992–3; (1992) 63 *BY* 660–1.

[132] The position of individuals or corporations as bearers of rights under international law is a distinct one. They may have standing under treaties, and they may certainly have rights especially under international human rights instruments. That does not make them in any meaningful sense 'international legal persons'. As holders of rights and even obligations they do not cease to be subject to the State of their nationality, residence or incorporation, as the case may be. On the position of individuals under international law see Janis (1984) 17 *Cornell ILJ* 61; Orentlicher (1991) 100 *Yale LJ* 2537; Vazquez (1992) 92 Col *LR* 1082; Meron (2000) 94 *AJ* 239; Dolzer (2002) 20 *Berkeley JIL* 296. Compare St Korowics (1956) 50 *AJ* 533.

[133] For criticism see Schwarzenberger, *International Law*, vol I, 128–9, 469–71, 523, 596. Brownlie describes the passage cited as 'an assertion of political and constitutional fact rather than a reasoned conclusion', but regards it as 'appropriate and necessary' in the special circumstances: *Principles* (2nd edn), 670; (6th edn), 661. Cf also Oppenheim (8th edn), vol 1, 407 (§168), 880 (§492), 928–9 (§522); ibid, (9th edn), vol 1, 18 (§7), 1203 (§583), 1263 (§627).

[134] See further O'Connell (1963) 67 *RGDIP* 5; Lauterpacht (1947) 63 *LQR* 433, (1948) 64 *LQR* 97; Siotto Pintor (1932) 41 *HR* 245; Aufricht (1943) 37 *Am Pol Sci R* 217; Scelle, in Lipsky (ed), *Law and Politics in the World Community*, 49.

questions, it is not in the bulk of cases but, rather, in the marginal ones that the more difficult questions are likely to arise.[135]

## (2) The State

In a sense, the whole of this work is an attempt to define and elucidate the concept of statehood as it operates in present-day international law. In particular, the criteria for statehood, ancient and modern, are examined in detail in Chapters 2 and 3. Despite its importance, statehood 'in the sense of international law' has not always been a clearly defined concept. Although the United Kingdom and Indian Governments thought a definition of the term 'State' a prerequisite for the proposed Draft Declaration on the Rights and Duties of States,'[136] the International Law Commission (ILC) concluded:

> that no useful purpose would be served by an effort to define the term 'State'... In the Commission's draft, the term ... is used in the sense commonly accepted in international practice. Nor did the Commission think that it was called upon to set forth ... the qualifications to be possessed by a community in order that it may become a State.[137]

This rather bland rejoinder concealed considerable disagreement as to the definition of both 'State' and 'Nation' and their relationship.[138] As we shall see, to refer merely to statehood 'for the purposes of international law' assumes that a State for one purpose is necessarily also a State for another. This may be true in most cases but not necessarily all. The 'A' Mandated territories were treated as States for the purposes of nationality, but were much less certainly States for other purposes. The Free City of Danzig was a State for the purposes of Article 71(2) of the Rules of the Permanent Court; whether it was a State for all purposes has been doubted. Many legal issues subsumed under the rubric of 'statehood' may be able to be resolved in their own terms—often this will take the form of interpretation of a treaty or other document. But at a basic level and for many purposes it still makes a great difference whether an entity is or is not a State. The matter is pursued in the next chapter.

[135] See, e.g., Tabory in Shapira (ed), *New Political Entities*, 139 (Palestine); Morin (1984) 1 *Rev Québéquoise DI* 163 (Quebec); Mushkat (1994) 24 *HKLJ* 328 (Macau); Crawford, *Rights in One Country* (Hong Kong).

[136] ILC, *Preparatory Study*, A/CN.4/2, 1948, 50.

[137] ILC, *Report* 1949: A/925, 9.

[138] See *ILC YBk*, 1949, 61–8, 70–1, 84–6, 138, 173.

## (3) Sovereignty

The term 'sovereignty' has a long and troubled history, and a variety of meanings.[139] In its most common modern usage, sovereignty is the term for the 'totality of international rights and duties recognized by international law' as residing in an independent territorial unit—the State.[140] It is not itself a right, nor is it a criterion for statehood (sovereignty is an attribute of States, not a precondition). It is a somewhat unhelpful, but firmly established, description of statehood; a brief term for the State's attribute of more-or-less plenary competence.

Unsurprisingly, the term has drawn criticism. According to Charney: 'The word "sovereignty" should be stricken from our vocabulary. It evokes the anachronistic idea of the total independence and autonomy of the state, and has no real meaning today. Use of the word calls to mind a fundamentalist view that is difficult to debate in light of its emotive baggage.'[141] But the term seems to be ineradicable, and anyway its eradication might only make matters worse. Better, one might think, 192 sovereigns than one or a few. Associated with the concept of sovereign equality, the term is a normative one and may be unobjectionable. What is objectionable is the abuse of language involved in statements of the form 'State A is sovereign therefore its conduct is unquestionable' (a statement normally used to defend the conduct of one's own State, not that of others). As a United States court observed:

> We cannot accept . . . [a] definition of sovereignty as the 'supreme, absolute, and uncontrollable power by which an independent state is governed.' [Appellant] would have us believe that sovereignty is an 'all or nothing' concept . . . we disagree . . . [T]his

[139] See 10 *Enc PIL* 397, 399; Wildhaber, in Macdonald and Johnston (eds), *The Structure and Process of International Law*, 425; Hinsley, *Sovereignty* (2nd edn 1986), 224–35; Kranz (1992) 30 *Archiv des Völkerrechts* 411; Bartelson, *A Genealogy of Sovereignty*; E Lauterpacht (1997) 73 *Int Affairs* 137; Dupuy, *Dialectiques du droit international*; Merriam, *History of the Theory of Sovereignty since Rousseau*; Rawls, *Law of Peoples*, 27, 79; Jackson (2003) 97 *AJ* 782; Sarooshi (2004) 25 *Michigan JIL* 1107; Krasner, *Sovereignty: Organized Hypocrisy*, 3–25.

[140] Cf *Reparations Case*, ICJ Rep 1949 p 174, 180. See generally Whiteman, 1 Digest 233–82; Korowicz, *Organisations internationales et souveraineté États membres*; Sukiennicki, *La Souveraineté des Etats en droit internationale moderne*; Crawford, *Selected Essays*, 95. Kamal Hossain, 'State Sovereignty and the UN Charter' (MS DPhil d 3227, Oxford, 1964) distinguishes three meanings of sovereignty: (1) State sovereignty as a distinctive characteristic of States as constituent units of the international legal system; (2) Sovereignty as freedom of action in respect of all matters with regard to which a State is not under any legal obligation; and (3) Sovereignty as the minimum amount of autonomy which a State must possess before it can be accorded the status of a 'sovereign state'. There is a fourth meaning: sovereignty as plenary authority to administer territory. The first meaning seems to be reflected in the following UK Government statement: 'Sovereignty is an attribute which under international law resides inherently in any independent state recognised as such. By virtue and in exercise of their sovereignty, states conduct dealings with one another internationally.' *HL Debs*, vol 566, *WA* 85, 16 October 1995.

[141] Charney (1997) 91 *AJ* 394, 395 (citing Henkin).

argument ignores the distinction between sovereignty, or the legal personhood of the nation, and jurisdiction, or the rights and powers of the nation over its inhabitants. It is uncontrovertible that nations, even though they are recognized as full members of the international community, must modify their internal affairs as a result of their participation in the international community.[142]

In any event, as a matter of international law no further legal consequences attach to sovereignty than attach to statehood itself. The question of sovereignty in international law is not to be confused with the constitutional lawyer's question of supreme competence within a particular State: the 'sovereignty of Parliament' could coexist with the effective abandonment of the sovereignty of the United Kingdom.[143] Nor is it to be confused with the exercise of 'sovereign rights': a State may continue to be sovereign even though important governmental functions are carried out on its behalf by another State or by an international organization. And, finally, 'sovereignty' does not mean actual equality of rights or competences. The actual competence of a State, for example, to wage war, may be restricted by its constitution,[144] or by treaty[145] or even by a particular international rule.[146] As a legal term 'sovereignty' refers not to omnipotent authority—the authority to slaughter all blue-eyed babies, for example—but to the totality of powers that States may have under international law.[147] By contrast, as a political term its connotations are those of untrammelled authority and power and it is in such discourse that the term can be problematic.[148]

## (4) State and government[149]

One of the prerequisites for statehood is the existence of an effective government; and the main—for most purposes the only—organ by which the State

[142] *Heller v US*, 776 F 2d 92, 96–7 (3rd Cir 1985).

[143] Cf *Harris v The Minister of the Interior* [1952] 2 SA (AD) 428. The confusion was reflected in the plaintiff's argument in *Blackburn v AG* [1971] 1 WLR 1037, 52 ILR 414. On the 'sovereignty of parliament' in relation to the incorporation of European law into UK law, see Akehurst (1989) 60 BY 351.

[144] E.g., The Philippines by the Constitution of 1935 as amended, Art II(3).

[145] E.g., Austria by the State Treaty of 1955, 217 UNTS 223, Art 13.

[146] E.g., Switzerland, by the 'public law of Europe': McNair, *Law of Treaties*, 50.

[147] The utility of the term is not increased by a good deal of writing loosely suggesting the eclipse of States, the lapse of sovereign equality and the value of 'relative' sovereignty. See, e.g., Simonovic (2000) 28 *Georgia JILC* 381; Wriston (1993) 17 *Fletcher Forum World Aff* 117, 117; Schreuer (1993) 4 *EJIL* 447–71; Cullet (1999) 10 *EJIL* 549, 551; Williams (2000) 26 *Rev Int Stud* 557, 557–73. See also Kingsbury (1998) 9 *EJIL* 599.

[148] Cf Westlake, *International Law*, vol I, 237 (cited in translation in the French *Counter-Mémoire, The Lotus*, PCIJ ser C, no 13-II, 275); Hart, *The Concept of Law* (1961), 217–18. See also Reisman (1990) 84 *AJ* 866; Henkin (1999) 68 *Fordham LR* 1; Krasner, *Sovereignty: Organized Hypocrisy*.

[149] See Whiteman, 1 *Digest* 911–16; Jennings (1967) 121 *HR* 350–2; Arangio Ruiz (1975) *OZFÖR* 265, 260; Verhoeven, *Reconnaisance*, 66–71.

acts in international relations is its central government.[150] There would thus seem to be a close relation between the concepts of government and statehood. According to O'Connell: 'Until the middle of the nineteenth century, both types of change [change of State and change of government] were assimilated, and the problems they raised were uniformly solved. With the abstraction of the concept of sovereignty, however, a conceptual chasm was opened between change of sovereignty and change of government.'[151] This 'post-Hegelian'[152] development O'Connell criticizes as 'dogmatic' and 'arbitrary'.[153] In the context of succession to obligations—that is, in the context of the legal effects of changes in State or government—it is more useful and more cogent in his view to pay regard not to any such distinction but to the real changes or continuities in political, social and administrative structure.[154] He thus advocates a return to the eighteenth-century position of practical assimilation of changes of State and government.[155]

It is true that some changes of government have greater and more traumatic effects than most changes of statehood (as with Russia in the period after the Revolution of 1917). Nonetheless it is a reasonable assumption that changes in statehood are more likely to have greater social and structural importance than changes in government. In any event, international law does distinguish between change of State personality and change of the government of the State.[156] There is a strong presumption that the State continues to exist, with its rights and obligations, despite revolutionary changes in government, or despite a period in which there is no, or no effective, government. Belligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State.[157] The legal position of governments-in-exile is dependent on the distinction between government and State.[158] So also is the characterization of a lengthy conflict such as the Spanish Civil War as a 'civil' rather than as 'international' war.[159] The concept

[150] Cf *Genocide case (Bosnia and Herzegovina v Yugoslavia) (Preliminary Objections)*, ICJ Rep 1996 p 595, 621–2 (citing Vienna Convention on the Law of Treaties, Art 7(2)(a)).

[151] *State Succession* (1967), vol I, 5–6. [152] Ibid, vol 1, vi. [153] Ibid, vol I, 7; II, vi.

[154] Ibid, vol II, vi. [155] Ibid, vol I 1, 7.

[156] Wright (1952) 46 *AJ* 299, 307; *Jessup, Modern Law of Nations*, 43.

[157] The occupation of Iraq in 2003 illustrated the difference between 'government' and 'State'; when Members of the Security Council, after adopting SC res 1511, 16 October 2003, called for the rapid 'restoration of Iraq's sovereignty', they did not imply that Iraq had ceased to exist as a State but that normal governmental arrangements should be restored. See Grant (2003) 97 *AJ* 823, 836–7.

[158] Whiteman, 1 *Digest* 921–30; Oppenheimer (1942) 26 *AJ* 568–95; Verhoeven, *Reconnaissance*, 76–83. On governments-in-exile, see Talmon, *Recognition of Governments in International Law*. For the special case of the Baltic States of Estonia, Latvia and Lithuania, see Grant (2001) 1 *Baltic YBIL* 23, 41–9.

[159] For the distinction between government and State in the Spanish Civil War, *see Government of Spain v Chancery Lane Safe Deposit Ltd; State of Spain v Chancery Lane Safe Deposit Ltd, The Times*,

of representation of States in international organizations also depends upon the distinction.[160]

Moreover, in arguing for a closer identification of 'State' and 'government', O'Connell sought to maximize the extent to which treaty and other obligations are transmitted from one State to its successor.[161] In other words he was trying to draw from the relative stability secured by the principle of State continuity a similar stability for the law of State succession. But the law of State succession has developed otherwise:[162] it has come to be accepted that successor States, in particular newly independent States, have substantial freedom as to the succession of treaty rights and obligations, although with certain exceptions.[163] To obliterate the distinction between 'change of State' and 'change of government' would now only decrease the stability of legal relations.

## (5) State continuity and State succession

There is then a clear distinction in principle between the legal personality of the State and its government for the time being.[164] This serves to distinguish in turn the field of State personality (which includes the topics of identity and continuity of States) and that of State succession.[165] State succession depends upon the conclusion reached as to State personality.[166] This is not to say,

26 May 1939; noted (1944) 21 *BY* 195. See also *Spanish Civil War Pension Case* (1978, Federal Social Court, FRG) 80 ILR 666, 668–70.

[160] The transition of the FRY (Serbia & Montenegro) from predecessor to successor State is discussed in Chapter 17.

[161] Cf *State Succession*, vol I, 30–5. The argument, for opposite reasons, was advanced by La Forest (1966) 60 *PAS* 103; cf the reactions of Briggs, ibid, 125, Aufricht, ibid, 126.

[162] See Crawford, *Selected Essays*, 243 for a detailed study in the context of O'Connell's own work and that of the ILC.

[163] In recent practice the recognition of newly emergent States has often been conditional on their acceptance of obligations arising under certain treaties to which the 'parent' State had been party. The 1991 EC Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union provided that States accept 'all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability' '31 ILM 1486'. European States required, under the rubric of disarmament, that States established on the territory of the former Soviet Union accept the obligations contained in the Treaty on Conventional Armed Forces in Europe, which the Soviet Union had signed on 19 November 1990 (30 ILM 1 (1991)). See, e.g., 63 *BY* 637 (EC Presidency statement regarding Kyrghyzstan and Tadzhikistan, specifying requirement to observe, *inter alia*, the Treaty on Conventional Armed Forces in Europe). This practice has tended to be specific and of variable quality; its impact on general issues of treaty succession is doubtful.

[164] Cf O'Connell, *State Succession*, vol I, 3; O'Connell, 1972 *Grotius SP* 23, 26–8; Charpentier, *Reconnaissance*, 15–16.

[165] Marek, *Identity and Continuity*, 9–14, describes the two as 'mutually exclusive'; cf Pereira, *Succession d'États en Matière de Traité*, 7–11. The ILC resisted attempts at eroding the distinction in its work on State succession: see, e.g., *ILC Ybk*, 1974/II(1), 14–16, 30–1.

[166] Hall, *International Law* (8th edn), 114, cited O'Connell, *State Succession*, vol I, 3.

however, that the topic of State succession is irrelevant to this study. Views taken of particular State succession situations may illuminate related problems of personality. In some areas, at least, the principles and policy considerations involved are similar. The problem of 'State succession' in the case of devolving territories such as the British Dominions, 1919 to 1945, was in part a matter of succession and in part a matter of personality or agency. Nonetheless the concepts of continuity and succession remain distinct, and blurring them serves no useful goal.[167]

[167] For the outcome of the ILC's work on State succession see Vienna Convention on Succession of States in respect of Treaties (1978) (entered into force 6 November 1996), 1946 UNTS 3, (1978) 17 ILM 1488; Vienna Convention on Succession of States in respect of State Property, Archives and Debts (1983), (1983) 22 ILM 298, A/CONF/117/15, 7 April 1983.

# Chapter 2

# THE CRITERIA FOR STATEHOOD: STATEHOOD AS EFFECTIVENESS


| | | |
|---|---|---|
| **2.1** | **Introduction** | 37 |
| **2.2** | **The classical criteria for statehood: *ex factis jus oritur*** | 45 |
| | (1) Defined territory | 46 |
| | (2) Permanent population | 52 |
| | (3) Government | 55 |
| | (4) Capacity to enter into relations with other States | 61 |
| | (5) Independence | 62 |
| | (i) Formal independence | 67 |
| | (ii) Real or actual independence | 72 |
| | (iii) The relation between formal and actual independence | 88 |
| | (6) Sovereignty | 89 |
| | (7) Other criteria | 89 |
| | (i) Permanence | 90 |
| | (ii) Willingness and ability to observe international law | 91 |
| | (iii) A certain degree of civilization | 92 |
| | (iv) Recognition | 93 |
| | (v) Legal order | 93 |


## 2.1 Introduction

If the effect of positivist doctrine in international law was to place the emphasis in matters of statehood on the question of recognition, the effect of modern doctrine and practice has been to return the attention to issues of statehood and status independent of recognition. Nevertheless there has long been no generally accepted and satisfactory legal definition of statehood.

Attempts to declare rules about recognition within the framework of international codification have always been rejected.[1] For example during the ILC's work on the proposed Declaration on the Rights and Duties of States, Panama proposed the following articles:

> 2. Every State is entitled to have its existence recognized. The recognition of the existence of a State merely signifies that the State recognizing it accepts the person of the State recognized, together with all the rights and duties which arise out of international law. Recognition is unconditional and irrevocable.
>
> 3. The political existence of the State is independent of its recognition by other States. Even before it has been recognized, the State has the right to defend its integrity and independence, to provide for its preservation and prosperity, and, consequently, to organize itself as it sees fit, to legislate in regard to its interests, to administer its services and to determine the jurisdiction and competence of its courts of justice.[2]

To this over-ambitious proposal India proposed an alternative: 'Every State has the right to recognize another State. The recognition of the existence of a State signifies that a State recognizing it accepts the person of the State recognized together with all the rights and duties which arise out of international law.'[3] During debate on these proposals Brierly again argued that 'the definition [of 'State'] would be difficult to establish and highly controversial', though he added that 'the word was commonly used in documents and speech, and its meaning had been understood without definition.'[4] Scelle was more emphatic: he 'had been active in international law for more than fifty years and still did not know what a State was and he felt sure that he would not find out before he died. He was convinced that the Commission could not tell him.'[5] Neither article was included in the Draft Declaration. The ILC concluded that: 'the

[1] The League of Nations Committee of Experts for the Progressive Codification of International Law rejected a proposal of Suarez to formulate 'a test by which the form of recognition of a Government could be regulated.' The proposal was opposed by Brierly, Fromageot and de Visscher and was rejected. For example, Brierly stated: 'that the Committee should refuse to discuss this question of all others, since the regulation of it by means of international conventions was neither realisable nor desirable. The difficulties arising from it and the delicacy of the question were well known, and, from a purely legal point of view, it was a subject which neither could nor ought to be treated juridically. To take an analogy: it was as though a State passed a law regulating the choice of friends to be adopted by its citizens. Such a law, if passed, would be null and void at the outset, and the same was true of a regulation of international relations.' *League of Nations Committee of Experts for the Progressive Codification of International Law* (1925–8), vol I, Minutes, Rosenne (ed) (1972) 38–9.

[2] ILC, *Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States* (Memorandum submitted by the Secretary-General) A/CN.4/2, 15 December 1948, 35–8, 55–6.

[3] Ibid, 52.

[4] *ILC Ybk* 1949, 64–5.

[5] *ILC Ybk* 1950/I, 84 (para 22); ILC 2nd sess 52nd mtg 22 June 1950 p 8: cited in Weissberg, *The International Status of the United Nations*, 194.

proposed article [2] would go beyond generally accepted international law in so far as it applied to new-born States . . . [T]he whole matter of recognition was too delicate and too fraught with political implications to be included . . . in this draft Declaration.'[6]

A similar issue arose during the drafting process leading to the Vienna Convention on the Law of Treaties, article 6 of which reads: 'Every State possesses capacity to conclude treaties.' An earlier draft, prepared by Fitzmaurice, included the following 'related definition':

> For the purposes of the present Code (a) In addition to the case of entities recognized as being States on special grounds, the term 'State' (i) means an entity consisting of a people inhabiting a defined territory, under an organized system of government, and having the capacity to enter into international relations binding the entity as such, either directly or through some other State; but this is without prejudice to the question of the methods by, or channel through which a treaty on behalf of any given State must be negotiated—depending on its status and international affiliations; (ii) includes the government of the State.[7]

But even this unremarkable attempt was deleted. The ILC's commentary on the Draft Articles records, with fine circularity, that the 'term "State" is used . . . with the same meaning as in the Charter of the UN, the Statute of the Court, the Geneva Convention on the Law of the Sea and the Vienna Convention on Diplomatic Relations: that is, it means a State for the purposes of international law.'[8] Later drafts prepared by the ILC likewise fail to define the term, even those dealing with the related issues such as State succession.[9]

Nor was any attempt made to define the term for the purposes of the General Assembly's 'Definition of Aggression', Article 1 of which reads:

> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

[6] ILC Report 1st sess, 12 April–9 June, 1949 *GAOR* 4th sess. supp no 10 A/925, 9, para 50. For discussion, see *ILC Ybk* 1949 pp 81–8, 150–2, 171–4, 178. The ILC voted 7:5 to delete the proposed article.

[7] *ILC Ybk* 1956/II, 107.

[8] Ibid, 1966/II, 178, 192.

[9] Article 1(1)(a) of the Draft Articles on Succession of States with respect to Treaties provided that ' "Succession of States" means the replacement of one State by another in the *sovereignty of territory or in the competence to conclude treaties with respect to territory*' (ibid, 1968/II, 90–1; 1970/II, 301–2; 1972/I, 30–1). The words in italics were substituted, in the Drafting Committee, by the phrase 'responsibility for the international relations of territory': ibid, 1972/I, 270–1. See now Vienna Convention on Succession of States in Respect of Treaties (1978), Art 2(1)(b), 23 August 1978, 1946 UNTS 3.

Explanatory Note; In this definition the term 'State' (a) is used without prejudice to questions of recognition or to whether a State is a Member of the UN, and (b) includes the concept of a 'group of States' where appropriate.[10]

The topic of recognition of States and governments has remained on the ILC work programme since 1949, but little interest has been shown in pursuing the matter.[11]

It may be asked how a concept as central as statehood could have gone without a definition, or at least a satisfactory one,[12] for so long. This may be because the question normally arises only in the borderline cases, where a new entity has emerged bearing some but not all characteristics of statehood. The resulting problems of characterization cannot be resolved except in relation to the particular facts and circumstances. But, it may be asked, are there any legal consequences that attach to statehood as such, which are not legal incidents of other forms of international personality? To put it another way, is there a legal concept of statehood at all or does the meaning of the term vary indefinitely depending on the context?[13] In the previous chapter, I discussed the attempt to dispense with criteria for statehood by reference to recognition. Some writers, by contrast, come close to denying the existence of statehood as a legal concept in the interests of a thoroughgoing functionalism.[14] Such views may be understandable as a reaction against absolutist notions of statehood and sovereignty.[15] But statehood is nonetheless a central concept of international law, even if it is one of open texture.

The following exclusive and general legal characteristics of States may be instanced.

(1) In principle, States have plenary competence to perform acts, make treaties, and so on, in the international sphere: this is one meaning of the term 'sovereign' as applied to States.[16]

[10] GA res 3314 (XXIX) 14 December 1974 (adopted without vote).

[11] In 1973, during a discussion of the future ILC work programme, the consensus was that '[t]he question of recognition of States and governments should be set aside for the time being, for although it had legal consequences, it raised many political problems which did not lend themselves to regulation by law': see *ILC Ybk* 1973/I, 175 (Bilge), 164 (Castañeda); but cf 165, 170 (Tsuruoka). The matter was raised again in 1996, but no action was taken. See ILC Planning Group, Working Group on the Long-Term Programme of Work: Annex 2: Outline of Issues on the Topic of Statehood, reprinted below (with permission) as Appendix 4, p 757.

[12] The deficiencies in the definition taken from the Montevideo Convention on the Rights and Duties of States are discussed below.

[13] Cf Weissberg, *International Status of the United Nations*, 193–4.

[14] Anzilotti, *Corso di Diritto Internazionale* (3rd edn), vol I, 163–6.

[15] Cf Higgins, *Development*, 11–17, 42–5, 54–7; Riphagen (1975) 6 *NYIL* 121.

[16] *Military and Paramilitary Activities in and against Nicaragua*, ICJ Rep 1986 p 14, 133 (para 265): 'Similar considerations apply to the criticisms expressed by the United States of the external policies and alliances of Nicaragua . . . it is sufficient to say that State sovereignty evidently extends to the area of its foreign policy, and that there is no rule of customary international law to prevent a State from choosing and conducting a foreign policy in co-ordination with that of another State.'

(2) In principle States are exclusively competent with respect to their internal affairs, a principle reflected by Article 2(7) of the United Nations Charter.[17] This does not of course mean that international law imposes no constraints: it does mean that their jurisdiction over internal matters is prima facie both plenary and not subject to the control of other States.

(3) In principle States are not subject to compulsory international process, jurisdiction, or settlement without their consent, given either generally or in the specific case.[18]

(4) In international law States are regarded as 'equal', a principle recognized by the Charter (Article 2(1)). This is in part a restatement of the foregoing principles, but it has other corollaries.[19] It is a formal, not a moral principle. It does not mean, for example, that all States are entitled to an equal vote in international organizations: States may consent to unequal voting rights by becoming members of organizations with weighted voting (the United Nations, the World Bank . . .). Still less does it mean that they are entitled to an equal voice or influence. But it does mean that at a basic level, States have equal status and standing: 'A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.'[20]

(5) Derogations from these principles will not be presumed: in case of doubt an international court or tribunal will tend to decide in favour of the freedom of action of States, whether with respect to external[21] or internal affairs,[22] or as not having consented to a specific exercise of international jurisdiction,[23] or to a particular derogation from equality.[24] This presumption—rebuttable in any case—has declined in importance, but is still invoked from time to time and is still part of the hidden grammar of international legal language. It will be referred

[17] Ibid, 133 (para 263): '. . . adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.'

[18] *Monetary Gold removed from Rome in 1943*, ICJ Rep 1954 p 19, 20 ILR 441; *Western Sahara Case*, ICJ Rep 1975 p 12, 33. See also Rosenne in Diez (ed), *Festschrift für Rudolf Bindschedler*, 407.

[19] See Dickinson, *The Equality of States in Public International Law*: the notion of equality of States is not historically a deduction from sovereignty, however: ibid, 56, 334–6.

[20] Vattel, *Le droit des gens*, Introduction, §18, quoted in *Claimants of the Brig General Armstrong v United States*, 5 US Cong Rep CC 149 (US Court of Claims, 1858, Gilchrist, CJ).

[21] *The Lotus*, PCIJ ser A no 10 (1927) 18; in external affairs the presumption is less significant, since it must be weighed against the equal rights of other States.

[22] *Polish War Vessels in the Port of Danzig* PCIJ ser A/B no 43 (1931) 142.

[23] *Eastern Carelia Opinion* ser B no 5 (1923) 27–9.

[24] *Interpretation of Peace Treaties (Second Phase)*, ICJ Rep 1950 p 221, 228–9.

to as the *Lotus* presumption— its classic formulation being the judgment of the Permanent Court in *The Lotus*.[25]

These five principles, it is suggested, constitute in legal terms the core of the concept of statehood, the essence of the special position of States in general international law. As a matter of interpretation the term 'State' in any treaty or other instrument prima facie refers to States having these attributes; but again

[25] PCIJ ser A no 10 (1927) 18. The cogency of the *Lotus* presumption in modern law has been doubted: see, e.g., Brownlie, *Principles* (6th edn), 299–1. It was referred to with approval by the Permanent Court in the *Free Zones Case*, PCIJ ser A no 24, 11–12 (1930), but it was not applied by the Court in cases involving the constitution of international organizations when a rather extensive interpretation was adopted: see *Competence of the ILO with respect to Agricultural Labour*, PCIJ ser B nos 2–3 (1922) 23–6; *Competence of the ILO to regulate, incidentally, the work of the Employer*, PCIJ ser B no 13 (1926) 21–3; *Jurisdiction of the European Commission of the Danube*, PCIJ ser B no 14 (1927) 36, 63–4; contrast Judge Negulesco (diss), ibid, 104–5. In the *Territorial Jurisdiction of the Oder Commission*, PCIJ ser A no 23 (1929) 26, the Court refused to accept the contention 'that, the text being doubtful, the solution should be adopted which imposes the least restriction on the freedom of States. This argument, though sound in itself, must be employed only with the greatest caution. To rely upon it, it is not sufficient that the purely grammatical analysis of a text should not lead to definite results; there are many other methods of interpretation; in particular, reference is properly had to the principles underlying the matter to which the text refers; it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favourable to the freedom of States.' Like most of the secondary rules of interpretation the *Lotus* presumption found no place in the Vienna Convention on the Law of Treaties 1969, Arts 31–3. It was not applied by the majority in the *Admissions Case*, ICJ Rep 1948 p 63; the dissentients (Judges Basdevant, Winiarski, McNair, Read) referred to it as 'a rule of interpretation frequently applied by the Permanent Court' (ibid, 86). It was applied in the *Asylum Case*, ICJ Rep 1950 p 266, 275. Apart from the separate opinion of Judge Guillaume in *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep 1996 p 226, 291 (paras 9, 10) asserting that States remain free to act absent a prohibition, its reception in recent decisions has been ambiguous. Consider, e.g., *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Request for the Indication of Provisional Measures), ICJ Rep 2000 p 182, 233, Declaration of Judge Van Den Wyngaert, (para 10), and various statements in *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep 1996 p 226, 239 (para 21). In that case President Bedjaoui indicated that the *Lotus* presumption has 'very limited application in the particular context of the question which is the subject of this Advisory Opinion': ibid p 226, 270–1 (paras 12, 15); cf Judge Shahabudeen, ibid, 376, 395. In his dissent, Judge Weeramantry discussed the presumption at length, suggesting '*inter alia*' that the *Lotus* presumption might be inverted given that the use of nuclear weapons would drastically restrict the freedom of the States against which they were used. Cf Judge Dillard's comment in *Fisheries Jurisdiction (United Kingdom v Iceland)*, ICJ Rep 1974 p 3, 59: '[I]f the exercise of freedom trespasses on the interests of other States then the issue arises as to its justification. This the Court must determine in light of the applicable law and it does not advance the enquiry to attempt to indulge in a presumption or to lean on a burden of proof. It can be argued, for instance, that Iceland was the "actor" who sought to change the established law and the burden of proving legal justification rests on her. Conversely it can be argued that the Applicant was in the role of plaintiff and should therefore have the burden of establishing the illegality of Iceland's actions. In either event the Court must determine the rights of the Parties. Freedom of State action and burdens of proof suggest analogies to the criminal and civil procedures of some States. Applied to the present case the analogy is misplaced.' See also Lauterpacht (1949) 26 *BY* 48; Spiermann, *International Legal Argument in the Permanent Court of International Justice*, 247–63.

this is subject to the context. The term 'State' should be more strictly interpreted where the context indicates plenitude of functions—as for example in Article 4(1) of the United Nations Charter. Conversely, if a treaty or statute is concerned with a specific issue, the word 'State' may be construed liberally—that is, to mean 'State for the specific purpose' of the treaty or statute.[26] This is in accordance with the principle that where a legal document uses some technical term, even if it is capable of a wider meaning, prima facie the technical meaning is the one intended.

These five principles appear nominal, but it is difficult to find more substantive candidates. Thus the possession of a nationality is not conclusive for statehood. 'A' Mandates, which were not States, had nationality; so too did Andorra at a time when it was not generally considered a State.[27] That an entity has rights and obligations under international law or may be responsible for conduct that is internationally wrongful does not make it a State: international organizations,[28] insurgent or devolving governments,[29] the International Committee of the Red Cross[30] and a range of other entities are accounted

[26] Thus the Australian State of New South Wales, not a 'State' in the international law sense, was held to be a 'foreign country' for the purposes of a double taxation statute: *Burnet v Chicago Portrait Co*, 285 US 1 (1932), 6 ILR 19: the decision need have been no different if the statute had applied to 'foreign States.' See also *Gilmore Steel Corp v Dep't of Revenue* 9 Or Tax 210, 222–3 (1982) ('foreign country' and political subdivision synonymous for purposes of Oregon tax law); *Smith v US* 953 F 2d 1116, 1117 (9th Cir 1991) (Antarctica, a 'sovereignless region without civil tort law', held a 'foreign country' for purposes of Federal Tort Claims Act); *Couvertier v Gil Bonar* 173 F 3d 450, 452 (1st Cir 1999) (US Virgin Islands a 'foreign country' for the purposes of a statute barring importation of lottery tickets from any foreign country). Conversely, a foreign State may, for purposes of a particular statute, sometimes be treated as something else: see, e.g., *O'Reilly v Fox Chapel Area School District*, 527 A 2d 581, 584 (Pa, 1987) (foreign country equated to part of the United States for purposes of income tax); *R v Governor of Belmarsh Prison* [2001] 1 AC 84, 92 (Ireland not a 'foreign state' for purposes of s 3 of the Foreign Extradition Act 1989). See also *Randall v Randall*, 759 NYS 2d 537 (2003); *In re YMA*, 111 SW 3d 790 (Tex App, 2003) (both treating foreign countries as part of the United States for family law purposes).

[27] For Mandates see Chapter 12. For the nationality of Andorra before 1993 see Bélinguier, *La Condition juridique des vallées d'Andorra*, 206, 221; Ourliac in *Mélanges Maury*, 1, 403; Crawford (1977) 55 *RDISDP* 259.

[28] E.g., the United Nations may bring international claims (*Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Rep 1949 p 174, 178–9) and be held responsible for the wrongful conduct of its officials and agents: *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Rep 1999 p 62, 88–9 (para 66); *Insas BHD v Cumaraswamy* (2000) 121 ILR 463 (Kamalanathan Ratnam J). Cf Weissberg, *International Status of the United Nations*, 209; 1975 UN *Jur Ybk* 153–5; Fox (1999) 12 *Leiden JIL* 488; Sands and Klein, *Bowett's Law of International Institutions* (5th edn), 512–26; Amerasinghe, *Principles of the Institutional Law of International organizations* (2nd edn), 384–406.

[29] See Cassese (1981) 30 *ICLQ* 416.

[30] *Prosecutor v Simic* Case No. IT-95-9-PT (Trial Chamber, ICTY, 27 July 1999) (ICRC privilege in respect of subpoenaed employees). See also ICC Rules of Procedure and Evidence, Art 73.

subjects of international law, generally or for particular purposes. Article 2(4) of the Charter (which enjoins the use of force by States in international relations except in self-defence), or at least its customary equivalent, applies to certain non-State entities.[31] It is sometimes said that States only are competent to develop or change customary international law:[32] this is not true, but even if it were, it would be useless as a criterion because it is not equally true of all States.

Indeed, statehood is rather a form of standing than a set of rights. States exist 'at the international level' or 'on the international plane', but this is a concept rather than a place, since in fact there is only one world. To be a State is to have a range of powers and responsibilities at that level. Though entities other than States can make treaties, not to have treaty-making power is conclusive against being a State.[33] That an entity is not internationally responsible for its acts is conclusive against its being a State,[34] though which of two entities is responsible in a situation of divided competences may be a question of some difficulty.[35] Not being a State is to be denied independent access to those forums that States—themselves or through international organizations—still control.

If there is then a legal concept of statehood, there must be means of determining which entities are 'States' with these attributes; in other words, of establishing the criteria for statehood. Two preliminary points should, however, be made. First, it will be noted that the exclusive attributes of States do not prescribe specific rights, powers or capacities that all States must, to be States, possess: they are presumptions as to the existence of such rights, powers

[31] Brownlie, *Use of Force*, 380–1; Higgins, *Development*, 221–2. For Taiwan see Chapters 5 and 10.

[32] *Nanni v Pace and the Sovereign Order of Malta* (1935) 8 ILR 2, 5: 'only States can contribute to the formation of international law as an objective body or rules—States as international entities which are territorially identifiable' (Italy, Court of Cassation, 1935).

[33] Thus States make the treaties which allow investors to sue them at the international level (see Douglas (2003) 74 *BY* 151, 184–5), just as they grant individuals access to human rights courts and committees. See *Tangiora v Wellington District Legal Services Committee* (1999) 124 ILR 570, 572, 576. See also Sieghart, *The International Law of Human Rights*, 45–8; Kedzia, 'United Nations Mechanisms to Promote and Protect Human Rights' in Symonides (ed), *Human Rights*, 3, 31; Dennis and Stewart (2004) 98 *AJ* 462. At the international level, bearing responsibility is more fundamental than enjoying rights. Cf *LaGrand Case (Germany v United States)*, ICJ Rep 1999 p 9, 16 (para 28); ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Art 33(2) and commentary, *ILC's Articles*, reprinted in Crawford, 209–10.

[34] 'Sir Humphrey Waldock said that a distinction had to be made between the conduct of international relations and responsibility for international relations. He also said that the latter was the best short definition possible' *ILC Ybk* 1972/I, 271; and for discussion of this formula, ibid, 1974/II(1), 26–8.

[35] The British Government still claimed responsibility for the international affairs of the Dominions at a time when they were effectively independent: see Chapter 8. In later, analogous cases, it has not claimed such responsibility (e.g., Southern Rhodesia before 1965).

or capacities, rules that these exist unless otherwise stipulated. This must be so, since the actual powers, rights and obligations of particular States vary considerably. The legal consequences of statehood are thus seen to be—paradoxically—matters of evidence or rather of presumption. Predicated on a basic or 'structural' independence, statehood does not involve any inherent substantive rights. Further, the law recognizes no general duty on a State to maintain its independence: independence is protected while it exists, but there is no prohibition on its partial or permanent alienation.[36] The legal concept of statehood provides a measure for determining whether in a given case rights have been acquired or lost.

Second, the criteria for statehood are of a special character, in that their application conditions the application of most other international law rules. As a result, existing States have tended to retain for themselves as much freedom of action with regard to new States as possible. This may explain the reluctance of the International Law Commission to frame comprehensive definitions of statehood when engaged on other work—albeit work that assumed that the category 'States' is ascertainable. It follows that, at the empirical level, the question must again be asked whether, given the existence of international law rules determining what are 'States', those rules are sufficiently certain to be applied in specific cases or have been kept so uncertain or open to manipulation as not to provide any standards at all. And this question is independent of the point that States may on occasions treat as a State an entity that does not come within the accepted definition of the term.[37] The question is rather—can States effectively refuse, under cover of the 'open texture' of the rules, to treat entities as States that do in truth qualify as such? To avoid that is the point of having—if we do have—'objective' criteria for statehood.

## 2.2 The classical criteria for statehood: *ex factis jus oritur*

The best known formulation of the basic criteria for statehood is that laid down in Article I of the Montevideo Convention on the Rights and Duties of States, 1933: 'The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and

[36] Cf Judge Anzilotti, *Austro-German Customs Union Case*, PCIJ ser A/B no 41 (1931), 59.

[37] Thus the Holy See (1870–1929) and British India (1919–47) were treated as States for at least some purposes. The UN membership of Byelorussia and the Ukraine is a later example: see Chapter 4. But cf Higgins, *Development*, 41 n 69; Marek, *Identity and Continuity*, 145, both of whom are too unqualified in their support of the declaratory theory.

(d) capacity to enter into relations with other States.'[38] It is a characteristic of these criteria—and of the others to be examined in this section—that they are based on the principle of effectiveness among territorial units.[39] By contrast, criteria to be examined in Chapter 3 either supplement or in certain cases contradict this principle on grounds of legality or legitimacy.[40] But they operate only in exceptional cases: the general criteria based on effectiveness must first be dealt with.

## (1) Defined territory

Evidently, States are territorial entities. 'Territorial sovereignty . . . involves the exclusive right to display the activities of a State.'[41] Conversely, the right to be a State is dependent at least in the first instance upon the exercise of full governmental powers with respect to some area of territory. But, although a State must possess some territory, there appears to be no rule prescribing the minimum area of that territory.[42] States may occupy an extremely small area,

[38] Convention on the Rights and Duties of States, Montevideo, 26 December 1933, 165 LNTS 19. The Convention was ratified by the United States and certain States in Latin America: it is still in force. Despite its regional character and low participation, the Convention definition is referred to reflexively, irrespective of its actual language or of the context: Grant (1999) 37 *Col JTL* 403, 415 n 51. Its drafters no doubt had in mind standard definitions of the State: cf Crane, *The State in Constitutional and International Law*, 65 ('government, independence, territory and people'); Kelsen (1929) 4 *RDI* 613, 614: 'un État est formé lorsqu'un ordre de contrainte relativement souverain, c'est-à-dire dependant exclusivement du droit des gens, se créé et deviant efficace sur un territoire donné et vis-à-vis d'une population donnée'. On the historical antecedents of the Montevideo criteria, see Grant, 414–18.

[39] On effectiveness and the traditional criteria of statehood, see Vukas (1991 VI) 231 *HR* 263, 283–308; Guśz (1994) 49 *Panstwo i Prawo* 45, 45–54; Held (1994) 4 *Schweizerische Zeitschrift für internationales und europäisches Recht* 221, 227–28; Craven (1995) 16 *AYIL* 199, 212–18; Chaigne, *La reconnaissance des gouvernements chinois par la France*; Krieger, *Das Effektivitätsprinzip im Völkerrecht*.

[40] The changing concept of statehood thus reflects historical and philosophical developments—the latter, perhaps, at a respectful distance. In the pre-Vattelian period the link between the law of nations and natural law was associated with a lack of a developed distinction between States and non-state entities (as noted in Chapter 1). The growth of positivism more or less coincided with the development of the doctrine of sovereignty and the decline of the principle of legitimacy—rejected in terms of its influence on statehood by the 1820s. The period after 1918 and (decisively) after 1945 saw the development of new principles of legitimacy, based on self-determination and human rights. See generally Franck, *The Power of Legitimacy Among Nations*; Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*; Roth, *Governmental Illegitimacy*; Buchanan, *Justice, Legitimacy, and Self-Determination*.

[41] *Island of Palmas Case* (1928) 1 RIAA 829, 839 (Arbitrator Huber) 4 ILR 3, 103, 108, 110, 111, 113, 114, 418, 479, 482, 487, 492.

[42] Franck and Hoffman (1976) 8 *NYUJIL* 331, 383–4 ('infinitesimal smallness has never been seen as a reason to deny self-determination to a population'). See also Mendelson (1972) 21 *ICLQ* 609, 610–17; Verhoeven, *Reconnaissance*, 54; Orlow (1995) 9 *Temple ICLJ* 115, 115–40; Schachter in Beyerlin (ed), *Recht zwischen Umbruch und Bewahrung* (1995) 179.

provided they are independent in the sense to be explained. The ten smallest States at present are as set out in Table 1.

**Table 1. Areas of some small States**[43]

| | |
|---|---|
| Vatican City | 0.4 sq km |
| Monaco | 1.5 |
| Nauru | 21 |
| Tuvalu | 26 |
| San Marino | 61 |
| Liechtenstein | 160 |
| Marshall Islands | 181 |
| St. Kitts & Nevis | 267 |
| Maldives | 298 |
| Malta | 315 |

Nor is there any rule requiring contiguity of the territory of the State. The separation of East Prussia from Germany between 1919 and 1945, of East Pakistan from West Pakistan before 1971, or of Alaska from the 'lower Forty-Eight', cast no doubt on the statehood of Germany, Pakistan or the United States. Some archipelagic States—e.g., the Federated States of Micronesia, the Marshall Islands, São Tomé e Príncipe—consist of minute areas of land territory separated by wide expanses of ocean, the ocean nonetheless legally under the aegis of the land.[44] Little bits of States can be enclaved within other States.[45] Sovereignty comes in all shapes and sizes.

No doubt small size and fragmentation make independence difficult to achieve and maintain. One reason given by the United Kingdom for non-recognition of one of the Bantustans, Bophuthatswana, was its disconnected and fragmented territory: 'the fragmentation of the territory of Bophuthatswana within South Africa, the pattern of the population and the economic dependence on South Africa more than justify our refusal to recognise Bophuthatswana.'[46] But none of the Bantustans was internationally recognized, fragmented or not. Fragmentation may be an indication of some other disability, but it is not in itself determinative against a claim of statehood.

[43] Source: *World Gazetteer*, 2005.

[44] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, 1833 UNTS 3, art 49.

[45] *Case Concerning Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, ICJ Rep 1959 p 209, 212–13, 229; *Case Concerning Right of Passage over Indian Territory (Portugal v India)*, ICJ Rep 1960 p 6, 27.

[46] Minister of State, FCO, 12 November 1986, *HC Deb* vol 105 col 100, reprinted (1986) 57 *BY* 507, 507–8.

Given that statehood implies exclusive control over *some* territory, small or large, the relation between statehood and territorial sovereignty appears to be of a special kind—a point that nineteenth-century international law failed to emphasize since it concentrated on problems of acquisition of territory by already existing States, on the view that territorial sovereignty was analogous to the ownership of land. That analogy was of limited value even in an era of colonialism; in the case of acquisition of territory by new States it was positively misleading.[47] The issues will be discussed further in Chapter 6: it is enough to posit here that the category of statehood has priority over the category of acquisition of territory. In other words, the definitive establishment of a new State on certain territory defeats claims by other States that relate to the whole of that territory; where the claims relate to part only of the territory, they may survive but they become dependent for settlement on the consent of the new State.

A new State may exist despite claims to its territory, just as an existing State continues despite such claims.[48] Two different situations may be distinguished: first, where the claim relates to the entire territory of a new State; secondly, where it relates to the boundaries of the State. In particular cases the two types of claim may coexist. This was so with Israel in 1948. It was argued that the partition resolution, GA resolution 181(II) of 29 November 1947, in some way conferred territory on the new State, so that the case was merely one of undefined frontiers, but the other view is tenable. In the event Israel was admitted to the United Nations on 11 May 1949.[49] Ambassador Jessup, arguing for Israel's admission on behalf of the United States, discussed the requirement of territory in the following terms:

> One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers . . . The formulae in the classic treatises somewhat vary, . . . but both reason and history demonstrate that the concept of territory does not necessarily include precise delimitation of the boundaries of that territory. The reason for the rule that one of the necessary attributes of a State is that it shall possess territory is that one cannot contemplate a State as a kind of disembodied spirit . . . [T]here must be some portion of the earth's surface which its people inhabit and over which its Government exercises authority. No one can deny that the State of Israel responds to this requirement . . .[50]

[47] Cf Jennings, *Acquisition of Territory*, 7–11.

[48] The point was assumed by the Permanent Court in two cases: *Monastery at St Naoum (Albanian Frontier)*, PCIJ ser B no 9 (1924) 2 ILR 385; *Polish-Czechoslovakian Frontier (Question of Jaworzina)*, PCIJ ser B no 8 (1923). But cf the stricter view proposed in the British Memorial: *Interpretation of the Treaty of Lausanne*, PCIJ ser C no 10, 202–3. There is no reference to the matter in the judgment: PCIJ ser B no 12 (1925).

[49] GA res 273 (III) (37–12:9), 11 May 1949; SC res 70, 4 March 1949 (9–1) (Egypt): 1 (UK)).

[50] *SCOR* 383rd mtg 2 December 1948, 11, and Jessup's remarks generally, ibid, 8–14.

The question of Israel is discussed in Chapter 9.

Claims to the entire territory of a State have commonly been raised in the context of admission to the United Nations: this was the case with Israel, and also with Kuwait, Mauritania and Belize.[51] The alleged independence or autonomy of Oman from the Sultanate of Muscat and Oman in a sense raised the issue, but more important problems were whether the territory constituted a protectorate, and whether the matter was one for the Committee of Twenty-Four.[52] The proposition that a State exists despite claims to the whole of its territory was not challenged in these cases.

It should be noted that the question of admission to the United Nations raises somewhat different issues from those simply of statehood. Thus the obligations of a State towards a fellow Member are greater than those towards a non-Member State: there would seem to be grounds for refusing United Nations membership to any State the territory of which was subject to a serious and genuine unresolved territorial claim of another Member. But of the two instances referred to, Iraq's claim to Kuwait was hardly 'serious and genuine', whatever means Iraq used to pursue it. In any event, customary international law prohibits the settlement of territorial disputes between States by the threat or use of force, and a State for the purpose of this rule means any entity established as a State in a given territory, whether or not that territory formerly belonged to, or is claimed by, another State.[53]

It is only to be expected then that claims to less than the entire territory of a new State, in particular boundary disputes, do not affect statehood. A German–Polish Mixed Arbitral Tribunal stated the rule succinctly:

> Whatever may be the importance of the delimitation of boundaries, one cannot go so far as to maintain that as long as this delimitation has not been legally effected the State

[51] On Kuwait see Al Baharna, *The Legal Status of the Arabian Gulf States*, 250–8; Hassouna, *The League of Arab States and Regional Disputes*, 91–140. On Mauritania see Higgins, *Development*, 18–19, 307. For Bahrain see Chapter 7. Cf also Mendelson, 100–8. For Belize, see Maguire (1982) 22 *Va JIL* 849, 849–881. The position of Guatemala was that 'the granting of independence to Belize by the United Kingdom is a unilateral act which is not recognised by Guatemala since this is not a case of a colony which is being granted independence but of a territory which is the subject of a dispute not yet resolved. The United Kingdom cannot disregard its territorial dispute with Guatemala, or its legal liability for the damage caused to Guatemala and for its failure to fulfil various obligations it has had with respect to Guatemala in connection with Belize.' Note of 27 January 1983, reprinted (1983) 54 *BY* 395. On Belize see also Chapter 14.

[52] For a thorough treatment of the dispute, see Al Baharna, *The Arabian Gulf States* (2nd rev edn), 157–61, 239–49.

[53] See Al-Baharna, *Arabian Gulf States* 250–8; Mendelson and Hulton, in Schofield (ed), *Territorial Foundations of the Gulf States*, 117. The boundary question was settled, definitively it would seem, after the Gulf War of 1990–1 with the establishment of a demarcation commission and confirmation of its findings: SC resns 773, 26 August 1992; 806, 5 February 1993; 833, 27 May 1993. See also Iraq–Kuwait International Boundary Report, 20 May 1993, 94 ILR 1.

in question cannot be considered as having any territory whatever . . . In order to say that a State exists . . . it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory.[54]

And the International Court in the *North Sea Continental Shelf* cases confirmed the rule *en passant*:

The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations.[55]

The Court has tacitly affirmed this in subsequent cases involving territorial disputes, such as that over the boundary between Libya and Chad.[56]

In Croatia, the borders of the new State in 1991 were sufficiently certain (insofar as the principle of *uti possidetis* was taken to preserve the former inter-republican boundaries of the SFRY), but effective control fluctuated with military conflict between the new State and Serbian forces, local and federal. The rule applied in the cases noted above was reasserted in 1992 when Croatia was recognized notwithstanding the occupation of Eastern Slavonia by the Yugoslav National Army and operations by Serbian irregulars elsewhere.[57] Again, this was hardly a new situation, both Polish republics—inter-war and post-war—having had uncertain borders, especially in 1918.[58] The rule thus is seen to apply in a range of situations, from boundaries still to

[54] *Deutsche Continental Gas-Gesellschaft v Polish State* (1929) 5 ILR 11, 14–15.

[55] ICJ Rep 1969 p 3, 32.

[56] *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ Rep 1994 p 6, 22, 26 (paras 44, 52). See also Thirlway (1995) 66 *BY* 1, 18–19.

[57] But see statement of Minister of State, FCO, 12 December 1991, 200 *HC Deb* col 1166: 'The traditional criteria that we adopt for the recognition of states probably apply to Slovenia. They do not apply in the case of Croatia in the same way, but I accept . . . that one of the reasons why the criteria do not apply to Croatia is that Croatian territory has been invaded by the [Jugoslav National Army] and Serbian irregulars.' This, however, would not seem to state the general practice: 'The United Kingdom recognises many states whose borders are not fully agreed with their neighbours. This is normally a bilateral matter for the states concerned.' See also Minister of State, FCO, 5 February 1999, 185 *HC Deb* WA col 84.

[58] Part IX(B) of the Potsdam Agreement provided that final delimitation of the western frontier of Poland was to await a final peace settlement. *Report on the Tripartite Conference of Berlin*, 2 August 1945, 3 *Bevans* 1224, 1234, [1945] *FRUS* 1499, 1509, discussed by Czaplinski (1992) 86 *AJ* 163. On the post-World War II borders generally, see Crawford (1977) 4(1–2) *Studies for a New Central Europe* 89; Jedruszczak (1979) 20 *Polish–Western Affairs* 222, 222–43; Tyranowski (1979) 20 *Polish Western Affairs* 112; Jasica (1991–2) 19 *Polish YIL* 71; Piotrowicz 1991–2 (1992) 63 *BY* 367. On the situation in 1918 see Hillgruber, *Die Aufnahme neuer Staaten*, 181–3.

be resolved to violations of a boundary defined in principle in accordance with the *uti possidetis*.

The question is whether there are any exceptions to this rule. Higgins states that 'when the doubts as to the future frontiers [are] of a serious nature, statehood [becomes] in doubt. Thus when in 1919 Estonia and Latvia were recognized by the Allied Powers, no recognition was granted to Lithuania on the express ground, that owing to the Vilna dispute, its frontiers were not yet fixed.'[59] In view of what has been said, the general proposition is doubtful, and in any event Lithuania does not provide an example. It is true that *de jure* recognition of Lithuania by the Allies was refused because of the Vilna dispute,[60] but this appears to have been politically motivated and was not an expression of an Allied view that Lithuania was not a State. The British Under-Secretary of State for Foreign Affairs had previously accepted that the Polish occupation of Vilna (Wilno) was an occupation 'of Lithuanian territory',[61] and as late as 1920 the Prime Minister agreed that the same considerations applied to the *de jure* recognition of Lithuania as to Latvia and Estonia.[62] The merits of the Vilna dispute appear to have been decidedly in favour of Lithuania,[63] and the Allied actions to have been based more on the desire for a strong Poland than an appreciation of those merits.[64] It is clear that Lithuania and the other Baltic States were independent by mid-1919, despite then-existent or subsequent territorial claims. Arbitrator Reichmann in *Germany v Reparations Commission* stated that: 'Le Gouvernement lithuanien a été reconnu *de facto* en septembre 1919, mais il existait comme Gouvernement indépendent déjà lors de la signature du Traité de Versailles . . .'.[65] Lithuania was thus not included in the territory of 'Russia' within the meaning of Article 260 of the Treaty at the time of its signature (28 June, 1919). And a similar view seems to have been taken by the Permanent Court in two cases concerning Lithuania, though the issue was not directly in point in either of them.[66]

[59] Higgins, *Development* 20n. On the Baltic States after World War I, see Hillgruber, *Die Aufnahme neuer Staaten*, 245–62.

[60] 139 *HC Deb* col 2207, 21 March 1921.

[61] 116 *HC Deb* col 1201, 28 May 1919.

[62] 129 *HC Deb* col 240, 11 May 1920.

[63] See *LNOJ* sp supp no 4 (1920). See further Lapradelle, le Fur and Mandelstam, *The Vilna Question*; Kavass and Sprudzs (eds), *Baltic States: A Study of their Origin and National Development in International Military Law and History*; Langer, *Seizure of Territory*, 22–5; Scelle (1928) 35 *RGDIP* 730; Brockelbank (1926) 20 *AJ* 483.

[64] Cf Judge Anzilotti, *Railway Traffic Between Lithuania and Poland*, PCIJ ser A/B no 42 (1931) 108.

[65] (1924) 1 RIAA 524, 525 (13th Question).

[66] In the *Railway Traffic Between Lithuania and Poland*, PCIJ ser A/B no 42 (1931) 112, the Court thought the establishment of Lithuania antedated the seizure of Vilna on 9 October 1920. See also *Panavezys-Saldutiskis Railway Case*, PCIJ ser A/B no 76 (1939) 10. To the same effect *Répertoire Suisse* 1, 439–41. For an overview of UK cases in which the status of Estonia was at issue see Hillgruber, *Aufnahme neuer Staaten*, 262–5.

Thus even a substantial boundary or territorial dispute with a new State is not enough, of itself, to bring statehood into question. The only requirement is that the State must consist of a certain coherent territory effectively governed—a formula that suggests that the requirement of territory is rather a constituent of government and independence than a distinct criterion of its own.

## (2) Permanent population

If States are territorial entities, they are also aggregates of individuals. A permanent population is thus necessary for statehood, though, as in the case of territory, no minimum limit is apparently prescribed. The ten smallest States by population are set out in Table 2.

**Table 2. Populations of some small States**[67]

| | |
|---|---|
| Vatican City | 768 |
| Tuvalu | 9,743 |
| Nauru | 11,218 |
| Palau | 21,092 |
| San Marino | 30,472 |
| Monaco | 33,084 |
| Liechtenstein | 34,927 |
| St Kitts & Nevis | 39,601 |
| Marshall Islands | 54,313 |
| Andorra | 68,584 |

Of States with very small populations only the Vatican City raises any question on this ground, and this more because of the ecclesiastical character of its population than its size.[68]

The criterion under discussion requires States to have a permanent population: it is not a rule relating to the nationality of that population. It appears that the grant of nationality is a matter that only States by their municipal law (or by way of treaty) can perform.[69] Nationality is dependent upon statehood, not vice versa. Whether the creation of a new State on the territory of another results in statelessness of the nationals of the previous State there resident,[70] or

[67] Source: *World Gazetteer*, 2005.

[68] For the Vatican see Duursma, *Microstates*, 374, 411–12; and below Chapter 5.

[69] *Nottebohm Case (Second Phase)*, ICJ Rep 1955 p 4, 23.

[70] Cf the Israeli cases in the period (1948–52) when there was no Israeli nationality law: 17 ILR 110–12. See also *Naqara v Minister of the Interior* (1953) 20 ILR 49.

an automatic change in nationality,[71] or in retention of the previous nationality until provision is otherwise made by treaty or the law of the new State,[72] is a matter of some doubt. Persons could very well be regarded as nationals of a particular State for international purposes before the State concerned had established rules for granting or determining its nationality. On the other hand, in the absence of treaty stipulation a new State is not obliged to extend its nationality to *all* persons resident on its territory, and as between habitual residents and other categories of persons there is no a priori definition of those who should be considered prescriptively associated with a given territory.

Two views of the matter may be contrasted:

> . . . in view of the rule that every State must have a determinate population (as an element of its statehood), and therefore nationality always has an international aspect, there is no very fundamental distinction between the issue of statehood and that of transfer of territory . . . [T]he evidence is overwhelmingly in support of the view that the population follows the change of sovereignty in matters of nationality.[73]

> Although inhabitants of territory ceded by or seceding from the Crown lose their British nationality, it does not follow that they acquire either automatically or by submission that of the successor State. The latter may withhold the granting of its nationality to all or portions of the persons concerned . . . Undesirable as it may be that any persons become stateless as a result of a change of sovereignty, it cannot be asserted with any measure of confidence that international law, at least in its present stage of development, imposes any duty on the successor State to grant nationality.[74]

A reconciliation may be suggested on the following lines. In the absence of agreement to the contrary, persons habitually resident in the territory of the new State automatically acquire the nationality of that State, for all international purposes, and lose their former nationality, but this is subject to a right in the new State to delimit more particularly who it will regard as its nationals. This view is consistent with the decision of the Permanent Court in the *Case Concerning Acquisition of Polish Nationality*:

> the Minorities Treaties in general, and the Polish Treaty in particular, have been concluded with new States, or with States which, as a result of the war, have had their territories considerably enlarged, and whose population was not therefore clearly

[71] *AB v MB* (1951) 17 ILR 110, referring to the 'absurd result of a State without nationals'; Draft Convention of Harvard Law Research, Art 18(2); *Wildermann v Stinnes* (Romanian-German Mixed Arbitral Tribunal) (1924) 2 ILR 224; *Poznanski v Lentz & Hirschfeld* (1925) 4 *Rec MAT* 353.

[72] *Date of Entry into Force of Versailles Treaty (Germany) Case* (1961) 32 ILR 339. See also Weis, *Nationality and Statelessness in International Law*, 151 ff.; Beemelmans (1995) 41 *Osteuropa-Recht* 73, 97–8.

[73] Brownlie (1963) 39 *BY* 284, 320.

[74] O'Connell, *State Succession*, vol 1, 497–528, 503.

defined from the standpoint of political allegiance. One of the first problems which presented itself in connection with the protection of the minorities was that of preventing these States from refusing their nationality, on racial, religious or linguistic grounds, to certain categories of persons, in spite of the link which effectively attached them to the territory allocated to one or other of these States.[75]

The matter has been taken somewhat further by the ILC in its Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, which formulates the issues in terms of a 'right to nationality'.[76] Under Article 1, 'Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned.' Article 4 calls on States to 'take all appropriate measures' to prevent individuals from becoming stateless as a consequence of succession.

The matter was put to the test before the Eritrea–Ethiopia Claims Commission, where individual claims arose respecting arbitrary deprivation of nationality. Ethiopia argued that Ethiopian citizens who registered to vote in the 1992 referendum on Eritrean independence thereby became Eritrean nationals and lost their Ethiopian nationality.[77] Eritrea argued that, whilst there existed at the time a provisional Eritrean government, the State of Eritrea came into being only after the referendum and thus there could have been no conferral of Eritrean nationality at the time Ethiopia alleged the loss of Ethiopian nationality occurred.[78] Ethiopia argued in reply that Eritrea had '*de facto* emerged as a State prior to the Referendum, and was [thus] capable of conferring nationality.'[79] But Ethiopia had taken various steps tending to communicate an intention to allow persons both to register in the referendum and to remain Ethiopian nationals (e.g., issuance of Ethiopian passports, continued permission to own real property and to carry on business in Ethiopia).[80] According to the Claims Commission:

> nationality is ultimately a legal status. Taking into account the unusual transitional circumstances associated with the creation of the new State of Eritrea and both Parties' conduct before and after the 1993 Referendum, the Commission concludes that those

[75] PCIJ ser B no 7 (1923) 15. For comment see Berman (1993) 106 *HLR* 1792, 1834–42. Cf also *Nationality (Secession of Austria) Case* (1954) 21 ILR 175; *Murray v Parkes* [1942] 2 KB 123, 10 ILR 27; Graupner (1946) 32 *GST* 87.

[76] Annexed to GA res 55/153, 12 December 2000. See Mikulka Reports, *ILC Ybk* 1995 ii/1, A/CN.4/467; ibid, 1996 ii/1, A/CN.4/474; ibid, 1997 ii/1, A/CN.4/480 & add 1; ibid, 1998 ii/1, A/CN.4/489. See also Mikulka, in Decaux (ed), *Nationalité, minorities et succession d'Etats en Europe de l'est*, 11; Ert (1998) 36 *Can YB* 151; Grossman (2001) 50 *ICLQ* 849.

[77] *Partial Award (Civilian Claims) (Eritrea's Claims)*: (2005) 44 ILM 601, 610, 17 December 2004, para 43: Ethiopian nationality is lost when a person acquires another nationality.

[78] Ibid, para 44. [79] Ibid, para 45. [80] Ibid, paras 46–9.

who qualified to participate in the Referendum in fact acquired dual nationality. They became citizens of the new State of Eritrea pursuant to Eritrea's Proclamation No. 21/1992, but at the same time, Ethiopia continued to regard them as its own nationals.[81]

However, the Claims Commission went on to say, the outbreak of war between the two States in 1998 was a fundamental change of circumstances and, while not in itself suspending dual nationality, placed dual nationals 'in an unusual and potentially difficult position'.[82] It fell to the Claims Commission to determine in which cases suspension of Ethiopian nationality had been arbitrary and in violation of international law. The principle of nationality by estoppel appears to have been decisive here: for four classes of person, the Claims Commission held deprivation of Ethiopian nationality had been 'arbitrary and unlawful'; the two main classes comprising persons who had benefited from land ownership or business licenses in Ethiopia and had held and travelled on Ethiopian passports.[83] This qualifies Article 10(1) of the Draft Articles, which specifies that a 'predecessor State may provide that persons concerned who, in relation to the succession of State, voluntarily acquire the nationality of a successor State shall lose its nationality.'[84] The problematic cases, in the Claims Commission's view, were those where individuals lost Ethiopian nationality and ended up stateless because either they had acquired but later lost Eritrean nationality; or had never had Eritrean nationality (para 62). It held that: '[w]hile Eritrea cannot claim for the loss suffered by the persons who were the victims of those errors, Ethiopia is liable to Eritrea for any damages caused to it by those errors' (para 62).

### (3) Government

The requirement that a putative State have an effective government might be regarded as central to its claim to statehood. 'Government' or 'effective government' is evidently a basis for the other central criterion of independence.[85]

[81] Ibid, para 51. [82] Ibid, para 55. [83] Ibid, paras 75–6.

[84] Article 9 of the Draft Articles addresses the situation the other way around: where a person is qualified to acquire the nationality of the successor State, that State is permitted to require the person to renounce another nationality. Consonant with Art 4 respecting prevention of statelessness, Art 9 further provides, 'such requirements shall not be applied in a manner which would result in rendering the person concerned stateless, even if only temporarily.' There is no analogous clause in Art 10.

[85] It is clear that 'government' and 'independence' are closely related as criteria—in fact they may be regarded as different aspects of the requirement of effective separate control. For present purposes, government is treated as the exercise of authority with respect to persons and property within the territory of the State; whereas independence is treated as the exercise, or the right to exercise, such authority with respect to other States. Other writers draw a similar distinction but in different terms: e.g., Wheaton ('internal' and 'external' sovereignty); Kamanda *Legal Status of Protectorates*, 175–82 ('sovereignty' (internal) and 'independence' (external)).

Moreover, international law defines 'territory' not by adopting private law analogies of real property but by reference to the extent of governmental power exercised, or capable of being exercised, with respect to some territory and population. Territorial sovereignty is not ownership of but governing power with respect to territory. There is thus a good case for regarding government as the most important single criterion of statehood, since all the others depend upon it. This is true equally for external as internal affairs. Governmental authority is the basis for normal inter-State relations; what is an act of a State is defined primarily by reference to its organs of government, legislative, executive or judicial.[86]

The difficulty is, however, that the criteria for statehood are nominal and exclusionary. Their concern is not with the clear undoubted cases but with the borderline ones. Hence the application of the criterion of government in practice is much less simple than this analysis might suggest.

A striking modern illustration is that of the former Belgian Congo, granted a hurried independence in 1960 as the Republic of the Congo (later Zaire; since 1997, the Democratic Republic of Congo). The situation in the Congo after independence has been described elsewhere.[87] It involved the following factors:

- The absence of any effective preparation for independence. The process of granting formal independence took hardly more than a year. For example no Congolese had by 1960 achieved more than adjutant rank in the armed forces.[88]
- The existence of various secessionary movements, at least one of which (in Katanga) was inspired by foreign interests and led to civil war.[89]
- The division of the central government, shortly after independence, into two fractions, both claiming to be the lawful government.[90]
- The reintroduction, in violation of the treaty of Friendship, Assistance and Co-operation between Belgium and the Congo,[91] of Belgian troops shortly after independence, under claim of humanitarian intervention.[92]

[86] See ARSIWA 2001, Arts 4–7 for the normal situation of responsibility for acts of State organs or agencies and Arts 8–11 for other more-or-less exceptional cases.

[87] Kanza, *Conflict in the Congo*, 192; Barraclough (ed), *Survey of International Affairs 1959–60*, 396–436; Hoskyns, *The Congo since Independence*; Said, *De Léopoldville à Kinshasa*; Higgins, *Development*, 162–4; Abi-Saab, *The United Nations Operation in the Congo, 1960–1964*; James, *Britain and the Congo Crisis, 1960–63*; Edgerton, *History of the Congo. See also Restatement (Third)*, s 201, Reporter's Note 2, (1987) 74.

[88] Kanza, *Conflict in the Congo*, 192.

[89] Kanza, *Conflict in the Congo*, 78, 109, 196 ff. The secession had been planned prior to 1960.

[90] See GA res 1498 (XV), 22 November 1960 (53–24:19 abstentions); Higgins, *Development*, 162–4.

[91] 29 June 1960. 164 BFSP 645 Art 6.

[92] Belgian withdrawal was requested by the following: SC resns 4387, 13 July 1960 (8–0:3); 4405, 22 July 1960 (11–0); 4426, 1 August 1960 (9–0:2); GA res 1599 (XV), 15 April 1961 (61–5:33).

- The immediate and continuing need, because of the effective bankruptcy of the Congolese authorities, for international aid on a large scale.[93]
- The introduction of United Nations forces shortly after independence to restore order and prevent civil war.
- '[T]he continued presence of Belgian and other foreign military and paramilitary personnel and political advisers, and mercenaries, in disregard of repeated resolutions of the United Nations', referred to by General Assembly resolution 1599 (XV) as 'the central factor in the present grave situation in the Congo.'

Anything less like effective government it would be hard to imagine. Yet despite this there can be little doubt that in 1960 the Congo was a State in the full sense of the term. It was widely recognized. Its application for United Nations membership was approved without dissent.[94] United Nations action subsequent to admission was based on the 'sovereign rights of the Republic of the Congo'.[95] On no other basis could the attempted secession of the Katanga province have been condemned as 'illegal'.[96]

What then is to be made of the criterion of 'effective government'? Three views can be taken of the Congo situation. It may be that international recognition of the Congo was simply premature because, not possessing an effective government, the Congo was not a State.[97] It may be that the recognition of the Congo was a case where an entity not properly qualified as a State is treated as such by other States, for whatever reason—that is, a case of constitutive recognition. Or it may be that the requirement of 'government' is less stringent than has been thought, at least in particular contexts.

This third view is to be preferred. The point about 'government' is that it has two aspects: the actual exercise of authority, and the right or title to exercise that authority. Prior to 1960 Belgium had that right, which it resigned in favour of the new entity. Of course the Congo could thereafter have disintegrated. Moreover, the creation of States is in principle an original, not a derivative, act—each State must make its own title to recognition. Nevertheless, by withdrawing its own administration and conferring independence on local

[93] See, e.g., the Agreement on Financial Assistance of 23 August 1960, UN–Congo: 373 UNTS 327, providing $5 million 'to finance normal imports' (Art 4) and 'to meet . . . current budgetary needs, preference being given to the government pay-roll and emergency relief expenditure' (Art 7).

[94] SC res 142, 7 July 1960; GA res 1480 (XV), 20 September 1960.

[95] Cf GA res 1474 (ES-IV), 20 September 1960 (70–0:11) para 6; *GAOR* 863 mtg, Fourth Emergency spec sess, 17–20 September 1960.

[96] SC res 169, 24 November 1961 (9–0:2).

[97] This was, it seems, the older view: Baty (1934) 28 *AJ* 444. Higgins describes the Congo's UN admission as a derogation from 'the fairly distinct pattern of consistent adherence to the requirement of a stable and effective government': *Development*, 21–2.

authorities, Belgium was precluded from denying the consequences of its own conduct. Thereafter there was no international person as against whom recognition of the Congo could be unlawful. It is to be presumed that a new State granted full formal independence by a former sovereign has the international right to govern its territory—hence United Nations action in support of that right. On the other hand, in the secessionary situation the position is different. A seceding entity seeks statehood by way of an adverse claim, and in general, statehood can only be obtained by effective and stable exercise of governmental powers. Acquisition of territory does not provide an exact analogy but the difference is similar to that between cession and prescription.

The position of Finland in 1917 to 1918 provides a good example of the latter situation. Finland was an autonomous part of the Russian Empire from 1807 until its declaration of independence after the November revolution. Its territory was thereafter subject to a series of military actions and interventions; it was not until after the defeat of Germany by the Entente and the removal of Russian troops from Finnish territory by Sweden that some degree of order was restored. In those circumstances it was not surprising that the Commission of Jurists appointed by the League to report on certain aspects of the Åland Islands dispute were of the opinion that . . .

> for a considerable time, the conditions required for the formation of a sovereign State did not exist. In the midst of revolution and anarchy, certain elements essential to the existence of a State, even some elements of fact, were lacking for a fairly considerable period. Political and social life was disorganized; the authorities were not strong enough to assert themselves; civil war was rife; further, the Diet, the legality of which had been disputed by a large section of the people, had been dispersed by the revolutionary party, and the Government had been chased from the capital and forcibly prevented from carrying out its duties; the armed camps and the police were divided into two opposing forces, and Russian troops, and after a time Germans also, took part in the civil war between Red and White Finnish troops. It is therefore difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. This certainly did not take place until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops. It would appear that it was in May 1918, that the civil war was ended and that the foreign troops began to leave the country, so that from that time onwards it was possible to re-establish order and normal political and social life, little by little.[98]

The test applied rather strictly by the Jurists reflects the requirement of government in a secessionary situation. The Commission of Rapporteurs

[98] LNOJ spec supp no 4 (1920) 8–9.

disagreed with the Jurists, because of the importance they attached to Soviet recognition of Finland,[99] and, more particularly, because of Finland's continuity of personality before and after 1917. They therefore applied rules relating to the restoration of law and order in Finnish territory,[100] and to the legality of foreign assistance for that purpose,[101] rather than the stricter rules relating to the initial establishment of an independent government by secession.[102]

The following conclusions suggest themselves. First, to be a State, an entity must possess a government or a system of government in general control of its territory, to the exclusion of other entities not claiming through or under it.[103]

Second, international law lays down no specific requirements as to the nature and extent of this control, except that it include some degree of maintenance of law and order and the establishment of basic institutions.

Third, in applying the general principle to specific cases, the following must be considered:

(1) whether the statehood of the entity is opposed under title of international law: if so, the requirement of effectiveness is likely to be more strictly applied;
(2) whether the government claiming authority, if it does not effectively control the territory in question, has obtained authority by consent of the previous sovereign and exercises a certain degree of control;[104]
(3) there is a distinction between the creation of a new State on the one hand and the subsistence or extinction of an established State on the other.[105] In the former situation, the criterion of effective government may be applied more strictly.[106]

These considerations are borne out in practice. The factors favouring the statehood of the Congo apply equally to Rwanda and Burundi,[107] as well as to

[99] LN Council Doct B7: 21/68/106 (1921) 22.

[100] Ibid, 23: '[T]he legal government, appointed by the Diet before its dispersion by the insurrection, never ceased to exist throughout a part of the country, even in the midst of the civil war. It took refuge at Vasa, raised an army there, reconquered the provinces one by one and ended by crushing the revolution.'

[101] Ibid: 'The sovereignty of the Finnish State was not diminished by the co-operation of Germany. A State does not lose its sovereign rights because it receives outside aid for the re-establishment of its authority.'

[102] Larnaude and Struycken, two of the Commission of Jurists, later reaffirmed their view before the Council: LNOJ September 1921, 697. Huber was absent and could not give an opinion.

[103] This meets the common case where some of the functions of government are exercised by other States or entities on a basis of agency. Cf ARSIWA, Art 6.

[104] Cf Higgins, *Development*, 24. See also below, Chapter 8.

[105] For the case of the so-called 'failed States' see Schachter (1998) 36 *Col JTL 7*, and see Chapter 17.

[106] See to this effect Warbrick in Evans (ed), *Aspects of Statehood and Institutionalism in Contemporary Europe*, 14–16. See also below, Chapter 16.

[107] Cf Higgins, *Development*, 22–3.

other cases of 'premature independence'. On the other hand, where entities attempt to secede from within the State, the requirement of effectiveness is strictly applied: this was so with Biafra, for example, and in the very many cases of unsuccessful secession since (reviewed in Chapter 9).

The cases of the 'divided States' are also of interest. The statehood of Korea was certified by General Assembly resolution 195 (III): there the grant of independence by consent of the previous sovereign to 'Korea' as a whole, and the establishment in conformity with the various instruments of a freely elected government justified for a time the claim of the Republic of Korea to be 'the government of Korea' as a whole.[108] But the continuance of an effective regime in the North led eventually to the acknowledgment of its separate statehood, leading to the eventual admission of both North and South Korea to the United Nations.[109] The case of Vietnam was less clear, if only because of the contradictory grants of power to various regimes by France, as well as the doubtful independence of the 'Republic of Vietnam'. And Taiwan, though possessing an effective government, has not been recognized as a separate State, principally because at the time its government moved offshore from mainland China, and for long afterwards, it did not claim to be separate but continued as 'the Government of China': in other words, its claim was not adverse to that of the People's Republic of China.[110]

The requirement of government thus has the following legal effects. Positively, the existence of a system of government in and of a specific territory indicates a certain legal status, and is in general a precondition for statehood. Continuity of government in a territory is an important factor determining continuity of the State concerned, as well as continuity between different forms of legal personality (see further Chapter 16). Although the law distinguishes States from their governments, normally only the government of a State can bind that State, for example by treaty. The existence of a government in a territory is thus a precondition for the normal conduct of international relations. Negatively, the lack of a coherent form of government in a given territory militates against that territory being a State, in the absence of other factors such as the grant of independence to that territory by a former sovereign. 'Nomadic tribes . . . travers[ing] the desert on more or less regular routes' may not have government in the sense required and so may not be States, though they may have a more limited legal personality.[111]

[108] Cf Rudzinski (1952) 480 *Int Conc* 173.

[109] SC res 702, 8 August 1991; GA res 46/1, 17 September 1991.

[110] Changes in the nature of Taiwanese claims may be in train: see Chapter 5. Generally on the 'divided States' see Chapter 10.

[111] ICJ Rep 1975 p 12, 41 (para 87). See further Chapter 6.

To summarize, statehood is not simply a factual situation. It is a legally circumscribed claim of right, specifically to the competence to govern a certain territory. Whether that claim of right is justified as such depends both on the facts and on whether it is disputed. Like other territorial rights, government as a precondition for statehood is thus, beyond a certain point, relative. But it is not entirely so: each State is an original foundation predicated on a certain basic independence. This was represented in the Montevideo formula by 'capacity to enter into relations with other States'.

### (4) Capacity to enter into relations with other States

Capacity to enter into relations with States at the international level is no longer, if it ever was, an exclusive State prerogative.[112] True, States preeminently possess that capacity, but this is a consequence of statehood, not a criterion for it—and it is not constant but depends on the situation of particular States.[113] It might still be said that *capacity* to enter into the full range of international relations is a useful criterion, since such capacity is independent of its recognition by other States and of its exercise by the entity concerned.[114] Something like this seems to have been the view when the UK voted against a proposed General Assembly resolution calling for national liberation movements to be accorded status under the Convention on the Representation of States in their Relations with International Organizations of Universal Character. The UK Representative stated:

> [T]here is no justification for the resolution to call upon States to accord to certain national liberation movements, functional privileges and immunities. An entity other than a State cannot be regarded as the same as the government of a State. A national liberation movement does not have the same ability as a government to provide the guarantee of good conduct and behaviour which a host country is entitled to require.[115]

[112] Cf Opinion 1/94, *Community Competence to Conclude Certain International Agreements*, 1994 ECR I-5276.

[113] Some writers nonetheless suggest this as a distinct criterion of statehood: e.g., Hillgruber (1998) 9 *EJIL* 491, 499–502. See also Hillgruber, *Aufnahme neuer Staaten*, 42: 'Die Fähigkeit und die . . . Bereitschaft, die Staaten nach allgemeinen Völkerrecht obliegenden Pflichten zu erfüllen, wird zu so zum entscheidenden Kriterium für die Anerkennung eines Neustaates als Völkerrechtssubjekt.' Vukas takes the better view, i.e., that capacity is more a consequence than a criterion of statehood. Vukas (1991/VI) 231 *HR* 263, 282.

[114] Montevideo Convention, Art 1(d); *Restatement 2nd, Foreign Relations Law of the US*, ss 4, 100(c); *Restatement 3rd*, s 201, comment e.

[115] Statement of Mr FD Berman, 7 December 1984 (1984) 55 *BY* 446. GA res 43/160/A, 9 December 1988, noting that SWAPO and the PLO already had been granted observer status (respectively, by GA resns 31/152, 20 December 1976 and 3237 (XXIX), 22 November 1974), extended the organizations a privilege of direct communication to the General Assembly; but GA res 43/160/B

But capacity, competence or 'ability' in this sense depends partly on the power of internal government of a territory, without which international obligations may not be carried into effect, and partly on the entity concerned being separate for the purpose of international relations so that no other entity both carries out and accepts responsibility for them. In other words, capacity to enter into relations with other States, in the sense in which it might be a useful criterion, is a conflation of the requirements of government and independence.[116] To the latter we must now turn.

## (5) Independence

Independence is the central criterion for statehood.[117] As Judge Huber stated in the *Island of Palmas* arbitration:

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries, and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.[118]

In more than one sense it has been a 'point of departure', since the difficulty of applying independence as a criterion leads in many cases to assumptions, based on little or no argument as to the independence or otherwise of an entity. The claim of international law to determine questions of statehood is squarely in issue.

As usual, the problem is partly one of determining the purposes for which and the context within which the question is asked. Different legal consequences may be attached to lack of independence in specific cases. Lack of independence

noted 'that the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character . . . regulates only the representation of States in their relations with international organizations.' See generally Morgenstern, *Legal Problems of International Organizations*, 68–74.

116 For a discussion of nascent independence and the effect that a growing functional capacity to engage in international relations may have on status see Lloyd and James (1996) 67 BY 479. See further Chapter 8.

117 See, e.g., Higgins, *Development*, 25–42; Kamanda, *Legal Status of Protectorates*, 188–91; Verzijl, *International Law*, vol II, 455–90; Mendelson, *Acquisition of Membership in Selected International Organizations*, 114–67. The term 'independence' is sometimes used as a synonym for statehood: 'In practice, the third element [that a State be under the control of its own government] is the most salient factor in the statehood calculus', *Efrat Ungar v Palestine Liberation Organization*, 402 F 3d 274, 288 (Selya, CJ, 1st Cir, 2005) (citing the first edition of this work (1979), 42).

118 *Island of Palmas Case* (1928) 2 RIAA 829, 838.

may be so complete that the entity concerned is not a State but an internationally indistinguishable part of another dominant State. A grant of 'independence' may, in certain circumstances, be a legal nullity, or even an act engaging the responsibility of the grantor, as with so-called 'puppet States'. Or an entity may be independent in some basic sense but act in a specific matter under the control of another State so that the relation becomes one of agency, and the responsibility of the latter State is attracted for acts of the former.[119] Moreover, although our concern is with independence as the basic element of statehood in international law, in other contexts the term can have other meanings. In particular it is important to distinguish independence as an initial qualification for statehood and as a condition for continued existence. A new State attempting to secede will have to demonstrate substantial independence, both formal and real, from the State of which it formed part before it will be regarded as definitively created. On the other hand, the independence of an existing State is protected by international law rules against unlawful invasion and annexation, so that the State may, even for a considerable time, continue to exist as a legal entity despite lack of effectiveness. The context in which the claim to independence or to loss of independence is made is thus highly significant.

There is a related distinction to be drawn between independence as a criterion for statehood and independence as a right of States.[120] These distinctions are relevant to an examination of the 'leading case' on the notion of independence, the *Austro-German Customs Union Case*.[121] This involved the meaning of the term 'independence' in a treaty designed to guarantee the continuance of Austria and its separation from Germany; thus the context was that of the putative loss of independence of an existing State. The Court was asked to advise whether the proposed customs union between Germany and Austria was consistent with obligations of Austria under the Treaty of Saint-Germain and the Protocol of Geneva.[122] The Court was unanimous in holding that the proposed regime,

[119] The ILC Articles on State responsibility avoid the terminology of agency but allow that one State may be responsible for the conduct of another in several contexts: where the latter acts on the instructions of the former or under its direction or control in the relevant respect (ARSIWA, Art 8), where the former has adopted conduct not otherwise attributable to it (Art 11), where the former has aided or assisted the latter (Art 16), where the former 'directs and controls' the latter (Art 17) or where the former has coerced the latter (Art 18).

[120] Cf Whiteman 5 *Digest* 88–124; and the Draft Declaration of the Rights and Duties of States, 1949, Art 1: 'Every State has the right to independence, and hence to exercise freely and without dictation by any other State, all its legal powers, including the choice of its own form of government.'

[121] PCIJ ser A/B no 41 (1931).

[122] By Art 88 of the Treaty of Saint Germain-en-Laye, 10 September 1919, 226 CTS 8, 36, Austria's independence was inalienable except with the consent of the League Council: Austria undertook 'to abstain from any act which might directly or indirectly or by any means whatever compromise

based on the equality of the two parties and terminable on twelve months notice,[123] was not an 'alienation' of independence. Indeed, that proposition could 'scarcely be denied'.[124] But, by eight votes to seven, the Court held the proposed union unlawful. The majority, while agreeing that Austria's independence was not 'strictly speaking' endangered within the meaning of Article 88, held that the proposed union was a 'special regime or [grant of] exclusive advantages calculated to threaten [*sc.* economic] independence' within the meaning of the Protocol.[125] Judge Anzilotti doubted whether the Protocol could expand the scope of obligation under the Treaty but held the union inconsistent with both.[126] A strong minority held it inconsistent with neither.[127] The case has been subject to convincing criticism;[128] and indeed a majority can be found against each possible *ratio*. But its importance for present purposes is very limited.

For it is clear that the Protocol, with its emphasis on 'economic independence', asserted an extensive interpretation of Article 88. The Protocol implies that 'a special regime or exclusive advantages' threatening merely 'economic independence' was prohibited by Article 88, a point the Court expressly denied.[129] Moreover, the various agreements were not concerned with the criteria for statehood but with the preservation of full independence as a (possibly unwelcome) duty incumbent upon Austria for the benefit of general European peace.[130] This point was emphasized in the French submission and in the oral argument of Basdevant[131] and was implicitly accepted by the Court:

*irrespective of the definition of the independence of States which may be given by legal doctrine or may be adopted in particular instances in the Practice of States*, the independence of

her independence . . . by participation in the affairs of another Power': 112 BFSP 317, 360. By Protocol no 1, Geneva, 4 October 1922, Austria again undertook not to alienate its independence, to abstain from all 'negotiation and from any economic or financial undertaking calculated directly or indirectly to compromise this independence', and not to grant 'to any State whatever a *special régime* or *exclusive advantages* calculated to threaten this independence': 116 BFSP 851 (emphasis added).

[123] Protocol of Vienna, Arts XI(3), XII: 134 BFSP 991. The proposed customs union was in fact abandoned before the Court's judgment. See further Spiermann *Permanent Court* 316–24.

[124] PCIJ ser A/B no 41, 52; Judge Anzilotti, ibid, 66–7.

[125] Ibid, 52 (Guerrero, Rostworswski, Fromageot, Altamira, Urrutia, Negulesco, de Bustamante).

[126] Ibid, 64, 73.

[127] Ibid, 81–7 (Adatci, Kellogg, Rolin-Jacquemyns Hurst, Schücking, van Eysinga, Wang).

[128] Brierly, in *Collected Papers*, 242–9; Morgenthau, *Politics among Nations* (5th edn), 426 (describing the Opinion as 'the greatest intellectual debacle in the history of that judicial agency'). See also Lauterpacht, *Development*, 47–9.

[129] PCIJ ser A/B no 41, 52.

[130] Ibid, 57 (Anzilotti J).

[131] Cf French submission, PCIJ ser C no 53, 128: 'En second lieu, ce que le Traité de Saint-Germain et le protocole de 1922 ont eu en vue, c'est l'independence de l'Autriche. Ils ont envisagé non la conception théorique de l'indépendance des États, mais l'independance de l'Autriche . . . telle qu'elle se comportait en 1919.' Emphasized in oral argument of Basdevant: ibid, 400, 404, 417. Cf Kaufmann's response, ibid, 508–9; Basdevant's reply, 566–7.

Austria, according to Article 88 of the Treaty of Saint-Germain, must be understood to mean the continued existence of Austria within her present frontiers as a separate State with the sole right of decision in all matters economic, political, financial or other with the result that that independence is violated, as soon as there is any violation thereof, either in the economic, political, or any other field, these different aspects of independence being in practice one and indivisible.[132]

This passage is often cited as a definition of independence, but it must be read in its specific context. As a general definition of independence as a criterion of statehood it is much too absolute.

The joint minority opinion differed not so much over the definition of 'independence' for the relevant purposes as over the disputed questions of fact.[133] On the other hand, the definition of independence given by Judge Anzilotti has become the classic statement:

[T]he independence of Austria within the meaning of Article 88 is nothing else but the existence of Austria, within the frontiers laid down by the Treaty of Saint-Germain, as a separate State and not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that the State has over it no other authority than that of international law . . . It follows that the legal conception of independence has nothing to do with a State's subordination to international law or with the numerous and constantly increasing states of *de facto* dependence which characterise the relation of one country to other countries. It also follows that the restrictions upon a State's liberty, whether arising out of ordinary international law or

[132] PCIJ ser A/B no 41, 45 (emphasis added). Cf the significantly wider terms of Art 4 of the Austrian State Treaty, 1955: 217 UNTS 225, 227–9: '1. The Allied and Associated Powers declare that political or economic union between Austria and Germany is prohibited. Austria fully recognizes its responsibilities in this matter and shall not enter into political or economic union with Germany in any form whatsoever. 2. In order to prevent such union Austria shall not conclude any agreement with Germany, nor do any act, nor take any measures likely, directly or indirectly, to promote political or economic union with Germany, or to impair its territorial integrity or political or economic independence. Austria further undertakes to prevent within its territory any act likely, directly or indirectly, to promote such union and shall prevent the existence, resurgence and activities of any organizations having as their aim political or economic union with Germany, and pan-German propaganda in favour of union with Germany.' On the 1955 State Treaty see Curtis (1981) 7 *RIS* 159, 159–64; Schweitzer (1985) 23 *AdV* 130; Köck (1996) 50 *ZföR* 75.

[133] The minority opinion gave a purely formal, and unhelpful, definition of independence: 'A State would not be independent in the legal sense if it was placed in a condition of dependence on another Power, if it ceased itself to exercise within its own territory the *summa potestas* or sovereignty, i.e. if it lost the right to exercise its own judgment in coming to the decisions which the government of its territory entails.' PCIJ ser A/B no 41, 77. See for comment on the case and on the problem of defining 'sovereignty' (in the sense of independence) generally, Fried (1994) 20 *Canada–United States LJ* 39, 39–42.

contractual engagements, do not as such in the least affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.[134]

Two main elements are involved here: the separate existence of an entity within reasonably coherent frontiers; and its not being 'subject to the authority of any other State or group of States', which is to say that it has over it 'no other authority than that of international law'.[135] 'Separate existence' in this sense is dependent upon the criteria discussed already; that is, upon the exercise of substantial governmental authority with respect to some territory and people. Where this exists, the area concerned is potentially a 'State-area'. But as Judge Anzilotti made clear, some further element is necessary—the absence of subjection to the authority of another State or States. In this context, there are various possibilities. It may be that an entity, while not formally independent, operates in fact with substantial freedom in both internal and external affairs. This situation arises where formal or nominal claims are made to 'suzerainty' or 'residual sovereignty', or where the gradual grant of power from a metropolitan State to a former colony masks the emerging statehood of the latter. Or it may be that an entity formally independent is in fact under the direction of another State to the extent that its formal independence is nugatory or meaningless. These different situations correspond with an ambiguity in the term 'authority' or in Vattel's formulation 'rule', which may mean a claim of right, or the actual exercise of power in derogation from such a claim. It is thus necessary to distinguish 'formal' from 'actual' independence, and to determine the relation between them.[136]

[134] PCIJ ser A/B no 41, 57–8. But cf Anzilotti's view (a denial of any objective rules defining statehood) in his *Corso di Diritto Internazionale* (3rd edn), vol I, 163–6. See also Austria's definition of independence in its written submissions of 26 June 1931: 'Vu la grande diversité des intérêts et motifs en cause et des formes qu'un traité de sujétion ou de protection peut revêtir, la question de savoir si un État est à ranger dans la catégorie d'État dépendant ou indépendent peut être délicate, notamment si la protection ou la garantie de l'indépendance est expressément stipulée, ou si la réciprocité des intérêts des États protecteur et protégé est clairement à la base de leurs rapports réciproques. Mais le critère essential d'après lequel la classification doit être faite n'est pas moins certain: à savoir le fait d'une sujétion, ou le fait soit du contrôle, soit de l'ingérence d'une volonté étatique supérieure dans la gestion des affaires d'un État, faits qui affectent la personnalité de celui-ci sa capacité juridique de façon à lui imposer une qualification juridique de caractère permanent et stable.

'Toutes les autres modifications que l'indépendance d'un État peut subir ne constituent que des *restrictions à l'exercice de sa souveraineté*; ou bien il ne s'agit même qui de *dépendances ou interdépendances de fait* qui ne touchent pas au problème de droit que est ici en cause.' (Emphasis in original.) PCIJ ser C no 53, 90.

[135] Cf Vattel, *Droit des gens*, vol I, ch 1, ss 5–11: Sovereignty is 'the right to self-government', so that a people 'under the rule of another' is not a State.

[136] Marek, *Identity and Continuity*, 162–89; *Higgins, Development*, 26; Bothe and Schmidt (1992) 96 *RGDIP* 811, 823 (contrasting earlier purely formal independence of Belarus and Ukraine with later actual independence).

### *(i) Formal independence*

Formal independence exists where the powers of government of a territory (in internal and external affairs) are vested in the separate authorities of the putative State. The vesting of power, in this sense, may arise under the law in force in the territory (e.g., its constitution) or it may be the result of a grant of full power from the previous sovereign; it may be established, or recognized, by bilateral or multilateral treaty. Formal independence involves, in Rousseau's terminology, '*l'exclusivité de la compétence*'.[137] This aspect is best illustrated by examining some factors that have been regarded as relevant to formal independence in international practice.

#### (a) Situations not derogating from formal independence

The following types of situation are not regarded as derogating from formal independence, although if extended far enough, they may derogate from actual independence.[138]

#### *(1) Constitutional restrictions upon freedom of action*

The written constitutions of many States contain legally enforceable restrictions on governmental action: these are, of course, entirely consistent with independence. For example the constitutions of the States emerging in the early 1990s as a result of the dissolution of the former Yugoslavia contained provisions guaranteeing minority rights, as stipulated by the EC Guidelines for Recognition.[139] Macedonia presented a special case. Greece had expressed the view that the name 'Macedonia' implied territorial ambitions against it and indicated that guarantees were required from Macedonia on this point.[140] The *Guidelines* stipulated that

> a Yugoslav Republic . . . commit itself, prior to recognition, to adopt constitutional and political guarantees ensuring that it has no territorial claims towards a neighbouring Community State and that it will conduct no hostile propaganda activities versus a

[137] Rousseau (1948) 73 *HR* 171, 220; Rousseau, *DIP*, vol II, 55–94 (to the same effect).

[138] Cf Verzijl's categories: '(a) Permanent Neutrality; (b) Protection; (c) Guarantee and/or control in general; (d) Various limitations on the national constitution; (e) Forbidden, or automatic, association with another State; (f) Attachment to a foreign State for specific purposes; (g) Conduct of diplomatic or consular relations of a State by another State; (h) Restrictions in territorial respect; (i) Subjection to special rights of control; (j) Subjection to the principle of the open door; (k) Capitulatory system; (l) Demilitarization.' *International Law* II, 455–90.

[139] EC Guidelines (1992) 31 ILM 1486.

[140] For background see Warbrick and Lowe (1993) 42 *ICLQ* 433, 437–8; Craven (1995) 16 *AYIL* 199, 201–7; Pazartzis (1995) 41 AFDI 281, 284–88. The United States, on 5 November 2004, recognized the State under its own constitutional name, 'Republic of Macedonia'.

neighbouring Community State, including the use of a denomination which implies territorial claims.[141]

Accordingly Macedonia amended Article 49 of its Constitution, to remove reference to the protection by the Republic of the 'status' and the 'rights of citizens of neighbouring countries who are of Macedonian origin', and it agreed to adopt the name 'Republic of Macedonia (Skopje)'.[142] This was an unusual requirement,[143] imposed in a facially neutral way but in fact directed at one State alone. But regardless of the wisdom or otherwise of EC policy towards Macedonia, it was not suggested that these requirements derogated from Macedonia's formal independence.

A more extreme case of constitutional limitations (extending far beyond the imposition of a name or a particular external policy) was the 1960 Constitution of the Republic of Cyprus: there a range of detailed requirements were incorporated in the constitution, which was subjected to a form of international guarantee and much of which was stated to be unamendable. (The Cyprus conflict is discussed in Chapter 5.) But provided no other State possesses discretionary authority to alter its constitution,[144] the fact that a State has no power to do so itself does not derogate from formal independence. Canada only acquired that power (and then with certain exceptions) in 1949, after more than twenty years of independence,[145] and the process of patriation of the Constitution was not completed until 1982.[146] The constituent power

[141] However, concern for the naming of States was not entirely confined to Macedonia. A proposal in Uzbekistan to change the name of that State to 'Turkestan' or 'Turania' was said to imply a claim to the territory of neighbouring Central Asian States, and was not implemented. See Dawisha and Parrott, *Russia and the New States of Eurasia*, 85.

[142] *Commission of the European Communities v Hellenic Republic*, Case C-120/94 R (interim measures order, 29 June 1994), 100 ILR 221, 229 (para 19).

[143] See, e.g., Janev (1999) 93 *AJ* 155, 155–60. The Arbitration Commission of the Conference on Yugoslavia considered that Macedonia satisfied EC criteria for recognition): see Opinion 6, On the Recognition of the Republic of Macedonia by the European Community and its Member States, 11 January 1992, 92 ILR 182. Despite this, Macedonia was not recognized until April 1993, when it was admitted to the UN under the name 'The Former Yugoslav Republic of Macedonia (FYROM)' (SC res 817, 7 April 1993; GA res 47/225, 8 April 1993), and even then only by some States (e.g., the United Kingdom). The United States recognized Macedonia under the title 'FYROM' in February 1994. Greece recognized FYROM in September 1995, under Art 1(1) of a Greece–FYROM Interim Accord and Memorandum on Practical Measures Related to the Interim Accord, 13 September 1995, reprinted at 34 ILM 1461. See also Craven (1995) 16 *AYIL* 199; Poulakidas (1995) 18 *Hastings ICLR* 397; Triantafyllou (1995) 73 *RDISDP* 261; Riedel (1996) 45 *Südost-Europa* 63; Hilpold (1998) 42 *Recht in Ost und West* 117.

[144] This seems to have been an objection to Cracow's independence (1815–46): see Ydit, *Internationalized Territories*, 95–108, 107.

[145] British North America Act (No 2) 1949 (UK) s 1.

[146] Canada Act 1982 (UK), sch B. On the Canada Bill it was said by the British Minister: 'This . . . important Bill . . . marks the formal removal of an anomalous qualification to the exercise by Canada of its independence—an independence which *de facto* stretches back for many decades.' See (1982) 53

under discussion here is to an authority under the law of the State concerned: internationally, a State may change its constitutional arrangements in violation of the previous municipal law, whether by a coup or a revolution (though here again Cyprus was an apparent exception).

*(2) Municipal illegality of the government of a State*

The illegality of a *de facto* government under the law of the State concerned is not a derogation from formal independence. This is a further corollary of the rule that revolutions do not affect the continuity of the State; by definition every coup or revolution involves a constitutional discontinuity to a greater or lesser extent.[147]

*(3) Treaty obligations*

The International Court has frequently confirmed the principle that treaty obligations do not derogate from the formal independence of the States parties. In *The Wimbledon*, which concerned the effects on Germany of the Treaty of Versailles, the Court . . .

> decline[d] to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right to enter into international engagements is an attribute of State sovereignty.[148]

This principle was confirmed in later decisions of the Permanent Court[149] as well as by its successor. In the *Nicaragua case*, the Court observed that a State can undertake by international agreement to adopt a particular domestic policy:

> The assertion of the commitment raises the question of the possibility of a State binding itself by agreement in relation to a question of domestic policy, such as that relating to the holding of free elections on its territory. The Court cannot discover, within the

*BY* 348–9, and see further Albert (1981) 23 *Harv ILJ* 395; Hogg (1983) 8 *Queen's LJ* 123; Rémillard (1984) 25 *Cahiers de droit* 15.

147 See Finnis, 'Revolutions and Continuity of Law' in Simpson (ed), *Oxford Essays in Jurisprudence* (second series, 1973), 44; and see further Chapter 16.

148 PCIJ ser A no I (1920) 25. In consequence Germany was required to allow passage through the Kiel Canal for war munitions destined for Poland, at war with Russia, despite the fact that Russia was not a party to the Treaty of Versailles. The same argument had been raised by Germany, and rejected, before signature of the Treaty: Temperley, *History of the Peace Conference at Paris*, vol II, 397, 408.

149 *Exchange of Greek and Turkish Populations*, PCIJ ser B no 10 (1925) 21; *Jurisdiction of the European Commission of the Danube*, PCIJ ser B no 14 (1927) 36; cf the Austrian Memorial in the *Customs Union Case*, PCIJ ser C no 53, 91–3.

range of subjects open to international agreement, any obstacle . . . to hinder a State from making a commitment of this kind. A State, which is free to decide upon the principle and methods of popular consultation within its domestic order, is sovereign for the purpose of accepting a limitation of its sovereignty in this field.[150]

A State, then, may enter into an international agreement determining core issues such as the form of its own government.

*(4) Military bases or other territorial concessions*

Military or other territorial concessions do not, of themselves, derogate from formal independence. The sometimes extensive territorial concessions granted by the North African States and China nevertheless preserved the formal 'territorial integrity and political independence' of those States.[151] One consequence of continued statehood in such situations may be the ability to terminate or avoid such arrangements.[152]

*(5) Exercise of governmental competence on a basis of agency*

The exercise of governmental competence by another international person on behalf of and by delegation from a State is not inconsistent with formal independence. Foreign affairs and defence powers are quite often so delegated; as are certain economic or technical competences (e.g., in the field of currency or police). The powers delegated to neighbouring States by the European 'microstates' are an example.[153] The essential point is that the competence is exercised not adversely to but in right of the State concerned.

*(6) Possession of joint organs for certain purposes*

The creation of joint organs to carry out certain governmental functions is quite a common feature of international relations. For example Austria-Hungary under the Dual Monarchy (1867–1918) possessed joint organs for foreign affairs, defence, finance and trade, but Austria and Hungary probably remained separate international entities.[154]

*(7) Membership of international organizations possessing coercive authority*

Despite the extensive powers of the Security Council under the Charter, the United Nations 'is based on the principle of the sovereign equality of all its

[150] ICJ Rep 1986 p 14, 131. [151] Verzijl, *International Law*, vol II, 482–8.

[152] Higgins, *Development*, 32. On military 'servitudes' generally see ibid 31–4; Esgain in O'Brien (ed), *New Nations in International Law and Diplomacy*, 42–97; De Lupis, *International Law and the Independent State*, 200–23. [153] See Duursma, 161–70, 274–88; and see further Chapter 7.

[154] The ministries of foreign affairs, war and finance were joint institutions, as was a customs and trade control commission, the *Zoll- und Handelskonferenz*: Verosta and Seidl-Hohenveldern (eds), *Die völkerrechtliche Praxis der Donaumonarchie*, 82–8. See also Nemitz (1997) 43 *Osteuropa-Recht* 89, 120 (on joint Austro-Hungarian organs not derogating the separate legal status of the component entities of the Dual Monarchy).

members'.[155] Membership of the European Union involves an increasing abdication of powers over a wide range of matters including significant fields of external relations, but no one doubts that EU Member States retain formal independence. *A fortiori* this is true so far of other international organizations possessing lesser powers.

*(8) Other special relations: devolution and its residue*

Where a State comes into existence by gradual devolution from a metropolis, special relations may well continue to exist between the new and the old State. These may include common citizenship, special provision for immigration, extradition and such matters, and special defence arrangements. As will be seen in Chapter 8, within certain limits such relations do not prejudice formal independence.

**(b) Situations regarded as derogating from formal independence**

Two basic situations may be regarded as derogating from what would otherwise be formal independence as defined above.

*(1) The existence of a special claim of right to exercise of governmental authority over the putative State*

Where a State claims the right to exercise governmental authority over a territory the formal independence of that territory is in issue. This is an expression of Rousseau's requirement of *l'exclusivité de la compétence*.[156] Excluded from the category of 'special claims of right' are rights under general international law, for example, the rights of a belligerent over occupied territory. Examples of a 'special claim of right' include: the claim of the Government of Great Britain to bind the Dominions, without their separate consent, to the Treaty of Lausanne, 1924, and the claim of the Porte to conclude concessions for lighthouses in Crete and Samos. The acceptance by the Nationalist authorities of the proposition that Taiwan is part of a single China is perhaps a further example, although that claim is gradually being modified. In all such cases it is crucial that the governmental authority is claimed as of right, and not on the basis of the consent of the local unit.

*(2) Discretionary authority to intervene in the internal affairs of the putative State*

Discretionary authority to intervene in or conduct the internal affairs of a territory, whether or not it arises from a treaty or other consensual arrangement,

[155] UN Charter, Art 2(1). On the relationship between State sovereignty and the Charter see also Bourquin, *L'État souverain et l'organisation internationale*; Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations*; Korowicz, *Organisations internationales et souveraineté des États membres*, 185–257; Simma *et al*, *The Charter of the United Nations* (2nd edn), 68–91 and works cited.

[156] (1948) 73 *HR* 171, 220.

would appear to be inconsistent with formal independence. A striking case was the British claim to 'paramountcy' over the Indian Native States.[157] What is crucial here is *compétence de la compétence*: for example, the undefined powers of intervention asserted by France in respect of Monaco led to doubts concerning the latter's independence.[158] The point is that, in the absence of machinery for adjudication, a broad discretionary power of intervention can always be used with colour of right to deny local independence.[159]

*(ii) Real or actual independence*

Even in cases where formal independence appears to subsist, it may be necessary to enquire further as to the actual or effective independence of the putative State: this element corresponds to Rousseau's *plénitude de la competence*.[160] Actual independence is relative, or in Rousseau's terms 'quantitative': it is a matter of degree.[161] For present purposes it may be defined as the minimum degree of real governmental power at the disposal of the authorities of the putative State that is necessary for it to qualify as 'independent'. It is a matter of political fact; specific cases may raise serious problems of appreciation. Nevertheless, it is not the case that the problem 'escape[s] all definition'.[162] The way in which a rule is applied to the range of factual situations that have arisen is hardly less of a legal problem than the enunciation of the rule itself, especially when the rule has a general character. An examination of the practice reveals that the degree of actual independence necessary to qualify an entity as a State may be minimal, but that in cases of conflict of legal rights this element is of considerable importance. It also suggests several presumptions as to the existence or otherwise of actual independence. Again the point may be illustrated by an examination of factors that have been regarded as relevant.

**(a) Situations not derogating from actual independence**

*(1) Diminutive size and resources*

Diminutive size and resources are consistent with both formal and actual independence, as has been seen.

[157] See Jeffrey (ed), *People, Princes and Paramount Power*, 1, and see further Chapter 7.

[158] See Chapter 7. An earlier example was Cuba under the Treaty of Future Relations of 22 May 1903, incorporating the Platt Amendment in the Act of Congress of 2 March 1901: 96 BFSP 548, esp Art 3. See also 193 CTS 198. The legal debate is summarized by Fitzgibbon, *Cuba and the United States 1900–1935*, 89–93. The 1903 Treaty was abrogated by a much less draconian Treaty of 29 May 1934: 6 *Bevans* 1163, as to which see *Rasul v Bush*, 124 S Ct 2686, 2690–1 (2004) (Stevens J).

[159] Cf Mendelson, '*Acquisition*,' 160, 249–51.

[160] (1948) 73 *HR* 171, 248.

[161] Cf *Duff Development Co v Government of Kelantan* [1924] AC 797, 814 (Viscount Finlay).

[162] As Marek, *Identity and Continuity*, 112 asserts.

*(2) Political alliances and policy orientation between States*

The existence of close political and ideological links between States has been a feature of international relations in all epochs. Such links do not of themselves derogate from actual independence.[163]

*(3) Belligerent occupation*

Pending a final settlement of the conflict, belligerent occupation does not affect the continuity of the State. The governmental authorities may be driven into exile or silenced, and the exercise of the powers of the State thereby affected. But it is settled that the powers themselves continue to exist. This is strictly not an application of the 'actual independence' rule but an exception to it, based on the maxim *ex factis ius non oritur* pending a settlement of the conflict by a peace treaty or its equivalent.[164]

*(4) Illegal intervention*

Illegal intervention, in the absence of *debellatio*, does not extinguish either the formal or even (up to a point) the actual independence of the State. The Israeli and Syrian invasions of Lebanon;[165] the Vietnamese invasion of Cambodia;[166] the Soviet invasions of Czechoslovakia and Afghanistan;[167] and the United States invasions of Grenada, Panama, Afghanistan and Iraq, and subsequent events in those countries, were not regarded by other States as calling in question their existence as States. The same was true of the earlier intervention in Hungary, although the credentials of the Hungarian delegation were not

[163] This issue was raised by the Anglo-Iraqi Treaty of Alliance of 30 June 1930, 132 BFSP 280, intended to regulate relations after the termination of the Mandate. The treaty provided for 'co-ordination' of foreign policies (Art 1), mutual assistance in war (Art 4), and granted to the U.K. extensive facilities in time of war, including two permanent air bases (Art 5). The presence of British forces in Iraq was not to 'constitute in any manner an occupation and will in no way prejudice the sovereign rights of Iraq.' The treaty was to remain in force for 25 years and then to be renegotiated on a basis which still provided for 'the continued maintenance and protection in all circumstances of the essential communications of His Britannic Majesty.' (Art 11). The Permanent Mandates Commission, while expressing reservations, concluded that 'although certain of the provisions of the Treaty . . . were somewhat unusual in treaties of this kind, the obligations entered into by Iraq towards Great Britain did not explicitly infringe the independence of the new State.' Main, *Iraq from Mandate to Independence*, 104–12, 110. The Treaty of Alliance came into force upon Iraq's admission to the League on 3 October 1932. It was replaced by a Special Agreement of 4 April 1955: 162 BFSP 112, at which time the British bases were closed down.

[164] For the continuance of Austria after 1945 see Seidl-Hohenveldern in Brunner (ed), *Sowjetsystem und Ostrecht*, 833–46; and for Germany after 1945 see Chapters 10 and 12.

[165] Saseen (1990) 6 *Am UJILP* 57.

[166] E/CN.4/Sub 2/1982/L.4; Klintworth, *Vietnam's Intervention in Cambodia in International Law*, 59–84, 85–108.

[167] Statement of R Fursland, 12 October 1984, Third Committee, General Assembly, reprinted (1984) 55 *BY* 433.

approved in the period 1956 to 1963 as a gesture of disapproval of the Kadar government.[168] No equivalent action was taken in the Czechoslovak case. In the case of Iraq after the intervention and overthrow of its government in 2003, the Security Council, which had not authorised the use of force, shortly after took account of its consequences calling for a new government to be formed on the basis of free elections.[169] In the meantime the credentials of new Iraqi representatives to the General Assembly were accepted; the credentials question continuing somewhat longer with respect to the representation of Iraq in regional organizations.[170] On the other hand, the continuance of even an illegal occupation for a sufficiently long time after the cessation of hostilities will lead to the extinction of the occupied State by *debellatio*: this was the case with Hyderabad.[171]

**(b) Situations regarded as derogating from actual independence**

Three factors should be mentioned here:

*(1) Substantial illegality of origin*

Where an entity comes into existence in violation of certain basic rules of international law, its title to be a 'State' is in issue. Traditional international law in matters of statehood was based essentially on the principle of effectiveness,[172] although illegality of origin might sometimes be taken as a ground for non-recognition.[173] The question whether, and to what extent, the modern law has developed criteria for statehood not based on effectiveness is examined in Chapter 3.

*(2) Entities formed under belligerent occupation*

However, in at least one case before 1939 international law appeared to condition effectiveness by considerations of legality. As has been said, it has always been the case that belligerent occupation does not deprive the occupied State of its formal independence, though it might suspend the exercise of its powers. As a corollary, even before 1939, any new 'State' established during belligerent occupation was presumed not to be independent.[174] But this seems to

[168] Higgins, *Development*, 158–9.

[169] SC res 1483, 22 May 2003. See also SC resns 1500, 14 August 2003; 1511, 16 October 2003; 1546, 8 June 2004.

[170] See Grant (2003) 97 *AJ* 823, 837–8, 842.

[171] On Hyderabad see Eagleton (1950) 44 *AJ* 277; and contrast Das (1949) 43 *AJ* 57.

[172] See Kelsen, *Principles of International Law* (2nd edn), 420–33; Touscoz, *Le Principe d'effectivité dans l'ordre international*, 125–8.

[173] For eighteenth-century practice based on dynastic legitimacy see Grant (1999) 37 *Col JTL* 403, 418–20.

[174] Marek, *Identity and Continuity*, 111–26. The same approach was applied to puppet governments.

have been a presumption rather than a substantive rule. The independence of the illegal entity was probably not precluded, although its formation might attract the responsibility of the occupying State. A new entity established under occupation might, if able to establish its independence vis-à-vis the occupant, become a State, subject to cessation of hostilities with or recognition by the previous sovereign. For example, the Bao Dai regime established at the end of Japanese occupation of Vietnam must be presumed to have been non-independent; the Viet-Minh regime on the other hand, both in view of its effectiveness and its partial recognition by France, was in a different position.[175]

This distinction between illegality of origin and effectiveness was, however, blurred during the Manchurian crisis. There, as the Lytton Commission found, Japanese action contrary both to the Covenant and the Kellogg–Briand Pact resulted in the establishment of the 'State of Manchukuo', a puppet State under Japanese control.[176] This inspired the 'Stimson doctrine': the refusal of the United States, and of the large majority of Members of the League of Nations, to 'admit the legality of any situation *de facto* . . . which may impair . . . the sovereignty, the independence, or of the territorial and administrative integrity of the Republic of China . . .' or to recognize any situation '. . . brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928 [or, in the case of League Members, of the Covenant].'[177] In its reply to the Stimson note, the Japanese Government, while denying responsibility, doubted whether 'the impropriety of means necessarily and always avoids the end secured',[178] a point the 'academic validity' of which was conceded by some commentators.[179] Since Manchukuo was both illegally created and not independent, the need to distinguish the two issues did not really arise. But extensive enquiry by the League and its Committees

[175] See Thierry (1955) 1 *AFDI* 169, 171–4; Weiler, *Vietnam: Eine völkerrechtliche Analyse des amerikanischen Krieges und seiner Vorgeschichte*, 3–10.

[176] Manchukuo's independence was proclaimed on 18 February 1932, under the former Chinese Emperor Henry Pu-yi. The regime was eventually recognized by or had relations with Japan (see the Protocol of Good Neighbourship, 1932: 135 BFSP 637), San Salvador, Germany, Italy, Poland, the Vatican, Hungary and Spain. Grant, *Recognition of States*, 131, citing Shen, *Japan in Manchuria*, 299–300.

[177] Sec State to Chinese and Japanese Govts, 7 January 1932: 1932/III USFR 7; endorsed by Assembly Resolution of 24 February 1933: LNOJ spec supp no 101/I, 87. Japanese action in Manchuria was in violation of Art 12 of the Covenant, but in view of the fact that the hostilities were not part of a declared 'war', there was doubt whether Japan was technically in breach of Art 16 ('resort to war'): Lauterpacht (1934) 28 *AJ* 43. There was, however, a clear breach of Art 2 of the Pact of Paris: 128 BFSP 447. See also Jessup, *Birth of Nations*, 305–4. Lauterpacht referred to the episode as 'the crucial event in the history of the League': *Collected Papers*, vol 3, 471.

[178] (1932) 26 *AJ* 343.

[179] Wright (1932) 26 *AJ* 342, 345.

into the reality or otherwise of its independence would have been unnecessary if the illegality of its creation operated as a categorical bar on statehood.

For present purposes then, the position before 1945 could be summarized in the following terms. First, where a putative State (or government) was created in territory under belligerent occupation, there was a strong presumption against its actual independence. A non-independent 'State' (or 'government') so established was regarded as the agent of the belligerent occupant, with no more competence to bind the occupied State than its principal. The status of these rules in the modern law will be discussed in Chapter 3.

*(3) Substantial external control of the State*

An entity, even one possessing formal marks of independence, which is subject to foreign domination and control on a permanent or long-term basis is not 'independent' for the purposes of statehood in international law. In applying this principle, two difficulties arise.

First, in certain cases at least, substantial external domination may not be regarded as 'foreign', and may not therefore derogate from the statehood of the entity concerned. For example, quadripartite authority in Germany between 1945 and 1990 was not such as to extinguish that State's independence: the Four Powers were expressly acting as the Government of Germany and in that capacity were not foreign to Germany.[180] The fact that a foreign citizen is head of State does not mean that the State concerned is subject to foreign control, if the head of State operates as the local government or upon the advice of such a government.[181] But these examples are exceptional and limited in scope. What is necessary in such cases is a relatively clear understanding as to the capacity in which the various powers are exercised.[182]

Secondly and more generally, the problem is to determine at what point foreign influence becomes 'control' or 'domination'. This can raise difficult problems of appreciation, as the following review will indicate.

*(i) Protected States.* The problem of protectorates and other dependent States will be discussed in Chapter 7. An illustration of the problem of lack of actual independence is provided by the Malay States in the period prior to

[180] See Chapters 10 and 12. Other cases of international control such as Greece after 1827 and Albania after 1913 are discussed in Chapter 12.

[181] This is the case with those Commonwealth Members that have so far retained the Crown as Head of State. For the curious case of Rajah Brooke, see Smith, *GB & LN*, vol II, 83–96. For personal unions see Chapter 11.

[182] This was the key problem with Andorra, before the tripartite Treaty of Vicinage of 3 June 1993, (1994) 98 *RGDIP* 525 set out clearly the respective rights and obligations of France, Spain and Andorra. Andorra was thereafter admitted to the UN. GA res 232, 28 July 1993. See further Duursma, *Fragmentation*, 338–48.

1948: Kelantan may be taken as an example. Under an Agreement of 1910 the Sultan agreed to have no political relations with any foreign power except through the British Government and to follow in all matters of administration (except for matters concerning Islam or Malay custom) the advice of a British adviser.[183] The House of Lords was subsequently faced with the issue of the sovereign immunity of the Sultan in British courts, which was settled in the Sultan's favour by a Foreign Office certificate. The substantive point was, however, raised in argument: it was said that the certificate (which incorporated the text of the 1910 Agreement) was contradictory, and that the matter was thus effectively still open. Counsel for the Company argued that:

> The distinguishing mark of an independent sovereign power is that it has reserved to itself the right to manage its own internal affairs, but by the terms of the agreement . . . the King of England has the right to appoint a resident official to tell the Sultan . . . how he is to manage the internal affairs of his country. That is wholly inconsistent with the idea of an independent sovereign as that term is understood by jurists of repute.[184]

For the Sultan it was argued merely that 'some dependence on the protecting power is not inconsistent with sovereignty'.[185] The majority of the House of Lords held the certificate not to be contradictory, since the Foreign Office must be taken to have considered the Agreement before determining the question: its determination was in any case conclusive, irrespective of conflict. However, Viscount Finlay and Lord Carson (who dissented on a different point) disagreed on the question of actual independence. Viscount Finlay thought that '[w]hile there are extensive limitations upon its independence, the enclosed documents do not negative the view that there is quite enough left to support the [Kelantan Government's] claim to sovereignty.'[186] Lord Carson, on the other hand, thought it 'difficult to find in these documents the essential attributes of independence and sovereignty in accordance with the tests laid down by the exponents of international law.'[187] In fact it is difficult to see that the Government of Kelantan had any real power at all. Whilst Lord Carson was probably right on the general point, on the issue of sovereign immunity it must be said that British practice favoured the immunity of even merely formal sovereigns or princes. As Fawcett points out: 'The courts appear to have granted immunity from process to the rulers of protected states either by way

[183] 103 BFSP 518, Arts 1–2.

[184] *Duff Development Co v Government of Kelantan* [1942] AC 797, 800.

[185] Ibid, 803.

[186] Ibid, 816.

[187] Ibid, 830. For the background to *Duff Development*, see Marks, *British Acquisition of Siamese Malaya (1896–1909)*, esp 29–33, 79–91.

of a constitutional convention or in pursuit of a meaningless abstraction in the shape of a "sovereign ruler." '[188]

*(ii) Puppet States and governments* The term 'puppet State' is used to describe nominal sovereigns under effective foreign control, especially in cases where the establishment of the puppet State is intended as a cloak for illegality. The creation of Manchukuo has already been mentioned: in that case the Lytton Commission's Report of October 1932 found as a fact that: 'The independence movement, which had never been heard of in Manchuria before September 1931, was only made possible by the presence of Japanese troops and for this reason the present regime cannot be considered to have been called into existence by a genuine and spontaneous independence movement.'[189] The League Assembly endorsed this conclusion in the following terms:

> A group of Japanese civil and military officials conceived . . . the Manchurian independence movement as a solution to the situation in Manchuria as it existed after the events of September 18, and, with this object, made use of the names and actions of certain Chinese individuals and took advantage of certain minorities and native communities that had grievances against the Chinese administration. This movement, which rapidly received assistance and direction from the Japanese general staff, could only be carried through owing to the presence of the Japanese troops. It cannot be considered as a spontaneous and genuine independence movement. The main political and administrative power in the 'Government' of 'Manchukuo' . . . rests in the hands of Japanese officials and advisors, who are in a position actually to direct and control the administration in general. The Chinese in Manchuria, who . . . form the vast majority of the population do not support this 'Government' and regard it as an instrument of the Japanese.[190]

On this basis Manchuria was still regarded as Chinese territory, although it remained under Japanese control until 1945. The Yalta Agreement provided merely that China would 'retain full sovereignty in Manchuria'.[191] No formal action was deemed necessary for the resumption of actual control by China of the Three Provinces, and there was no reference to Manchuria in the Japanese

[188] Fawcett, *British Commonwealth*, 126–9. For Johor, which maintained its independence throughout the nineteenth century, see Braddell, *The Legal Status of the Malay States*; Thio (1967) 40 *Journal of the Malayan Branch of the Royal Asiatic Society* 1, 35; Trocki, *Development of Johor & Singapore*; Winstedt, *A History of Johore* (1365–1941), esp 98 ff; Nadarajah, *Johore and the Origins of British Control 1895–1914*, esp 109 ff. See also *Mighell v Sultan of Johore* [1894] 1 QB 149, 153, in which the Sultan of Johore, sued for breach of promise of marriage, was held entitled to sovereign immunity.

[189] *LN Publ* 1932 VII A 12, 71, in Wright, *Legal Problems in the Far Eastern Conflict*, 57–8.

[190] Resolution of 24 February 1933: LNOJ Sp Supp no 101/I, 87; Wright, *Legal Problems*, 57–8. Contrast Cavaré (1935) 42 *RGDIP* 5.

[191] Whiteman, 3 *Digest* 600.

Peace Treaty of 1951. In particular there was no retrocession or renunciation of title by Japan.[192] This confirms that Manchuria remained under Chinese sovereignty in the period 1932 to 1945.

Similar conclusions were reached with regard to two European 'States' established in German occupied territories. Slovakia was a nominally independent part of Czechoslovakia under German protection from 18 March 1939 to April 1945. It was accorded a certain degree of recognition at least *de facto* prior to September 1939,[193] but there can be little doubt as to its puppet character.[194] Croatia was also established on occupied (Yugoslavian) territory between 1941 and 1945. A United States International Claims Commission held that Yugoslavia was not a successor State to Croatia, and that damage to property caused by the puppet State was not action 'by Yugoslavia':

> Croatia embraced approximately one-third of the total area of Yugoslavia and approximately one-third of its population. At all times during the period of its existence as a so-called independent State, forces headed by Mihalovic and Tito conducted organized resistance within it. At no time during its 4-year life was Croatia's control of its territory and population complete. It was created by German and Italian forces and was maintained by force and the threat of force, and as soon as the threat subsided Croatia ceased to exist . . . [I]t appears well established that . . . Croatia was . . . .during its entire 4-year life . . . subject to the will of Germany or Italy or both, in varying degrees, except as to civil administration matters . . . It was unwanted by, and never became a part of, the permanent Government of Yugoslavia. It was not established through any dereliction on the part of the Government of Yugoslavia and that Government had no control over the acts of Croatia. It further seems clear that neither the Government of Yugoslavia nor its peoples received benefits from the takings alleged . . . Croatia is defined by contemporary writers as a 'puppet state' or 'puppet government', terms which appear to be of comparatively recent adoption in the field of international law . . . A 'puppet state' or local *de facto* government such as Croatia also possesses characteristics of 'unsuccessful revolutionists' and 'belligerent occupants'. It is . . . settled that a State has no international legal responsibility to compensate for damage to or confiscation of property by either . . . [F]or the reasons . . . given . . . , the

[192] By Art 8(a) Japan recognized, *inter alia*, 'any other arrangements by the Allied Powers for or in connection with the restoration of peace': 136 UNTS 45. cf *In re Nepogodin's Estate* (1955) 22 ILR 90 (Manchuria part of China in 1945).

[193] Marek, *Identity and Continuity*, 287–91, 290. The US did not recognize it: 1941/I(ii) USFR 32–3. The Czechoslovak Government-in-exile was recognized by the Allies during the War: e.g., 356 *HC Deb* col 552, 20 December 1939; 373 *HC Deb* col 86, 18 July 1941. This must have involved withdrawal of the previous *de facto* recognition accorded to Slovakia. See also Lemkin, *Axis Rule in Occupied Europe*, 139–44; Langer, *Seizure of Territory*, 207–44.

[194] Marek, 287–91; 1948/IV USFR 434; contrast Mikus, *La Slovaquie dans le drame de l'Europe*, 97–204. Mikus regarded Slovakia as having had a genuine independence movement but conceded 'une influence politique allemande incontestable.'

Government of Yugoslavia is not factually or legally a successor to the Government of Croatia.[195]

Although these findings, and the Tribunal's decision, were undoubtedly correct, comparison of a puppet entity with a local *de facto* government is not of much value. Puppet entities—whether 'States' or 'governments'—bind the existing State only so far as the Geneva Conventions allow: different tests apply to genuine *de facto* governments. Moreover, even if a puppet entity extended over the entire State, its status would be the same, which is not true of *de facto* governments.

In the absence of general recognition or other special factors, the status of a puppet entity and its international capacity are minimal. A request for annexation or intervention made by the puppet government of an admitted State is without international validity, as with the Baltic States annexed in 1940 by the Soviet Union.[196] Neither can a cession of territory by such a government bind the State.[197]

How is the puppet character of a given entity to be determined? In practice this raises less difficulty than might have been thought. The presumption of puppet character of regimes constituted under belligerent occupation, or subsequent to illegal intervention or to the threat or use of force, will often apply. In other cases it is of course a question of fact. Factors taken into account have included the following: that the entity concerned was established unlawfully, by the threat or use of external armed force; that it was imposed on, and

[195] *Socony Vacuum Oil Co. Claim* (1954) 21 ILR 55, 58–62. Cf the useful analysis by Sereni (1940) 35 *Am Pol Sc R* 1144.

[196] Marek, *Identity and Continuity*, 375–416; Ziemele, 'The Role of State Continuity and Human Rights in Matters of Nationality of the Baltic States' in Jundzis (ed), *The Baltic States at Historical Crossroads* (1998) 248. See also *A/S Tallinna Laevauhisus & Ors v Tallinna Shipping Co* (1945) 79 Lloyds LR 245, 251 (Atkinson J); affirmed on other grounds: (1946) 80 Lloyds LR 99.

[197] On the Lublin Government of Poland, established by the USSR in 1944 and effectively recognized by the Allies at the Yalta Conference, see Marek, *Identity and Continuity*, 478–507, Crawford (1977) 4(1–2) *Studies for a New Central Europe* 89, and the discussion in Chapter 17. The distinction between 'puppet State' and 'puppet government' is in point here. Marek contends that the Lublin Government was a 'puppet State,' not a 'puppet Government,' apparently on the twin bases of substantial loss of territory and revolutionary change in legal order. The argument cannot be accepted. As a puppet Government the new regime did not affect the position of the legitimate government-in-exile—at least prior to the Yalta Agreement. But the argument that it constituted a new 'puppet State' not identical with pre-1939 Poland ignores two points of major importance. Firstly, identity of a 'real' and a 'puppet' entity is, on Marek's principles, a priori impossible. Secondly, it is clear that the Lublin Government itself, the London Government and the USA, regarded the matter as one concerning recognition of a new government rather than a new State: after the end of the War there was no other Poland. Soviet practice (which Marek relies on to the contrary) is neither clear nor, in the circumstances, entitled to much weight. A puppet entity is to be judged as being what it claims to be: in this case, the 'government of Poland'—which, slightly reconstituted, the Lublin Government became.

rejected by the vast majority of the population it claimed to govern; that in important matters it was subject to foreign direction or control;[198] that it was staffed, especially in more important positions, by nationals of the dominant State. It was not regarded as relevant that certain individuals or groups (including minority groups) in the territory concerned carried out normal administrative functions, or constituted the formal government, if the elements mentioned above were present.[199] In such circumstances, any acts of the puppet entity must be regarded as void, as far as concerns the previously effective State, except to the extent that they can be regarded as acts of the belligerent occupant itself, or unless and until ratified by an effective government of the State concerned. Thus by Article 31 of the Peace Treaty of 1947, Italy recognized 'that all agreements and arrangements made between Italy and the authorities installed in Albania by Italy from April 7, 1939 to September 3, 1943, are null and void.'[200]

It is important to distinguish questions concerning the international status of 'puppet States' or 'governments' from issues of the responsibility of the State that has installed them. Thus in *Loizidou v Turkey*, a Cypriot national claimed damages for losses resulting from the seizure of property in northern Cyprus carried out by the local authorities under Article 159 of the TRNC constitution. The European Court of Human Rights found that acts of the TRNC were imputable to Turkey:

> It is not necessary to determine whether . . . Turkey actually exercises detailed control over the policies and actions of the authorities of the 'TRNC'. It is obvious from the large number of troops engaged in active duties in northern Cyprus . . . that [Turkey's] army exercises effective overall control over that part of the island. Such control . . . entails her responsibility for the policies and actions of the 'TRNC'.[201]

By the same token local courts established by an occupant—if operating independently—may afford local remedies for the purposes of the exhaustion

[198] But the influence of a belligerent occupant on a pre-existing government in the occupied State may not be enough: the Vichy regime was regarded as the genuine government of France until 1944, and de Gaulle's Free French were not accorded recognition as the French government-in-exile: see, e.g., 371 HC Deb col 1713, 27 May 1941; Flory, *Le Statut international des gouvernements réfugiés* (1952).

[199] Other puppet entities include Napoleonic Holland (Marek, *Identity and Continuity*, 170–3); the Kuusinnen Government of Finland, 1939–40 (ibid, 66–8); and Albania, 1939–44 (ibid, 331–7). On the puppet government set up by the Japanese in the Philippines, see 1943/III *USFR* 1105–7; UNLS *Materials on Succession of States*, 143–6. 170. Cf *In re G* (1945) 12 AD no 151 (on the puppet governments in Greece during World War II) 12 ILR 437; Ténékides (1947) 51 *RGDIP* 113.

[200] 49 UNTS 124. See also Marek, *Identity and Continuity*, 336; and generally Verhoeven, *Reconnaissance*, 54–64, 93–9.

[201] *Loizidou v Turkey* (Merits), ECHR 18 December 1996, 108 ILR 443, 466–7 (para 56).

of local remedies rule, even if the entity to which they profess allegiance has no distinct international status.[202]

Another distinct issue is that of the applicable law in armed conflict: courts may be asked to determine whether certain general or conventional rules of international law apply, and the answer may depend upon the independence, or otherwise, of putative entities party to the conflict. In the *Tadić* case, the question arose whether the conflict between Bosnian and Serb forces on Bosnian territory was international for purposes of application of the grave breaches regime of the 1949 Geneva Conventions 'which applies only to armed conflict of an international character and to offences committed against persons or property regarded as "protected", in particular civilians in the hands of a party to a conflict of which they are not nationals.'[203] The Trial Chamber took the view that a showing of continuous and effective control by the FRY over Serb forces in Bosnia was necessary to establish the international character of the conflict and that Serbia did not exercise such control at relevant times.[204] The Appeals Chamber applied a lower threshold: in its view, 'overall control' sufficed to establish the relevant connection between the foreign State and the local entity. In particular the power of the FRY over the 'foreign relations' of Republika Srpska was indicative of its overall dependence:

> [O]verall political and military authority over the Republika Srpska was held by the FRY . . . Indeed, the fact that it was the FRY that had the final say regarding the undertaking of international commitments is by the Republika Srpska, and in addition pledged, at the end of the conflict, to ensure respect for those international commitments by the Republika Srpska, confirms that (i) during the armed conflict the FRY exercised control over that entity, and (ii) such control persisted until the end of the conflict.[205]

[202] See *Cyprus v Turkey*, judgment of 10 May 2001, (2002) 35 EHRR 30, 970–77, 120 ILR 12, 40–6 (paras 82–102), esp 35 EHRR 30, 976, 120 ILR 12, 46 (para 101): '[T]he applicant Government's reliance on the illegality of the "TRNC" courts seems to contradict the assertion made by that same Government that Turkey is responsible for the violations alleged in northern Cyprus—an assertion which has been accepted by the Court . . . It appears indeed difficult to admit that a State is made responsible for the acts occurring in a territory unlawfully occupied and administered by it and to deny that State the opportunity to try to avoid such responsibility by correcting the wrongs imputable to it in its courts. To allow that opportunity to the respondent State in the framework of the present application in no way amounts to an indirect legitimization of a regime which is unlawful under international law.' (120 ILR 12, 46 (para 101).)

[203] *Prosecutor v Tadić*, ICTY Trial Chamber Case IT-94-1-T, (1997), 112 ILR 1, 178 (para 559).

[204] ICTY Case IT-94-1-T, 112 ILR 1, 194 (para 595). President McDonald dissented, arguing that the test of 'effective and daily control' was too stringent: ibid, 268–74.

[205] *Prosecutor v Tadić*, ICTY Appeals Chamber (1999) 124 ILR 61, 114–21 (para 160). See also De Hoogh (2001) 72 *BY* 255.

In *Rajíc*, a trial chamber held that the extent of control exercised over Croat forces in Bosnia was sufficient to allow their acts to be attributed to the State of Croatia. There, too, the standard applied was one of overall control.[206]

But the question of the standard of control for attribution of conduct to an intervening State is a distinct one from that required for determining the separate status of local entities; and the question of the applicable rules of international humanitarian law is different again.[207] In the Cypriot and Bosnian cases alike, responsibility for the acts of secessionist entities was not imputed to the State on whose territory they were created and whose authority they were contesting. Any such responsibility would have to be established on independent grounds.[208]

*(iii) Purported grants of colonial independence.* There is a presumption in favour of the independence of ex-colonies granted formal independence by their metropolitan State. Nevertheless where the grant is only partial,[209] or where there is evidence that real control has not been transferred, other States may be justified in withholding recognition and may even be bound to do so.[210]

In this context the cases of Syria and Lebanon (1942–6) are of interest. These two 'A' Mandates had been 'provisionally recognized' as independent in 1919, but had remained under effective French control until 1940.[211] In 1941,

[206] *Prosecutor v Rajíc*, ICTY, decision of 13 September 1996. The overall control standard was applied also in *Ilascu v Moldova and Russia*, ECHR, judgment of 8 July 2004 (para 316). A Swiss tribunal adroitly avoided the matter of attribution by holding simply that 'le conflit dans l'ex-Yougoslavie doit être approché de manière globale et qualifié de conflit international.' *In re G* Military Tribunal, div 1, Lausanne, Switzerland, 18 April 1997, cited Ziegler (1998) 92 *AJ* 78, 80.

[207] As noted by the ILC in its commentary to ARSIWA, Art 8, Para (5), reprinted in Crawford, *Selected Essays*, 112.

[208] Cf *Ilascu v Moldova and Russia*, ECHR, judgment of 8 July 2004, para 331: '[E]ven in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.' In that case Moldova was held responsible for the acts of Transdniestrian authorities (considered as puppets of a Russian occupying force) on the basis that it had assumed responsibility for the Applicants' detention through the acts of its courts without being able to do anything effective to secure their release. Some Members of the Court would have gone further: see, e.g., the partly dissenting opinion of Judge Casadevall, who rejected a temporal limit adopted by the Court for Moldovan responsibility; dissenting opinion of Judge Ress, citing *Assanidze v Georgia* [GC] no. 71503/01, ECHR 2004. Cf the partly dissenting opinions of Judges Bratza and Loucaides, who rejected the view that responsibility of Moldova was engaged by conduct of the Russian Federation on territory outside the ambit of 'direct or indirect authority' of the government of Moldova.

[209] As with the Associated States in Vietnam: O'Brien and Goebel, 'U.S. Recognition Policy', 147–51.

[210] For cases where recognition of colonial independence is justified despite a lack of full independence see Chapter 9.

[211] In 1936, France negotiated treaties with Syria and Lebanon designed to lead to a form of independence by January 1940. These treaties failed to be ratified by the French Parliament. Cf Whiteman, 2 *Digest* 188–9. For 'A' Mandates generally see Chapter 13.

Allied Forces evicted the Vichy French administration and installed a Free French administration under General Catroux. By a proclamation of 27 September 1941 the French Delegate-General purported to transfer to Syria 'all rights and prerogatives of an independent and sovereign State, limited only by the exigencies of the war and the security of its territory'.[212] The United Kingdom shortly thereafter accorded recognition to Syria and Lebanon[213] but the United States declined to do so,[214] agreeing only to accredit a 'diplomatic agent'.[215] In March 1943, when General Catroux replaced the existing Syrian regime with a new provisional government,[216] Secretary of State Hull described the change as 'essentially only a replacement of one French-appointed regime for another'.[217] While accepting the need for control of certain aspects of government by the military authorities, the State Department required 'a considerable degree of independence' with respect to civilian activities.[218] Specifically, Acting Secretary of State Willis on 22 August 1943 described his Government's

> established policy to defer recognition of another executive until:
>
> 1) It is in possession of the machinery of State, administering the government with the assent of the people thereof.
>
> 2) It is in a position to fulfil the international obligations and responsibilities incumbent upon a sovereign State under treaties and international law. We welcome the successful re-establishment of constitutional government in Syria as an important step toward the fulfilment of these conditions, but believe that there must be an effective transfer of substantial authority and power to the new government before serious consideration can be given to the extension of full recognition.[219]

In November 1943, after elections had been held, the French Delegate-General once again removed a local (in this case Lebanese) government—an action

[212] 1941/III USFR 786. Cf Whiteman, 2 *Digest* 189 (Lebanon). However, a French *aide-mémoire* at the same time argued that, because the Mandate required termination by the League, 'the regime . . . set up in Syria during the war cannot be anything but provisional': 1941/III USFR 79.

[213] Cf 393 *HC Deb* col 157, 27 October 1943.

[214] Memorandum of 16 December 1941: 1941/III USFR 813.

[215] '[T]he Department contemplates the extension only of limited recognition to Syria and Lebanon, at least for the present. Since diplomatic agents are accredited by the US to areas such as Morocco which are less than fully independent, the establishment of such a rank in Beirut would be in accord with the existing situation there.' Ibid 1942/IV, 656; cf 663, 665. Other reasons for the US refusal were the uncertainty over the future French position in the area, and the maintenance of US rights under a 1924 treaty: 120 BFSP 399.

[216] It was argued that 'non-recognition by most foreign States justified in itself a continuing exercise of the mandatory power': 1943/IV USFR 956.

[217] Ibid, 966.

[218] Ibid, 970.

[219] Ibid, 987; repeated in a Memorandum of 25 October: ibid, 1000–1 and cf also 1007–8.

reversed only after strong Allied protests.[220] There followed an 'accelerated transfer of governmental powers' to such an extent that, on 5 September 1944, the United States concluded that 'the local Governments may now be considered representative, effectively independent and in a position satisfactorily to fulfil their international obligations and responsibilities.'[221] 'Full and unconditional' recognition followed, despite the continued presence of French troops in the Levant and the failure of the French and local governments to agree on a treaty of future relations. In the American view 'the war powers exercised by the French and British authorities . . . could not be considered inconsistent with or derogatory to the independence of the States, since these powers have been freely and willingly granted and have been repeatedly confirmed by the local governments.'[222] The presence of French troops gave rise to further difficulty in May 1945, when force was used in an attempt to secure agreement on a treaty of future relations. A British ultimatum, accompanied by military intervention, ensued, but, on this occasion, the illegality of French action was a corollary of the independence of Syria and Lebanon, and of their original membership of the United Nations.[223] The Syrian and Lebanese cases demonstrate well the requirement of independence as a criterion for statehood. Substantial local control exercised by a government with popular support was, properly, regarded as sufficient to override continuing French claims. Once independence had been acquired, it provided a basis for regulating remaining restrictions upon independence, actual or asserted.

*(iv) Other cases of absence or loss of actual independence.*[224] The category of non-independent entities is not closed, nor would much purpose be served by further detailed descriptions. The evidence suggests that the degree of actual independence necessary, as a matter of general international law and apart from special requirements that may exist in particular cases, is slight.[225] To prove lack of real independence one must show 'foreign *control* overbearing the decision-making of the entity concerned on a wide range of matters and doing

[220] Ibid, 1022; Khadduri (1944) 38 *AJ* 601.

[221] 1945/V USFR 774.

[222] Ibid, 796 (5 October 1944).

[223] 1945/VIII USFR 1093, 1124, 1130–1, 1179. For a full account see Longrigg, *Syria and Lebanon under French Mandate*, esp 317–18. Also Whiteman, 2 *Digest* 188–98, 218–26; O'Brien and Goebel, 'U.S. Recognition Policy', 190–4. For termination of the Mandates see Chapter 13.

[224] Cf the distinction between acquisition and loss of independence: above, this chapter.

[225] Cf Hart, *The Concept of Law* (2nd edn), 222–3, where the requirement of independence is described as variable and essentially 'negative in force'. Kamanda, *Legal Status of Protectorates*, 188–91 goes so far as to describe it as a fiction. As a legal concept, however, although its operation is variable, it will have significant consequences and is far from fictional in effect. The most important particular case is secession in a non-colonial context, where substantial and continued independence is required: see Chapter 9.

so systematically and on a permanent basis.'[226] To establish such lack of independence, in the absence of foreign occupation or unlawful military intervention, is to overcome a formidable burden of proof, though the fact that an entity is a puppet may be self-evident.[227] Perhaps the most difficult situation is where an existing government remains in power during a period of foreign occupation in time of war, a situation that has occurred both with respect to allied and enemy forces. The case of Vichy France has been mentioned already.

The extent to which statehood may coexist with substantial lack of independence is demonstrated by the case of Iran under Allied occupation from 1941 to 1946. In August of 1941 Soviet and British forces occupied Iran to forestall fears of impending German control. Both parties emphasized that they had 'no designs on Iranian sovereignty or territorial integrity'[228] and that the occupation of the country would be temporary.[229] The occupation was followed by a change in government, Reza Shah Pahlavi replacing his father. The new regime was not, however, treated as a puppet government, and the change in government was widely recognized.[230] The United States view was that the British and Russian occupation was necessary and justified, although fears were expressed as to the future independence of Iran.[231] At the Teheran Conference the Allies reaffirmed 'their desire for the maintenance of the independence, sovereignty and territorial integrity of Iran'.[232] Under these circumstances, there was never any suggestion that Iran had in some way ceased to exist, despite the inability of the Iranian government effectively to control events in parts of its territory during the war.[233]

[226] Brownlie, *Principles* (2nd edn), 76 (his emphasis); ibid (6th edn) 72–4. Eagleton, *International Government* (3rd edn) 82–3 expresses it in terms of 'regular control or direction by another State'.

[227] The lengthy opposition to Mongolia's UN admission was, ostensibly at least, based on lack of effective independence. After ten rejections in the Security Council (1946–57) the Mongolian People's Republic was eventually admitted by SC res 166, 25 October 1961; GA res 1630 (XVI) 27 October 1961. Cf the pertinent comments of Higgins, *Development*, 28–30, 40; and see generally Friters, *Outer Mongolia and its International Position* Nemzer (1939) 33 *AJ* 452; Hackworth, 1 *Digest* 75–6; Whiteman, 3 *Digest* 600–16.

[228] 1941/III USFR 439. See also the Tripartite Treaty of Alliance of 29 January 1942: 144 BSFP 1017, Art 4: 'It is understood that the presence of these powers on Iranian territory does not constitute a military occupation and will disturb as little as possible the administration and the security forces of Iran, the economic life of the country, the normal movements of the population and the application of Iranian laws and regulations.' By Art 1 the 'territorial integrity, sovereignty and political independence' of Iran was guaranteed. The allied armies were to be withdrawn six months after the end of hostilities (Art 5).

[229] 1941/III USFR 439, and cf 1941/III USFR 443.

[230] Ibid, 462.

[231] Memorandum of 23 January 1943: 1943/IV USFR 331–3; cf 378–9.

[232] Declaration regarding Iran, 1 December 1943: ibid, 413.

[233] For the Soviet refusal to evacuate northern Iran, and the Azerbaijan secession movement, see 1945/VIII USFR 359–522: 1946/VII USFR 289–567; Hamzavi, *Persia and the Powers, An Account of Diplomatic Relations 1941–1946*.

A strong application of the same presumption in favour of formal independence is the decision of the Berlin Court of Appeal in the case concerning *Restitution of Household Effects belonging to Jews deported from Hungary*. The case concerned Hungarian legislation on Jews during the period from 1938 to 1944: the question was whether the Reich itself could be held responsible for restitution of property confiscated under Hungarian laws.[234] As the Court said, 'A seizure by the German Reich was feasible if the Hungarian Government was in fact to be regarded merely as a tool of the German rulers . . .'[235] The restitution claim was, however, denied, since the Court held that

> The Hungarian leadership was not just such an institution used by the German Reich for the registration and seizure of Jewish property . . . [T]he Royal Hungarian Government never abandoned its freedom of action vis-à-vis the German Reich . . . It is true that the entry of German troops on 19 March 1944 was not without influence on the position of Hungary in constitutional and international law. Nevertheless Hungary's constitutional form of government was preserved. Hungary still remained an independent State . . . The events of 19 March 1944 have to be viewed in the perspective of the above situation. At first glance . . . the occupation of Hungarian territory by German troops behind the Imperial Administrator's back does not seem compatible with Hungary's position as an independent State. Military intervention by one State in the sovereign territory of another often leads to the termination of the latter's independence. In the case of Hungary, however, this consequence did not materialize, since the statesmen concerned did not intend it.[236]

The Court went on to discuss the situation in detail. Against the weight to be placed on German military presence and evident intervention in securing governments of suitable pliability,[237] the Court relied on evidence of actual autonomy in important decisions—the prevention of further deportations,[238] the dismissal of a Prime Minister considered too pro-German, and the commencement of cease-fire negotiations with the 'enemy Powers'.[239] '[T]hese measures,' the Court held, 'justify the conclusion that supreme power remained continuously with the Hungarian State leadership even after 19 March 1944, even if at times the leadership did not use its governmental authority in favour

[234] On the German occupation forces, including an enumeration of competences assigned Edmund Veesenmayer, the 'Plenipotentiary of the Greater German Reich and Minister in Hungary,' appointed on 19 March 1944, see Braham, *The Politics of Genocide: The Holocaust in Hungary* (rev edn), 406–17. Veesenmayer entered the country with a large staff and assumed responsibility for many aspects of government in Hungary: ibid, 407–8. See also, generally, Kádár and Vági, *Self-financing Genocide*.

[235] (1965) 44 ILR 301, 333.

[236] Ibid, 301, 333, 334, 337.

[237] Ibid, 337–8, 340.

[238] Ibid, 339, 341.

[239] Ibid, 339.

of resistance against the influence of the National-Socialists.'[240] The decision is mitigated by the willingness of German courts to allow reparations against Germany for Hungarian acts on the basis of causation.[241] For restitution, there must have existed 'a factual power of disposal over the lost property by the German Reich or an equivalent body.'[242] But this borderline decision does illustrate the minimal content of 'actual independence' in a war situation among allies. It would undoubtedly have been different if an occupied enemy State's legislation had been in point.

### *(iii) The relation between formal and actual independence*

The two concepts of formal and actual independence analysed here are closely linked: their exact relation is, however, complex. Where formal independence and actual independence coexist, there is no difficulty. On the other hand, where formal independence masks the lack of any actual independence at all, the entity should be regarded as not independent for the purposes of statehood. More difficult is the intermediate case, where a certain lack of formal independence coexists with substantial *de facto* independence—as with the Dominions in 1924. The problem is examined in Chapter 8. It must be emphasized that the specific context, and the legal consequences sought to be drawn from alleged lack of independence, are of great importance. So, too, in borderline cases, are such factors as recognition (especially if widespread and consistent), and longevity. In particular in applying the criterion of independence as a basis for statehood, certain presumptions are of value.

(1) As a matter of general principle, any territorial entity formally separate and possessing a certain degree of actual power is capable of being and, other things being equal, should be regarded as a State for general international law purposes. The denomination '*sui generis*', often applied to entities that for some reason it is desired not to characterize as States, is of little value. The regime of rules concerning States provides a flexible and readily applicable standard; by contrast, inducing a multitude of necessary and usually unexpressed rules regarding a '*sui generis* entity' is laborious and for most purposes unnecessary. To suggest that entities such as 'protected States' or 'internationalized territories' are a priori excluded from statehood is unjustified and exaggerates the exclusivity of the international legal regime of statehood. The International Court has never made that assumption.

[240] (1965) 44 ILR, 340. See Deàk (1995) 9 *Eastern European Politics & Society* 209, 209–33.

[241] (1965) 44 ILR 333. After October 1944, and the overthrow of the legitimate government, local independence was much more dubious. The Court found it necessary to refer to continued German recognition of Hungary (ibid, 341)—in the context not a convincing test.

[242] Ibid, 333.

(2) Specifically, independence for the purposes of statehood should be presumed where an entity is formally independent and its creation was not attended by serious illegality. On the other hand the presumption is against independence where either the entity is not formally independent or though formally independent, its creation was attended by serious illegalities, or where, in the case of territory under belligerent occupation, a new regime is created by or under the auspices of the occupying power.

(3) There is, as we have seen, a strong presumption in favour of the continued statehood of existing States, despite sometimes very extensive loss of actual authority.

(4) There is a presumption in favour of the independence of a territorial unit as a whole, when it has been granted full formal independence by the former metropolitan State.

It has been assumed here that an entity may become a State despite serious illegalities in the method or process of creation. Before 1919 that assumption was barely challenged: the problems were problems of application of a dominant principle of effectiveness. The question whether it is the only relevant principle will be examined in the next chapter.

## (6) Sovereignty

The term 'sovereignty' is sometimes used in place of 'independence' as a basic criterion for statehood. However, it has another more satisfactory meaning as an incident or consequence of statehood, namely, the plenary competence that States prima facie possess.[243] Since the two meanings are distinct, it is better to use the term 'independence' to denote the prerequisite for statehood and 'sovereignty' the legal incident.

The term 'sovereign' is also used in other senses, for example, to indicate plenary authority with respect to internal or external affairs. Thus it could be said that, while Cyprus under its 1960 Constitution was an independent State it was not sovereign, because the Constitution placed a wide range of acts beyond its power. This meaning of the term 'sovereign' is common in political discourse:[244] nevertheless as a matter of international law a State has in general no entitlement to 'sovereignty' in this wider sense.

## (7) Other criteria

Certain other criteria are sometimes suggested as necessary for statehood.

[243] See Rousseau (1948) 73 *HR* 171 for a forceful argument in favour of the distinction and terminology adopted in the text—though his lectures concern rather the consequences of than the preconditions for statehood.

[244] See Wade (1996) 112 *LQR* 568, 573–4.

*(i) Permanence*

The American Law Institute's Second Restatement provided as a precondition for recognition, *inter alia*, that an entity 'shows reasonable indications that the[se] requirements . . . will continue to be satisfied'.[245] The Third Restatement modified this, commenting that '[e]ven when an entity appears to satisfy the requirements of [statehood] . . . other states may refuse to treat it as a state when circumstances warrant doubt that it will continue to satisfy the requirements of statehood.'[246] But neither the Third Restatement nor its predecessors defined the State as a permanent entity,[247] and in fact States may have a very brief existence, provided only that they have an effective independent government with respect to a certain area and population. Thus Zanzibar was both a State and a United Nations Member from December 1963 to April 1964, when it merged in the new State of Tanzania. The Mali Federation lasted only from 20 June to 20 August 1960, when it divided into two separate States, Mali and Senegal. British Somaliland was a State for five days, from 26 to 30 June 1960,[248] when it united with the former Italian Trust Territory of Somaliland to form the Somali Republic.[249]

But permanence may be highly relevant to statehood in some cases. In particular where another State's rights are involved (for example in a secession), or where certain criteria for statehood are not fulfilled for the time being, continuance of an entity over a period of time is of evidential value.[250] For example, in the divided State situations, whatever the original legality of the establishment of certain of those regimes, long continuance eventually forced

[245] *Restatement 2nd, Foreign Relations Law of the US* (1965) s 100

[246] *Restatement 3rd, Foreign Relations Law of the US* (1987), s 202, Comment d. See also Third Reading, Foreign Corporations Bill, statement of the Lord Chancellor: '[T]he accepted international criteria in accordance with which Her Majesty's Government recognise states also include a settled population and a defined territory, as well as some prospect of permanence of all these indices.' 530 *HL Deb* col 988, 3 July 1991.

[247] *Restatement 2nd*, s 4; *Restatement 3rd*, s 201 ('Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in or has the capacity to engage in, formal relations with other such entities.')

[248] It was informally accorded separate recognition by the US: (1960) 43 *DSB* 87; Whiteman, 1 *Digest* 216–17. See also Waldock, 1972/II *ILC Ybk* 34–5; Contini (1966) 60 *PAS* 127.

[249] An earlier and less well-known case was that of Yugoslavia, independent on 31 October 1918, which united with Serbia to form the Serb-Croat-Slovene State on 1 December 1918: Marek, *Identity and Continuity*, 239–44; contrast *Peinitsch v Germany* (1923) 2 Rec MAT 610. Degan, though with reference to the much longer-lived United Arab Republic, agrees that transience is no bar to statehood: 'La durée n'est pas une condition pour l'existence même d'un État.' (1999) 279 *HR* 199, 220.

[250] The US refused in 1927 to extend recognition to Yemen, citing the 'unsettled political situation and the resulting uncertainty as to the permanency of the political entities' formed in the Arabian Peninsula: Whiteman, 2 *Digest* 240–1. Recognition was accorded only in 1946: ibid, 240–1.

effective recognition of their position.[251] Permanence is thus not a criterion of statehood in the sense of an indispensable attribute: it may be an important piece of evidence as to the possession of those attributes.[252]

### *(ii) Willingness and ability to observe international law*

It is sometimes said that 'willingness to observe international law' is a criterion for statehood. The United States Secretary of State wrote in a letter of 2 August 1877: 'If a government confesses itself unable or unwilling to conform to those international obligations which must exist between established governments of friendly states, it would thereby confess that it is not entitled to be regarded or recognized as a sovereign and independent power.'[253] But it is necessary to distinguish recognition from statehood in this as in other contexts. Unwillingness or refusal to observe international law may constitute grounds for refusal of recognition,[254] or for such sanctions as international law allows, just as unwillingness to observe Charter obligations is a ground for non-admission to the United Nations. Both are distinct from statehood.[255]

It is sometimes suggested that inability to observe international law may be grounds for refusal to treat the entity concerned as a State. According to HA Smith: 'a State which has fallen into anarchy ceases to be a State to which the normal rules of international intercourse can be applied.'[256] But again one must distinguish between permitted sanctions for breach of international obligations (now referred to as countermeasures) and a lack of responsibility for public order or government such that the territory concerned ceases to be part of the defaulting State or (if the whole State territory is concerned) ceases to be a State. The former circumstance is clearly distinguishable from the latter and vastly more common: for example, statehood has been preserved amidst the chaos of the Democratic Republic of the Congo[257] and the lack of any

[251] See Chapter 10; and cf *Carl Zeiss Stiftung v Rayner & Keeler Ltd. (No 2)* [1967] 1 AC 853, 907 (Lord Reid).

[252] Durability may also be relevant as regards the recognition of partial *de facto* governments. The Italian Republic of Salò was effective with regard to at least part of Italy from 28 September 1943 to 28 April 1945. The Italian–United States Conciliation Commission held that its laws were 'laws in force in Italy' under Art 78, para 9(a) of the Italian Peace Treaty. *Levi Claim* (1957) 24 ILR 303; *Treves Claim* ibid, 313. See also *Rainoldi v Ministero della Guerra* (1946) 13 ILR 6; *Fubini Claim* (1959) 29 ILR 34, 44–7; *Falco Claim*, ibid, 21; *Baer Claim*, 29 ILR , 51, 52. See generally Gherari, (1994) 40 *AFDI* 419, 419–32.

[253] Moore, 1 *Digest* 6; Hackworth, 1 *Digest* 176–9; Whiteman, 2 *Digest* 72–3, 78–82.

[254] Cf *Restatement 2nd*, s 103. For US practice see O'Brien and Goebel, 'U.S. Recognition Policy', 106 ff.

[255] Chen, *Recognition*, 61–2; Lauterpacht, *Recognition*, 109–14; Charpentier, *Reconnaissance*, 289–90.

[256] *GB & LN*, vol I, 18–19, citing an Opinion of Harding on anarchy in Mexico: FO.83/2305, 20 March 1857.

[257] See Cooper, *Africa since 1940*, 163–8; Baregu (ed), *The Crisis in the Democratic Republic of Congo*.

overall governmental authority in Somalia.[258] The question is not 'ability to obey international law' but failure to maintain any State authority at all. As such it is referable to the criterion of government; reference to international law is unnecessary and confusing.

### *(iii) A certain degree of civilization*[259]

United States practice has on occasions supported the view that, to be a 'State of International Law the inhabitants of the territory must have attained a degree of civilization such as to enable them to observe with respect to the outside world those principles of law which are deemed to govern the members of the international society in their relations with each other.'[260] But the standard is subjective and tends to be applied in a discriminatory way:[261] the conduct of 'my' State (even if reprehensible) is a temporary aberration; it is always the *other* entity that is uncivilized.[262] Once again this should be seen as an aspect of government: 'international law presupposes, not any common faith or culture, but a certain minimum of order and stability.'[263]

[258] See Cooper, *Africa since 1940*, 180–6. On the earlier background to governmental crisis, see Human Rights Watch, *Somalia: A Government at War with its Own People*.

[259] On the 'standard of civilization' in nineteenth-century European practice see Andrews (1978) 94 *LQR* 408, 412–16; Anghie (1999) *Harv ILJ* 1, 22–34. On the standard in international law generally, see Gong, *The Standard of 'Civilization' in International Society*; Fidler (2001) 2 *Chicago JIL* 137.

[260] Hyde, *International Law* (2nd edn), 1, 23; cf 127–9; cited favourably by a Department of State Legal Adviser in relation to Indonesia, Whiteman, *Digest* 223–4.

[261] The civilizational standard was rejected by the Australian High Court on grounds of its discriminatory effect in municipal law: 'A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous of a settled colony, denies them a right to occupy their traditional lands.' *Mabo v Queensland (No 2)*, (HCA, Bernnan J), (1992) 107 ALR 1, 29; 112 ILR 457, 491.

[262] A position reflected in the letter of Emperor Qianlong of 22 September 1793 accepting the vassalage of King George III of Great Britain at the conclusion of Lord Macartney's mission to China. The letter appears in full in Peyrefitte, *The Collision of Two Civilizations*, 289–92. Macartney's own view was that 'Nothing could be more fallacious than to judge of China by any European standard.' Quoted in Peyrefitte, front page.

[263] Smith, *GB & LN*, vol I, 8; cf Chen, *Recognition*, 60. In *Hunt v Gordon* (1883) 2 NZLR 160, 184 Richmond J was asked, for the purposes of a naturalization enquiry, whether '*de facto* Samoa is civilized' so as to possess a nationality binding on other States. He held that Samoa was not a 'body politic capable of accepting a transfer of allegiance' (ibid, 186), because 'it is plain, on the terms of the Order in Council of 1877, that Samoa is not to be regarded as a civilized State or Power.' (ibid, 184). The New Zealand Court of Appeal reached the same result by relying on the absence of British recognition and of orderly government: ibid, 147–51, 166–7. A similar issue before the Supreme Court of Fiji was decided solely on the basis that Samoa did not 'exercise sovereignty and control over foreign subjects within her territory': *Hunt v The Queen (No 2)* (1882) 1 Fiji LR 59, 105 (Gorrie CJ). In *The Helena* (1801) 4 C.Rob. 3, 5, 7, 165 ER 515, 515–16, Sir William Scott held an Algerian captive not piratical, but sufficient to pass title, on the basis that the 'African States . . . have long acquired the character

### *(iv) Recognition*

As was argued in Chapter 1, recognition is not a condition for statehood in international law. 'An entity not recognized as a State but meeting the requirements for recognition has the rights of a State under international law in relation to a non-recognizing State.'[264] Rights under international law are not contingent upon the acceptance of the right-holder by individual others. An entity is not a State because it is recognized; it is recognized because it is a State.

On the other hand it is true that, in some cases at least, an entity that for some reason may not qualify as a State under the criteria discussed in this chapter may nonetheless be recognized as such. Such recognition may be constitutive of legal obligation for the recognizing or acquiescing State; it may also tend to consolidate a general legal status at that time precarious or in the process of being constituted. Recognition in cases such as Bosnia-Herzegovina, where effective control was lacking, or of the European 'micro-States', where questions arose as to both formal and actual independence, has led writers to emphasize these aspects.[265] Recognition, while in principle declaratory, may thus be of great importance in particular cases.[266] At least where the recognizing government is not acting in a merely opportunistic way, recognition is important evidence of legal status.

### *(v) Legal order*

Since the modern State is the territorial basis for a legal order,[267] it might be thought that the existence of a 'legal order', or at least its basic rules, is a useful criterion for the existence of the State.

> As a political organization, the state is a legal order. But not every legal order is a state . . . The state is a relatively centralized legal order . . . The legal order of primitive society and the general international law order are entirely decentralized coercive

of established governments, with whom we have regular treaties, acknowledging and confirming to them the relations of legal states . . . Although their notions of justice, to be observed between nations, differ from those that we entertain, we do not, on that account, venture to call into question their public acts. As to *the mode* of confiscation . . . we must presume it was done regularly *in their way*, and according to the established custom of that part of the world.' [emphasis original] For the question of 'failed States' see below, Chapter 17.

[264] *Restatement 2nd*, s 107. Comment a states that 'basic principles of fairness and the need for an orderly system of international relations require that the rights which international law accords to states not be dependent on recognition.'

[265] See, e.g., Duursma, *Fragmentation and the International Relations of Micro States*, 115; Hillgruber (1998) 9 *EJIL* 491. On Bosnia and Herzegovina see the comment by Rich (1993) 4 *EJIL* 36, 49.

[266] See, e.g., the discussion in Chapter 5 on Taiwan; Chapter 7 on Monaco; Chapter 12 on Austria after 1938; Chapter 9 on seceding States generally; and Chapters 10, 17 on the non-extinction of 'Germany' after 1945.

[267] D'Entréves, *The Notion of the State*, 96.

orders and therefore not states. In traditional theory the state is composed of three elements, the people of the state, the territory of the state, and the so-called power of the state, exercised by an independent government. All three elements can be determined only juridically, that is, they can be comprehended only as the validity and the spheres of validity of a legal order.[268]

No doubt 'legal order' is an important element of government, hence an indication of statehood. But its status as a distinct criterion is open to doubt. Thus a revolutionary (that is, illegal) change of constitution does not as such affect the identity or continuity of the State. At the time they come into existence States may have only rudimentary or fragmentary legal systems. In extreme cases, there may be no more than a diffused willingness to accept the system to be established by a constituent assembly.[269] A State may well compose several interlocking legal systems, having a complex interrelation and without the subordination of one to the other—this is the case with federations. An entity such as the European Union, which embodies a well-developed and effective legal system, may be so dependent on its constituent States for resources and enforcement that it does not itself constitute a State but a 'supranational' organization.[270] As a criterion, 'legal system' seems to be least helpful in just those cases for which the criteria should exist.

It could be argued that, although 'legal system' as a whole may not be a useful criterion, the existence of a 'basic norm' within a State is both necessary and sufficient. Thus Marek finds it

> both necessary and possible to define the 'separateness' of the State in strictly legal terms: and in these terms it simply means that every State is determined by the basic norm of its legal order, which it does not share with any other State. This basic norm is its own; it is not, and cannot be, derived from any other State order. In other words, *the legal source, the reason of validity* of the legal order of a State cannot be found in the legal order of one or several other States . . . for if it were, the entity in question would not be an independent State, but a component legal order of that State or group of States by whom it would be delegated.[271]

[268] Kelsen, *The Pure Theory of Law* (2nd edn), 286–7.

[269] Austria in 1918 seems to be an example: Marek, *Identity and Continuity*, 202. The common phenomenon of continuity of law from the previous regime does not affect the matter.

[270] See Hartley (2001) 72 *BY* 1, 10–17 (describing the EU as a separate legal system deriving its validity from the Treaties and international law). The German Constitutional Court described the EU not as a 'Bundesstaat' (federal State) but as a 'Staatenverbund' (an invented term meaning 'compound of States' and said to suggest something less integrated than a confederation): Decision of 12 October 1993, 89 BverfG 155, 184, reprinted (1994) 33 ILM 388, 419, about which see Götz (1993) *Juristiche Zeitung* 1081; Tomuschat [1993] *Europaische Grundrechte Zeitschrift* 489; Frowein (1994) 54 *ZaöRV* 1; Morgan (1995) 89 *ASIL Proc* 253.

[271] Marek, *Identity and Continuity*, 168 (emphasis added). She nonetheless accepts that change in the basic norm per se does not affect the continuity of the State: ibid, 188.

But as a separate criterion the 'basic norm' is no better than 'legal system'. It is, as Marek points out, a purely formal notion, and as such fails in two distinct ways. First, it fails to explain the independence of a State whose basic norm was given it by the legal system of another State. In such a case, formal legal dependence may coexist with international independence: until 1982 the United Kingdom Parliament could change the Canadian Constitution, and could do so as a matter of Canadian law. Marek rejects a priori the statehood of 'internationalized territories' such as the Free City of Danzig;[272] equally, under her formulation, an entity owing its municipal legal order or the recognition of its international personality to the action or guarantee of other States (e.g., Cambodia, Bosnia, Cyprus) could hardly be a State. Such a position is both unsatisfactory in principle and inconsistent with practice. Secondly, the basic norm can only explain the case of puppet States, with full formal but no actual independence, by an equivocation on the term 'reason for validity'. In such circumstances, the 'reason' appealed to is not formal but material, a conclusion of political fact in all the circumstances.

In short, one can only know the basic norm of a State when the State itself is identified as such. The basic norm is a conclusion to the problems of existence, identity and continuity, not the means of their solution. Nor can there be such a thing as an 'independent' basic norm;[273] merely the basic norm of a State that is independent. Again, this is not to deny that the legal system of an entity is a part of its general system of government, and as such relevant to questions of existence, identity and continuity of statehood.[274]

[272] Marek, *Identity and Continuity*, 168 n 2. See Chapter 5 for discussion of Danzig.

[273] Marek, *Identity and Continuity*, 188.

[274] For similar criticism see Kamanda, *Legal Status of Protectorates*, 181–2. This seems to be the sense of 'system'—as part of a general system of government—to which the Foreign Corporations Act 1991 (UK) refers, in setting the condition 'that the laws of that territory are at that time applied by a settled court system in that territory.' See Chapter 5 for discussion of Taiwan as the prototype of the independent legal system that is not a State.

# Chapter 3

# INTERNATIONAL LAW CONDITIONS FOR THE CREATION OF STATES


**3.1 Legality and statehood** 97
(1) Development of the concept of peremptory norms 99
(2) Effects of peremptory norms on situations other than treaties 102
(3) Status of entities created by treaties 105
(4) Legality and statehood: general conclusions 106

**3.2 Statehood and self-determination** 107
(1) Self-determination in modern international law 108
(i) Self-determination before 1945 108
(ii) Self-determination under the United Nations Charter 112
(iii) Identifying the units of self-determination 115
(iv) The consequences of self-determination 121
(v) Conclusions 122
(2) Statehood and the operation of the principle of self-determination 128

**3.3 Entities created by the unlawful use of force** 131
(1) The relation between self-determination and the use of force 134
(i) Assistance to established local insurgents 138
(ii) Military intervention to procure self-determination 139
(2) Conclusions 147

**3.4 Statehood and fundamental human rights** 148
(1) General considerations 148
(2) Democracy as a continuing condition for statehood 150
(3) *Apartheid* and the bantustan policy 155
(4) Conclusions 155

**3.5 Other cases** 155
(1) Entities not claming to be States 156
(2) Puppet States and the 1949 Geneva Conventions 156
(3) Violation of treaties providing for independence 157

**3.6 Collective non-recognition** 157
(1) Collective non-recognition and territorial status 158
(2) Consequences of collective non-recognition 162
(i) The *Namibia* Opinion 162
(ii) The ILC Articles on State Responsibility, Articles 40 to 41 168
(iii) Subsequent consideration by the International Court 168
(iv) Conclusion 173

## 3.1 Legality and statehood

It has been seen that the classical criteria for statehood (the so-called 'Montevideo criteria') were essentially based on the principle of effectiveness. The proposition that statehood is a question of fact derives strong support from the equation of effectiveness with statehood. Even if effectiveness was conceded to be a legal requirement—and not simply a self-evident fact—it was generally denied that there exist (or even that there could exist) criteria for statehood not based on effectiveness. For example according to Charpentier 'les tentatives de développement de règles de légalité objective détachées de l'effectivité jointes à l'absence de sanctions capables de les faire respecter entraînent fatalement un *confit entre le droit et le fait* dans lequel celui-là risque de l'emporter, constituant ainsi à lui seul un critère de validation de l'extension illégale des compétences.'[1]

In the first place it is necessary to distinguish two possible positions: that there cannot a priori be any criteria for statehood independent of effectiveness, and that no such criteria yet exist as a matter of international law. If the former position is correct there can be no inquiry into the effect of particular rules on statehood. But, clearly, effective entities have existed that have been widely or even universally held not to be States—for example, Rhodesia, Taiwan and the Turkish Republic of Northern Cyprus. Conversely, non-effective entities have been regarded as continuing to be States: for example, the various entities unlawfully annexed in the period 1936 to 1940 (Ethiopia, Austria, Czechoslovakia, Poland, the Baltic States), Guinea-Bissau before Portuguese recognition or Kuwait in the period 1990 to 1991. The proposition that statehood must necessarily be equated with effectiveness is not supported by this practice. Nonetheless, various arguments have been made in support of that view.

[1] Charpentier, *Reconnaissance*, 127–8 (emphasis in original). Cf Mouskhély (1962) 66 *RGDIP* 469, 475, referring to 'les tentatives de réglementation juridique de la naissance des États'; Verhoeven, *Reconnaissance*, 548–9, 589–91.

First it is argued that to apply rules of this type in the absence of an authoritative system of determination of status is impractical. Since there will be no certainty as to the application of peremptory rules in this situation in the absence of some form of collective recognition, no such rules can be accepted.[2] This is a variant of an argument that is central to the constitutive position and that has been discussed in Chapter 1. No compulsory procedure for determining disputed questions exists in most fields of international law and the view that statehood is, exceptionally, a matter requiring such certification cannot be accepted: why should the normal modes of international law-making and application cease to apply in this field? Anyway the uncertainties can easily be exaggerated: the international legal status of most States most of the time is not in dispute, just like the existence of most treaties most of the time. 'Collectivization' of recognition may be desirable,[3] but since 1945 there has developed through admission to the United Nations and in other ways a process of certification that has fulfilled the function of certification, without the attribute of a priori certainty that constitutive theorists vainly seek.[4]

A second argument is that international law risks being ineffective and creating a 'fatal conflict between law and fact' if it challenges the validity of effective situations, especially situations of power such as the existence of States. But the question is precisely whether the term 'State' should be regarded as for all purposes equivalent to certain situations of power. It could be said that international law risks being ineffective precisely when it does not challenge effective but unlawful situations. For example, the resolution of the Rhodesian situation was undoubtedly assisted, if it was not produced, by the widespread conviction that the white minority regime's claim to statehood was illegitimate—effective though the Rhodesian regime certainly was for a time in terms of power, i.e. as fact. The same may be said of South Africa's bantustans or of the general non-recognition of Indonesia's claim to sovereignty over East Timor. International law was not the only, and may not have been the main, reason for the eventual changes that allowed each of these situations to be resolved. But by insisting on the illegitimate character of certain factual situations, international law kept these on the agenda and facilitated their resolution. No doubt effectiveness remains the dominant *general* principle, but it is consistent with this that there should exist exceptions based on other fundamental principles.

A more persuasive argument relates to the difficulty of applying the principle of extinctive prescription—i.e. of bringing law and fact back into accord—in

[2] Charpentier, *Reconnaissance*, 318. [3] Lauterpacht, *Recognition*, 78.

[4] Briggs (1950) 44 *PAS* 169; Dugard, *Recognition and the United Nations*. Cf Warbrick in Evans (ed), *Aspects of Statehood*, 9. See also Chapter 4.

situations where the two conflict for a long period of time. But this difficulty arises most acutely in cases where the continued acceptance of non-effective entities is most clearly demonstrated: that is, the non-extinction of States by unlawful annexation. It is sufficient to say here that the same problems of application occur in other contexts (for example, acquisition and loss of territory). Moreover international law operates on long time scales: the Namibia, Rhodesia and East Timor situations took several decades to resolve; the position of the Baltic States took even longer. It may be that international law's main contribution in such cases *is* to keep the issues on the agenda until the circumstances change and a settlement becomes possible.[5] But that is a task worth performing, and certainly not one to be rejected on a priori grounds.

A further argument concerns the undesirable legal vacuum created where international law withholds legal status from effective legal entities. But this assumes that international law does not apply to *de facto* entities; and this is simply not the case. Relevant international legal rules can apply to *de facto* situations here as elsewhere. For example, Taiwan, though not a State, is not free to act contrary to international law and does not claim to be. The process of analogy from legal rules applicable to States (e.g., in the field of treaties) is quite capable of providing a body of rules applicable to non-State entities. The argument that no such rules apply smacks of the outdated view that international law only applies to States.

Fundamentally, the argument that international law cannot regulate or control effective territorial entities is an expression of the view that international law cannot regulate power politics at all; that it is in the end non-peremptory. But on its own terms and with whatever results, international law is in a stage of development towards greater coherence and cogency. An important development here has been the acceptance of the notion of peremptory norms of general international law (*jus cogens*), and this development should first be summarized.

## (1) Development of the concept of peremptory norms[6]

The existence of a hierarchy of international law rules has long been posited; but to avoid confusion certain initial distinctions must be made. There are

[5] In other contexts the International Court has been careful not to commit itself to *any* doctrine of acquisitive prescription: e.g., *Kasikili/Sedudu Case*, ICJ Rep 1999 p 1045, 1105–6 (paras 96–9).

[6] See, e.g., Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*; Danilenko (1991) 1 *EJIL* 42, 48–57; de Hoogh (1991) 42 *Austrian JPIL* 183; Simma and Alston (1992) 12 *AYIL* 82; Verhoeven in Wellens (ed), *International Law*, 195; Byers, *Custom, Power and the Power of Rules*, 12–13, 183–203; Haopei in Yee and Tieya (eds), *Essays in Memory of Li Haopei*, 499. A critical view is suggested in Weisburd (1995) 17 *Mich JIL* 1.

rules which are preconditions for effective international activity, for example the principle *pacta sunt servanda*.[7] To abrogate that rule is not plausible: it would be to abrogate a key part of the language of international relations. A treaty providing that treaties are binding is reaffirmation; a treaty denying it is a contradiction: the very activity of treaty-making assumes the general rule. Similarly a treaty abolishing States (without providing for their replacement by other governmental forms) would be meaningless; the activity of international relations as at present conducted assumes States as the basic international units. Thus in discussing the problem of peremptory norms we are concerned only with what may be called substantive, not with structural, rules.[8]

Furthermore, the issue of peremptory norms is that of restrictions upon the possible freedom of action of States, not of limitations upon some absolute liberty States have never had. For example, the proposition that States are in principle free to make whatever treaties they wish is far too absolute: rather, States are in principle free to make whatever provision they wish concerning their own rights. The *pacta tertiis* rule has nothing to do with peremptory norms. In the absence of consent, States do not have the competence to deprive other States of their rights by way of treaty. A treaty attempting to impose duties on third States is not void—as is a treaty in violation of a peremptory norm. It provides a possible set of rules which are, in the absence of the consent of any affected State, non-opposable to that State.[9] So the principle of consent is a further structural principle of international law, distinct from peremptory norms.

The concept of peremptory norms was authoritatively endorsed in the Vienna Convention on the Law of Treaties in 1969.[10] Article 53 of the Convention provides:

> A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted

[7] Cf *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*, ICJ Rep 1997 p 7, 68–9 (paras 114–15).

[8] To the same effect Verdross (1966) 60 *AJ* 55, 58–9 (but cf Verdross (1937) 31 *AJ* 572); Scheuner (1967) 27 *ZaöRV* 520–32, 525; Marek in Marek (ed), *Receuil d'études en homage à Paul Guggenheim*, 526, 549.

[9] Vienna Convention of the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art 34.

[10] At the Vienna Conference only France opposed the notion outright. Among earlier writers Schwarzenberger was notable for his opposition: (1965) 43 *Texas LR* 455; but cf *International Law*, vol I, 425–7. See Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties*; Rozakis, *The Concept of Jus Cogens in the Law of Treaties*; De Hoogh, *Obligations Erga Omnes and International Crimes*.

and which can be modified only by a subsequent norm of general international law having the same character.[11]

Subsequent texts have employed the same language,[12] and have applied the concept of peremptory norms outside the sphere of treaty law.[13] So far the International Court has been wary of using the term, employing virtual synonyms (such as the concept of obligations *erga omnes*).[14] But other international and national tribunals have done so,[15] and the concept is definitively accepted in the literature.

In short the category of peremptory norms is established, but the content of the category is less well-settled and despite last minute redrafting, Article 53 is of little help, being entirely circular.[16] Nevertheless, the extent of disagreement can be exaggerated, and courts have had less difficulty in identifying such rules than might have been expected.[17] Scheuner suggests three categories of peremptory norms: first, rules protecting the foundations of international order, such as the prohibition of genocide or of the use of force in international relations except in self-defence; secondly, rules concerning peaceful cooperation in the protection of common interests, such as freedom of the seas; and, thirdly, rules protecting the most fundamental human rights. To this list we must now add self-determination and the basic rules for the protection of civilians in time of war.[18]

[11] Articles 65–6 provide for judicial settlement of disputes concerning Art 53. For the *travaux préparatoires* see Rosenne, *The Law of Treaties*, 290–3.

[12] Vienna Convention on the Law of Treaties Between States and International Organizations or between International Organizations, 21 March 1986, A/Conf.129/15 (not yet in force), Art 53.

[13] See ILC Articles on Responsibility of States for Internationally Wrongful Acts annexed to GA res 56/83, 12 December 2001, Arts 26, 40, 50(1)(d).

[14] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Preliminary Objections, ICJ Rep 1996 p 595, 616 (para 31); *Case Concerning East Timor (Portugal v Australia)*, ICJ Rep 1995 p 90, 102 (para 29); *Barcelona Traction, Light and Power Company, Limited*, Second Phase, Judgment, ICJ Rep 1970 p 3, 32 (paras 33–34).

[15] E.g., *Prosecutor v Furundžija* (ICTY, 1998), 38 ILM 317, 349 (para 153); *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147, 198, 275, [1999] 2 WLR 827 (HL), 119 ILR 135, 149, 229; *Al-Adsani v United Kingdom* (2002) EHRR 11 (ECHR), 123 ILR 24, 41 (para 60).

[16] Rousseau, *DIP*, vol I, 149–51; de Visscher (1971) 75 *RGDIP* 5, 7.

[17] 'Only a few elementary legal mandates may be considered to be rules of customary international law which cannot be stipulated away by treaty. The quality of such legal norms may be attributed only to such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of national as an international legal order, and the observance of which can e required of all members of the international legal community.' 18 BVerfGE 441 (7 April 1965), quoted by Reisenfeld, (1966) 60 *AJ* 513. Cf Schwelb (1967) *AJ* 946.

[18] An early case in which a treaty was held to be void was *US v Krupp* (1949) 10 *Law Reports of Trials of War Criminals* 141; 15 ILR 620, 627: 'By way of justifying the use of French prisoners of war in

These fundamental rules have a special character in modern international law. Treaties in conflict with them are void.[19] Pre-existing treaties are annulled when inconsistent peremptory norms come into existence.[20] But the question is what further effects they have in the field of status as distinct from transactions.

## (2) Effects of peremptory norms on situations other than treaties

Article 53 of the Vienna Convention states that 'no derogation is permitted' from peremptory norms, and this language is wide enough to include acts other than treaties. Evidently Article 53 was not attempting to create a hierarchy of conventional rules only; the relationship between treaties is dealt with in Articles 40, 41 and 59 of the Vienna Convention, not in Article 53. Moreover, it is difficult to accept that a rule should be sacrosanct in one context and freely derogable in another. By virtue of their primacy, then, peremptory norms may invalidate not just treaties but other inconsistent legal acts, as well as affecting the legal consequences which would otherwise flow from factual situations inconsistent with them.

On the other hand the notion of peremptory norms, originally formulated to deal with the validity of treaties, raises somewhat different issues when it has to be applied to problems of territorial status.[21] Even a fundamental norm—e.g., that prohibiting torture or the killing of prisoners of war—can be violated incidentally in the course of a conflict. In the context of legal acts such as treaties it is reasonable for the law to say there shall be no facial contradiction between text and peremptory norm: if slavery or torture is fundamentally unlawful, treaties may not even incidentally provide that there may be slavery or torture. By contrast in the context of territorial status, incidental violations of peremptory norms—however deplorable as incidents—can hardly be held to preclude the statehood of an entity otherwise qualified, and thus to impair the representation at the international level of the people concerned. War crimes may be committed during a war of national liberation, for example: a treaty could not provide for impunity in respect of such crimes, but is the status of the emergent entity to be denied because of them?

armament industry it is claimed that this was authorized by an agreement with the Vichy Government . . . [I]f Laval or the Vichy Ambassador to Berlin made any agreement such as that claimed, it was manifestly *contra bonos mores* and hence void.'

[19] Vienna Convention, Art 53. A treaty inconsistent with an existing peremptory norm cannot be severed but is invalid in whole: Art 44(5). Cf USFR 1946/VIII, 1082–3 (France).

[20] Vienna Convention, Art 69.

[21] Scheuner (1967) 27 *ZaöRV* 520, 525n ('the concept of *jus cogens* is not suitable to be employed in connection with territorial settlements'). On different grounds, Marek, *Guggenheim Festschrift*, 426, 439–41.

The International Law Commission faced this problem when it had to deal with the category of the most serious breaches of international law and their effects in the field of State responsibility. The International Court in the *Barcelona Traction* case provided the starting point when it said that:

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[22]

*Barcelona Traction* itself concerned a matter of diplomatic protection, and the Court's dictum was as much a concealed apology for the fiasco of the *Second South West Africa* decision[23] as it was a contribution to the resolution of a bilateral dispute between Belgium and Spain. Moreover, in avoiding any reference to the newly developed and still controversial concept of peremptory norms, the Court may have added to the difficulties rather than resolving them. One Latin phrase (obligations *erga omnes*) was launched alongside another (*jus cogens*) and the result has been confusion.

Part of the problem has been the mistaken belief that the invocation of a norm as hierarchically superior or more fundamental avoids the need to deal with issues of its scope and application. International law is a system: treaties may contradict each other, but the function of lawyers is to seek a resolution of conflicts, not simply to display them. Even fundamental norms have to be applied in the context of the legal system as a whole. For example, there is a difference between jurisdiction and substance,[24] a difference between legal interest to raise an issue (e.g., as a member of a putative international community) and the substantive consequences that should follow from a breach.

In the context of State responsibility the International Law Commission distinguished between the public interest of States to invoke responsibility (addressed by the International Court in *Barcelona Traction* through the phrase 'obligations *erga omnes*') and the substantive or material consequences of breaches of fundamental norms (the corollary in the field of responsibility of

[22] ICJ Rep 1970 p 3, 32 (para 33). See Ragazzi, *The Concept of International Obligations* Erga Omnes; Tams, *Enforcing Obligations* Erga Omnes in *International Law*; Orakhelashvili, *Peremptory Norms in International Law*.

[23] ICJ Rep 1966 p 6. There the Court (on the casting vote of its President, Spender) denied that the two African States members of the League of Nations had a legal interest in challenging the application of the apartheid system to the League Mandate of South West Africa. Cf the decision of the majority of the Court in the first phase of the case: ICJ Rep 1962 p 319.

[24] *East Timor Case*, ICJ Rep 1995 p 90, 102 (para 29).

Article 53 of the Vienna Convention). In its commentary to Chapter 2, Part III (Serious Breaches of Obligations under Peremptory Norms of General International Law) the ILC said:

> it is necessary for the articles to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility. Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which the International Court has given of obligations towards the international community as a whole all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the Vienna Convention involve obligations to the international community as a whole. But there is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance—i.e., in terms of the present articles, in being entitled to invoke the responsibility of any State in breach. Consistently with the difference in their focus, it is appropriate to reflect the consequences of the two concepts in two distinct ways. First, serious breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible State but for all other States. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole. The first of these propositions is the concern of the present Chapter; the second is dealt with in article 48.[25]

Thus the Commission chose the concept of peremptory norms in dealing with issues of substance and that of obligations to the international community as a whole in dealing with questions of invocation or standing, while implying that the two are aspects of the same idea of fundamental, 'intransgressible'[26] or non-derogable norms. If a norm of general international law is non-derogable, third States must have an interest in compliance with it, whether non-compliance manifests itself in the conclusions of a treaty or otherwise. But the consequences of breach must still depend on the circumstances, including the seriousness of the breach. Hence the obligation of third States not to recognize the consequences of a breach of a peremptory norm under ARSIWA Article 41 is limited to serious breaches of peremptory norms, defined by Article 40(2) as breaches

[25] ILC, Commentary to ARSIWA, Part Two, Chapter III, para (7), reproduced in Crawford, *Selected Essays*, 244–5 (footnotes omitted).

[26] *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep 1996 p 226, 257 (para 79).

that involve 'a gross or systematic failure by the responsible State to fulfil the obligation'.[27] Among the elements of practice relied on by the ILC in support of these provisions is practice concerning the non-recognition of Manchukuo, the Iraqi annexation of Kuwait, the situation in Rhodesia and the South African bantustans.[28]

To summarize, the concept of peremptory norms cannot be limited to the sphere of the law of treaties. If agreements of States can be invalid as contravening fundamental norms, so too can their other transactions. But some of the formal considerations that apply to the validity of treaties may be peripheral to questions of territorial status. In these latter cases the question must be whether the illegality is so central to the existence or extinction of the entity in question that international law may justifiably treat an effective entity as not a State (or a non-effective entity as continuing to be a State).

### (3) Status of entities created by treaties

One further situation requires consideration. States and internationalized territories are quite often created pursuant to treaty provisions. Article 71 of the Vienna Convention provides:

1. In the case of a treaty which is void under article 53 the parties shall:
   (a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and
   (b) bring their mutual relations into conformity with the peremptory norm of general international law.
2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:
   (a) releases the parties from any obligation further to perform the treaty;
   (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination

provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.[29]

[27] The language of Art 40 was quoted by the Court (without express acknowledgment) in the *Wall Advisory Opinion*, ICJ Rep 2004 p 136, 199–200 (paras 155–9). See also Judge Kooijmans, sep op, 231–2 (paras 40–5).

[28] ILC, Commentary to ARSIWA, Art 42, paras (6)–(12), reproduced in Crawford, *Selected Essays*, 250–2.

[29] It will be noted that, despite Art 44(5), there is a certain severance of the legal effects of illegal treaties. On peremptory norms and nullification of treaties, see Dinh, *Droit International Public* (7th edn), 204–6.

This suggests that where a State or other entity is created under a treaty that is valid at the time, its status is not affected by subsequent invalidity of the treaty. This is particularly so in that the new entity may not be a party to the treaty under which it is created, so that whilst the 'rights, obligations or situations' of the parties may be inconsistent with the new peremptory norm, this will not be the case with the 'rights, obligations or situations' of the new State created under the treaty. On the other hand there is nothing illogical about a State being a party to the treaty that constitutes or reconstitutes it.[30] But it is hard to envisage a situation arising where a treaty creating a State (as distinct from one providing for its termination) could be a breach of a peremptory norm. The same arguments apply to Article 71(1), which requires only that the *parties* 'bring their mutual relations into conformity with the peremptory norm', and eliminate 'as far as possible' the consequences of acts performed in execution of the treaty. A State granted independence under a treaty to which it was not a party could be immune from the effects of Article 71.

## (4) Legality and statehood: general conclusions

For the reasons given, there is nothing incoherent about the legal regulation of statehood on a basis other than that of effectiveness. And, although this has been denied,[31] there is now a considerable amount of practice in favour of regulations of this type. This position was foreshadowed by Lauterpacht in 1947:

> International law acknowledges as a source of rights and obligations such facts and situations as are not the result of acts which it prohibits and stigmatizes as unlawful . . . It follows from the same principle that facts, however undisputed, which are the result of conduct violative of international law cannot claim the same right to be incorporated automatically as part of the law of nations . . .[32]

And in another passage he stated that: 'The principal and *probably the only* essential condition of recognition of States and governments is effectiveness of power within the State and of actual independence of other States. Other conditions are irrelevant to the true purposes and nature of recognition.'[33]

[30] This is true, for example, of the Austrian State Treaty, 15 May 1955, 217 UNTS 223 (to which Austria was a Party); the Treaty Concerning the Establishment of the Republic of Cyprus, 16 August 1960, 382 UNTS 8 (to which Cyprus was a Party) and the Dayton–Paris Accord [General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, 35 ILM 75 (to which Bosnia-Herzegovina was a party).

[31] Charpentier, *Reconnaissance*, 127–8; Chen, *Recognition*, 54. Cf Verhoeven, *Reconnaissance*, 607–17.

[32] Lauterpacht, *Recognition*, 409–10; cf ibid, 285, 340–1.

[33] Ibid, 340–1 (emphasis added). Cf also ibid 285: 'A rule of law which compels third States to regard as invalid, for a prolonged period of time, the laws and administration of a *de facto* authority

Thirty years after Lauterpacht wrote, it could be argued that other conditions unrelated to effectiveness must be relevant,[34] and by the turn of the century this had come to be widely accepted.[35] No doubt the principle of effectiveness remains a major consideration; it was noted in connection with the spate of State-creation in the early 1990s.[36] Practice, however, does not support the conclusion that it is the only element, and the development of the concept of peremptory norms in the Vienna Convention confirms this conclusion: norms that are non-derogable and peremptory cannot be violated by State-creation any more than they can by treaty-making. But Articles 53 and 64 of the Vienna Convention were not intended to have direct application to situations involving the creation of States. Their importance is rather indirect, by emphasis on the centrality and permanence of certain basic rules.[37]

Three different problems must be distinguished: illegality affecting the creation of a State; illegality affecting the title of its government to represent it, and illegality affecting its termination. Different considerations may apply to these. Only the first problem will be dealt with in this chapter.[38]

## 3.2 Statehood and self-determination

An obvious area for inquiry is the relation between statehood and self-determination: self-determination is, at the most basic level, a principle concerned with the right to be a State. A significant body of practice attests the reality of the link; but it remains to be seen whether self-determination as such has become a criterion of statehood; and if so, with what effects.

and to regard as valid within the territory of that authority the laws and administration of the *de jure* government, is not one which commends itself to sound principle (unless, perhaps, in particular cases, the *de facto* authority is established in violation not only of the constitutional law of the State concerned but also of international law).'

[34] Cf Eekelaar in Simpson (ed), *Oxford Essays in Jurisprudence* (2nd series), 22–43, 39–40; Mendelson, 114; Reuter, 1975/I *ILC Ybk* 45.

[35] See, e.g., Duursma, *Microstates*, 127–32; Grant, *Recognition*, 213–14; Roth, *Governmental Illegitimacy*, 130. Cf Gowland-Debbas, *Southern Rhodesia*, 205–9.

[36] See, e.g., *HC Deb* vol 169 WA cols 449–50, 19 March 1990 (Minister of State, FCO, identifying effectiveness criteria as relevant in assessing the declaration of independence of Lithuania).

[37] But see Bokor-Szegö, *New States in International Law*, 66–75.

[38] For illegality and extinction of States see Chapter 17. Illegality and governmental representation is a topic on which practice is, scanty. It is outside the scope of this study. See, generally, Roth, *Governmental Illegitimacy in International Law*.

## (1) Self-determination in modern international law[39]

In the years after 1945 the question whether self-determination was a legal right or principle was a divisive issue.[40] Self-determination as a legal right or principle threatened to bring about significant changes in the political geography of the world, not limited to the dismemberment of Empires. As an overtly political principle it raised concerns about the character of international law and the justiciability of political disputes. And, for our purposes, it was potentially a most significant exception to the traditional view that the creation of States is a matter of fact and not of law.

### *(i) Self determination before 1945*

Self-determination had obvious antecedents in the principle of nationality, but its appearance as an operative principle dates from the Bolshevik revolution and the peace settlements at the end of the First World War.[41] Its legal status was an issue in the *Åland Islands* case before the first session of the League of Nations. The population of the Islands claimed the right to attach themselves to Sweden rather than Finland, at the time when Finland itself was establishing its independence from the Russian Empire.[42] The League appointed two

[39] See generally Rigo Sureda, *The Evolution of the Right of Self-determination*; Pomerance, *Self-Determination*; Hannum, *Autonomy, Sovereignty, and Self-Determination*; Tomuschat (ed), *Modern Law of Self-Determination*; Cassese, *Self-Determination of Peoples*; Duursma, *Microstates*, 5–109; Thornberry in Ku and Diehl (eds), *International Law*, 135; McCorquodale (ed), *Self-Determination in International Law*; Crawford in Alston (ed), *People's Rights*, 7; Knop, *Diversity and Self-Determination in International Law*; Raic, *Statehood and the Law of Self-Determination*, 408–38; Buchanan, *Justice, Legitimacy, and Self-determination*.

[40] Fitzmaurice referred to the notion of a legal right to self-determination as juridical nonsense: *Institut de Droit International*, 196, 233. The issue of self-determination was avoided, not very felicitously, in the *Right of Passage Case*, ICJ Rep 1960 p 6, and concerns as to the justiciability of the principle underlay the evasive attitude of the majority in the *Second South West Africa Cases*, ICJ Rep 1966 p 6.

[41] For Soviet practice in this period see Carr, *The Bolshevik Revolution 1917–1923*, 414–35. The term was also given currency by President Wilson: see Hackworth, 1 *Digest* 422–5. It is implicit in the Fourteen Points, and was included in the first American draft for the Covenant. Wilson's draft of article X of the Covenant would have provided: 'The Contracting Powers unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial readjustments, if any, as may in the future become necessary by reason of changes in present racial conditions and aspirations or present social and political relationships, pursuant to the principle of self-determination, and also such territorial readjustments as may be in the judgment of three-fourths of the Delegates be demanded by the welfare and manifest interest of the peoples concerned, may be effected, if agreeable to those peoples; and that territorial changes may in equity involve material compensation. The Contracting Powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary.' Reprinted in Hunter Miller, *Drafting of the Covenant*, vol 2, 99. This essay was subsequently deleted.

[42] See also Barros, *The Åland Islands Question*; Delavoix, *Essai historique sur la séparation de la Finlande et de la Russie*.

Commissions to investigate different aspects of the dispute. An International Commission of Jurists reported that the matter was not one within Finland's domestic jurisdiction under Article 15(8) of the Covenant, because Finland at the time was not definitively established, and because the principle of self-determination had a role to play in the case of *de facto* revolutionary entities such as Finland in 1919. Thus, although the Commission of Jurists rejected the principle of self-determination, it did so only in the context of entities definitively established as States.[43] The Jurists' Report reads in relevant part as follows:

> Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.
>
> On the contrary, in the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every State. Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation. Generally speaking, the grant or the refusal of such a right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitely constituted. A dispute between two States concerning such a question, under normal conditions therefore, bears upon a question which International Law leaves exclusively to the domestic jurisdiction of one of the States concerned. Any other solution would amount to an infringement of sovereign rights of a State and would involve the risk of creating difficulties and a lack of stability which would not only be contrary to the very idea embodied in the term 'State', but would also endanger the interests of the international community. If this right is not possessed by a large or small section of a nation, neither can it be held by the State to which the National group wishes to be attached, nor by any other state.
>
> The Commission, in affirming these principles, does not give an opinion concerning the question as to whether a manifest and continued abuse of sovereign power, to the detriment of a section of the population of a state, would, if such circumstances arose, give to an international dispute, arising therefrom, such a character that its object should be considered as one which is not confined to the domestic jurisdiction of the State concerned, but comes within the sphere of action of the League of Nations. Such a supposition certainly does not apply to the case under consideration.

[43] Report of Commission of Jurists (Larnaude, Huber, Struycken), LNOJ Sp Supp No 3 (October 1920), 5–6.

It must, however, be observed that all that has been said concerning the attributes of the sovereignty of a State, generally speaking, only applies to a nation which is definitively constituted as a sovereign State and an independent member of the international community, and so long as it continues to possess those characteristics. From the point of view of both domestic and international law, the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law. This amounts to a statement that if the essential basis of these rules, that is to say, territorial sovereignty, is lacking, either because the State is not yet fully formed or because it is undergoing transformation or dissolution, the situation is obscure and uncertain from a legal point of view, and will not become clear until the period of development is completed and a definite new situation, which is normal in respect to territorial sovereignty, has been established.

This transition from a *de facto* situation to a normal situation *de jure* cannot be considered as one confined entirely within the domestic jurisdiction of a State. It tends to lead to readjustments between the members of the international community and to alterations in their territorial and legal status; consequently, this transition interests the community of States very deeply both from political and legal standpoints . . .

Under such circumstances, the principle of self-determination of peoples may be called into play . . .

The fact must, however, not be lost sight of that the principle that nations must have the right of self-determination is not the only one to be taken into account. Even though it must be regarded as the most important of the principles governing the formation of States, geographical, economic and other similar considerations may put obstacles in the way of its complete recognition. Under such circumstances, a solution in the nature of a compromise, based on an extensive grant of liberty to minorities, may appear necessary according to international legal conception and may even be dictated by the interests of peace.[44]

By contrast the Committee of Rapporteurs disagreed with the view that Finland was a new State: rather, in their opinion, it was a continuation of an autonomous State of Finland that had always included the Åland Islands.[45]

[44] Report of Commission of Jurists (Larnaude, Huber, Struycken), LNOJ Sp Supp No 3 (October 1920), 5–6. The British delegate, Fisher, proposing acceptance of the Report, stated, *inter alia*: 'The Council will no doubt accept to the full the doctrine that it belongs to the sovereign rights of a definitely constituted State to accord or refuse to a fraction of the population the right of determining its political destiny by plebiscite or otherwise. I am, however, of opinion that the doubts expressed by the Commission of Jurists as to whether Finland was such a legally constituted State during the recent period of revolution are justified . . .' LNOJ, October 1920, 395. The Council accepted the British proposal without dissent.

[45] Report of the Committee of Rapporteurs (Beyens, Calonder, Elkens), 16 April 1921: *LN* Council Doct. B7/2I/68/106 [VII], 22–3. For the historical background see Human Rights Project Group, *The Åland Islands: A Model of Territorial Autonomy*, 7–14; Hannum, *Autonomy, Sovereignty and Self-determination* (1990) 370–5.

There was thus no question of Finland in 1917 not being definitively constituted and the principle of self-determination was inapplicable. About self-determination, the Rapporteurs had this to say:

> This principle is not, properly speaking a rule of international law and the League of Nations has not entered it in its Covenant. This is also the opinion of the International Commission of Jurists . . . It is a principle of justice and of liberty, expressed by a vague and general formula which has given rise to most varied interpretations and differences of opinion . . . To concede to minorities, either of language or religion, or to any fraction of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity . . . The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.[46]

Although the Reports on the Åland Islands are cited for the proposition that self-determination was not a legal principle in 1920, that statement requires some qualification. In the first place, modern international law does not accept the application of self-determination to discrete minorities within a State, including cases such as the Åland Islanders. Moreover, both Reports admit the possibility that the principle will apply to territories that are so badly misgoverned that they are in effect alienated from the metropolitan State. This situation may be described as *carence de souveraineté* and, although the modern law remains undeveloped, it will be proposed as one way in which the principle can apply in particular cases. Finally, the Rapporteurs expressly stated that Finland was a 'people' in a way in which the population of the Åland Islands was not; so that even if Finland had not been a separate entity before 1917 its secession from the Russian Empire would have been justified.[47]

The Council accepted the Report of the Committee of Rapporteurs, recognized Finnish sovereignty over the Islands and recommended certain minority guarantees, a modified version of which is still in force.[48] Such cases of minority guarantees, as well as other conventional arrangements such as

[46] Committee of Rapporteurs, 27–8. [47] Ibid.

[48] Resolution of 24 June 1921, LNOJ Sp Supp No 5, 24; Convention relating to the Status of the Åland Islands, 20 October 1921, 9 LNTS 212. See de Visscher (1921) 2 *RDILC* 35, 243; Padelford and Andersson (1939) 33 *AJ* 465. For subsequent developments see Hannikainen and Horn (eds), *Autonomy and Demilitarisation: The Åland Islands in a Changing Europe*, Ch 10. For the Autonomy Statute of 1991 see ibid, 309.

plebiscites and the Mandate system, demonstrate the political force of the principle of self-determination in the inter-war period.[49] Nonetheless there was little *general* development of the principle before 1945.[50]

### *(ii) Self-determination under the United Nations Charter*

The Charter uses the term self-determination twice: in Article 1(2) (Purposes and Principles) where one of the purposes of the United Nations is stated to be the development of 'friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples', and in Article 55 where the same formula is used to express the general aims of the United Nations in the fields of social and economic development and respect for human rights.[51] By elaborating upon these rather cryptic references, the General Assembly has sought in a vast number of resolutions to define more precisely the content of the principle.

For example, resolution 545(VI)[52] decided that an article providing that 'All peoples shall have the right of self-determination' would be included in the International Covenants on Human Rights, which were finally adopted in 1966. Common Article 1 of the two Covenants provides as follows:

1. All peoples have the right of self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Convention, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[53]

[49] Calogeropoulos-Stratis, *Le Droit des peuples à disposer d'eux-mêmes*, 62–86; Hillgruber, *Aufnahme neuer Staaten*, 173–8 (minority rights guarantees in Poland after 1918).

[50] See the quite favourable discussion, *de lege ferenda*, by Bisschop (1921–2) 2 *BY* 122, 129–30, and the important early study of Redslob, *Le Principe des nationalités*, discussed by Berman (1992–3) 106 *HLR* 1792, 1808–21.

[51] See also the Atlantic Charter of 14 August 1941, 204 LNTS 384, which referred to 'the right of all peoples to choose the form of government under which they will live.' A proposal by China in 1945 to expand the scope of self-determination was rejected at San Francisco: Bedjaoui in Cot & Pellet (eds), *La Charte des Nations Unies*, 1062–63.

[52] 5 February 1952 (42–7:5).

[53] International Covenant on Economic, Social and Cultural Rights, 16 December 1966 (entered into force 3 January 1976), 993 UNTS 3, Art 1; International Covenant on Civil and Political Rights, 16 December 1966 (entered into force 23 March 1976), 999 UNTS 171, Art 1; adopted by GA res

The Colonial Declaration, clause 2, stated that: 'All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'[54] The principle has also been affirmed by the Security Council.[55]

In the Friendly Relations Declaration annexed to resolution 2625 (XXV), the Assembly dealt in the following terms with 'The principle of equal rights and self-determination of peoples':

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter . . . all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.
>
> The territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter . . . Every State shall refrain from any action aimed at the partial or total disruption of the national unity or territorial integrity of any other State or country.[56]

Of course, the General Assembly is not a legislature. Mostly its resolutions are only recommendations, and it has no capacity to impose new legal obligations on States.[57] No doubt the Assembly has a measure of discretion as to the way in which it interprets and applies the Charter on matters falling within the scope of its responsibilities, including Chapters XI and XII of the Charter. But

2200A, 16 December 1966 (104–0:0). Common Article 1 was referred to in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 Jul 2004, ICJ Rep 2004 p 136, 171–2 (para 88). See also Cassese, *Self-determination of peoples*, 47–62.

[54] GA res 1514 (XV), 14 December 1960 (89–0:9), Declaration on the Granting of Independence to Colonial Countries and Peoples. For the status of the Declaration see Asamoah, *The Legal Significance of the Declarations of the General Assembly*, 164–73; Alston (2004) 15 *EJIL* 457, 478. See also GA res 1541 (XV), 15 December 1960, which Keitner & Reisman describe as 'an authentic explanation of how to grant independence': (2003) 39 *Texas ILJ* 1, 5–6.

[55] E.g., SC resns 301, 20 October 1971 (Namibia); 377, 22 October 1975 (Western Sahara); 384, 22 December 1975 (Portuguese Timor); 1598, 28 April 2005 (Western Sahara). By contrast SC res 1483, 22 May 2003, on Iraq, refers to 'sovereignty and territorial integrity' without reference to 'self-determination'.

[56] 24 October 1970 (adopted without vote).

[57] See further Sloan (1948) 25 *BY* 1; Johnson (1955–6) 32 *BY* 97; Higgins, *Development*, 1–10; Asamoah, *The Legal Significance of the Declarations of the General Assembly*, 169–73; Falk (1966) 60 *AJ* 782; Castañeda, *The Legal Significance of Resolutions of United Nations Organs*, 120–1; Onuf (1970) 64 *AJ* 349. For a stricter view see Judge Fitzmaurice, diss, *Namibia Opinion*, ICJ Rep 1971 p 6, 280–1, and in *Institut de Droit International. Livre du Centenaire*, 268–71. Cf Judge Lauterpacht, sep op, *Voting Procedure Case*, ICJ Rep 1955 p 67, 116.

the resolutions cited are not merely interpretations of Charter texts. Both references to self-determination in the Charter seem to mean something rather different from the usual understanding of 'self-determination'. That term can refer to the sovereign equality of existing States, and in particular the right of the people of a State to choose its own form of government without external intervention. It can also mean the right of a specific territory (or more correctly its 'people') to choose their own form of government irrespective of the wishes of the rest of the State of which that territory is a part. Pre-1945 international law recognized the first but not the second of these, from which it is said that it did not recognize the right of self-determination.[58] The Charter, in referring to 'equal rights and self-determination' in Articles 1(2) and 55, seems to be referring to self-determination in this first and uncontroversial sense.[59] Self-determination in the second sense is not mentioned, though it is implicit in Articles 73(b) and 76(b). In proclaiming a general right of self-determination, and in particular of immediate self-determination, the resolutions cited go beyond the terms of the Charter.

But this does not foreclose the issue of general international law. State practice is just as much State practice when it occurs in the context of the General Assembly as in bilateral forms.[60] The practice of States in assenting to and acting upon law-declaring resolutions may be of probative importance, in particular where that practice achieves reasonable consistency over a period of time. In Judge Petrèn's words, where a resolution is passed by 'a large majority of States with the intention of creating a new binding rule of law'[61] and is acted upon as such by States generally, their action will have quasi-legislative effect. The problem is one of evidence and assessment. For present purposes such an assessment requires two distinct inquiries: whether there exists any criteria for the determination of territories to which a 'right of self-determination' is to be accorded; and whether in its application to those territories self-determination has been treated as peremptory.

[58] Parry, in Sørensen, *Manual*, 1, 19–20.

[59] At the San Francisco Conference, Committee II/4 had this to say on Art 1(2): '[T]he Committee understands that the principle of equal rights of peoples and that of self-determination are two complementary parts of one standard of conduct: that the respect of that principle is a basis for the development of friendly relations and is one of the measures to strengthen universal peace; that an essential element of the principle in question is a free and genuine expression of the will of the people, which avoids cases of the alleged expression of the popular will, such as those used for their own ends by Germany and Italy in later years.' 6 *UNCIO* 955. See also Kaur (1970) 10 *Indian JIL* 479.

[60] See Fitzmaurice in Institut de Droit International, *Livre du Centenaire 1873–1973*, 196, 271–5; Gupta (1986) 23 *Int Stud* 143; Schwebel in Bos and Siblesz (eds), *Essays in Honour of Willem Riphagen*, 203; Rosenne, 1 *Encyclopedia of Public International Law* (1992), 632.

[61] *Fisheries Jurisdiction Case (Second Phase)*, ICJ Rep 1974 p 3, 162 (Judge Petrèn).

### *(iii) Identifying the units of self-determination*

Here it is necessary to distinguish the political principle or value of self-determination from the putative legal right or principle. The former has had a place in democratic thought since at least 1789, and was prominent at particular periods (in particular, 1917–20).[62] The weight accorded the principle of self-determination as a political value contributed to the body of practice examined here; but this general ideal is too ill-defined to constitute a substantive legal entitlement applying of its own force to 'peoples' in general. Yet it is sometimes assumed that proponents of a legal principle of self-determination are committed to just this view of it. The distinction is similar to that between the general political value of 'sovereignty' and the legal principle that has, as we have seen, a considerably more restricted scope.

This comparison leads to the second point: there is a clear but not always articulated distinction between the identification of territories to which legal principles such as sovereignty apply and the legal consequences of that principle in its application to the territories so identified. Thus sovereignty applies as a legal right (more properly, a legal presumption) only to territories constituted and accepted as States. This is one reason why we speak of a *principle* of sovereignty: the notion of a right presupposes identification of its subject, and such an identification must be made independently of the principle of sovereignty.[63] Indeed it could be that the territories to be regarded as 'sovereign' were determined by political rather than legal processes, yet the consequences of the principle in its application to such territories could be legal. This was Oppenheim's view of the sovereignty of States: sovereignty was a legal principle applying to entities identified by the purely political and discretionary act of recognition.[64]

A legal principle of self-determination is an analogy. In practice since 1945 there has been a considerable elaboration of the legal consequences of the principle of self-determination for particular territories; but the question of the ambit of self-determination, the territories to which it applies, has arguably remained as much a matter of politics as law. Much of the emphasis in practice has been on the application of the principle to territories to which it has come to apply either by a form of recognition or by agreement pursuant to treaty arrangements. The effect of this practice has been to elaborate sometimes cryptic references to the principle in the constituent documents, acting in

[62] See, e.g., Cobban, *The Nation State and National Self-Determination* (rev edn).

[63] The problem of determining the territories to which self-determination applies is thus very similar to the problem of determining the criteria for statehood.

[64] Oppenheim (1st edn), vol 1, 108–14. For discussion see above, Chapter 1.

some ways as a form of administrative law of the institutions in question. These institutions are dealt with in more detail elsewhere in this study, but must be briefly mentioned here.

**(a) The mandate and trusteeship systems**

Established respectively under Article 22 of the League of Nations Covenant and Chapters IX and XIII of the Charter, these two systems provided both for the enlightened administration of certain territories (the notion of a 'sacred trust') and for their 'progressive development towards self-government or independence'.[65] But they only applied to specific territories, i.e., those detached from defeated States by the peace treaties of 1919 to 1923 and (for former Italian territories) in 1947. The principle of self-determination was made applicable to these territories,[66] and formal 'securities for performance' were established by the mandate and trusteeship agreements.[67]

**(b) Non-self-governing territories**

What may now be seen as a much more significant extension of the principle was brought about in Chapter XI of the Charter, which applies to 'territories whose peoples have not yet attained a full measure of self-government'. Chapter XI reflects a compromise between those seeking an extension of the Trusteeship system to all 'colonial' territories, and those resisting such a change.[68] The result was an acceptance of much the same the substantive obligations as those under the Mandate and Trusteeship systems—in particular of 'the principle that the interests of the inhabitants of these territories are paramount', and of an obligation 'to develop self-government'[69]—but with a much more attenuated form of international accountability.[70] In practice Chapter XI of the Charter has been subjected to a pronounced progressive interpretation, a process repeatedly endorsed by the International Court.[71]

[65] Charter, Art 76b.

[66] See below this chapter, regarding the *Namibia Opinion*, ICJ Rep 1971 p 6 and the *Western Sahara Case*, ICJ Rep 1975 p 12. See further Chapter 12.

[67] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 Jul 2004, ICJ Rep 2004 p 136, 171–2 (para 88); (2004) 43 ILM 1009, 1034.

[68] Cf Russell and Muther, *A History of the United Nations Charter*, 813–24.

[69] Charter, Art 73. Reference is also made to the 'sacred trust', in language borrowed from Art 22 of the Covenant.

[70] See Chapter 14.

[71] *Namibia Opinion*, ICJ Rep 1971 p 16, 31 (para 52); *Western Sahara Opinion*, ICJ Rep 1975 p 12, 31–3 (paras 54–9); *East Timor*, ICJ Rep 1995 p 90, 103 (para 31), *Wall Opinion*, ICJ Rep 2004 p 136, 171–2 (para 88). Cf *Barcelona Traction, Light and Power Company, Limited*, Second phase, ICJ Rep 1970 p 3.

**(c) Application to particular territorial disputes or situations**

In a number of cases the principle of self-determination has been adopted by the parties as a criterion for settlement of a particular dispute or issue; for example, the use of plebiscites in determining boundaries.[72]

**(d) Criteria for self-determination territories**

It will be seen that in each of these cases the problem of identification has been solved in practice by processes of agreement or at least acquiescence. Indeed for the first and third categories this was true by definition.[73] Chapter XI of the Charter appears to apply to defined territories irrespective of the consent of the States administering them, but the early reporting practice was also quasi-conventional in nature: Member States were asked to list territories to which, in their own assessment, Chapter XI applied and no general examination was made of the completeness or appropriateness of their responses.[74] Practice since 1946, though based on a narrow interpretation of the term 'territories whose peoples have not yet attained a full measure of self-government',[75] has been more searching; it is to this practice that one must look to find even rudimentary criteria for self-determination territories.

Thus after some years of study the General Assembly listed 'Principles which should guide Members in determining whether or not an obligation exists to transmit information called for under Article 73(e) of the Charter.'[76] Pursuant to those principles, the Assembly has 'determined' that particular territories were non-self-governing, in some cases against the wishes of the Member State administering the territory in question.[77] Unlike Chapter XII, Chapter XI is not expressed to depend on the consent of particular administering powers; but the absence of any more peremptory[78] or thorough process of identification of non-self-governing territories remains significant. In addition the General Assembly has adopted a restrictive definition of 'non-self-governing territories', which (as elaborated in Resolution 1541(XV)) refers exclusively to

[72] Cf Bowett (1966) 60 *PAS* 129, 130–1.

[73] Thus Charter Art 77(2) made it clear that there was no automatic transfer of territories from mandate to trusteeship, and the International Court held that there was no obligation to negotiate trusteeship agreements: *Status of South West Africa Opinion*, ICJ Rep 1950 p 128, 139–40; cf Judge de Visscher at 187–90. Article 77(1)(c) provided for other territories to be 'voluntarily placed' under the system by states responsible for their administration. There have been no such territories.

[74] See Chapter 14. [75] UN Charter Art 73.

[76] GA res 1541 (XV), Annex, 15 December 1960 (69–2:21); about which, see Chapter 14.

[77] In the *Namibia Opinion*, Judge Fitzmaurice stated that 'on any view SW Africa is a non-self-governing territory' under Chapter XI of the Charter: ICJ Rep 1971 p 6, 296.

[78] The Annex to GA res 1541 (XV) refers to 'Principles which should guide *Members*...' The Assembly's role is treated as secondary.

the notion of 'colonial territories' in 1945, despite the fact that Chapter XI itself expressly includes territories acquired after 1945. On the other hand, given that definition it is the case that virtually all the territories qualified as non-self-governing under the twin criteria of geographical separateness and political subordination of the population have been treated as such, at least for a time. Moreover, as will be seen in Chapter 14, the principle of self-determination has continued to be regarded as relevant to those territories, even when they were no longer reported on under Article 73(e).

**(e) The 'safeguard clause'**

Tentative steps towards a broader approach have been based on the so-called 'safeguard clause', first articulated in principle 5, paragraph 7of the Friendly Relations Declaration:

> nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or color.[79]

The 'safeguard clause' was reaffirmed in slightly different language by the United Nations World Conference on Human Rights held in Vienna in 1993. The Vienna Declaration provides, in relevant part:

> In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this [*sc* the right of self-determination] shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory *without distinction of any kind*.[80]

According to this formula, a State whose government represents the whole people of its territory without distinction of any kind, that is to say, on a basis of equality, and in particular without discrimination on grounds of race, creed

[79] Friendly Relations Declaration, GA 2625 (XXV), Annex, 24 October 1970, principle 5 para 7. For a summary of writers' views on the meaning of the Declaration and its safeguard clause, see Knop, *Diversity and Self-Determination in International Law*, 75–9. See also GA res 47/135, 18 December 1991, Art 8(4).

[80] United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993, (1993) 32 ILM 1661, 1665 (emphasis added).

or colour, complies with the principle of self-determination in respect of all of its people and is entitled to the protection of its territorial integrity. To put it another way, the people of such a State exercise the right of self-determination through their participation in the government of the State on a basis of equality.[81]

The question is whether these paragraphs envisage what may be termed 'remedial secession' in the case of a State that does not conduct itself in compliance with the principle of equal rights and self-determination of peoples; e.g., in the case of total denial to a particular group or people within the State any role in their own government, either through their own institutions or the general institutions of the state. At least it is arguable that, in extreme cases of oppression, international law allows remedial secession to discrete peoples within a State, and that the 'safeguard clauses' in the Friendly Relations Declaration and the Vienna Declaration recognize this, even if indirectly.

The most significant modern discussion of this issue occurred before a national court, the Canadian Supreme Court, in the *Quebec Secession* case. It is true that factually the issue had no direct relevance there. By no stretch of the imagination could it be said that the people of Quebec were oppressed or that Canada was not governed by a constitutional system 'representing the whole people belonging to the territory without distinction of any kind'. However, the Government of Canada relied on the obverse of the safeguard clause: without actually committing itself to the idea of remedial secession, it argued that the safeguard clause was a safeguard against secession for those States that complied with it.

The Supreme Court took a similar line, holding that this was 'normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state.'[82] The right to external self-determination only arose in 'the most extreme of cases and, even then, under carefully defined circumstances',[83] having regard to the parallel need for respect for the territorial integrity of states. After citing the safeguard clause, the Court went on to quote the final statement of the CSCE Vienna meeting in 1989, to the effect that '[n]o actions or situations in contravention of this principle will be recognized as legal by the participating States.'[84] It concluded, paraphrasing the language of the safeguard clause, by saying:

> There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a 'people' to achieve a full

[81] See Cassese, *Self-determination of Peoples*, 109–25 for a full discussion of the 'safeguard clause'.
[82] (1998) 115 ILR 536, 582 (para 126). [83] Ibid, 584 (para 126).
[84] Ibid, 585 (para 129). For the text of the 1989 statement see (1989) 28 ILM 527.

measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.[85]

But the Court went on to discuss the positive aspect of the safeguard clause, i.e. the issue whether external self-determination may sometimes be justified as the only method of preventing systematic oppression of a distinct people within a State:

The right of colonial peoples to exercise their right to self-determination by breaking away from the 'imperial' power is now undisputed . . . The other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context. This recognition finds its roots in the Declaration on Friendly Relations . . . A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance . . . [T]he underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The Vienna Declaration requirement that governments represent 'the whole people belonging to the territory without distinction of any kind' adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession. Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated. While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination. Even assuming that the third circumstance is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold.[86]

There is a further issue of internal self-determination in the sense of the recognition of cultural identity and internal self-government for different groups or peoples within the State. Traditionally international law treated such issues as matters of domestic jurisdiction, as reflected in the very reserved formulation in the minority rights clause, Article 27, of the International Covenant on Civil and Political Rights.[87] Developments in respect of the idea

[85] (1998) 115 ILR 585 (para 130).

[86] Ibid, 586–7 (paras 132–5), citing Cassese, *Self-determination of Peoples*, 334.

[87] This provides: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.'

of internal self-determination and self-government are, however, occurring, and they are accompanied by an extension of minority rights, including the rights of national minorities,[88] and an increased recognition of the rights of indigenous peoples.[89] Consistently with these developments, the term 'peoples' is coming to be seen as more inclusive, and is not limited to the people of the State as a whole. But these developments are still tentative (*de lege ferenda*), and they do not affect the established rules and practices with respect to self-determination and the territorial integrity of States.[90]

### *(iv) The consequences of self-determination*

Where a territory is recognized as a unit of self-determination, the consequences have been defined in the first place in the relevant instruments themselves; for

[88] See, e.g., GA res 47/135, 18 December 1992, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities. At the regional level, Council of Europe, Framework Convention for the Protection of National Minorities, 1 February 1995, (1995) 34 ILM 351.

[89] ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989: (1989) 28 ILM 1382; UN Commission on Human Rights, Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/SUB.2/1994/2/Add.1 (1994), (1995) 34 ILM 535. See further Chapter 6.

[90] An example of the sensitivity of the term 'people' is provided by developments concerning Corsica. Article 2 of the Constitution of the French Republic of 1958 declares that France is an 'indivisible Republic'. On the basis of Art 2, the French Government denies that there are even linguistic or cultural minorities within its metropolitan territory. When France ratified the International Covenant on Civil and Political Rights in 1980, it made the following reservation: 'In the light of Article 2 of the Constitution of the French Republic, the French Government declares that Article 27 [minority rights] is not applicable so far as the Republic is concerned': United Nations, *Multilateral Treaties Deposited with the Secretary-General. Status as at 31 December 1995* (ST/LEG/SER.E/14, 1996) 124. Corsica, acquired by purchase from Genoa in 1768, has its own language and culture. On 13 October 1988 the Corsican Assembly affirmed 'the existence of a living historical and cultural community comprising native-born Corsicans and Corsicans by adoption: the Corsican people'. Partly in response, the French Parliament in 1991 enacted a law 'portant statut de la collectivité territoriale de Corse', Art 1 of which provided: 'La République française garantit à la communauté historique et culturelle vivante que constitue le peuple corse, composante du peuple français, les droits à la préservation de son identité culturelle à la défense de ses intérêts économiques et sociaux spécifiques. Ces droits, liés à l'insularité, s'exercent dans le respect de l'unité nationale, dans le cadre de la Constitution, des lois de la République et du présent statut.' In a decision of 9 May 1991, the Conseil Constitutionnel held Art 1 invalid on the following basis: 'Considérant que la France est, ainsi que se proclame l'article 2 de la Constitution de 1958, une République indivisible, laïque, démocratique et sociale qui assure l'égalité devant la loi de tous les citoyens quelle que soit leur origine; que dès lors la mention faite par le législateur du "peuple corse, composante du peuple français" est contraire à la Constitution, laquelle ne connaît que le peuple français, composé de tous les citoyens français sans distinction d'origine, de race ou de religion . . .' (Décision 91–290 DC, 9 May 1991: [1991] *Revue du Droit Public* 969, 971.) On the other hand the Court upheld provisions allowing the territorial assembly to promote the teaching of Corsican language and culture (ibid, 975–6. For commentary see Luchaire, ibid, 943). In fact the separatist movement in Corsica has little popular support (ca 10%), but one can expect that (as with Quebec) many more identify with the idea of a people than support secession.

example, the mandate or trusteeship agreement read in the context of the Covenant or the Charter. But the effect of subsequent practice has been marked: despite equivocal references to it in the original instruments, the principle of self-determination has emerged as dominant.[91] A striking example is the case of 'C' Mandates, such as South West Africa: the 'C' Mandate was regarded by some as a form of disguised annexation,[92] but that view did not prevail.[93] Institutions based on self-determination have also been regarded as having a relatively permanent status; for example, the Mandate regime survived the extinction of the League of Nations in 1946, with the result that United Nations membership effected a form of novation of reporting responsibilities from the League Council to the General Assembly.[94] The principle has also been regarded as justifying the revocation or termination of rights to administer territory conferred by international agreement in the event of fundamental violation of the humanitarian interests sought to be protected by those agreements. These matters are discussed further in Chapters 13 and 14.

### *(v) Conclusions*

After contentious beginnings the principle of self-determination is firmly established in international law, in particular in relation to territories of colonial type. In the *Namibia Opinion* the Court stated that

> . . . the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all 'territories whose peoples have not attained a full measure of self-government' (Art. 73). Thus it clearly embraced territories under a colonial regime. Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which 'have not yet attained independence'. Nor is it possible to leave out of account the political history of mandated territories in general. All those which did not acquire independence, excluding Namibia, were placed under trusteeship. Today, only two out of fifteen, excluding Namibia, remain under United Nations tutelage. This is but a manifestation of the general development which has led to the birth of so many new States.[95]

[91] Cf *Namibia Opinion*, ICJ Rep 1971 p 6, 31.

[92] Cf the dispute on the point between South Africa and the Permanent Mandates Commission; noted (1931) 12 *BY* 151.

[93] Cf Wright, *Mandates under the League*, 324–7; Chapter 13.

[94] *Status of South West Africa Case*, ICJ Rep 1950 p 128.

[95] ICJ Rep 1971 p 6, 31.

This passage was cited with approval by the Court in the *Western Sahara* case, in an Opinion that strongly affirmed the right of the people of the territory to determine their future political status, notwithstanding claims to revindication on the part of Morocco and Mauritania.[96] Self-determination was also reaffirmed as the relevant juridical principle in several of the separate opinions.[97] Thus Judge Dillard stressed 'that a norm of international law has emerged applicable to the decolonization of those non-self-governing territories which are under the aegis of the United Nations.'[98] He went on to refer to:

> the cardinal restraint which the legal right of self-determination imposes. That restraint may be captured in a single sentence. It is for the people to determine the destiny of the territory and not the territory the destiny of the people. Viewed in this perspective it becomes almost self-evident that the existence of ancient 'legal ties' of the kind described in the Opinion, while they may influence some of the projected procedures for decolonization, can have only a tangential effect in the ultimate choices available to the people.[99]

This forthright view may be compared with the nuances of Judge Petrèn's separate opinion. Referring to the important 'place of decolonisation, under the aegis of the United Nations, in the present evolution of international law', he pointed out that:

> a veritable law of decolonization is in the course of taking shape. It derives essentially from the principle of self-determination of peoples proclaimed in the Charter of the United Nations and confirmed by a large number of resolutions of the General Assembly. But, in certain specific cases, one must equally take into account the principle of the national unity and integrity of States, a principle which has also been the subject of resolutions of the General Assembly. It is thus by a combination of different elements of international law evolving under the inspiration of the United Nations that the process of decolonization is being pursued . . . [H]owever . . . the wide variety of geographical and other data which must be taken into account in questions of decolonization have not yet allowed of the establishment of a sufficiently developed body of rules and practice to cover all the situations which may give rise to problems. In other words, although its guiding principles have emerged, the law of decolonization does not yet constitute a complete body of doctrine and practice. It is thus natural that political forces should be constantly at work rendering more precise and complete the content of that law in specific cases like that of Western Sahara.[100]

This may simply mean that, although the guiding principles (and in particular the principle of self-determination) of the 'law of decolonization' have

[96] ICJ Rep 1975 p 12, 31–3.
[97] Cf ibid, 99–100 (Judge Ammoun), 30–1 (Judge Nagendra Singh), 170–1 (Judge de Castro).
[98] ICJ Rep 1975 p 12, 121–2. [99] Ibid, 122. [100] Ibid, 110.

emerged, certain aspects of the application of those legal principles remain unclear and *de lege ferenda*. But such uncertainties can be exaggerated, and the Court provided an answer to a request concerning just such an area of doubt. On the other hand, the passage might be interpreted as meaning that, since the application of the guiding principles remains in some cases unclear or uncertain, the principles themselves, and thus the whole 'law of decolonization' remain essentially *de lege ferenda*. This implies a rather cataclysmic view of the growth and creation of international law rules: until a suggested rule has become entirely clear in principle and application, it is not a rule at all. That would constitute a powerful solvent in many areas of the law. But 'guiding juridical principles' can coexist with uncertainties as to their application in specific cases: so long as there exists a core of reasonably clear cases, the status of the principle need not be doubted. On the other view, the emergence of a 'law of decolonization' must await the completion of the process of decolonization, since only then could no doubts or difficulties arise.

Three main arguments have been made against self-determination as a principle of international law. First, it is argued that the notion of self-determination involves in some way a logical contradiction:

> The initial difficulty is that it is scarcely possible to refer to an entity as an entity unless it already is one, so that it makes little juridical sense to speak of a claim to *become* one, for in whom or what would the claim reside? By definition, 'entities' seeking self-determination are not yet determined internationally . . . Alternatively, if they do possess such rights, they are entities, which are already determined internationally . . . [101]

This argument involves an equivocation on the terms 'entity' and 'determination'. The identification of a self-determination unit is a different thing from the determination by that unit in accordance with appropriate procedures of its future status. There is nothing self-contradictory in an entity having a limited status, consisting primarily in the right at some future time to opt for some more permanent status.

A second argument is that it is impossible to delineate with sufficient or indeed with any precision the unit to which the right of self-determination is to be attributed. This point is made, somewhat caustically, by Ivor Jennings: 'On the surface it seem[s] reasonable: let the people decide. It [is] in fact ridiculous because the people cannot decide until somebody decides who are the people.'[102] The short answer is that a substantial body of practice enables us to identify with reasonable precision the units to which self-determination

[101] Fitzmaurice, in Institut de Droit International, *Livre du Centenaire*, 233n.
[102] *The Approach to Self-Government*, 56.

applies as of right (in this study referred to as self-determination units). The point is made by Higgins in this way:

> [T]o what unit does the concept of self-determination apply? If the international order is not to be reduced to a fragmented chaos, then some answer must be provided to this question. The present stage of development of international law and relations as exemplified by United Nations practice, does allow certain tentative observations to be made. Self-determination refers to the right of the majority within a generally accepted political unit to the exercise of power. In other words, it is necessary to start with stable boundaries and to permit political change within them. That the right of self-determination operates within generally accepted political units is an essential premise, for several reasons—first, without this qualification, all is in flux, and there is no constant factor at all; second, to withdraw this proviso would encourage impermissible use of force across state boundaries, an outcome which the United Nations can hardly encourage; and third, by and large the emergent states seem content so far to accept the colonial boundaries imposed on them.[103]

By contrast the definition of a 'people' at large, outside the context of 'generally accepted political units' has proved fraught with difficulty.[104] Parties affirming an existing disposition of territory have used the term 'people', if at all, as referring to the accepted categories of self-determination unit discussed above. Parties seeking revision of some territorial arrangement, in contrast, will take the view that the inhabitants of the territory constitute a separate 'people' if the population favours change; or may deny that classification if it evidently does not. Thus Argentina argued that the inhabitants of the Falkland Islands are not a 'people', and the United Kingdom rejected the view.[105]

Various formulae were proposed during discussions leading to the ICCPR and ICESCR: in the end, it was decided that no definition was necessary.[106] The OAU, in drafting the African Charter on Human and Peoples' Rights was presented with the issue of definition directly, in view of the presence of the term in the title of the Banjul Charter itself, but a definition was deliberately

[103] Higgins, *Development*, 104.

[104] See, e.g., Crawford (ed), *Rights of Peoples*, 5, 72–7, 168–70, Ruiloba Santana in *Homenaje al professor Miaja de la Muela*, 303–36; Vukas (1991 VI) 231 *HR* 231, 317–23; Duursma, *Microstates*, 31–3, 38–9, 44–6, 71–7; Kingsbury (1998) 92 *AJ* 414, 453–5; MacGoldrick (1999) 6 *Int J Minority & Group Rights* 1; Elsner, *Die Bedeutung des Volkes im Völkerrecht*; Raic, *Statehood and the Law of Self-Determination*, 247–65.

[105] For an exchange of UK and Argentine views, see S/PV.2350, p 72, 3 April 1982. The UK had taken a rather different view, however, toward the British Indian Ocean Territory, where it sought to characterize the status of the inhabitants in such a way as not to trigger obligations under Chapter XI of the Charter. For ministerial communications on the point, see *Regina (Bancoult) v Foreign Secretary* [2001] QB 1067, 1079–84; [2001] 2 WLR 1219; 123 ILR 555, 561–6. See further, Chapter 14.

[106] Duursma, *Microstates*, 32–3.

omitted.[107] The Working Group on a draft declaration on rights of indigenous peoples noted disagreement as to the scope of application of the term 'indigenous peoples', Asian States taking the view that the term should apply only to territories that were subject to European colonization.

At the root, the question of defining 'people' concerns identifying the categories of territory to which the principle of self-determination applies as a matter of right. Practice identifies such categories plainly enough. Specifically, the principle of self-determination applies in the following cases.

First, it applies to entities whose right to self-determination is established under or pursuant to international agreements, and in particular to mandated, trust and non-self-governing territories.

Secondly, it applies to existing States, excluding for the purposes of self-determination those parts of the State that are themselves self-determination units as defined. In this case the principle of self-determination normally takes the well-known form of the rule preventing intervention in the internal affairs of a State, a central element of which is the right of the people of the State to choose for themselves their own form of government. In this sense, at least, self-determination is a continuing, and not a once-for-all right.[108] Since self-determination units are coming increasingly to be States (subject to the second rather than the first meaning of self-determination) it is likely that self-determination in the future will be a more conservative principle than has sometimes been feared.

However, there is a further possible category of self-determination units, that is, entities part of a metropolitan State but that have been governed in such a way as to make them in effect non-self-governing territories—in other terms, territories subject to *carence de souveraineté*. Possible examples are Bangladesh, Kosovo and perhaps Eritrea.[109]

Consideration of this further category brings us back to the third objection to the principle of self-determination. This objection is made for example by Verzijl: 'The "right of self-determination" has . . . always been the sport of

[107] OAU Doc. CAB/LEG/67/3/Rev.5 (1981), entry into force, 12 October 1986 (with 26th instrument of ratification), Rapporteur's Report, OAU Doc. CM/1149 (XXXVII), Ann. 1, 4, para 13 (1981), cited by Kiwanuka, (1988) 82 *AJ* 80, 82.

[108] For democracy as a continuing form of self-determination and its limitations see e.g., Franck (1992) 84 *AJ* 46; Crawford (1993) 64 *BY* 113; Crawford and Marks, in Archibugi, Held and Köhler (eds), *Re-Imagining Political Community. Studies in Cosmopolitan Democracy*, 72; Fox and Roth, *Democratic Governance and International Law*; Marks and Clapham, *International Human Rights Lexicon*, 61–70.

[109] In addition there is the case where the principle of self-determination is adopted by the parties as a criterion for settlement of a particular dispute or issue: e.g., the use of plebiscites in determining boundaries. On this application see in particular Bowett (1966) 60 *PAS* 129, 130–1.

national or international politics and has never been recognized as a genuine positive right of "peoples" of universal and impartial application, and it never will, nor can be so recognized in the future . . . '[110] It is true that the principle of self-determination could well apply to a wider range of territories and peoples. But it is far too late in the day to contest the application of self-determination to dependent peoples and colonial territories. The impact of the double-standards argument, if accepted, must therefore be substantially in the further area of misgovernment and denial of fundamental human rights, which, it has been argued, falls within the ambit of the safeguards clause. But the extension of self-determination to that type of case would appear to be precisely the point of Verzijl's argument.

To summarize, the following conclusions are supported by current practice.

(1) International law recognizes the principle of self-determination.
(2) It is, however, not a right applicable just to any group of people desiring political independence or self-government. Like sovereignty, it is a legal principle: Fawcett calls it a 'directive principle of legislation'.[111] It applies as a matter of right only after the unit of self-determination has been determined.
(3) The units to which the principle applies are in general those territories established and recognized as separate political units; in particular it applies to the following: (a) trust and mandated territories, and territories treated as non-self-governing under Chapter XI of the Charter; (b) States, excluding for the purposes of the self-determination rule those parts of States which are themselves self-determination units as defined; (c) other territories forming distinct political-geographical areas, whose inhabitants are arbitrarily excluded from any share in the government either of the region or of the State to which they belong, with the result that the territory becomes in effect, with respect to the remainder of the State, non-self-governing;[112] and (d) any other territories or situations to which self-determination is applied by the parties as an appropriate solution.
(4) Where a self-determination unit is not already a State, it has a right of self-determination: that is, a right to choose its own political organization. Such a right, in view of its close connection with fundamental human

[110] Verzijl, *International Law*, vol I, 324; cf Fitzmaurice, 'Law and Procedure of ICJ', 232–3; Blum (1975) 10 *Israel LR* 509.

[111] Fawcett (1971) 132 *HR* 363, 387.

[112] GA res 1541 (XV), Annex ('Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73e of the Charter of the United Nations') provides guidance in identifying territories in this category. But the fact that a territory is not reported on is not decisive.

rights, is to be exercised by the people of the relevant unit without coercion and on a basis of equality.[113]

(5) Self-determination can result either in the independence of the self-determining unit as a separate State, or in its incorporation into or association with another State on a basis of political equality for the people of the unit.

(6) By definition, matters of self-determination are not within the domestic jurisdiction of the metropolitan State.

(7) Where a self-determination unit is a State, the principle of self-determination is represented by the rule against intervention in the internal affairs of that State, and in particular in the choice of the form of government of the State.

## (2) Statehood and the operation of the principle of self-determination

The relation between the legal principle of self-determination and statehood must now be considered. It has been seen already, in situations such as that found in the Congo, that the principle of self-determination will operate to reinforce the effectiveness of territorial units created with the consent of the former sovereign. However, this only holds good where the new unit is itself created consistently with the principle of self-determination. Where, as with the Bantustans in South Africa a local entity is created in an effort to prevent the operation of the principle to the larger unit, different considerations apply. The same principle holds good in cases of secession. The secession of a self-determination unit, where self-determination is forcibly prevented by the metropolitan State, will be reinforced by the principle of self-determination, so that the degree of effectiveness required as a precondition to recognition may be substantially less than in the case of secession within a metropolitan unit. The contrast between the cases of Guinea-Bissau and Biafra is marked and can be explained along these lines. As a consequence, the rules relating to intervention in the two cases are, it seems, different. These problems will be elaborated further in Chapter 9.

These are, perhaps, ancillary or peripheral applications of the principle. The question remains whether the principle of self-determination is capable of preventing an effective territorial unit, the creation of which was a violation of self-determination, from becoming a State. Practice in this area is not well developed, but in one case, that of Southern Rhodesia, the problem was squarely raised.

[113] See Johnson, *Self-determination with the Community of Nations*, and the early classic studies by Wambaugh, *A Monograph on Plebiscites; Plebiscites since the World War*.

From its unilateral declaration of independence (UDI) on 11 November 1965 until the return of a British governor on 12 December 1979,[114] a minority government exercised effective control within the territory of Southern Rhodesia, and, for that period, it was the only government to do so, despite British claims under the Southern Rhodesia Act 1965 and generally. If the traditional tests for independence of a seceding colony were applied, Rhodesia would have been an independent State.[115] However, Southern Rhodesia was not recognized by any State as independent, nor was it regarded as a State by the United Nations or any other organization.[116] The UDI was immediately condemned by the General Assembly[117] and the Security Council, which decided 'to call upon all States not to recognize this illegal racist minority regime in Southern Rhodesia and to refrain from rendering any assistance to this illegal regime.'[118] A further Council resolution of 20 November 1965 stated that the declaration of independence had 'no legal validity' and referred to the Smith government as an 'illegal authority'.[119] Partly, at least, on this basis various types of sanction were authorized against Southern Rhodesia. Notwithstanding the effectiveness of the government in Southern Rhodesia, the United Kingdom was regarded as the administering authority of the territory which remained a non-self-governing territory under Chapter XI.

Against this background, three positions are possible: that Rhodesia was a State, and that action against it, so far as it was based on the contrary proposition, was unlawful; that recognition is constitutive, and in view of its non-recognition Rhodesia was not a State; or that the principle of self-determination in this situation prevented an otherwise effective entity from being regarded as a State. In view of the consistent practice referred to, the first position is unacceptable.[120] Moreover, the Southern Rhodesian government

[114] Slinn (1980) 6 *CLB* 1038, 1050.

[115] Fawcett (1971) 34 *MLR* 417; Coetzee, *The Sovereignty of Rhodesia and the Law of Nations*.

[116] In 1966 the minority government forwarded communications to the Secretary-General and affirmed a right, as a 'state which is not a Member of the United Nations' to participate in proceedings under Article 32 of the Charter. The Secretary-General stated that 'the legal status of Southern Rhodesia is that of a Non-Self-Governing Territory under resolution 1747 . . . and Article 32 of the Charter does not apply . . .' There was no dissent from this view, and the minority government was not invited to participate under Art 32 or otherwise: *SCOR* 1280th mtg, 18 May 1966, 23. For criticism see Stephen (1973) 67 *AJ* 479. On the diplomatic isolation of Southern Rhodesia, see Ford, *Ian Smith's Rhodesia* (dissertation, Harvard, 1989).

[117] GA res 2024 (XX), 11 November 1965 (107–2:1 (Fr)). Two States did not participate.

[118] SC res 216 (1965), 12 November 1965 (10–0:1 (Fr)), para 2.

[119] SC res 217 (1965), 20 November 1965 (10–0:1), para 3.

[120] To the same effect Higgins (1967) 23 *The World Today* 94, 98; it was also the view of Harold Wilson, *The Labour Government 1964–1970*, 966. Contrast Marston (1969) 18 *ICLQ* 1, 33; Verhoeven, *Reconnaissance*, 548.

did not itself dissent from the view that the United Kingdom retained authority with respect to its affairs, since it apparently accepted that any settlement of the situation had to be approved and implemented by the United Kingdom (as indeed happened).[121] The question of recognition has been discussed already, and the conclusion reached that recognition is in principle declaratory. It must be concluded that Southern Rhodesia was not a State because the minority government's declaration of independence was and remained internationally a nullity, as a violation of the principle of self-determination.[122] In Fawcett's words:

> . . . to the traditional criteria for the recognition of a régime as a new State must now be added the requirement that it shall not be based upon a systematic denial in its territory of certain civil and political rights, including in particular the right of every citizen to participate in the government of his country, directly or through representatives elected by regular, equal and secret suffrage. This principle was affirmed in the case of Rhodesia by the virtually unanimous condemnation of the unilateral declaration of independence by the world community, and by the universal withholding of recognition of the new régime which was a consequence. It would follow then that the illegality of the rebellion was not an obstacle to the establishment of Rhodesia as an independent State, but that the political basis and objectives of the régime were, and that the declaration of independence was without international effect.[123]

In Hillgruber's terms, Rhodesia's claim to statehood was defeated by an 'error at birth'.[124]

[121] For the Pearce Commission Report, see *Cmnd* 4904 (1972). The Smith Government consented to the Pearce Commission enquiring as to the acceptability of certain proposals as a basis for a settlement; and subsequently accepted a settlement as structured under United Kingdom guidance and involving an explicit acknowledgment that Southern Rhodesia was part of the British constitutional framework. See further Chapter 14.

[122] The Privy Council in *Madzimabamuto v Lardner-Burke* [1968] 3 WLR 1229, 1250 did not consider this position, arguing instead that Southern Rhodesia was not a State because the legitimate government was still trying to reassert itself. Cf *In re James* [1977] 2 WLR 1 (CA); (1977) 81 *RGDIP* 1189; SC res 423, 14 March 1978.

[123] (1965–6) 41 *BY* 103, 112–13, citing the Universal Declaration, the Colonial Declaration and GA res 648 (VII), 10 December 1952. Brownlie regarded the status of Rhodesia as flowing from 'particular matters of fact and law' without further elaboration: *Principles* (4th edn), 98; cf his later formulation (6th edn), 95. Marshall (1968) 17 *ICLQ* 1022, 1033 argued that, because Rhodesia remained a monarchy but the Queen refused to act, there was 'no legal entity which can be recognized'. But this is an inadequate explanation: the proclamation of a Republic in 1970 did not alter Rhodesia's international status. Okeke, *Controversial Subjects of Contemporary International Law*, 88 referred to Fawcett's position with apparent approval but paradoxically concluded that 'Rhodesia ranks among the entities which are endowed with statehood under international law' (ibid, 104–5).

[124] Hillgruber, *Aufnahme neuer Staaten*, 601. Generally on Rhodesia see ibid, 554–602.

This view was contested by Devine, who moved from a quasi-declaratory[125] to a firmly constitutive view[126] of recognition by his consideration of the Rhodesian affair. His position was to some extent vitiated by his misreading of Fawcett's criterion as one of 'good government'.[127] Good government was not then (and is not now) a criterion for statehood, but Fawcett did not suggest otherwise. Statehood is a predicate for governmental authority, whether exercised well or badly; if badly the State is internationally responsible, e.g., for breaches of fundamental human rights of its citizens; while such actions may delegitimize the government, they do not affect the State as such. Fawcett's position was a more limited one: that where a particular people has a right of self-determination in respect of a territory, no government will be recognized which comes into existence and seeks to control that territory as a State in violation of self-determination.[128] It may be concluded that an entity may not claim statehood if its creation is in violation of an applicable right to self-determination.

## 3.3 Entities created by the unlawful use of force[129]

Article 2 paragraph 4 of the Charter prohibits the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations. This prohibition does not affect the right of self-defence against armed attack under Article 51. These rules concerning the use of force are a clear case of peremptory norms.[130] Moreover the principle that territory may not be validly acquired by the use of force is well established.[131] The principles of State succession do not, it seems,

[125] [1967] *Acta Juridica* 39.

[126] [1973] *Acta Juridica* 1, 142–5; also McDougal and Reisman (1968) 62 *AJ* 1, 17. Cf Devine (1969) 2 *CILSA* 454; Richardson (2000) 45 *Villanova LR* 1091, 1125–6.

[127] (1971) 34 *MLR* 410; cf [1973] *Acta Juridica* 83–6.

[128] Devine accepted that UDI was a violation of self-determination in a political sense: [1973] *Acta Juridica* 67. But he regarded self-determination as 'too controversial, unaccepted and vague to be used by the Rhodesians as a shield or by anyone else as a sword against them': ibid, 77. Cf Devine (1971) 34 *MLR* 415, and Fawcett's reply, ibid, 417. On the so-called 'failed States' see further pp 719–23.

[129] The literature on statehood and the use of force remains sparse. There is a characteristic contribution by Baty (1926–7) 36 *Yale LJ* 966 (based on the old regime of rules relating to the use of force). The relation between State extinction and the use of force has been more extensively discussed: see Chapter 17.

[130] Vienna Convention on the Law of Treaties, Arts 52 and 53. Article 52 was reaffirmed in the *Icelandic Fisheries Case (First Phase)*, ICJ Rep 1973 p 3, 19.

[131] Whiteman, 5 *Digest* 874–965 and authorities there cited. See also *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina*

apply to cases involving the violation of the Charter, and in particular of Article 2 paragraph 4.[132] The protection accorded States by Article 2 paragraph 4 extends to continuity of legal personality in the face of illegal invasion and annexation: there is a substantial body of practice protecting the legal personality of the State against extinction, despite prolonged lack of effectiveness. In summary, the prohibition of the threat or use of force in international relations is one of the most fundamental of international law rules. The international community has with considerable consistency refused to accept the legal validity of acts done or situations achieved by the illegal use of force. If ever effective territorial entities were to have their status regulated by international law, it would be so regulated by the rules relating to the use of force.[133]

Of course, quite apart from Article 2 paragraph 4, there is a presumption against the independence of entities created by the use of force or during a period of belligerent occupation. The question is whether modern law regulates the creation of States to any greater degree than this, in a situation involving illegal use of force. Answering the question is made more difficult because, in most of the limited number of cases where it has arisen other factors have been determining.

For example, in the Manchurian crisis the question whether Manchukuo could have become an independent State notwithstanding the illegal Japanese intervention was never really in issue, since the puppet nature of the Manchukuo regime was and remained evident. It is true that the League of Nations resolutions which proclaimed the duty of non-recognition referred not to lack of independence but to violation of the Covenant and the Pact of Paris.[134] Recognition was stated to be 'incompatible with the fundamental principles of existing international obligations'.[135] Despite these statements, League action was predicated on the Lytton Commission's finding that Manchukuo was

*v Yugoslavia)* (Further Request for the Indication of Provisional Measures, 13 September 1993), sep op Judge ad hoc Lauterpacht, ICJ Rep 1993 p 325, 434–5, 440 (paras 80–3, 100). The statement in *Gosalia v Agarwal* (S Ct India, Chandrachud CJ, 1981) that '[t]he territories comprised in Goa, Daman and Diu under . . . Portuguese rule were annexed by the Government of India by conquest', if defensible at all, must be seen as a reflection of special considerations in a colonial situation where self-determination has been forcibly resisted: AIR 1981 SC 1946, 1948; 118 ILR 429, 432 (para 5).

[132] Vienna Convention on Succession of States in respect of Treaties, 23 August 1978, 1946 UNTS 3: 'The present Convention applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.' Cf 1972/II *ILC Ybk* 60.

[133] Cf Shaw (1997) 8 *EJIL* 478, 500 .

[134] Assembly res, 11 March 1932: LNOJ Sp Supp no 101/I, 87.

[135] Assembly res, 24 February 1933: ibid LNOJ Sp Supp no 112/II, 14. The language of the resolution is taken directly from the Lytton Commission's Report: C.663.M.320. 1932 [VII], 128. The Chinese position was that 'in pursuance of the obligations created by the Covenant . . . it is

not 'a genuine and spontaneous independence movement'. Given its total lack of independence the question whether, had it been effectively independent, it would have been denied statehood because of Japanese violations of the Covenant and the Pact of Paris did not really arise. The various entities created during the war by illegal use of force were also regarded as puppets and thus not independent.[136] And the status of Taiwan has been determined, not by any illegality by which it has been enabled to survive as a separate entity, but by the insistence of both governments involved that Taiwan remains part of China—a view acquiesced in by all other States.

More recent cases exhibit a similar mixture of arguments. In the International Court, counsel for Bosnia, argued that the Republika Srpska was not a State because of multiple, if related, factors: 'the creation or maintenance of an entity purporting to be a state in violation of the prohibition of the use of force, or all other rules of *jus cogens*, such as the prohibition of apartheid, and it is submitted, the obligation not to perpetrate genocide, cannot have legal consequences.'[137] The dependency of the Turkish administration in northern Cyprus on military support from Turkey was identified by the European Court of Human Rights as a deciding factor[138] while elsewhere non-recognition of the TRNC has been traced to the illegality of the military intervention that led to its eventual establishment.[139] Unlawful use of force in furtherance of a claim to statehood is often accompanied by other illegalities or by lack of actual

incumbent upon the League to use, to the fullest extent necessary, its authority to prevent such a changed political situation from being created, or, if created *de facto*, from being recognized by the League or by its members as of a *de jure* character. Indeed, if brought into a *de facto* existence, in violation of the Covenant . . . it is the contention of the Chinese Government that the League should use its authority to break down that *de facto* situation in order that the political order existing prior to September . . . may be re-established' (*LoN Doc*. A. (extr) 105.1932[VII] (23 April 1932), 8). And see Kolb (2000) 33 *RBDI* 84, 116–24.

[136] Another example, which bears close comparison with Manchuria, was the Azerbaijan independence movement in 1945–6 in northern Iran under Soviet occupation: cf USFR 1945/VIII, 512.

[137] *Memorial of Bosnia & Herzegovina*, 264, *Application of the Genocide Convention* (15 April 1994), cited in Grant (1997) 33 *Stanford JIL* 305, 323. In its judgment on preliminary objections the Court certainly did not treat Republika Srpska as a State, but did not say why: *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Yugoslavia)* (Preliminary Objections) ICJ Rep 1996 p 595.

[138] *Cyprus v Turkey*, 35 EHRR 30, 969, 120 ILR 12, 39 (para 77): [H]aving effective overall control over northern Cyprus, [Turkey's] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support.'

[139] Press statement of Sec State, FCO, 16 December 1997, reprinted (1997) 68 *BY* 520: '[T]he occupation of the northern section of Cyprus is illegal and we do not recognize the so-called Turkish Republic of Northern Cyprus as a legitimate entity.'

independence, thus rendering it difficult to identify the legal consequence of use of force on the status of a putative State.[140]

Moreover, the specific dispute which calls status into question will colour its treatment. In the *Rajíc* case, the issue was the applicability of international humanitarian law (as distinct from the law concerning internal armed conflict) to the conflict in Bosnia. A finding that Croatia controlled the putative Croat State in Bosnia would establish the international character of the conflict. A trial chamber of the International Criminal Tribunal for the Former Yugoslavia agreed that Croatia exercised such control over 'Herceg-Bosna' that the latter entity was in essence an extension of the former. But this was for the limited purpose of determining jurisdiction of the Tribunal—not necessarily for determining the responsibility of Croatia.[141]

The puppet-State situation illustrates the difficulty involved in any consideration of the relation between statehood and the illegal use of force. Either the entity owes its existence directly and substantially to the illegal intervention—in which case it is unlikely to be and will be presumed not to be independent—or it does not, in which case the normal criteria for statehood will apply. But it is conceivable that an entity created by external illegal force could be genuinely independent in fact. The situation most clearly relevant is that of Bangladesh in 1971. But that case involved also a problem of self-determination, so that we must first consider the relation between self-determination and the rules relating to the use of force.

### (1) The relation between self-determination and the use of force

The relation between self-determination and the rules relating to the use of force is a question of some difficulty.[142] That there may well be a significant connection between the two is apparent from the Charter itself: Article 2

[140] States rejecting claims of the statehood of the bantustans sometimes relied on the fact that they were not independent: 'We do not recognise Bophuthatswana as an independent State on the grounds that it does not enjoy genuine independence.' Min State, FCO, 74 *HC Deb* WA col 305, 1 March 1985.

[141] *Prosecutor v Rajíc*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence. no IT-95–12-R61, International Criminal Tribunal for the Former Yugoslavia, 13 September 1996, para 26. For comment see Scharf (1997) 30 *NYUJILP* 167, 197; Swaak-Goldman (1997) 91 *AJ* 523, 525–6, Meron (1998) 92 *AJ* 236. See also Gray (1996) 68 *BY* 155; Kolb (2000) 71 *BY* 259, 275–8. See also the ILC's commentary to ARSIWA Art 8, para 6, reprinted in Crawford, *Selected Essays*, 111–12.

[142] See, however, Rigo Sureda, *Evolution of the Right of Self-determination*, 346–51; Zourek, *L'Interdiction de l'emploi de la force en droit international*, 108–11; Bennouna, *Le Consentement à l'ingérence militaire dans les conflits internes*, 159–70; Dugard (1967) 16 *ICLQ* 157–90; Sukovič in Šahoric (ed), *Principles*, 363–8; Cassese, *Self-determination of Peoples*, 193–201; Knop, *Diversity*, 82, 86–90.

paragraph 4 includes an undertaking not to use force 'in any other manner inconsistent with the Purposes of the United Nations', and 'respect for the principle of equal rights and self-determination of peoples' is one of those purposes. It might be argued that preventing the use of force contrary to the purposes of the United Nations is only a subordinate aim of Article 2 paragraph 4 (cf the word 'other'). If the prevention of the use of force against the territorial integrity or political independence of States is the primary aim of the paragraph, the protection or advancement of the other purposes would be lawful only where it does not involve the use or threat of force against the territorial integrity or political independence of any State. The development of Article 2 paragraph 4 in practice has tended to emphasize the prevention of overt aggression rather than, for example, the use of force by an incumbent against insurgents claiming for a territory a right of self-determination.[143] In view of these uncertainties, the problem of the relationship between self-determination and the use of force must be considered separately in relation to the various types of situation that may arise. In some areas practice is reasonably well developed, in others we are reduced to speculation on the basis of general principles.

The following situations may be envisaged:

(1) A self-determination unit (other than a State) is prevented from exercising its right to self-determination by the use of force.
(2) A self-determination unit is invaded and annexed by force without being allowed to opt for incorporation or any alternative status.
(3) An effective self-governing entity is created in accordance with an applicable right to self-determination by unlawful external force.
(4) An effective self-governing entity is created in violation of an applicable right to self-determination by external unlawful force.

The much-debated problem of the legitimacy of rebellion or of a liberation movement's 'right to self-defence against colonial domination' is not in point here. Debate on the lawfulness or otherwise of the use of force by a non-State entity presupposes the legal personality of that entity. If such personality derives from the right of the entity in question to self-determination, it is unlikely that the use of force to assert the right could be the foundation for its unlawfulness in international law: on that view the existence of a right would be precisely what made its exercise unlawful.[144] It is probably the case that the

[143] In the *Corfu Channel Case*, ICJ Rep 1949 p 4, the International Court condemned the threat of force in a self-help operation where the other party's behaviour was hardly consistent with Art 1 of the Charter.

[144] Cf Devine [1973] 1 *Acta Juridica* 72–8; Okeke, *Controversial Subjects of International Law*, 86.

use of force by a non-State entity in exercise of a right of self-determination is legally neutral, that is, not regulated by international law at all (though the rules of international humanitarian law may well apply).[145] The question of the right to self-defence is not in point either. What is relevant is the lawfulness or otherwise of action by other States in assisting or opposing the self-determination unit.

The most important statement of principles in this area is still the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations approved by resolution 2625 (XXV). In its elaboration of Article 2 paragraph 4, the Declaration provides that: 'Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.' The elaboration of the principle of equal rights and self-determination repeats this formulation, and goes on to state that: 'In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.'[146] Taken literally, these propositions establish a close relationship between the two relevant principles, with the principle of self-determination taking priority over the prohibition of the use of force against the territorial integrity of a State. That primacy can perhaps best be expressed in the proposition that the phrase 'territorial integrity of any State' in Article 2 paragraph 4 excludes, so far as action in furtherance of self-determination is concerned, the territory of any self-determination unit as defined. The question is whether this proposition, which has a certain amount of doctrinal support, is also supported by relevant State practice.

[145] On the controversy surrounding Art 1(4) of the First Protocol to the 1949 Geneva Conventions, 8 June 1977, 1125 UNTS 3. Cassese in Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross principles*; Sandoz, Swinarski and Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977*, 46–55.

[146] Cf Art 7 of the Definition of Aggression, adopted without vote by GA res 3314 (XXIX), 14 December 1974:Nothing in this definition . . . could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived in that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations . . . particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.' See also GA res 3103 (XXVIII) ('Basic Principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes'), 12 December 1973 (83–13:19).

Perhaps the most straightforward situation to be looked at is that where a self-determination unit (other than a State) is prevented from exercising its right to self-determination by the use of force. Examples of such a situation were the Portuguese African colonies before 1974. Military action taken by an administering power to suppress widespread popular insurrection in a self-determination unit is itself a denial of self-determination and unlawful on that ground. Both the General Assembly and the Security Council[147] repeatedly condemned what they described as 'colonial wars' and 'acts of repression' in the Portuguese territories, but they refrained from characterizing the situations as aggressive war for the purposes of Article 2 paragraph 4. The contrast is demonstrated, more or less conclusively, by General Assembly resolution 3061 (XXVIII) which, pursuant to the thesis of the independence of Guinea-Bissau, condemned Portugal for 'illegal occupation . . . of certain sectors of the Republic . . . and acts of aggression committed against the people of the Republic.'[148] The difference between this language and that used in the case of Angola and Mozambique is significant. It is consistent with the primary emphasis in Article 2 paragraph 4 on prevention of direct military force against the territory of another State. The principle of self-determination does not deprive an administering State of its sovereignty with respect to a self-determination territory, but, rather, requires administration of the territory in furtherance of and in preparation for an act of self-determination. The use of force by a metropolitan power against a self-determination unit is not a use of force against the territorial integrity and political independence of a State, though it will be in another manner inconsistent with the purposes of the United Nations.

The second situation enumerated above—invasion and annexation of a self-determination unit by external force without according the people of the invaded territory any right to choose their future status—is also straightforward. Invasion and annexation of territory is unlawful, and the separate status of a territory for the purposes of self-determination, if anything, aggravates the illegality. The only difficulty that could arise is in the case of annexation of a territory that is not, in the full sense, a self-determination unit but rather a 'colonial enclave'. The distinction between those two types of territory is established in United Nations practice and is discussed in Chapter 14. Assuming the validity of the distinction, it is nonetheless the case that forcible annexation by

[147] E.g. SC res 322, 22 November 1972; Anderson (1974) 4 Denver *JILP* 133.

[148] GA res 3061(XXVIII), 2 November 1973 (97–7:30) ('Illegal occupation by Portuguese military forces of certain sectors of the Republic of Guinea-Bissau and acts of aggression committed by them against the people of the Republic').

the surrounding ('enclaving') State is unlawful, for the reasons stated above. When India invaded and annexed Goa in January 1961, a majority of the Security Council took this view.[149] India claimed that Goa was historically and legally Indian territory and that Article 2 paragraph 4 did not apply.[150] But it had on several occasions expressly recognized Portuguese sovereignty over its Indian territories, whilst claiming their return. Bearing in mind the predominant Charter emphasis on peaceful change, the better view is that Article 2 paragraph 4 applies to any established *de facto* political boundary, and that, even in the rather special situation of a colonial enclave, the international interest in peaceful settlement of disputes takes priority over any specific claim of the enclaving State.[151] The significance of self-determination in this context is not so much that it cures illegality as that it may allow illegality to be more readily accommodated through the processes of recognition, whereas in other circumstances aggression partakes of the nature of a breach of a peremptory norm and is not, or not readily, curable by lapse of time or acquiescence. The Committee of Twenty-Four in time ceased to treat Goa as a non-self-governing territory.[152]

The third and fourth situations are more difficult. The third situation is that in which an effective self-governing entity is created in pursuit of an applicable right to self-determination by external force which would otherwise be contrary to Article 2 paragraph 4. In practice this may involve two distinct problems: external aid to insurgents in a self-determination situation, and the large-scale use of force by another State aimed directly at 'liberating' a self-determination territory. The situation, in other words, may be one of assistance to an internal revolt which has achieved the dimensions of a civil war, or of a full-scale international military action aimed at securing for a territory self-determination or independence.

### *(i) Assistance to established local insurgents*

On numerous occasions General Assembly resolutions have encouraged or enjoined assistance, civil or military, to local insurgents either in general terms or in relation to specific territories. For example, paragraph 10 of resolution 2105(XX) on the implementation of the Colonial Declaration, an annual

[149] S/5033; *SCOR* 988th mtg, 18 December 1961, 26–7 (7–4:0 (USSR, Ceylon, Liberia, UAR)).

[150] *SCOR* 987th mtg, 18 December 1961, 8–9; ibid, 988th mtg, 18 December 1961, 14–19.

[151] On Goa see Brownlie, *Use of Force*, 349, 379–83; Higgins, *Development*, 187–8; Wright (1962) 56 *AJ* 617.

[152] By a treaty of 31 December 1974, 982 UNTS 159, Portugal recognized Indian sovereignty over the former Portuguese territories in India, which were stated to 'have already become parts of India' (Art I). For the contrasting case of the French colonial enclaves, see Marston (1992) 63 *BY* 443, 458.

resolution in more-or-less common form, '[r]ecognizes the legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination and independence and invites all States to provide material and moral assistance to the national liberation movements in colonial Territories.'[153] Resolution 2795 (XXVI) ('Question of Territories under Portuguese Administration'), by clause 13

> [r]equest[ed] all States . . . in consultation with the Organization of African Unity, to render to the peoples of the Territories under Portuguese domination, in particular the population in the liberated areas of those Territories, all the moral and material assistance necessary to continue their struggle for the restoration of their inalienable right to self-determination and independence.[154]

Resolutions in this form request what would otherwise be intervention against the established government in civil wars. Has the rule of non-intervention in civil wars ceased to apply in the case of colonial wars? Certainly that has been the contention of many Third World governments.[155] For present purposes, however, the lawfulness of military assistance or civil aid to insurgents in non-self-governing or other self-determination territories is of peripheral importance. What is clear is that the receipt of such assistance is not regarded as relevant where the local unit achieves effective self-government by military or other means. The fact that large amounts of aid were given to the PAIGC in Guinea-Bissau did not prevent general recognition of Guinea-Bissau as a State prior to Portuguese recognition.[156]

### *(ii) Military intervention to procure self-determination*

Where on the other hand the emergence of local self-government in a self-determination unit is the result not of insurgency but of external military intervention, the situation is quite different. With this situation must be considered the fourth case mentioned above; that is, the emergence of an effective self-governing entity as a result of military intervention in violation of self-determination. Three possibilities exist. First, it may be that the effectiveness of the emergent entity prevails, so that its illegality of origin—however

[153] GA res 2105(XX), 20 December 1965 (74–6:15).

[154] GA res 2795(XXVI), 10 December 1971 (105–8:5).

[155] For discussion of this view in the General Assembly see Dugard in Orkin (ed), *Sanctions Against Apartheid*, 113.

[156] On national liberation movements generally, see Verwey (1981) 75 *AJ* 69; Wilson, *International Law and the Use of Force by National Liberation Movements*, esp chs 5 and 6; Gandolfi, *Les mouvements de liberation nationale*; Brietzke (1994) 13 *Wisc ILJ* 1. On SWAPO see Theodoropoulos (1979) 26 *Africa Today* 39; Ginther (1982) 32 *ÖZöRV* 131.

serious—will not impede recognition as a State. Secondly, it may be that in both cases the illegality of origin should be regarded as paramount in accordance with the maxim *ex injuria non oritur jus*. Or thirdly, it may be that, in the self-determination situation, the status of the local entity and the legality of the use of force ought to be regarded as separate issues so that the illegality of the intervention should not prejudice the pre-existing right of the local unit to self-determination.

Earlier practice in the cases of Hyderabad and Goa was equivocal, given the character of those post-colonial situations. They certainly showed the conflicts of political interest in situations of this type, which threaten to overwhelm considerations of principle. On the other hand, many areas of State practice that are in principle regulated by international law are also politicized, sometimes highly so. Moreover, there do exist accepted principles that regulate the legal effects of State conduct in closely related areas. For example, if State personality is preserved despite effective but illegal annexation by force (Ethiopia, Czechoslovakia, Albania, Baltic States, Kuwait), why cannot statehood not be denied to an entity *created* by external illegal force? If the rule regulating the use of force in international relations is sufficiently important to outweigh the principle of effectiveness in the one situation, there is no reason why it should not have a similar effect in the other situation. Equally if a State cannot acquire territory by the use of force, it should not be able to achieve the same result in practice by fomenting, and then supporting, insurrection.[157] This was an important factor in the Manchurian crisis, although, as we have seen, the lack of independence of 'Manchukuo' enabled the situation to be dealt with, at least in form, within the structure of the legal rules deriving from the principles of effectiveness and *de facto* independence.

Analysis of this problem must then centre on an assessment of two cases, contrasting in their outcome: Bangladesh and the putative Turkish State in northern Cyprus.

Briefly the situation in Bangladesh was as follows.[158] East Pakistan, a part of the geographically divided State of Pakistan created at partition in 1947, had suffered relatively severe and systematic discrimination from the central government based in Islamabad. However, in December of 1970 elections were held throughout Pakistan for a constituent Assembly. East Pakistan

[157] Baty (1926–7) 36 *Yale LJ* 966, 979–82; Hsu, 1949 *ILC Ybk* 112–13.

[158] There is a useful though hardly impartial study by Chowdhury, *The Genesis of Bangladesh*. The factual material presented by Chowdbury is largely corroborated in *ICJ Review* no 8 (June 1972), 23. The best analysis is that by Salmon, in *Multitudo legum*, vol I, 467. See also Franck and Rodley (1972) 2 *Israel YBHR* 142; Nanda (1972) 66 *AJ* 321; Franck and Rodley (1973) 67 *AJ* 275; Salzberg (1973) 27 *Int Org* 115–28; Dugard (1987) 75–6.

elected 167 Awami League representatives out of a total of 169 seats allocated to it. The Awami League thus had an absolute majority in the 313-seat National Assembly. The League's leader was Sheikh Mujibur Rahman, and its programme was based on provincial autonomy. However, the Assembly was indefinitely suspended on 1 March 1971. On 25 March 1971 the central government instigated a period of martial rule in East Pakistan, which involved acts of repression and even possibly genocide and caused some ten million Bengalis to seek refuge in India. The Awami League proclaimed the independence of Bangladesh on 10 April 1971 but, although it retained the support of the people of East Pakistan it was reduced to a form of guerrilla warfare against the occupying forces. On 3 December 1971, large-scale war broke out between India and Pakistan on both eastern and western borders, and lasted until 17 December when the Pakistan army in East Bengal surrendered, and India declared a unilateral ceasefire on the western border. Meanwhile India and Bhutan had recognized Bangladesh on 6 and 7 December respectively. The Awami League substantially controlled East Bengal very shortly after the ceasefire, with the assistance of Indian troops. The continued presence of those troops was not regarded as sufficiently important to preclude recognition of the new State. Twenty-eight states had recognized Bangladesh *de jure* by 4 February 1972, and a further five states had extended *de facto* recognition. Recognition by Pakistan was, however, delayed until 22 February 1974.[159]

It is clear that Indian intervention was decisive in effecting the emergence of Bangladesh. There was substantial local support for autonomy or, if that could not be obtained, for independence: there was also a reasonably substantial local insurgency. But there can be no doubt that Indian intervention was the dominant factor in the success of the independence movement. Yet Bangladesh, despite Indian intervention, was rapidly and widely recognized as a State.[160] Indian intervention was criticized by many governments as a violation of the Charter,[161] but that illegality was not regarded as derogating from the status of East Bengal, or as affecting the propriety of recognition. Indeed, not even the fact that Indian troops remained in Bangladesh for a time was regarded as detracting from independence, despite the presumption against independence in such circumstances which has been consistently applied elsewhere.[162]

The question whether East Bengal in 1971 was a self-determination unit thus becomes important. If not, or if recognition was given simply on the basis of effectiveness without regard to the legality of Indian intervention or to any

[159] (1974) 78 *RGDIP* 1171–4.
[160] Salmon, 'Naissance et Reconnaissance' 478–9.
[161] Okeke, *Controversial Subjects of International Law*, 142–57.
[162] Cf [1974] *Rbdi* 348–50.

denial of right to the people of East Bengal, then there would appear to be no criterion of legality regulating the creation of States by the use of external illegal force.[163]

East Pakistan was not at any time after 1947 formally a non-self-governing territory. It would have been classified as 'metropolitan' and so outside the ambit both of Chapter XI of the Charter and (but for exceptional circumstances) the customary right of self-determination. However, its status, at least in 1971, was not so clear, for several reasons. In the first place, East Bengal qualified as a Chapter XI territory in 1971, if one applies the principles accepted by the General Assembly in 1960 as relevant in determining the matter.[164] According to Principle IV of resolution 1541 (XV), a territory is prima facie non-self-governing if it is both geographically separate and ethnically distinct from the 'country administering it'. East Pakistan was both geographically separate and ethnically distinct from West Pakistan: moreover by 1971 the relation between West and East Pakistan, both economically and administratively, could fairly be described as one which 'arbitrarily place[d] the latter in a position or status of subordination'.[165] It is scarcely surprising then that the Indian representative described East Bengal as, in reality, a non-self-governing territory.[166] In any case, and this point is perhaps as cogent, it is hard to conceive of any non-colonial situation more apt for the description *'carence de souveraineté'* than East Bengal after 25 March 1971. Genocide is the clearest case of abuse of sovereignty, and this factor, together with the territorial and political coherence of East Bengal in 1971, qualified East Bengal as a self-determination unit within the third, exceptional, category discussed above, even if it was not treated as a non-self-governing territory. The view that East Bengal had, in March 1971, a right to self-determination has received juristic support.[167] Moreover, the particular, indeed the extraordinary, circumstances of East Bengal in 1971 to 1972 were undoubtedly important factors in the decisions of other governments to recognize, rather than oppose, the secession: by its conduct the Pakistan army had disqualified itself, and the State, from any further role in East Bengal. The comparison with international opposition to secession in other cases is marked, as shown in Chapter 9.

[163] This position is suggested by the *Restatement (Third)* (1987), §202, Reporters' Note 5, 81–2: 'In most instances the issue is not subject to authoritative determination.'

[164] GA res 1541 (XV), 15 December 1960 (89–2:21). India and Pakistan both voted in favour.

[165] GA res 1541 (XV), Annex, Principle V. See Chapter 14.

[166] *SCOR* 1606th mtg, 4 December 1971, para 185.

[167] Chowdhury, *Genesis*, 188 ff; Okeke, *Controversial Subjects*, 131–41; Mani (1972) 12 *Indian JIL* 83; Nawaz (1971) 11 *Indian JIL* 251; Nanda (1972), 66 *AJ* 321; cf Nanda (1972) 49 *Denver LJ* 53. Contrast (1972) *ICJ Review* no 8, 51–2.

Thus, Salmon, after a cautious and reasoned assessment, concludes:

> La même idée qui si l'acte de force créant le Bangla-Desh fut illicite, le résultat ne l'est pas—car il fait suite à une autre violence qui empêchait ce peuple à disposer de lui-même—explique que n'ont point joué ici les règles qui interdisent de reconnaître une situation lorsque la reconnaissance constitue une intervention dans les affaires intérieures des autres États ou lorsqu'il s'agit d'une acquisition territoriale obtenue par la menace ou l'emploi de la force.[168]

The situation of Bangladesh may be compared with that in Cyprus. In Cyprus, too, external intervention was the decisive factor in establishing a new local administration, effective in a certain territorial sphere. Other aspects of the case, however, were in sharp contrast to Bangladesh, including assessments of the legality of the situation as it evolved.

A set of agreements reached in 1959 and 1960 between the administering power, Great Britain, and the two constituent communities in Cyprus, Greek and Turkish, included a constitution for the Republic of Cyprus and provided for its independence. Greece and Turkey were also parties. A 'Treaty of Guarantee' designated Great Britain, Greece and Turkey 'guaranteeing powers' undertaking to maintain the constitutional structures of Cyprus as set out in 1960.[169] The Constitution established institutions designed to assure the rights of the Greeks and Turks as separate communities within the State.[170] It guaranteed the territorial integrity of Cyprus and prohibited '[t]he integral or partial union of Cyprus with any other State or the separatist independence' of any part of the republic.[171]

The arrangement prescribed in the 1960 Constitution quickly proved unworkable.[172] Inter-communal frictions paralyzed institutions at the

[168] Salmon, 'Naissance et Reconnaissance', 490.

[169] Treaty of Guarantee, 16 August 1960, 382 UNTS 475, app B Art IV provided that '[i]n the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions.' 'In so far as common or concerted action may not prove possible, each of the three guaranteeing powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty.'

[170] See Republic of Cyprus Constitution, app D; 382 UNTS 5475; 397 UNTS 5712. Among these structures were two communal legislative chambers; separate electoral rolls for Greeks and Turks; and a House of Representatives in which a simple majority of delegates of either community could veto legislative initiatives. See Republic of Cyprus Constitution, Arts 61, 62, 67, 77. Articles 87 and 89 defined extensive competences belonging to the Communal Chambers.

[171] Constitution, Art 185.

[172] Ehrlich (1966) 18 *Stanford LR* 1021, 1040–7; Wippman (1996) 31 *Texas ILJ* 141, 146–7. Writers after the fact said that a breakdown had been inevitable: Anthias and Ayres in *Race and Class*, 70; Hitchins, *Cyprus*, 49. But see Ehrlich (1966) 18 *Stanford LR* 1021, 1040; Ehlrich, *Cyprus 1958–1967*, 36–60. Necatigil, *The Cyprus Question and the Turkish Position in International Law* (2nd edn), 20–6.

national level,[173] and by 1963 the Turkish community existed within its own enclaves, effectively self-administering.[174] On 15 July 1974, the president of Cyprus, Archbishop Makarios III, was overthrown by Greek Cypriot national guardsmen supported by the government of Greece, and Nikos Sampson, an advocate of 'enosis' (union of Cyprus with Greece) was declared president.[175] Invoking Article IV of the Treaty of Guarantee, Turkey deployed military forces to the north of Cyprus in July and August 1974.[176] The situation was deplored by the General Assembly, which called for the withdrawal of all foreign forces.[177] Nonetheless Turkish Cypriots consolidated their administration in the north of the island under the aegis of the Turkish army.

The northern administration declared a Turkish Federated State of Cyprus on 13 February 1975.[178] This was followed on 15 November 1983 with the declaration of an independent Turkish Republic of Northern Cyprus (TRNC). Security Council resolution 541 of 18 November 1983 'deplore[d] the declaration of the Turkish Cypriot authorities of the purported secession of part of the Republic of Cyprus' and called upon 'all States not to recognize any Cypriot State other than the Republic of Cyprus'.[179] Turkey was and remains the only State to extend recognition to the TRNC, a measure condemned by the Security Council.[180] There were substantial refugee movements, expelled Greek Cypriots moving south, Turkish Cypriots to the north.[181] Thus a putative State emerged in northern Cyprus with the assistance of foreign military intervention.

[173] The Greek community in 1963 proposed a set of thirteen changes to the constitution of Cyprus, but these were rejected by the Turkish community on the grounds that such amendment would violate Art 182(1) of the constitution, forbidding changes to certain 'basic Articles' of the constitution. On the 1963 proposals, see Rossides (1991) 17 *Syracuse JILC* 21, 32 n48.

[174] The Secretary-General in his report to the Security Council of 11 March 1965 noted the physical separation of the two communities. S/6228, paras 50–5.

[175] See Hart, *Cyprus*, 129–30.

[176] See Wippman (1996) 31 *Text ILJ* 141, 148–65.

[177] GA res 3212, 1 November 1974 (117:0:0), para 2: 'urg[ing] the speedy withdrawal of all foreign armed forces and foreign military presence and personnel from the Republic of Cyprus and the cessation of all foreign interference in its affairs.'

[178] SC res 376, 12 March 1975.

[179] SC res 541, 18 November 1983 (13–1:1) (Pakistan against, Jordan abstaining). This was reiterated in resolution 550 of 11 May 1984.

[180] SC res 550, para 2, 11 May 1984 (13–1:1) (Pakistan against, US abstaining). For the Turkish position on recognition and diplomatic relations, see Statement of Foreign Minister, 15 November 1983, A/38/602, 23 November 1983.

[181] Necatigil indicates that 200,000 Greeks left for the South. Necatigil, *Cyprus Question* (2nd edn), 136. An estimated 37,000 to 65,000 Turkish Cypriots resettled in the North: Pegg, *International Society and the De Facto State*, 98–9. See also Cooper and Berdal (1992) 35 *Survival* 118, 120; McDonald, *The Problem of Cyprus* (1988–9) Adelphi Papers, no 234, 10–11; Oberling, *Road to Bellapais*, 63–5. Provision for population exchange was made early in the process. See Population Exchange Agreement, 2 August 1975, S/11789.

There were important differences between the situation of Bangladesh and Turkish Cyprus. Though never formally declared a non-self-governing territory, the geographic separation of Bangladesh from the administering State, its ethnic distinctness and the arbitrary subordination of the territory to Pakistani rule built the case for its special status. Gross abuses amounting to genocide or crimes against humanity effectively made the separation irreversible. Moreover, the geography of the two cases was very different. The Turkish Cypriot community, though preponderantly in the north of the island, existed in the south as well, and members of the Greek community were to be found throughout Cyprus.

But the distinctions are not so plain as to speak for themselves. Unlike Bangladesh, Cyprus possessed domestic constitutional instruments formally acknowledging special rights in the seceding community (supported internationally by the guarantee of the former administering power, Britain, as well as by Greece and Turkey). The breakdown of any process within the framework of the 1960 institutions raised serious questions as to whether the Turkish Cypriot community could maintain its identity and rights.

The two dominant considerations, however, were the international guarantee of the unity of Cyprus, a condition of independence, and the external use of force, avowedly pursuant to a vague reservation of rights under Article IV of the Treaty of Guarantee but in fact aimed at partition. The TRNC declaration of independence of 15 November 1983 was clearly expressed to establish a new State on territory once part of the Republic of Cyprus. According to Necatigil:

> The aim of the Turkish Cypriots in declaring, on 15 November 1983, an independent state, *i.e.*, the Turkish Republic of Northern Cyprus, was to assert their status as co-founders of the future federal republic of Cyprus and to ensure that the sovereignty of that republic will derive from the existing two states joining together as equals to form the future federal republic.[182]

The declared openness of Turkish Cypriot negotiators to some form of federal republic may imply an ambiguity in the nature of the TRNC.[183]

[182] Necatigil, *Cyprus Question*, 203–4, 318. See also Letter dated 16 November 1983 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General, A/38/602, 23 November 1983 ('independence does not necessarily mean that the island will remain divided forever and that they are determined not to unite with any State, unless it be in a federation with the Greek Cypriots').

[183] According to the Secretary-General's Set of Ideas, agreed to in August 1992:'[The process] will result in a new partnership and a new constitution for Cyprus that will govern the relations of the two communities on a federal basis that is bi-communal as regards the constitutional aspects and bi-zonal as regards the territorial aspects . . . The overall framework agreement ensures that the Cyprus

Bangladesh, by contrast, was no mere legal feint toward statehood; in light of the events that had occurred, no federal solution was remotely practical. It was also significant that the putative Turkish Cypriot State continued to depend upon the presence of Turkish military forces for its existence. The use of force to change the legal status of territory is excluded by a peremptory norm of general international law, and applies to *all* uses of force in international relations (including in self-defence)—*a fortiori* where the use of force is of doubtful legality. Thus States, the Security Council,[184] the General Assembly,[185] the Council of Europe,[186] the Commonwealth,[187] the European Union,[188] the European Court of Justice[189] and the European Court of Human Rights[190]

settlement is based on a State of Cyprus with a single sovereign and international personality and a single citizenship.' Set of ideas on an overall framework agreement on Cyprus, Annex, paras 2, 4, S/24472, 21 August 1992.

[184] See, e.g., SC resns 365, 13 Dec 1974, para 1; 367, 12 March 1975, para 2 ('Regret[ing] the unilateral decision of 13 February 1975 declaring that a part of the Republic of Cyprus would become "a Federated Turkish State" '); 541, 18 Nov 1983, paras 2, 7 ('Consider[ing] the declaration [of independence of the "Turkish Republic of Northern Cyprus"] invalid and call[ing] for its withdrawal' and '[c]all[ing] upon all States not to recognize any Cypriot State other than the Republic of Cyprus'); 544, 15 Dec 1983 (noting agreement of 'Government of Cyprus' that extension of the UNFICYP mandate was necessary); 550, 11 May 1984, para 3 ('Reiterat[ing] the call upon all States not to recognize the purported State of the "Turkish Republic of Northern Cyprus" ').

[185] See, e.g., GA res 3212 (XXIX), 1 Nov 1974, para 1 (calling on all States to respect the territorial integrity of the Republic of Cyprus).

[186] See CE Parl Ass rec 974(83), 9 Dec 1983 ('Deploring the unilateral proclamation . . . of the secession of a part of the Republic of Cyprus'). The Committee of Ministers 'decided that it continued to regard the government of the Republic of Cyprus as the sole legitimate government of Cyprus'; quoted in *Cyprus v Turkey*, 35 EHRR 30, 762 (120 ILR 12, 23–24, para 14).

[187] The Commonwealth Heads of Government indicated in a communiqué at New Delhi, 23–9 Nov 1983: '[The] Heads of Government condemned the declaration by the Turkish Cypriot authorities issued on 15 November 1983 to create a secessionist state in northern Cyprus, in the area under foreign occupation. Fully endorsing Security Council Resolution 541, they denounced the declaration as legally invalid and reiterated the call for its non-recognition and immediate withdrawal. They further called upon all States not to facilitate or in any way assist the illegal secessionist entity. They regarded this illegal act as a challenge to the international community and demanded the implementation of the relevant UN Resolutions on Cyprus.' Quoted in *Loizidou v Turkey*, ECHR (1997) 23 *EHRR* 513, 521 (Application 15318/89), Judgment of 18 Dec 1996, para 23.

[188] See, e.g., Common Statement of the 10 States Members of the European Community on the situation in the Republic of Cyprus issued in Athens on 16 Nov 1983, S/16155, Annex, 17 Nov 1983 ('continu[ing] to regard the Government of President Kyprianou as the sole legitimate Government of the Republic of Cyprus'); European Parliament resolution on state of accession negotiations with Cyprus, 5 Sept 2001, OJ 2002 C72E/77 (indicating that there would be 'no question either of accession for two Cypriot States or of accession of the northern part of the island upon Turkish accession').

[189] *R v Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouri) Ltd and others* [1994] ECR I-3087, Judgment of 5 July 1994, paras 40, 47.

[190] *Loizidou v Turkey* (1997) 23 *EHRR* 513, 526, 527, paras 42, 43: '[I]t is only the Cypriot government which is recognised internationally as the government of the Republic of Cyprus in the

have consistently declined to accept the statehood of the TRNC.[191] United Nations plans for a resolution of the Cyprus conflict have had as their premiss the continued existence of a single federal State.[192] Cyprus was admitted to the European Union on 1 May 2004, although the *acquis communautaire* does not apply to the north pending a resolution of the conflict.[193]

## (2) Conclusions

The position, consistent with general principle and with a now substantial body of practice, is as follows.

(1) The use of force against a self-determination unit by a metropolitan State is a use of force against one of the purposes of the United Nations, and a violation of Article 2 paragraph 4 of the Charter. Such a violation cannot effect the extinction of the right.

(2) The annexation of a self-determination unit by external force in violation of self-determination also does not extinguish the right, except, possibly, in the controversial case of the 'colonial enclave', where the annexing State is the enclaving State and where the local population acquiesces in the annexation.

(3) Assistance by States to local insurgents in a self-determination unit may be permissible, but in any event, local independence will not be impaired by the receipt of such external assistance (unless, at least, the continuation of independence relies upon continued external military assistance).

context of diplomatic and treaty relations and the working of international organisations'; and 'it is evident from international practice and the various, strongly worded resolutions . . . that the international community does not regard the "TRNC" as a State under international law and that the Republic of Cyprus has remained the sole legitimate Government of Cyprus.' See also *Cyprus v Turkey* (2002) 35 EHRR 30 (965), para 61: 'The Court reiterates the conclusion reached in its *Loizidou* judgment (*merits*) that the Republic of Cyprus has remained the sole legitimate government of Cyprus.'

[191] For the response of English courts see *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1977] 3 WLR 656; *R v Minister of Agriculture, ex parte S.P. Anastasiou (Pissouri) Ltd*, High Court, Queen's Bench Division, (1994) 100 ILR 245.

[192] On the unsuccessful 2004 Annan Plan for the reunification of Cyprus see Palley, *International Relations Debacle*. On Cyprus see further Chapter 5.

[193] See Protocol No 10 on Cyprus, 2003 Act of Accession, OJ L 236, 23 September 2003. Article 1 of the Protocol suspends the *acquis* 'in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control' (Art 1(1)). Under Art 1(2), it is for the Council to decide on the withdrawal of the suspension referred to in Art 1(1). The Protocol represents recognition by EU Member States that accession by the Republic of Cyprus to the EU gave competence to the Community to legislate for Cyprus as a whole with the consent of the Government of the Republic of Cyprus (decisions under the Protocol require unanimity).

(4) An entity claiming statehood but created during a period of foreign military occupation will be presumed not to be independent.[194]
(5) Where the local unit is a self-determination unit, the presumption against independence in the case of foreign military intervention may be displaced or dispelled. There is no prohibition against recognition of a new State which has emerged in such a situation. The normal criteria for statehood—based on a qualified effectiveness—apply.
(6) On the other hand, where a State illegally intervenes in and foments the secession of part of a metropolitan State other States are under the same duty of non-recognition as in the case of illegal annexation of territory.[195] An entity created in violation of the rules relating to the use of force in such circumstances will not be regarded as a State.

## 3.4 Statehood and fundamental human rights

### (1) General considerations

The principle of self-determination is itself an aspect of human rights law, but, apart from this, there is so far in modern practice no suggestion that as regards statehood itself, there exists any criterion requiring regard for fundamental human rights.[196] The cases are numerous of governments violating fundamental norms of human rights; there is no case where such violations have called in question statehood itself. Thus, in connection with South Africa, it was said in the Third Committee:

The issues of racism and self-determination are related. The South African system is particularly obnoxious because racism is institutionalized in the apartheid system; and because the majority of South Africa's people are denied any effective

[194] See *Knox v Palestine Liberation Organization*, 306 F Supp 2d 424, 437 (SDNY, 2004): '[under] international law, a state will *maintain* its statehood during a belligerent occupation . . . but it would be anomalous indeed to hold that a state may *achieve* sufficient independence and statehood in the first instance while subject to and laboring under the hostile military occupation of a separate sovereign' (emphasis in original); *Efrat Ungar v Palestine Liberation Organization*, 402 F 3d 274, 290 (1st Cir, Selya, CJ): 'Nor does the fact that the Egyptians and Jordanians occupied and controlled a significant portion of the defined territory immediately following the end of the mandate aid the defendants' cause. To the contrary, the fact is a stark reminder that no state of Palestine could have come into being at that time.'

[195] Cf *Restatement (3rd), Foreign Relations Law of the United States*, §202(2): 'A State has an obligation not to recognize or treat as a state an entity that has attained the qualifications for statehood as a result of a threat or use of armed force in violation of the United Nations Charter.'

[196] Fawcett (1965–6) 41 BY 103, 112 referred to the Rhodesian case as a 'systematic denial of civil and political rights.' It is submitted that the relevant rubric is self-determination.

role in running the society in which they live. That is, they are denied the right of self-determination.[197]

This is not to say that the transformation in international human rights norms and (to a lesser extent) institutions has had no consequence for States. States are no longer 'sovereign' in the sense of entitled to act at liberty on their own territory and with respect to their own nationals.

> The nature of a state's so-called sovereignty over its land territory has profoundly changed . . . International society, through international law and through nonlegal means, now has a direct interest in all that happens within any state system anywhere—the use and abuse of governmental powers over human beings (controlled especially through the concepts of human rights and the rule of law and, perhaps now or soon, democracy), and the use and abuse of the physical land, its resources and superjacent airspace (controlled especially through the developing concept of the environment), not to speak of the economic behavior of governments and those subject to their jurisdiction.[198]

But these changes have occurred, so to speak, within and in the context of the continuing acceptance of the sovereignty of States as the organizing or constitutional principle of the international system. The consequence of violations even of fundamental human rights will be responsibility, scrutiny and the loss of legitimacy; they do not entail the loss of title or status of the State concerned. An example is the case of Chechnya:

> For the Russians, the status of Chechnya is a matter of great importance. They emphasize that Chechnya is part of the Russian Federation and . . . the international community accepts that fact. But equally, in view of the commitments that Russia has made in the OSCE, what is happening in Chechnya is a matter of legitimate international concern.[199]

In other cases, States have gone further, intervening where the results of democratic elections have not been respected or where violence has threatened human rights values. Interventions in Haiti,[200] Kosovo[201] and West Africa[202]

[197] UK representative to the Third Committee, 12 October 1984: reprinted (1984) 55 *BY* 431–5. See also Theodoropoulos (1986) 2 *RIDC* 91.

[198] Allott (1992) 86 *AJ* 764, 767. See also Crawford (1993) 64 *BY* 113, 121.

[199] Statement of Min State, FCO, Douglas Hogg, *HC Deb* vol 252 cols 686, 17 January 1995. See Gazzini (1996) 17 *HRLJ* 93.

[200] Corten (1995) 6 *EJIL* 116.

[201] Lillich (1993) 53 *ZaöRV* 557; Chopra and Weiss in Ku and Diehl (eds), *International Law*, 369; Gray in Yee and Tieya (eds), *Essays in Memory of Li Haopei*, 240; Wippman (2001) 25 *Fordham ILJ* 129; Stromseth in Holzgrefe and Keohane (eds), *Humanitarian Intervention*, 234.

[202] Nolte (1993) 53 *ZaöRV* 603; Kwakwa (1994) 2 *African YIL* 9; Conteh (1995) 7 *AJICL* 166; Ofodile (1994) 32 *Col JTL* 381; Nolte, *Eingreifen auf Einladung*, 363–437; Levitt (2002) 96 *PAS* 135, 136–40.

begin to suggest a standard by which such interventions may be assessed.[203] But above all the criterion for the lawfulness of interventions of this kind—if they are ever lawful—is that the intervention must be carried out for the humanitarian purpose, cannot entail any acquisition of territory and must be brought to an end as soon as possible once the humanitarian situation has been restored.

### (2) Democracy as a continuing condition for statehood

Although this position holds with respect to general human rights, the question must be asked whether the principle of democratic government, recognised in international human rights instruments, might not occupy a special place. Just as self-determination is specifically *about* the right to full political participation of a community at the international level, so the democratic principle might be treated an internal analogue—as conditioning the entitlement to statehood by reference to some general standard of participation by the people of the State, for whose security and self-expression the State presumably exists.

There was a certain amount of earlier support for the view that 'the consent of the governed' is a necessary pre-requisite for recognition at least of revolutionary change of government. British and United States practice in particular supported the existence of some such criterion.[204] However, the practice was almost entirely restricted to recognition of new governments: moreover, it was not consistent. Provided a State had a government stable and firmly established and not imposed or controlled by outside forces, the actual form and character of the government was normally treated as an internal matter.[205] In specific cases the principle of self-determination may have modified the usual rule, but that principle in its positive form requires not a democratically organized government but rather a system of government instituted with the approval of the majority of the people concerned.

[203] See generally Bettati (1991) 95 *RGDIP* 644; Damrosch in Damrosch (ed), *Collective Intervention in Internal Conflicts*, 12–13, 356–9; Greenwood (February 1993) *World Today* 34; Gordon (1994) 15 *Mich JIL* 519; Kresock (1994) 27 *Cornell ILJ* 203; Corten and Klein, *Droit d'ingérence ou obligation de reaction* (2nd edn); Murphy, *Humanitarian Intervention*; Wheeler, *Saving strangers*; Chesterman, *Humanitarian Intervention and International Law* (2003); Diprizio, *US Interventions from Northern Iraq to Kosovo*; Donnelly, *Universal Human Rights in theory and Practice* (2nd edn); essays in Jokic and Wilkins (eds), *Humanitarian Intervention*; Gray, *International Law and the Use of Force* (2nd edn), 31 ff.

[204] Cf Whiteman, 2 *Digest* 77–8; Lauterpacht, *Recognition*, 115–40.

[205] Cf Art 1 of the ILC Draft Declaration on the Rights and Duties of States, annexed to GA res 375 (IV), 6 December 1949. The 'Estrada Doctrine', which treated all changes of government as matters of domestic jurisdiction and as not subject to recognition or non-recognition by other States, was espoused by Mexico: (1931) 25 *AJIL Supp* 203; Talmon (1992) 63 *BY* 231, 263–4.

Tentative steps towards a democratic legitimation test for governments within existing States were cross-cut by developments in practice in favour of a *de facto* approach. For example the United Kingdom in 1980 adopted a policy by which it would no longer recognize changes of government. The Foreign Secretary, Lord Carrington, stated:

[W]e have conducted a re-examination of British policy and practice concerning the recognition of Governments . . . On the basis of this review we have decided that we shall no longer accord recognition to Governments. The British Government recognise States in accordance with common international doctrine. Where an unconstitutional change of regime takes place in a recognised State, Governments of other States must necessarily consider what dealings, if any, they should have with the new regime, and whether and to what extent it qualifies to be treated as the Government of the State concerned. Many of our partners and allies take the position that they do not recognise Governments and that therefore no question of recognition arises in such cases. By contrast, the policy of successive British Governments has been that we should make and announce a decision formally 'recognising' the new Government. This practice has sometimes been misunderstood, and, despite explanations to the contrary, our 'recognition' interpreted as implying approval. For example, in circumstances where there might be legitimate public concern about the violation of human rights by the new regime, or the manner in which it achieved power, it has not sufficed to say that an announcement of 'recognition' is simply a neutral formality. We have therefore concluded that there are practical advantages in following the policy of many other countries in not according recognition to Governments. Like them, we shall continue to decide the nature of our dealings with regimes which come to power unconstitutionally in the light of our assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so.[206]

The 'new' position has been reiterated from time to time in connection with, for example, Cambodia,[207] Afghanistan,[208] Russia[209] and other new governments.[210]

[206] 408 *HL Deb* cols 1121–2, 28 April 1980; 983 *HC Deb* WA cols 277–9, 25 April 1980. See Warbrick (1981) 30 *ICLQ* 568; Talmon (1992) 63 *BY* 231, 231–2, 241–3, 248–66. See also Peterson (1983) 77 *AJ* 31; Peterson, *Recognition of Governments*, 35, 149, 155. For the practice of European and other States, see Talmon, *Recognition*, 3–14 and citations there.

[207] 132 *HC Deb* WA col 469, 4 May 1988 (statement of Parl Under-Sec State, FCO).

[208] 372 *HC Deb* col 1382, 19 October 2001 (statement of Parl Under-Sec State, FCO).

[209] Statement of FCO press spokesman on the coup against President Mikhail Gorbachev in Russia on 20 August 1991: reprinted (1991) 62 *BY* 557.

[210] Panama, 742 *HC Deb* WA col 742, 4 March 1988 (statement of Parl Under-Sec State, FCO); Zaire-Democratic Republic of the Congo, 295 *HC Deb* WA col 79, 2 June 1997 (statement of Min State, FCO); Congo (Brazzaville), 582 *HL Deb* WA col 262, 30 October 1997 (statement of Parl Under-Sec State FCO); Angola, 545 *HL Deb* WA col 71, 13 May 1993 (statement of Min State, FCO); Federal Republic of Yugoslavia: 'We recognise states, not governments. Recognition is not a reward.' FCO telegram, 11 April 1996: reprinted (1996) 67 *BY* 708–9.

Equivalent positions have been adopted by other States[211] and by the European Union: 'The Union recalls that it does not recognise governments, and even less political personalities, but States, according to the most common international practice.'[212]

This practice still accommodates expression of disapproval toward a given government, but this is done by refusal to establish diplomatic relations, a purely optional step in any event. Moreover, the United States, though sometimes cited as an exception to this policy, parallels the shift seen in the practice of many States: 'In recent years, U.S. practice has been to deemphasize and avoid the use of recognition in cases of changes of governments and to concern ourselves with the question of whether we wish to have diplomatic relations with the new governments.'[213] To an extent, then, the earlier function of recognizing—or not recognzing—governments has been folded into the institution of diplomatic relations.[214]

It is not necessary to enter the debate as to whether the institution of recognition of governments nonetheless survives,[215] although it cannot be maintained in face of this practice that it is *required*.[216] Of course, there is the question of identifying the persons and legal structures constituting the government of another State—just as it is necessary to identify the persons and legal structures constituent of other entities, companies, organizations, etc. Such identification may be performed through the institution of recognition but this is neither unique nor privileged by law; in particular a recognizing State has no special authority to determine the status of that which is recognized. For present purposes, however, the point is that any developments in the direction of conditioning the standing or legitimacy of governments by reference to democratic standards has not affected the underlying position of the State as an entity under international law.

[211] Peterson lists Belgium (1974), Italy (1979), Switzerland (1982), Australia and Canada (1988), New Zealand (1989) and the Netherlands (1990): *Recognition of Governments*, 180. See also Bergin (1988) 42 *Australian Outlook* 150; Charlesworth (1991) 18 *Melbourne ULR* 1; Davidson (1991) 40 *ICLQ* 162, 169–70 (discussing *Attorney General for Fiji v House* [1989] 2 NZLR 69).

[212] Statement regarding Belarus, EU Presidency, 20 July 1999, *EU Bull*, 1999–7/8, 60.

[213] [1977] *Digest of US Practice* 19–21, cited in *Restatement (Third)*, §203, Reporters' Note 1.

[214] Talmon cites a memorandum of the Ministry of Foreign Affairs and Trade Relations of the Solomon Islands counting 70 States. Talmon, *Recognition*, 3 n 1. Japan is an exception: Nomura (1982) 25 *Japanese Ann* 67; Ando (1985) 28 *Japanese Ann* 29.

[215] When pressed, governments sometimes revert to the old language of recognition. Thus France may have 'dusted off traditional language' in connection with changes of government during the civil war in Chad: Peterson, *Recognition of Governments*, 182. See also Filipiak (1999) 115 *Rev de droit public et de la science politique en France et à l'étranger* 1325.

[216] A position taken by Talmon, *Recognition of Governments* on the purest of a priori grounds. But for an excellent overview of the move away from formal recognition see ibid, 3–14.

The position with respect to newly emerging States may be different, even in cases where the principle of self-determination is not regarded as applicable in terms.[217] In 1991, in connection with the criteria for recognition of new States in the former USSR and Yugoslavia, the EC Member States expressed 'their readiness to recognise . . . those new States which, following the historic changes in the region, have constituted themselves on a democratic basis . . .'[218] The process of dissolution of Yugoslavia is discussed in further detail in Chapter 9. In the context of the Yugoslav conflict, where armed forces and militias responsible to different entities or to none were widely engaged, it was entirely reasonable to condition the recognition of the emerging republic on the democratically expressed support of their population. That this did not, however, involve any radical change of approach to statehood is suggested by passages such as the following:

> Recognition of the independence of republic depends on whether they meet well-established criteria for recognition. We will consider recognition on a case-by-case basis. However, it would be premature to recognise either Armenia or Azerbaijan as independent while they are still discussing with the centre and other republics the form of their future relationships. Not to recognise a republic's independence solely on the grounds of its human rights record would deny us an opportunity to press for improvements. But republics should be in no doubt that our relations will depend on their respect for democratic principles, including their human rights performance: independence does not give them a blank cheque.[219]

In any event the question of democracy as an element of international law is not a simple one, especially as it tends to be debated in terms of the possibility of external imposition, of a people being forced to be democratic.[220] Certain features of international law are themselves non-democratic, though they may well serve other values: the presumption that the executive has comprehensive power in foreign affairs; the supremacy of international law over national law, even when the latter is democratically legislated; the conservative aspect of the principle of self-determination, especially in its inhibiting effect on changes to established territorial boundaries (*uti possidetis*); the principle of non-intervention.[221] Moreover the practice of intervention, in cases such as

[217] See Murphy (1999) 48 *ICLQ* 545; Roth, *Governmental Illegitimacy in International Law*, 363.

[218] *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 16 December 1991: reprinted (1991) 62 *BY* 559–60. On democracy as a criterion in that situation, see Warbrick in Evans (ed), *Aspects*, 16–17.

[219] Lord Cavendish of Furness, 532 *HL Deb* col 1137, 21 November 1991.

[220] Crawford (1993) 64 *BY* 113, and for a general review, Marks and Clapham, *International Human Rights Lexicon*, 61–70.

[221] Crawford (1993) 64 *BY* 113, 117–19.

Nicaragua, Grenada[222] and Panama[223] does not increase confidence in it as a workable principle to govern international relations.[224] Even where—as with Haiti in 1992—intervention has the sanction of the Security Council, long-term, systemic change to a rule-of-law society has not necessarily followed.[225] It may have been considerations of this kind that led the International Court to reject the idea that the United States had any 'special responsibility' to enforce any democratic commitments the Nicaraguan Government may have made to the Organization of American States (OAS) when it came to power. The Court refused to 'contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.'[226]

The nearest approach to a denial of status based on contravention of democratic norms is that adopted by the OAS. The Quebec Declaration of 22 April 2002 proclaimed that: 'Any unconstitutional alteration or interruption of the democratic order in a state of the hemisphere constitutes an insurmountable obstacle to the participation of that state's government in the Summit of the America's process.'[227] Further the Inter-American Democratic Charter, 11 September 2001, Article 21 calls for suspension in cases of 'unconstitutional interruption of the democratic order of a member state':

When the special session of the General Assembly determines that there has been an unconstitutional interruption of the democratic order of a member state, and that diplomatic initiatives have failed, the special session shall take the decision to suspend said member state from the exercise of its right to participate in the OAS by an affirmative vote of two thirds of the member states in accordance with the Charter of the OAS. The suspension shall take effect immediately.

The suspended member state shall continue to fulfil its obligations to the Organization, in particular its human rights obligations.

Notwithstanding the suspension of the member state, the Organization will maintain diplomatic initiatives to restore democracy in that state.[228]

[222] GA res 38/7, 2 November 1983 (108–9:27). See Beck (1993) 33 *Va JIL* 765.

[223] OAS res CP/Res 534 (800/89), 22 December 1989. See Henkin (1991) 29 *Col JTL* 293; Nolte, *Eingreifen auf Einladung*, 287–88.

[224] Crawford (1993) 64 *BY* 113, 126–7.

[225] Scott (2004) 37 *Vanderbilt JTL* 555; Beer in Keating and Knight (eds), *Building Sustainable Peace*, 119. See EC Statement, 9 January 1991, reprinted (1991) 62 *BY* 573; OAS Minister of Foreign Affairs Resolution 3/92, MRE/Res.3/92, 17 May 1992. Compare the 1987 non-intervention in Fiji: see Illingworth [1987] *NZLJ* 207; McLachlan, ibid, 175; Islam (1988) 19 *California WJIL* 107; Kiwanuka (1988) 37 *ICLQ* 961; Lal, *Fiji: Coups in Paradise, Race, Politics and Military Intervention*.

[226] ICJ Rep 1986 p 14, 133. Cf also *Corfu Channel Case*, ICJ Rep 1949 p 4, 35.

[227] *Quebec Declaration*, para 5, OAS 31st Sess, 20–2 April 2001. See Lagos and Rudy, (2002) 96 *AJ* 173, 175. This provision resembles the democracy clause of the 1996 Mercosur customs union (Argentina, Brazil, Paraguay, Uruguay): ibid.

[228] http://www.cidh.oas.org/Basicos/democratic.htm, adopted 11 September 2001, Lima, Peru (site visited 27 June 2005), 28th Spec Sess OAS GA, OEA/ser.P/AG/Res.1(XXVIII-E/01), draft put

The Inter-American Democratic Charter is a resolution adopted within the framework of the OAS: it is neither a free-standing treaty nor a formal amendment to the OAS Charter. It does not set out standards for defining 'unconstitutional interruption' or for determining whether 'diplomatic initiatives have failed'. Far from establishing a mandate for hemispheric intervention in cases of lapsed democracy, American practice sets out only basic procedures for a modest set of responses. The continuity of the State and its international obligations is assumed.

### (3) *Apartheid* and the bantustan policy

The case of the Transkei and other bantustans established in pursuance of the *apartheid* policy in South Africa raised the question whether entities created by a State on its metropolitan territory pursuant to unlawful policies of racial discrimination against a majority of the people of the State in question should be accepted as States; in fact they were not but were unceremoniously disbanded when majority rule for South Africa as a whole came. The episode is discussed in Chapter 8.

### (4) Conclusions

As this review demonstrates, there is room for the insistence on general standards of human rights and of democratic institutions as an aspect of the stability and legitimacy of a new State. But this has not matured into a peremptory norm disqualifying an entity from statehood even in the cases of widespread violations of human rights. Recognition of governments is no longer widely practised, if not actually in desuetude as an institution, but the approach to internal changes of government remains essentially a *de facto* one. Even semi-formal institutions of suspension of representation, e.g., within the OAS, assume the personality and continuity of the State.

## 3.5 Other cases

Evidently the categories of cases in which international law may impact on questions of legal personality are not closed; the underlying category of peremptory norms itself is in principle open, as Article 64 of the Vienna Convention makes clear. On the other hand the test for whether a norm of

forward in OAS GA res 1838, 31st OAS General Assembly, 5 June 2001, 40 ILM 1289. For comment, see Ferguson, *The Inter-American Democratic Charter*; Lagos and Rudy (2004) 35 *U Miami Inter-Am LR* 283.

general international law is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted' is itself a stringent one, and international law can be expected to be rather conservative in admitting new peremptory norms or their implications in terms of derogation from the legal status of States and other entities. Outside the field of peremptory norms it is doubtful whether other rules of international law will have such effects.

That leaves a number of miscellaneous situations where constraints have been said to arise on State creation, not associated with serious breaches of peremptory norms. Three of these should be briefly reviewed.

### (1) Entities not claiming to be States

Statehood is a claim of right based on a certain factual and legal situation. The case of Taiwan raises the possibility that an entity which does not claim to be a State, even though it might otherwise qualify for statehood in accordance with the basic criteria, will not be regarded as a State.[229] Taiwan is discussed in Chapter 5.

### (2) Puppet States and the 1949 Geneva Conventions

As we have seen, there is a presumption that an entity with the formal attributes of a State which is established by a belligerent occupant is not independent and hence not a State in international law. The situation arose in Manchuria, and several times during World War II. As a result of deficiencies in existing international law the four Geneva Conventions of 1949 were concluded. Article 47 of the Fourth Convention relative to the Protection of Civilian Persons in Time of War (concluded to remedy evasion of the previous law through the use of puppet local authorities) provides that:

> Protected Persons who are in occupied territory shall not be deprived . . . of the benefits of the present Convention by any change introduced, as a result of the occupation of a territory, into the institutions of government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power . . .[230]

Marek argues that 'the Geneva Convention has positively outlawed the creation of puppets as a means of indirectly violating the international occupation regime. It has branded them as illegal.'[231] But this is too categorical. Although

[229] Andorra before 1993 was another possible case of an entity not claiming statehood. The *Restatement (Third)* has added as a criterion of statehood that the entity in question make the claim to be a State. §201, comment f. See also Grant (1999) 37 *Col JTL* 403, 439.

[230] 75 UNTS 287. [231] *Identity and Continuity*, 120.

such puppets (whether 'States' or 'governments') have no more governmental authority than the belligerent occupant itself, that does not mean that within the limits of the Hague and Geneva Conventions, the action of such a regime as an organ or agent of the occupant will not be valid. It is thus doubtful whether Article 47 establishes a categorical rule prohibiting puppet entities from being created, or from achieving real independence over a period of time. And this view is confirmed by the commentators on the Conventions.[232]

### (3) Violation of treaties providing for independence

Multilateral treaties, whether peace or armistice agreements or international 'constitutional' treaties such as the Covenant and the Charter, frequently provide for the independence of certain territories either immediately or contingently. Where the territory concerned claims independence but the relevant treaty provisions are not complied with, complex problems arise. In general, a distinction must be made between formal or procedural violations and violations of material provisions, and in particular of the purposes for or basic conditions upon which independence is to be granted. In the former case violations will not effect statehood provided genuine independence is attained (cf Syria and Lebanon in 1944, discussed in Chapter 2). In the latter the presumption may well be against statehood in the absence of compliance with the relevant provisions. Moreover, where the treaty is of such a kind that it creates a form of regime extending beyond the immediate parties, it may be that no entity created in violation of material provisions of the treaty will be recognized as a State. For example, South Africa could not have evaded its responsibilities towards Namibia by the grant of independence to a minority regime there.

## 3.6 Collective non-recognition

Collective non-recognition and its legal effects is a subject of some controversy. Certain distinctions are, however, clearly fundamental. Most importantly there is a distinction between non-recognition for legal reasons and non-recognition for political reasons.[233] Political non-recognition is discretionary, and its

[232] ICRC, *Commentary* (1958) IV, 272–4; Draper, *The Red Cross Conventions*, 38–9; US Dept. of the Army, *Field Manual* FM 27–10 (1956), §366. And see Scharf (1997) 91 *AJ* 718, 721: '[A]n occupying power cannot avoid responsibility for crimes that it instigated by setting up a puppet authority—the very thing Milosevíc did when the [Yugoslav National Army] in Bosnia was transformed into the Bosnian Serb army.'

[233] Chen, *Recognition*, 411–15, and generally Brownlie, *Use of Force*, 413–23.

effects may be purely nominal, since they are largely whatever the States concerned intend them to be. Thus acts that might be thought to imply recognition will not constitute recognition if they are expressed not to do so.[234]

What is of interest here is non-recognition on legal grounds. Such non-recognition is by no means a new phenomenon,[235] but, especially as 'collective non-recognition' it has achieved considerable prominence since 1932.[236] But two further distinctions may be noted. First, recognition of an unlawful situation is not necessarily forbidden by international law. A State directly affected may waive its rights in a particular matter, or other States may waive any interest they may have in the observance of the rule in question. Recognition is one form of waiver.[237] Secondly, one may refuse to recognize the validity or the legality of a particular act and yet be bound to recognize or accept all or some of the consequences. For example, although Pakistan was not bound to accept the legality of Indian intervention in 1971, it was, on the view expressed above, bound to accept the legal existence of Bangladesh after December 1971—in the sense that the existence of Bangladesh was opposable to Pakistan after that date. And in the event it did so, paving the way for Bangladesh's admission to the United Nations.

It must also be noted that we are here discussing two different concepts—nullity and illegality. An act which is void will, presumably, produce no immediate or direct legal consequences. An act which, while illegal, is still an 'act in law' may have direct legal effects. The relevance and extent of non-recognition in such cases may be different.

### (1) Collective non-recognition and territorial status

Where an entity claims but does not qualify for statehood, recognition, although it may create legal effects on a bilateral basis, may well be unlawful vis-à-vis the previous sovereign, and, in cases where the criterion involves a peremptory norm of general international law, will be unlawful *erga omnes*. Non-recognition in such cases is enjoined by international law as an aspect of the substantive obligation of respect for such norms.[238] However, at least

[234] Cf Lauterpacht, *Recognition*, 369–408; Chen, *Recognition*, 189 ff.

[235] Sharp, *Duties of Non-Recognition in Practice 1775–1934* (1934); but cf Lauterpacht, *Recognition*, 419 ('collective obligations of non-recognition of consequences of acts contrary to international law constitute a new feature of international practice').

[236] The practice is described in Brownlie, *Use of Force*, 410–23. It was also employed in the cases of Rhodesia and Namibia. See also Hill (1933) 293 *Int Conc* 355.

[237] See Charpentier, *Reconnaissance*, 217.

[238] See generally Zemanek (2000) 4 *Max-Planck YIL* 1.

where the illegality is not of a fundamental nature or where the breach is incidental or peripheral, the question of recognition of an effective but unlawful situation may arise. The function of recognition in these circumstances is well expressed by Lauterpacht:

> when the facts giving rise to the pretended new title are in violation of international law . . . recognition fulfils a function altogether distinct from other aspects of recognition. It is no longer an act of administration of international law; it is a political function. While not intended to do away with the moral or legal opprobrium attaching to the original illegality, it validates its consequences. It is against recognition of this nature that the policy or the obligation of non-recognition is directed. The illegal act in question may be in violation of the individual right of another State. In that case recognition is in the nature of a waiver of a right affected by the attempted or consummated acquisition of the new title . . . When the acts in question are in breach of general international law, such recognition . . . assumes the character of a quasi-legislative measure in the general interest of international society and of international peace.[239]

In the context of statehood and territorial status, a specific technique that has been adopted is that of collective non-recognition. The duty of collective non-recognition made its appearance in the Stimson doctrine and the resolutions of the League in the Manchurian crisis.[240] It has been invoked in relation to Southern Rhodesia, Namibia, the bantustans, Northern Cyprus and Kuwait and practised in a number of other situations without a formal United Nations resolution to that effect (e.g., East Timor). In such cases non-recognition is in the first place enjoined by the status—or lack of it—of the entity in question. However, the importance of a collective duty of non-recognition goes beyond this in that it reinforces the legal position, and helps to prevent the consolidation of unlawful situations. Its value in this respect is significant,[241] although non-recognition is not as such either a method of enforcement or a sanction.[242]

[239] Lauterpacht, *Recognition*, 412.

[240] See Langer, *Seizure of Territory*, 50–66, 95–99.

[241] Cf Chen, *Recognition*, 442–3; Bot, *Non-recognition and Treaty Relations*, 60–4.

[242] The principle of non-recognition in the Manchurian case was criticized, not without justification, as an evasion rather than an instance of enforcement action: McNair (1933) 14 *BY* 65; Williams (1933) 18 *Grotius ST* 109. For a more general critique to similar effect, see Moore (1933) 11 *For Aff* 547. See also Middlebush (1933) 27 *PAS* 40. Grant notes that States have resorted to diplomatic persuasion or sanction to induce other States to decline recognition of particular claims, but this most often has arisen in cases of a highly political nature (e.g., the FRG seeking to prevent recognition of the GDR, China of Taiwan, Morocco of the SADR). Grant (2000) 36 *Stanford JIL* 221–51. The political character of such attempts to 'enforce' non-recognition has led writers to doubt their status under international law. See, e.g., Dinh and ors, *Droit International Public* (7th edn), 802 (§491).

It is a precondition for other enforcement action and a method of asserting the values protected by the relevant rules.[243]

A duty of non-recognition arises in two situations, which are to some extent co-extensive. First, when the illegality invoked is substantial, and in particular when it involves a peremptory norm of international law, States have a duty under customary international law not to recognize the act as legal. The norm in question must either be one of the limited number of peremptory norms or, at any rate, a substantive rule of general international law, so that the illegality is one that involves the international community as a whole and not just particular States. As has been pointed out already, an obligation not to recognize the legality of an act does not necessarily involve an obligation not to recognize its effects. The extent of any further obligation depends upon the seriousness of the breach and all the circumstances.

The uncertainty evident here has in practice been resolved by a more explicit process of collective non-recognition, in particular in international organizations. This is the second situation referred to, although it might more accurately be regarded as an extension and an elaboration of the customary principle of non-recognition. The resolutions and undertakings with respect to non-recognition of Manchukuo have been referred to already. In the Rhodesian case, non-recognition was combined with economic sanctions under Chapter VII of the Charter,[244] and the implications of non-recognition were spelt out in considerable detail. Security Council resolution 217 (1965) called upon States not to recognize or entertain 'any diplomatic or other relations with this illegal authority'.[245] Security Council resolution 253 (1968) referred in addition to an obligation not to recognize passports issued by or on behalf of the 'illegal regime', and the need for withdrawal of consular and trade representation.[246] Security Council resolution 277(1970):

> 3. Call[ed] upon Member States to take appropriate measures, at the national level, to ensure that any act performed by officials and institutions of the illegal regime in

[243] Verhoeven is highly critical of the notion of a customary duty of non-recognition: *Reconnaissance*, 586–617. General international law in his view allows collective or individual non-recognition, but the duty of non-recognition in modern practice is conventional, not customary: ibid, 589. The notion of a general duty of non-recognition, in any event, involves a logical dilemma: non-recognition would lose 'tout raison d'être si la reconnaissance est impossible à défaut d'objet possible': ibid, 5; cf 611. But the 'object' of non-recognition here is not merely a state of affairs, a set of facts, but an asserted legal status arising from those facts. Illegality may preclude the attribution of that status initially: non-recognition is an attempt to prevent its consolidation. There is thus no logical difficulty.

[244] Willaert (1984–5) 18 *Rbdi* 216; Gowland-Debbas, *Collective Responses to Illegal Acts*, 423–86.

[245] 12 November 1965 (10–0:1). Diplomatic relations were argued by the United States to continue with the United Kingdom rather than with the illegal local authorities: see Gowland-Debbas, *Collective Responses to Illegal Acts*, 299–300.

[246] 29 May 1968 (11–0:0)

Southern Rhodesia shall not be accorded any recognition, official or otherwise, including judicial notice, by the competent organs of their State . . .

12. Call[ed] upon Member States to take appropriate action to suspend any membership or associate membership that the illegal regime in Southern Rhodesia has in the specialized agencies of the United Nations; [and]
13. Urge[d] Member States of any international or regional organization to suspend the membership of the illegal regime of Southern Rhodesia from their respective organizations and to refuse any request for membership from that regime.[247]

Subsequently the Security Council continued to develop the collective non-recognition process.[248] The presence of Israel in Jerusalem was addressed in resolution 478 of 20 August 1980, in which the Council stated that it would not 'recognize . . . actions by Israel that . . . seek to alter the character and status of Jerusalem', and called on States not to treat Jerusalem as the capital of Israel.[249] Separately, the Golan Heights, Syrian territory occupied by Israel during the 1967 war, was addressed by the General Assembly, which called the occupation 'illegal and invalid' and called on States not to recognize it.[250] The UK position has been consistent with the resolutions and representative of State practice: 'We do not recognise Israeli sovereignty over any part of Jerusalem or recognise Jerusalem as the capital of the state of Israel.'[251] The declaration of independence of 15 November 1983 by the TRNC led the Security Council to call on States 'not to recognize any Cypriot State other than the Republic of Cyprus' and to characterize the declaration as 'legally invalid'.[252] Turkey was the only State to recognize the TRNC; its dispatch of an ambassador to northern Cyprus was followed by a further resolution, condemning the action.[253] The claim by Iraq on 7 August 1990 to a 'comprehensive and

[247] 18 March 1970 (14–0:1). Cf res 288, 17 November 1970, para 5 ('any form of recognition'); GA res 2946 (XXVII), 7 December 1972, para 5 ('any action which might confer a semblance of legitimacy on the illegal . . . regime').

[248] Instances of collective non-recognition mediated through United Nations mechanisms are discussed by Dugard, *Recognition and the United Nations*, 108–15; Grant (2000) 33 *Vanderbilt JTL* 273, 291–2.

[249] See Tulman (1979) 3 *ASILS ILJ* 39; Cattan (1981) 10 *J Pal Stud* 3; Baron (1998) 8 *Touro ILR* 1.

[250] GA res 37/123A, para 5, 16 December 1982.

[251] Min State FCO, Douglas Hogg, 214 *HC Deb* col 1158, 27 November 1992. Israel declared Jerusalem its capital in 1980: (1995) 66 *BY* 666.

[252] SC res 541, 18 November 1983, para 7. The UK anticipated this, 'deplor[ing]' the declaration of independence. Foreign Secretary Sir Geoffrey Howe, 48 *HC Deb* col 725, 15 November 1983: reprinted (1984) 55 *BY* 422.

[253] SC res 550, para 2, 11 May 1984. The numerous affidavits and Foreign Office certificates issued in connection with cases touching upon the situation in Northern Cyprus have been consistent with the process of collective non-recognition. See, e.g., Affidavit of JS Buck, 25 April 1994, in *R v*

eternal merger' of Kuwait led the Security Council to adopt a number of resolutions requiring non-recognition. Resolution 661 of 6 August 1990 (just prior to the Iraqi declaration of annexation) called on States '[n]ot to recognize any regime set up by the occupying Power.'[254] Resolution 662 of 9 August 1990 called upon 'all States, international organizations and specialized agencies not to recognize [the Iraqi] annexation [of Kuwait], and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation.'[255] Regional organizations, including the League of Arab States and Gulf Cooperation Council, amplified collective non-recognition with their own declarations.[256] States adhered to these, refraining from acts that may have been seen to confirm Iraqi claims and eventually supporting action to reverse the purported annexation.

### (2) Consequences of collective non-recognition

Where non-recognition is obligatory (whether by resolution or treaty) the incidents of non-recognition will normally be spelt out in the instruments. However, there is an important question to what extent particular actions are prohibited as a result of the duty of non-recognition as a matter of customary international law in the absence of such an authoritative enumeration. It is clear that the obligation of non-recognition of an illegal situation is considerably more onerous than the consequences of a policy of non-recognition in bilateral relations need be. But just how extensive, and in what circumstances may the obligation be set aside?

#### *(i) The Namibia Opinion*[257]

No Chapter VII action was ever taken with respect to Namibia,[258] so any obligations upon States in that situation derived essentially from the principle

*IRC, ex parte Caglar*, reprinted (1994) 65 *BY* 590–2). See also the holding of the European Court of Human Rights in *Loizidou v Turkey* (Merits) (1996) 108 ILR 443, 462 (para 44).

[254] SC res 661, 6 August 1990, para 9(b).

[255] SC res 662, 9 August 1990, para 2. The Council subsequently characterizing the annexation of Kuwait as 'null and void': SC res 664, 18 August 1990, para 3.

[256] The extensive non-recognition practice of regional organizations in connection with the purported annexation of Kuwait is recited by Grant (2000) 33 *Vanderbilt JTL* 273, 294 n82. Cf *Iraq Airways Company and the Republic of Iraq v Kuwait Airways Corporation (No 1)* (2002), 103 ILR 340 (No 5), 116 ILR 534 (Nos 4 & 5), 125 ILR 602.

[257] About which see generally Gowlland-Debbas, *Collective Responses to Illegal Acts*, 287–303.

[258] On 6 June 1975, the USA, UK and France vetoed a draft Resolution that would have imposed a mandatory arms embargo on South Africa on the ground that the illegal occupation of Namibia constituted 'a threat to international peace and security': S/11713. About the veto, see Patil, *The UN Veto in World Affairs 1946–1990*, 102–5.

of non-recognition. The matter was dealt with fully by the International Court in the *Namibia* Opinion. The Court held that the presence of South Africa in the mandated territory, following the revocation of the mandate, was illegal, and then went on to consider the legal effects for States of the illegality. The Court stated, first, that United Nations members are 'under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia' and to refrain 'from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia', with certain exceptions.[259] The precise determination of matters inconsistent with this fundamental obligation the Court regarded as a matter for 'the appropriate political organs of the United Nations acting within their authority under the Charter'.[260] However, the Court did give some advice as to matters inconsistent with the declaration of illegality and which might imply recognition of the legality of South African administration. It expressed this in the following terms:

122. For the reasons given above, and subject to the observations contained in paragraph 125 . . . member States are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation. With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia. It will be for the competent international organs to take specific measures in this respect.

123. Member States, in compliance with the duty of non-recognition imposed by paragraphs 2 and 5 of resolution 276 (1970), are under obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there. They should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia.

124. The restraints which are implicit in the non-recognition of South Africa's presence in Namibia and the explicit provisions of paragraph 5 of resolution 276 (1970) impose upon member States the obligation to abstain from entering

[259] ICJ Rep 1971 p 3, 54. [260] Ibid, 55.

into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.

125. In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.

126. As to non-member States, although not bound by Articles 24 and 25 of the Charter, they have been called upon in paragraphs 2 and 5 of resolution 276 (1970) to give assistance in the action which has been taken by the United Nations with regard to Namibia. In the view of the Court, the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law; in particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof. The Mandate having been terminated by decision of the international organization in which the supervisory authority over its administration was vested, and South Africa's continued presence in Namibia having been declared illegal, it is for non-member States to act in accordance with those decisions.

127. As to the general consequences resulting from the illegal presence of South Africa in Namibia, all States should bear in mind that the injured entity is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted.[261]

In short, non-recognition implied abstention from treaty relations concerning Namibia; cessation of 'active intergovernmental co-operation' under existing bilateral treaties relating to Namibia; abstention from all diplomatic or consular activity in Namibia, and, notably, abstention from 'economic and other forms of relationship or dealing with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.' On the other hand, multilateral treaties of a humanitarian nature should continue to be applied and invalidity did not extend to 'those acts, such as, for instance, the registration of births, deaths and marriages, the effect of which can be ignored

[261] ICJ Rep 1971 p 6 at 55–6. Judge Padilla Nervo (ibid, 119–20) agreed.

only to the detriment of the inhabitants.' Non-member States, though not bound to any affirmative action, were obliged not to recognize the legality of the South African administration.

The Court thus attributed substantial legal content to the duty of non-recognition, both with respect to United Nations members and non-member States. On this point, more than any other in the case, there was substantial disagreement. Judges Petrèn, Onyeama, Fitzmaurice and Gros dissented, while Judge Ammoun on the other hand seemed prepared to attribute even more extensive obligations to the duty of non-recognition.[262] Judge Dillard, and to some extent Judge de Castro, were prepared to support the majority opinion only with reservations. Judge Dillard's opinion is representative. After referring to Security Council resolution 276 (1970), which, in his view, invoked 'a negative duty of restraint, not a positive duty of action', he continued:

> The Opinion of the Court . . . appears to be grounded at least in large part on principles of non-recognition under international law, and is thus in harmony with Security Council resolution 276. But a strong *caveat* is needed to avoid any misunderstanding. I refer to the fact that the references in operative clause 2 to '*any* facts' and '*any* dealings' are to be read subject to the critically significant qualifying phrase '*implying recognition of the legality*' of South Africa's presence in Namibia (emphasis added). This announces, to repeat, the doctrine of non-recognition.
>
> It is important to understand that this doctrine is not so rigid as to preclude *all* inter-governmental dealings under all circumstances. Even as applied to non-recognized governments and States, in which the administrative control over the government of the territory is conceded, the doctrine permits of flexibility in application at such governmental levels as do not imply recognition of legitimacy . . .
>
> But in my opinion the matter does not stop there. The legal consequences flowing from a determination of the illegal occupation of Namibia do not necessarily entail the automatic application of a doctrine of nullity . . . [T]he maxim *ex injuria jus non oritur* is not so severe as to deny that any source of right whatever can accrue to third persons acting in good faith. Were it otherwise the general interest in the security of transactions would be too greatly invaded and the cause of minimizing needless hardship and friction would be hindered rather than helped . . . A detailed specification of the particular acts which may or may not be compatible with South Africa's illegal presence in Namibia cannot be determined in advance since they depend on numerous factors including not only the interests of contracting parties who acted in good faith but the immediate and future welfare of the inhabitants of Namibia.[263]

[262] Ibid, 93–100.

[263] Ibid, 166–7, citing Lauterpacht, *Recognition*, 420. Cf Judge de Castro, 218–19. And see Kolb (2000) 33 *RBDI* 84, 136.

Judge Petrèn, on the other hand, dissented on the non-recognition point:

[T]he operative clause of the Advisory Opinion should deal with the legal effects which the continued presence of South Africa in Namibia has upon its relations with other States and, in particular, with the other Members of the United Nations. Having regard to what has been said above, these States must consider the termination of the Mandate as an established fact and they are under an obligation not to recognize any right of South Africa to continue to administer the Mandate. The question is therefore what conduct this obligation of non-recognition imposes as such on States. The reply must be sought in customary law as reflected in the settled practice of States, but that is easier in respect of the non-recognition of a State or of the government of a State than it is in respect of the non-recognition of the administration of a territory by the recognized government of a recognized State, especially if the economy of the said territory is more or less integrated in that of the said State. The very term *non-recognition* implies not positive action but abstention from acts signifying recognition. Non-recognition therefore excludes, above all else, diplomatic relations and those formal declarations and acts of courtesy through which recognition is normally expressed. Nevertheless, although the notion of non-recognition excludes official and ostentatious top-level contacts, customary usage does not seem to be the same at the administrative level, since necessities of a practical or humanitarian nature may justify certain contacts or certain forms of co-operation. A similar approach seems to prevail in regard to international agreements. While non-recognition seems not to permit the formal conclusion of treaties between governments, agreements between administrations, for instance on postal or railway matters, are considered to be possible. In the same way, the legal effect to be attributed to the decisions of the judicial and administrative authorities of a non-recognized State or government depends on human considerations and practical needs . . . [W]hat is important for the present Advisory Opinion is the fact that, in the international law of today, non-recognition has obligatory negative effects in only a very limited sector of governmental acts of a somewhat symbolic nature.

Outside this limited sphere, there cannot exist any obligations incumbent on States to react against the continued presence of South Africa in Namibia unless such obligations rest on some legal basis other than the simple duty not to recognize South Africa's right to continue to administer the Territory. Such a basis can be sought only in those resolutions of the Security Council which were referred to in the course of the proceedings.[264]

On the non-recognition issue, Judge Dillard thus took a middle position between the dissenters on one hand and the extensive pronouncements of the Opinion on the other. However, there was at least a measure of agreement as

[264] ICJ Rep 1971, 134–6. Cf Judge Onyeama, ibid,149; Judge Fitzmaurice, 295–8; Judge Gros, 339–41.

to what the obligation of non-recognition involves. It was agreed that any diplomatic action implying the legality of South African administration of Namibia was precluded, no less than outright recognition of legality. At the other end of the scale, it was agreed that acts unrelated to the political ends of the South African administration, or else such that non-recognition would harm rather than benefit the people of the territory, could be recognized as valid. This idea has found widespread support in practice.[265] It was also agreed that the Security Council could particularize other acts inconsistent with recognition, although the legal status of such resolutions was controversial.[266] There is thus implicit in both majority and minority views a distinction between acts in pursuance of the illegal administration, and acts which, either by their nature ('ministerial acts') or because of the benefit involved to the inhabitants were to be regarded as untainted by the illegality of the administration. Recognition of the latter class of acts was not a breach of the duty of non-recognition. This distinction is familiar in other contexts as the distinction between personal and impersonal governmental acts.[267] The disagreement within the Court in the *Namibia* Opinion related not to the existence of such a distinction but to its application. It is significant that the Majority Opinion appears to have conflated the requirements under customary law and those under the Charter,[268] which the separate and dissenting opinions sought to keep distinct. On the other hand, comparison with the case of unrecognized States or governments is not apt. Unrecognized but potentially opposable

[265] For example, travel documents issued by unrecognized authorities have been accepted as suitable evidence of the identity of the bearer. Statements confirming this, characteristically, make clear the limit of the legal conclusions to be drawn from acceptance. Thus acceptance of TRNC identity documents is 'no more than evidence of identity and not . . . recognition of a separate "TRNC" nationality.' Witness Statement, 19 July 2000, PJO Hill, HM Diplomatic Service, testifying in *Veysi Dag v Sec State for the Home Dept*, Immigration Appeal Tribunal: (2000) 72 *BY* 574–5, 122 ILR 529. Similarly the European Court of Human Rights has held that ECHR art 35 respecting exhaustion of local remedies applies in principle to TRNC courts on grounds cognate to those set out in *Namibia*, on which it has expressly relied. *Cyprus v Turkey*, 35 EHRR 30, 976 (para 98). And see Hoffmeister (2002) 96 *AJ* 445, 452.

[266] The Court held that relevant Council resolutions were 'decisions' under Art 25 and were binding, despite the absence of a determination under Art 39 of a threat to or breach of the peace: ICJ Rep 1971 p 3, 54. Judge Ammoun (ibid, 97–8) and Judge Padilla Nervo (ibid, 118–19) agreed. Judge Petrèn disagreed: in his view the resolutions only constituted recommendations, although they might also be legal *authorizations* for action by particular States: ibid, 136–7. Judge Dillard expressed strong reservations: ibid, 150, 165–6. Judges Fitzmaurice (ibid, 293), Gros (ibid, 340), and it seems Onyeama (ibid, 148–9) also disagreed.

[267] In the case of local *de facto* governments: see *Hopkins Claim* (1927) 4 RIAA 41. The distinction was expressly relied on by Judge de Castro, ICJ Rep 1971 p 3, 218–19. The older view was that *de facto* recognition was not inconsistent with the duty of non-recognition: Lauterpacht, *Recognition*, 285–7, 341, 347–8. The distinction was also seen in cases arising after the American Civil War: Grant, *Recognition*, 61–3.

[268] ICJ Rep 1971 p 3, 55.

situations are quite different from unlawful situations giving rise to a *duty* of non-recognition.[269] Judge Dillard's qualified support for the majority is thus justified in principle.

### *(ii) The ILC Articles on State Responsibility, Articles 40 to 41*

Articles 40 and 41 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts of 2001 address non-recognition of the consequences of serious breaches of international law in the following terms:

> Article 40 Application of this chapter
>
> 1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
> 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.
>
> Article 41 Particular consequences of a serious breach of an obligation under this chapter
>
> 1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
> 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
> 3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

The reasons for confining non-recognition to serious breaches of peremptory norms have been discussed already.

### *(iii) Subsequent consideration by the International Court*

The International Court has been called on to address collective non-recognition on several occasions since 1971. The first concerned Australia's recognition of the Indonesian administration of East Timor.[270] This recognition was demanded and given in the course of negotiating provisional arrangements for

[269] Thus a vote in favour of the admission of a State to the UN or the representation of a government does not imply recognition (cf Secretariat Memorandum on Representation, S/1466, February 1950: *SCOR* 5th yr, Supp for January–May 1950, 18), but such a vote would clearly be inconsistent with a duty of non-recognition of an unlawful regime.

[270] See Prescott (ed), *The Timor Gap Treaty*; Dunn, *East Timor*; Martin, *Self Determination in East Timor*; Hainsworth, *The East Timor Question*; Fitzpatrick, *Land Claims in East Timor*; Marker, *East Timor*; Rodrigues, *Nation-Building in East Timor*; Smith, *Peacekeeping in East Timor*.

the exploitation of continental shelf resources in the 'Timor gap', the area between Australia's north-eastern coast and the coast of the former Portuguese colony of East Timor. In 1975, following a partial Portuguese withdrawal from the colony (itself a part of the precipitate Portuguese withdrawal from its overseas territories following the 1974 revolution), Indonesian troops entered the territory and, following a spurious 'consultation' in 1976, purported to annex it as its 27th province. In 1975 and 1976 the Security Council criticized the Indonesian action;[271] the General Assembly also did so, but in increasingly diluted terms between 1975 and 1982.[272] Thereafter it was so unclear whether the relevant resolution would be passed that it was not put to the vote. But the United Nations retained East Timor on the list of Chapter XI territories, and was seeking to reach an agreement that would allow the people of the territory to decide on their future status.

Following the conclusion of the 1989 Treaty[273] Portugal commenced proceedings against Australia under the Optional Clause (Indonesia not being amenable to the Court's jurisdiction). It argued that there was a general obligation of non-recognition of the situation and that accordingly Australia was obliged not to deal with Indonesia in respect of the territory. By entering into the agreement, it argued, Australia

> is contravening Security Council resolutions 384 and 389 and is in breach of the obligation to accept and carry out Security Council resolutions laid down by the Charter of the United Nations, is disregarding the binding character of the resolutions of United Nations organs that relate to East Timor and, more generally, is in breach of the obligation incumbent on Member States to co-operate in good faith with the United Nations.[274]

There was, however, a technical difficulty: due to the strictly bilateral basis of the Court's jurisdiction in contentious cases it is unable to deal with the merits of a case against State B, if as a necessary prerequisite to doing so, it has to decide on the legal rights or obligations of State C and State C is not a party and has not consented to its doing so.[275] The Court applied these decisions to the

[271] SC resns 384, 22 December 1975; 389, 22 April 1976.

[272] GA resns 3485 (XXX), 12 December 1975; 31/53, 1 December 1976; 32/34, 28 November 1977; 33/39, 13 December 1978; 34/40, 21 November 1979; 35/27, 11 November 1980; 36/50, 24 November 1981; 37/30, 23 November 1982.

[273] Australia–Indonesia, Treaty on the Zone of Cooperation in an area between the Indonesian Province of East Timor and Northern Australia, Timor Sea, 11 December 1989, 1654 UNTS 106, 29 ILM 475 (in force 9 February 1991).

[274] ICJ Rep 1995 p 90, 94.

[275] *Monetary Gold Removed from Rome*, ICJ Rep 1954 p 19, as applied in *Certain Phosphate Lands in Nauru*, ICJ Rep 1992 p 240.

issue of the status of East Timor vis-à-vis third States such as Australia. In the Court's words:

> Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so; the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia.[276]

Portugal sought to avoid this difficulty in a number of ways. First, it argued that self-determination was an obligation *erga omnes*, and that Australia's obligation to respect the right of self-determination of the people of East Timor was independent of the obligations of any third state. The Court accepted the premise, the status of the right of self-determination, but summarily denied the conclusion:

> Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self- determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court . . . ; it is one of the essential principles of contemporary international law. However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.[277]

Secondly, Portugal argued that the United Nations had already decided the relevant issue, the continuing status of East Timor as a self-determination territory despite Indonesia's continuing occupation. As to this, the Court said:

> it cannot be inferred from the sole fact that the . . . resolutions of the General Assembly and the Security Council refer to Portugal as the administering Power of East Timor that they intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor. The Court notes . . . that several States have concluded with Indonesia treaties capable of application to East Timor but which do not include any reservation in regard to that Territory.[278]

[276] ICJ Rep 1995 p 90, 102 (para 28).
[277] Ibid, 102 (para 29).
[278] Ibid, 104 (para 32).

Judge Weeramantry and Judge ad hoc Skubiszewski dissented. Both took the view that a duty of non-recognition had arisen and required no finding by the Court relating to the rights of Indonesia. Judge Weeramantry identified UN practice as the origin of the obligation.[279] Judge ad hoc Skubiszewski took the view that the resolutions were not necessary because the illegality of Indonesian conduct itself established an obligation opposable against all States:

> [T]he rule of non-recognition operates in a self-executory way. To be operative it does not need to be repeated by the United Nations or other international organizations. Consequently, the absence of such direction on the part of the international organization in a particular instance does not relieve any State from the duty of non-recognition. Nor does the absence of 'collective sanctions' have that effect.[280]

Two points may be made in defence of a decision which has been much criticized in the literature.[281] First, the Court was evidently sensitive to the equivocal position taken by the political organs of the United Nations in relation to East Timor. Had they given a stronger lead (as they had done prior to the *Namibia* Opinion) the decision might well have been different. The second point is that the Court was not assisted by the approach of Portugal, which relied exclusively on the right of self-determination as the basis for an obligation of non-recognition, thereby necessarily calling on the Court to find, as against Indonesia, that the right was being violated. The position might have been different had Portugal relied on the obligation not to recognize a change of territorial sovereignty procured by the use of force. That obligation arises irrespective of the legality of the underlying use of force. For example it does not matter whether Israel was acting in self-defence in occupying the West Bank and the Gaza Strip during the Six Day War: whether or not it was then acting lawfully, third States are obliged not to recognize its sovereignty over those territories pending a final settlement. On that basis it could have been argued that all the Court needed to find in relation to East Timor was that Indonesia's occupation resulted in fact from a use of force, whether or not that force was unlawful. It is arguable that the *Monetary Gold* principle only applies to findings as to the legality or illegality of the conduct of a third state and not to mere findings of fact involving a third state, at least if the facts are manifest. Facts do not of themselves determine legal responsibility and anyway these

[279] Ibid, 186. [280] Ibid, 264.

[281] See, e.g., Clark, (1992) 4 *Pace UYIL* 69, 76–92; Chinkin (1993) 4 *EJIL* 206, 213; Maffei (1993) 4 *EJIL* 223, 227; Mofidi (1998) 7 *JIL & Prac* 35; Pummell (1998) 26 *Denver JIL & Pol* 655; French-Merrill (2000) 8 *Cardozo JICL* 285; Grant (2000) 33 *Vand JTL* 273; Ahrens (2004) 42 *Col JTL* 575, 587–8.

facts were public knowledge.[282] By this route the Court could arguably have dealt with the legal issue of Australia's recognition of Indonesia's claims to sovereignty.[283]

In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[284]the International Court also addressed the question of collective non-recognition arising from Israel's construction of a 'security barrier' separating Palestinian from settler populations in the West Bank. Much of the barrier lay within the Occupied Palestinian Territory, and in certain places it created enclaves of Palestinian towns and impeded travel between the various parts of the Territory.[285] The General Assembly called on Israel to 'stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law.'[286] After deciding that the Assembly's request for an advisory opinion was within power and admissible, the Court concluded that the construction of the wall violated Israel's obligation to respect the right to self-determination of the Palestinian people.[287] This made it necessary for the Court to address the obligations of States other than Israel in respect of the construction and maintenance of the wall. Noting its decision in *East Timor*, the Court stated that the right of self-determination is a right opposable against all States.[288] This meant that all States have certain obligations respecting the situation in the Occupied Palestinian Territory:

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the

[282] In the *Corfu Channel* case the Court examined the facts of a dispute over mine-laying involving conduct of a third state, and was able to find Albania responsible: ICJ Rep 1949 p 4. Cf also *Military and Paramilitary Activities in and against Nicaragua*, ICJ Rep 1986 p 14.

[283] See Crawford in Alston (ed), *People's Rights*, 7, 33–6. For the eventual resolution of the East Timor question see below, Chapter 14.

[284] For discussion see Araujo (2004) 22 *Boston University ILJ* 349; Symposium (2005) 99 *AJ* 1.

[285] The project is described at ICJ Rep 2004 p 135, 168–71 (paras 79–85).

[286] GA res ES-10/13, 27 October 2003, para 1.

[287] ICJ Rep 2004 p 135, 184 (paras 121–2).

[288] Ibid, 171–2, 199 (paras 88, 156).

Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.[289]

The Court was concerned not only with existing breaches of international humanitarian law and the responsibilities of an occupying power but also with potential changes of status that Israel's conduct might be seeking to achieve. The route of the barrier, including long segments within Palestinian territory, suggested that certain parts of the occupied territory would be practically separated from Palestinian administration and assimilated permanently into Israel. By identifying an obligation on the part of other States to deny the legality of the wall and its practical results, the Court sought to prevent crystallization of permanent claims of right by Israel over the West Bank.

### *(iv) Conclusion*

In conclusion, the duty of non-recognition is now firmly established as a specific technique for dealing with unlawful regimes. So long as it is not mistaken for a sanction or for enforcement action,[290] it is a valuable 'addition to the forces making for the reality of international law'.[291]

[289] Ibid, 200 (para 159). This was the sole element of the *dispositif* to draw any dissent (Judges Buergenthal and Kooijmans). [290] See Gowland-Debbas, 276–8 and works cited 278 n 3.
[291] Lauterpacht, *Recognition*, 435: cf Chen, *Recognition*, 441.

# Chapter 4

# ISSUES OF STATEHOOD BEFORE UNITED NATIONS ORGANS


| | | |
|---|---|---|
| **4.1** | **General considerations** | 174 |
| **4.2** | **League of Nations and United Nations membership** | 176 |
| | (1) Membership practice under the League of Nations | 176 |
| | (2) The United Nations: original membership | 177 |
| | (3) The United Nations: admission to membership | 179 |
| | (i) The criteria for membership: Article 4 in theory and practice | 179 |
| | (ii) The micro-State issue and the move to universality of membership | 182 |
| | (iii) Renewed controversy during the 1990s: the former Yugoslavia | 186 |
| | (iv) Conclusions | 189 |
| **4.3** | **Statehood for other United Nations purposes** | 190 |
| | (1) Statehood and dispute settlement: Articles 32 and 35(2) | 190 |
| | (2) Claims to be parties to the Statute of the International Court of Justice | 191 |
| | (3) Other cases | 192 |
| **4.4** | **UN observer status** | 193 |


## 4.1 General considerations

The word 'State' occurs thirty-four times in the United Nations Charter.[1] To be admitted to the United Nations an applicant must be a 'State'.[2] To bring a

[1] There is nothing inevitable about the use of the word 'State' as a criterion for membership of international organizations: Morgenstern, *Legal Problems of International Organizations*, 50–1. In the constitutive instruments of the IMF and World Bank, the word 'country' is used; in the Food and Agriculture Organization, 'nation'; in the WTO, 'State or separate customs territory possessing full autonomy in the conduct of its external commercial relations.'

[2] Article 4(1); *Admissions Case*, ICJ Rep 1948 p 57, 62.

question concerning international peace and security, or any other dispute, before the United Nations, it is necessary to be a 'State'.[3] To be entitled to participate without vote in the Security Council's consideration of any dispute, a party to the dispute must be a 'State'.[4] To become a party to the Statute of the International Court an applicant must be a 'State'.[5] There is thus much opportunity for disagreement about and development of the notion of statehood in United Nations organs.

Of course the meaning of legal terms is context-dependent, and the contexts of some of these uses of the term 'State' in the Charter varies. For example, Article 35(2) permits a State that is not a member of the UN to 'bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of the pacific settlement provided in the . . . Charter.' Under Article 35(2) the Security Council could be justified in allowing an entity to participate in its deliberations, although it might well hesitate to recommend admission of the same entity on the grounds that its legal status was transient or uncertain. Indonesia was invited to participate in 1947 over its dispute with the Netherlands, although its statehood was the very point at issue, and despite the fact that it probably did not yet qualify as a 'State' for the purposes of Article 4. A representative of Hyderabad was heard by the Security Council under Article 35(2) in relation to a dispute about its status.[6] The policy underlying Article 35(2) suggests that no fine distinctions should be drawn between established States and entities whose status is in dispute; otherwise a procedural decision could appear to prejudice the substance of the claim.

Thus, quite apart from the flexibility inherent in the general criteria discussed in the preceding chapters, contextual interpretation of the term 'State' may be justified where a claim to status is made for specific purposes.[7] But care is necessary in determining which contexts warrant a more attenuated meaning. Higgins suggests that 'entities which would not be considered states for the purposes of a claim for comprehensive participation in the United Nations might nevertheless satisfy the requirements of statehood where the claim is for limited participation.'[8] But the proposition that an entity which is not a 'State' for the purposes of United Nations membership may nonetheless

[3] Articles, 11(2), 35(2). [4] Article 32. [5] Article 93(2).

[6] 16 September 1948, *SCOR* 3rd year, 357th mtg, 109 (1948). Two further cases in which the status of the party invoking Art 35(2) was in dispute were Tunisia (1952) and Kuwait (1961): Schweisfurth in Simma (ed), *Commentary*, 609, 612–13.

[7] Cf Higgins, *Development*, 11–14, 42–50. [8] Higgins, *Development*, 42–3.

be a 'State' for the purposes of admission to a regional or functional organization has been disputed:

> not only is it *a priori* unlikely that the same concept—statehood—should be used in different senses by the same actors (the diplomatic representatives of States) in similar *fora* (intergovernmental organisations) for the same purposes (participation), but it is also a fact that the instances cited in support of the theory can, without exception, be better explained on other grounds, such as the presence of the veto in the UN and its absence in the Specialized Agencies.[9]

Moreover, it cannot be said that United Nations organs have consistently adhered to a contextual interpretation even in contexts such as Article 35(2). States may be unwilling to take sides in political controversy in cases such as Bangladesh. Where an entity such as Rhodesia is concerned, they will be reluctant to accord it any semblance of status. United Nations practice has tended to emphasize the political or honorific element of statehood and to treat issues of status, however arising, in the same way. The following account nonetheless deals with the practice under the different rubrics.

## 4.2 League of Nations and United Nations membership

### (1) Membership practice under the League of Nations

Article 1(2) of the Covenant provided that:

> Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed . . . in regard to its military, naval and air forces and armaments.[10]

The phrase 'fully self-governing State, Dominion or Colony' was used because, in Cecil's words 'some of the Members of the League, such as India and (at least in 1919) the British Dominions, were not "States" '.[11] Statehood was thus not

[9] Mendelson (1972) 21 *ICLQ* 609, 614; to the same effect his 'Acquisition of Membership in Selected International Organizations' (MS.D.Phil. d. 5229, Oxford, 1971) 85–92, 167–70.

[10] 119 BFSP 1. For exclusion from the Covenant of any reference to recognition see Graham, *The League of Nations*, 43–4.

[11] Hunter Miller, *The Drafting of the Covenant*, vol I, 284; for the position of the Dominions in 1919 see Chapter 8. Cecil conceded that, even on this formulation, India did not qualify since (like the Philippines) it was not a 'self-governing' Colony (ibid, 164; cf President Wilson, quoted in Miller, *Drafting*, vol I 165–6). Smuts pointed out that India qualified as an original member under Art 1(1), and that Art 1(2) was irrelevant. Further on India see Chapter 16.

a prerequisite for admission to the League, although in fact only States were admitted under Article 1(2). League practice on admission was not extensive, but the requirements of statehood tended to be interpreted strictly. Entities such as Armenia, Georgia and the Ukraine, which had separated from the Russian Empire, had their applications for membership rejected on the grounds of lack of stability or permanence.[12] Others such as Latvia, Lithuania and Estonia had their applications postponed until they could demonstrate some sort of permanence.[13] Liechtenstein was rejected on the grounds that, even though it was a State, it was too small to carry out its obligations under the Covenant.[14] By contrast League practice relating to the extinction of States was not consistent, giving the political vicissitudes of the appeasement policies of the major powers during 1935 to 1940, when the various issues arose.[15]

## (2) The United Nations: original membership

Like the League Covenant, and for the same reasons, the United Nations Charter distinguishes between original and admitted members. Article 3 of the Charter provides:

> The Original Members of the United Nations shall be the States which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.

The distinction was pointed out by the Rapporteur (Membership) of the Committee I/2 to Commission I at the San Francisco Conference:

> As regards original members their participation in the Organization is considered as acquired by right, while that of future members is dependent on the fulfilment of certain conditions . . . [T]he definition adopted would serve to calm the fears of certain nations participating in our deliberations which, properly speaking, are not *States* and for this reason might be denied the right of membership in the Organization.[16]

[12] Graham, The League of Nations, 26–32; Scelle (1921) 28 *RGDIP* 132.

[13] See Piip (1920) 6 *GST* 35. The Baltic States were admitted by the Second Assembly on 22 September 1921: LNOJ, October 1921, 863–8.

[14] League of Nations, First Assembly, Plenary Meetings, Annex C, 667–8. See Gunter (1974) 68 *AJ* 496; Kohn (1967) 61 *AJ* 547; Raton, *Liechtenstein, History and Institutions of the Principality*, 58–66.

[15] See Chapter 17. Cf Green, in Schwarzenberger (ed), *Law Justice and Equity*, 152, 157–8. On League membership practice in general see Graham, *The League of Nations*; Scelle (1921) 28 *RGDIP* 122; Hudson (1924) 18 *AJ* 436; Feinberg (1952) 80 *HR* 297; Schwarzenberger, *The League of Nations and World Order*.

[16] (1945) 7 *UNCIO* 324, doc 1178; Whiteman, 13 *Digest* 191–2. But Art 3 of the Charter, referring to original Members, does use the term 'State'.

As the Report delicately put it, 'certain nations' that became original members of the United Nations were not States: viz India, which had been a League member but the status of which was unchanged from 1919, the Philippines and two of the Union Republics of the Soviet Union, Byelorussia and the Ukraine.[17]

There were in all fifty-one original Members: forty-six States or other entities (including the Dominions and India) were invited to San Francisco. Byelorussia, the Ukraine, Argentina and Denmark were admitted at the Conference. The Polish Provisional Government was only admitted later, after the 'reconstitution' of the Polish Government in accordance with the Yalta decision.[18] The Vatican tentatively inquired about original membership in 1944 and was discouraged by the Secretary of State from applying.[19]

The membership of the two constituent Republics of the USSR deserves brief comment. Stalin had originally proposed that, pursuant to a 1944 amendment to the Soviet Constitution, all sixteen federal Republics should be admitted. A compromise was agreed at the Yalta Conference: the United Kingdom and the United States would support the original membership of these two Republics,[20] which were accordingly unanimously admitted as participants at the San Francisco Conference.[21] However, as a United States memorandum pointed out, the Soviet constitution did not permit the Soviet Republics 'to control their own foreign policy or affairs' and they were accordingly 'not Sovereign States under International Practice'.[22] Stetinnius and Eden supported the membership proposal at San Francisco on the basis of the contribution of the two Republics to the war effort: in effect the Soviet Union had three votes in the General Assembly.[23] But the separate position of Ukraine

[17] See Chen (2001) 12 *Indiana ICLR* 25, 34–7; Morgenstern, *Legal Problems of International Organizations*, 50–1.

[18] See Whiteman, 13 *Digest* 190–1. The admission of Argentina aroused controversy, given its late declaration against the Axis (March 1945): Hoopes and Brinkley, *FDR and the Creation of the UN*, 189–91.

[19] USFR 1944/I, 963–4; Duursma, *Fragmentation,* 405–6.

[20] USFR 1945 *The Conferences at Malta and Yalta*, 975–6.

[21] (1945) 1 *UNCIO* 165, 168. See also Hoopes and Brinkley, *FDR and the Creation of the UN*, 174–5, 189.

[22] USFR 1945 *The Conferences at Malta and Yalta*, 746–7. The analogy with India was rejected on the grounds that 'India has for some period past been gradually developing international relations, and is generally regarded as having more of the attributes of separate nationhood than the Soviet Republics.' See also Dolan (1955) 4 *ICLQ* 629; Timasheff (1945) 14 *Fordham LR* 180; Uibopuu (1975) 24 *ICLQ* 211.

[23] Outside the framework of the UN there was no pretence of a separate international status for the Ukraine and Byelorussia. For example the USSR negotiated their international boundaries with neighbouring States: e.g. Protocol to Specify the Line of the State Boundary between the People's Republic of Romania and the Union of Soviet Socialist Republics, 4 February 1948, 42 UNTS 3.

and Belarus as United Nations Members had unforeseen effects in 1990 to 1991 when they became really independent on the dissolution of the USSR. Their membership was simply continued, as India's had been on its independence in 1948.

## (3) The United Nations: admission to membership

### *(i) The criteria for membership: Article 4 in theory and practice*

Article 4 of the Charter states:

1. Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
2. The admission of any such State to membership in the United Nations will be affected by a decision of the General Assembly upon the recommendation of the Security Council.

The conditions for admission are thus five in number: 'to be admitted to membership in the United Nations, an applicant must (1) be a State; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so.'[24]

United Nations practice has attributed to the term 'State' in Article 4(1) the meaning it has under general international law. Membership of the United Nations involves a wide range of rights, duties and powers: the context confirms the presumption that the term 'State' in a legal document means 'State for the purposes of international law'.[25] But the question arises to what extent United Nations organs have conformed to the criteria of statehood in examining and approving applications for membership.[26]

In a comprehensive review of the practice to 1962, Higgins concluded that:

> variations in United Nations practice concerning claims of statehood are a result not of an abandonment of traditional legal criteria . . . , but of the proper use of flexibility in interpreting these criteria in relation to the claim in which they are presented. Concomitantly, the basic criteria of population, fixed territory, stable and effective government and sovereign independence have been—and should be—followed quite closely.[27]

[24] *Admissions Case* ICJ Rep 1948 p 57, 62.

[25] For a more extensive view of Art 4, see Reisman, *Puerto Rico and the International Process*, 53–62 ('broadest range of territorial communities').

[26] Morgenstern, *Legal Problems of International Organizations*, 48.

[27] Higgins, *Development*, 11–57, 54; to the same effect Mendelson, *Acquisition*, 84. See also Whiteman, 13 *Digest* 188–263; Aufricht (1949) 43 *AJ* 679; Rudzinski (1952) *Int Conc* no 480; Gross (1954) 48 *PAS* 37; Verhoeven, *Reconnaissance*, 470–3; Claude (1966) 20 *Int Org* 367.

But it has also been pointed out that purely political considerations often intrude in decisions concerning admission. In considering claims to admission under Article 4, legal and political factors have been difficult to separate, as the Court noted in the *Admissions* Opinion.[28] Moreover, if the Charter permits certain political considerations to be taken into account, it is difficult to tell whether the real political factors at issue in any specific case have been permissible ones. There were instances in pre-1963 practice of premature recommendations for admission—for example, the Republic of Vietnam, which, in 1950, was neither formally independent of France nor had a stable and effective government in the territory it claimed to govern.[29] Other controversies about United Nations action on admissions in this period, including the Congo, Israel and Korea, are dealt with elsewhere.

A review of UN admission practice in the period since Higgins' review might imply that virtually no problems have arisen, that membership has been unproblematic if not automatic. Of the eighty-five successful applications (1963–2005), all but five were approved without any objection in either the Security Council or the General Assembly.[30] Two applications (United Arab Emirates and Belize) were approved with only one dissent.[31] In only a few cases was there some sign of opposition. The case of Oman is discussed elsewhere.[32] Kuwait's first application was vetoed by the Soviet Union on grounds partly of lack of independence from Britain and partly of a territorial dispute with Iraq.[33] Kuwait was eventually admitted without opposition.[34] The first application of Bangladesh was vetoed by China: the grounds given were the alleged refusal of Bangladesh to comply with Assembly resolutions concerning repatriation of prisoners and withdrawal of foreign troops.[35] According to Dugard, Bangladesh 'was not a case in which United Nations collective action contributed to . . . statehood.'[36] But this is not quite accurate. On the one hand

[28] ICJ Rep 1948 p 57, 63; cf ibid, 85–6 (Joint Dissenting Opinion).

[29] Morgenstern, *Legal Problems of International organizations*, 50. It also has been suggested that the admissions of Georgia, Moldova and Bosnia and Herzegovina were premature: O'Keefe (2001) 1 *Baltic Ybk* 167, 171–6. In those cases, however, formal independence was probably more secure than in the Vietnamese case, even though the territorial control of the national governments was in doubt.

[30] The reports of the Security Council Committee on Admissions of New Members have mostly been *pro forma*: O'Keefe (2001) 1 *Baltic Ybk* 167, 170–1. See also Bailey and Daws, *The Procedure of the UN Security Council* (3rd edn), 339–44.

[31] UAE: GA res 2794 (XXVI), 9 December 1971 (93–1 (South Yemen):0); Belize: GA res 36/3, 25 September 1981 (144–1 (Guatemala):0).

[32] See Chapter 7. Oman's application was approved unanimously by SC res 299 (1971), 30 September 1971; GA res 2754 (XXVI), 7 October 1971 (117–1 (South Yemen): 2 (Cuba, Saudi Arabia)).

[33] *SCOR* 985th mtg, 30 November 1961, 9 (10–1:0). [34] GA res 1872 (S-IV), 14 May 1963.

[35] *SCOR* 659th mtg, 26 August 1972 (11–1 (China); 3 (Guinea, Somalia, Sudan)).

[36] Dugard, *Recognition*, 75.

GA resolution 2937 (XXVII), of 29 November 1972, adopted without vote, called for the admission of Bangladesh, indicating the conviction of a large majority of States that Bangladesh was a State. On the other hand the unresolved situation with Pakistan was evidently still at play. Bangladesh was not admitted until 17 September 1974, by which time it had already been recognized by Pakistan.[37]

But the surface appearance of consensus is misleading. For example the status of Guinea-Bissau had aroused controversy in both the General Assembly and the Security Council. However, by the time Guinea-Bissau was admitted an agreement had already been reached for *de jure* recognition and withdrawal of forces.[38] The cases of the Republic of Korea, the two Vietnams (and after unification, the Socialist Republic of Vietnam) and Angola caused some division in the Security Council.[39] In the case of Angola, United States opposition to intervention in the civil war was at least tangentially related to statehood, but a large majority of members had no doubt on this score: in their view the dispute over governmental control did not affect the status of the former colony.[40]

Most other cases of the admission of new States since 1990 were, likewise, uncontroversial by the time they came to be approved. Namibia, as represented by the United Nations Council for Namibia, had been admitted to UN functional agencies, including the FAO and ILO. Osieke considered the latter dubious,[41] and, according to Morgenstern the legal counsel to the ILO, relying on the *Danzig* case,[42] doubted whether admission would be in conformity with the ILO constitution.[43] An independent Namibia was admitted to the United Nations on 23 April 1990,[44] thus mooting the question.

The four major cases of divided State were settled, as a matter of UN membership, from the 1970s onward. The two German States were admitted as separate members in 1973; East Germany merged into the Federal Republic

[37] SC res 351 (1974), 10 June 1974; GA res 3203 (XXIX), 17 September 1974. Pakistan recognized Bangladesh on 2 February 1974; it had before then been recognized by many third States.

[38] See African Party for the Independence of Guinea-Portugal, Agreement Granting Independence of Portuguese Guinea, 26 August 1974, 13 ILM 1244. For Guinea-Bissau's admission see SC res 356 (1974), 12 August 1974; GA res 3205 (XXIX), 17 September 1974. Further on Guinea-Bissau see Chapter 9.

[39] On practice in the period 1945–9 respecting Korea see Dugard, *Recognition*, 58–60; respecting Angola and Guinea-Bissau, ibid, 73–5.

[40] See *Keesing's* 1977, 28156. Angola was admitted on 1 December 1976: SC res 397 (1976) (13–0:1 (USA)); GA res 31/44 (116–0: 1(USA)). Cf [1976] *US Digest* 39–40.

[41] Osieke, *Constitutional Law and Practice in the International Labour Organization*, 227–9.

[42] *Free City of Danzig and ILO*, PCIJ ser B no 18 (1930).

[43] Morgenstern, *Legal Problems of International Organization*, 51 n 17.

[44] SC res 652, 17 April 1990; GA res S-18/1, 23 April 1990.

in 1990, with the latter retaining its membership. A unified Vietnam was admitted in 1977. The seat of China was given to the People's Republic in 1973. The two Koreas were at last admitted as separate States in 1991.[45] In the German and Korean cases, it has been observed that admission of the opposing sides of the divided State seems to have awaited agreement as to their mutual status, and, that in Vietnam, where no *modus vivendi* ever was reached, admission only took place after unification.[46]

To summarize, disputes about status or membership were often kept below the surface because United Nations organs have tended to wait until bilateral issues were resolved. Moreover, the period of the Cold War and the strong support for decolonization tended to muffle debates about the viability of small States or about unresolved territorial claims. In the event the tendency to universal membership of the United Nations, even in the case of very small entities still connected to a degree with a former metropolitan State, has prevailed.

### *(ii) The micro-State issue and the move to universality of membership*

These elements were evident in the debate during the late 1960s over the so-called 'micro-States', an issue that was seen as having implications with respect to both United Nations voting and finance. If all the remaining Chapter XI territories were to seek membership upon independence, it was argued, numerical and fiscal disparities within the United Nations would be exacerbated. This prospect led some to advocate an intermediate form of United Nations membership without voting rights or with only limited voting rights.

The problem was raised by France during proceedings on the application for admission of the Maldives.[47] The United States delegate in turn expressed the need for

> some agreed standards, some lower limits, to be applied in the case of future applicants for United Nations Membership . . . We do not for a moment suggest the exclusion of

[45] In August 1975, the Security Council refused (7–6:2) to consider an application for membership by the Republic of Korea. In consequence, the US vetoed applications by the two Vietnams: 1836th mtg, 11 August 1975; 1846th mtg, 30 September 1975. cf Jacobs and Poirier (1976) 17 *Harv ILJ* 581–607. After reunification the Socialist Republic of Vietnam was admitted by SC res 413 of 20 July 1977 (consensus); GA res 32/2, 20 September 1977 (accl). North and South Korea were admitted in 1991 as separate States: SC res 702, 8 August 1991 (without vote); GA res 46/1, 17 September 1991 (without vote). The Security Council in its recommendation, unusually, included the rationale for admission: 'The aspirations of the peoples and Governments of the Democratic People's Republic of Korea and the Republic of Korea have harmoniously coincided. That is why the Council decided to consider and take a simultaneous decision on the admission of both parts of the Korean Peninsula': Security Council Presidential Statement, S/22911, 8 August 1991. Compare statement on admission of the Baltic States (Chapter 9). See also Pak, *Korea and the United Nations*.

[46] Chen (2001) 12 *Indiana ICLR* 25, 41.

[47] *SCOR* 1243rd mtg, 20 September 1965, 12.

small new States from the family of Nations. On the contrary, we believe we must develop for them some accommodation that will permit their close association with the United Nations and its broad range of activities.[48]

In 1966 the Secretary-General took the matter up in his Annual Report: referring to the principle of universality of membership as central, he also pointed to the need for some institutionalization of observer status as a possible substitute for membership.[49] In 1967 the Secretary-General discussed the issue at greater length:

It is, of course, perfectly legitimate that even the smallest territories, through the exercise of their right to self-determination, should attain independence . . . However, it appears desirable that a distinction be made between the right to independence and the question of full membership in the United Nations. Such membership may, on the one hand, impose obligations which are too onerous for the 'micro-States' and, on the other hand, may lead to a weakening of the United Nations itself . . . The League of Nations had to face the same issue over the question of the admission of certain European States which were then referred to as 'Lilliputian' States. Although the League of Nations was unable to define exact criteria, it prevented in due course the entry of the 'Lilliputian' States . . . [A] necessary corollary to the establishment of criteria on admission to full membership is the definition of other forms of association for 'micro-States' which would not qualify for full membership. As members of the international community, such States are entitled to expect that their security and territorial integrity should be guaranteed and to participate to the full in international assistance for economic and social development. Even without Charter amendment, there are various forms of association, other than full membership which are available, such as access to the International Court of Justice and membership in the relevant United Nations regional economic commissions. Membership in the specialized agencies also provides an opportunity for access to the benefits provided by the United Nations Development Programme and for invitations to United Nations conferences. In addition to participation along the foregoing lines 'micro-States' should also be permitted to establish permanent observer missions at United Nations Headquarters and at the United Nations Office at Geneva . . . Measures of this nature would permit the 'micro-States' to benefit fully from the United Nations system without straining their resources and potential through assuming the full burdens of United Nations membership which they are not, through lack of human and economic resources, in a position to assume.[50]

[48] Ibid, 14–15.

[49] Secretary-General's Introduction to the Annual Report. 1965–6, GAOR 21st sess supp no 1A (A/6301/Add.1) 14. See also Mower (1966) 20 *Int Org* 266; *UN Ybk* 1971, 159.

[50] Introduction to the Annual Report 1966–1967: *GAOR* 22nd sess supp no 1A (A/6701/Add.1), 20–1.

Subsequently Ambassador Goldberg (USA) proposed that the matter be referred to the Committee on Admission of New Members.[51] Again after the Council had unanimously voted to admit Mauritius, the United States representative raised the issue and repeated the proposal to reconvene the Committee on Admissions.[52] At length the Security Council convened a Committee of Experts to consider the problem.[53] It held one public meeting on 9 October 1969[54] and met on various occasions in private. A brief, unhelpful interim report was issued in 1970.[55] Writers have continued to address the topic,[56] but the United Nations debate faded out at this point.

As was made clear during the debates, the problem was not one of statehood as such.[57] The question was rather political and constitutional: was the principle that smallness of size did not preclude an entity from being a State to be carried over into universal participation in the United Nations of entities no matter how small in terms of population and resources? No doubt it might have been said (as the League of Nations had said of Liechtenstein) that small States were not 'able . . . to carry out' the obligations of the Charter. But since United Nations membership has come to be regarded as an important form of international certification,[58] that element of Article 4 has been discounted. Suggestions for change included a United States proposal for a form of associate membership (which would involve amendment of the Charter),[59] and a British proposal that small States should undertake, on admission, not to exercise voting rights or to be available for election to other United Nations organs in return for a nominal budgetary assessment.[60]

[51] S/3296, 13 December 1967.

[52] *SCOR* 23rd yr, 141st mtg, 13 April 1968, paras 97, 99. See also a further US letter of 14 July 1969, stating that consideration of the matter is 'long overdue': S/9327.

[53] *SCOR* 1505th mtg, 27 August 1969; 1506th mtg, 29 August 1969, 6.

[54] *UNMC* vol 6 no 9, 33–4 (1969).

[55] S/9836, 15 June 1970.

[56] See Duursma, *Microstates*, 134–9; Ginther in Simma (ed), *Commentary* (2nd edn), 177, 181–2; Bailey & Daws (3rd edn), 350–2; Conforti, *The Law and Practice of the United Nations* (3rd rev edn), 18–21, 27–8.

[57] Secretary-General's Introduction to the Annual Report, 1966–7: *GAOR* 22nd sess, supp 1A, 20–1.

[58] According to Dugard, *Recognition*, 73, 'several of the States that have achieved statehood in the past twenty-five years by this process of United Nations certification would not have received widespread recognition by individual States had they been left to make a determination of statehood in accordance with the traditional criteria . . . The unavoidable facts are that these entities have been admitted to membership in the United Nations and that such admission is today regarded as the definitive acknowledgement of their independence and statehood by the international community.' The latter statement is true; but it is difficult to point to any entity whose status was genuinely in dispute being admitted: rather the decolonisation movement and the trend towards universality have encouraged very small entities to seek statehood rather than, for example, association or integration. See further Chapter 14.

[59] S/9836, Annex I.

[60] Ibid, Annex II.

But the pressure for change came from only a few States and produced a very muted response. It was predictable that the United Nations, having swallowed the camel of a majority membership of small States, should not balk at the gnat of a relatively few very small States.[61] And so it has proved. In 1976 Western Samoa, which had previously rejected membership, changed its mind and was admitted without dissent.[62] More significant than this debate was the move to universality after 1989. The diminutive States of Europe—excepting the Vatican—sought admission and were accepted without dissent in the early 1990s.[63] In 1999 and 2000, four very small island States (Kiribati, Nauru, Tonga and Tuvalu), which like Samoa had chosen not to seek membership, applied[64] and were admitted.[65] Barely a score of very small separate entities remain.[66] In 2005, Monaco was the smallest United Nations member in terms of area (1.5 km²) and Tuvalu by population (9,743).

Universality of membership was thus virtually achieved. The crowning move in this respect concerned Switzerland, which, though a host country,[67] had repeatedly declined membership both in the League of Nations and the United Nations.[68] At length a referendum endorsed a change of

[61] Cf Mendelson (1972) 21 *ICLQ* 609, 621–3, 630.

[62] For Western Samoa's previous attitude see Davidson, *Samoa mo Samoa*, 425. On 'Micro-States' in general see also UNITAR, *Status and Problems of Very Small States and Territories*; Blair, *The Ministate Dilemma* (rev edn); Fisher (1968) 62 *PAS* 164; de Smith in Fawcett and Higgins (eds), *International Organization*, 64–78; Plischke, *Microstates in World Affairs*. Cf UN *Jur Ybk* 1975, 153. Western Samoa has since adopted the title 'Samoa'.

[63] Liechtenstein by SC res 663, 14 August 1990, GA res 45/1, 18 September 1990; San Marino by SC res 744, 25 February 1992, GA res 46/231, 2 March 1992; Monaco by SC res 829, 26 May 1993, GA res 47/231, 28 May 1993; Andorra by SC res 848, 8 July 1993, GA res 47/232, 28 July 1993. For the background to admission for each of these, see Duursma, *Microstates* 196–7, 259–68, 326–33, 393 respectively. Andorra is the distinctive case, in that before 1993, when a new 'trilateral treaty of vicinage' was seen to confirm its independence, organisations and States generally had denied that Andorra was a State: see Duursma, *Microstates*, 365–6.

[64] S/1999/477, S/1999/478, S/1999/793, S/2000/5.

[65] Kiribati, independent since 1979, by SC res 1248, 25 June 1999, GA res 54/1, 1 October 1999; Nauru, independent since 1968, by SC res 1249, 25 June 1999, GA res 54/2, 1 October 1999; Tonga, independent since 1970, by SC res 1253, 28 July 1999, GA res 54/3, 1 October 1999; Tuvalu, independent since 1978, by SC res 1290, 17 February 2000, GA res 55/1, 6 October 2000. For comment see Grant (2000) 39 *Col JTL* 177.

[66] In 2005, apart from 16 remaining non-self-governing territories (as to which see Chapter 14), there were only a handful of associated States not Members of the UN: Niue, the Cook Islands and the Commonwealth territories of the United States (Puerto Rico and the Northern Marianas).

[67] Headquarters Agreement between the United Nations and Switzerland, 11 June/1 July 1946, 1 UNTS 153. See Cotti in *Boutros Boutros-Ghali Amicorum Discipulorumque Liber*, 347, 347–9.

[68] An issue here, as it had been for Austria in 1955, was whether a guarantee of permanent neutrality might be seen as a reservation excluding application of the collective security provisions of the Charter. Swiss neutrality had sometimes been cited by Swiss publicists as a bar to membership: see Ginther (1976) 31 *Europa Archiv* 275; Zemanek (1978) 18 *Österreichische Zeitschrift für Aussenpolitik* 265; Jankowitsch (1979) 8 *Österreichische Zeitschrift für Politikwissenschaft*, 327; Herndl, in *Neue*

policy[69] and Switzerland was admitted to the United Nations on 18 September 2002.[70] Ginther's characterization of the UN as 'an open organization with a universal vocation' has been borne out by this practice,[71] as can be seen from Table 3 on the following page.

### *(iii) Renewed controversy during the 1990s: the former Yugoslavia*

In the period after the end of the Cold War, the most controversial membership issues concerned the States emerging from the dissolution of Yugoslavia, though again—except for Yugoslavia itself—this resulted in little debate in the Security Council or the General Assembly. When recommending the admission of Macedonia, the Security Council noted that 'a difference has arisen over the name of the State, which needs to be resolved in the interest of the maintenance of peaceful and good-neighbourly relations in the region.' The Security Council urged the parties to the dispute (Greece and Macedonia) to work within the framework of the International Conference on the Former Yugoslavia to 'arrive at a speedy settlement of their difference.'[72] Macedonia had already expressed willingness to continue its cooperation within the International Conference, and Greece, while maintaining an objection to certain symbols in the Macedonia national flag, had agreed to its admission under the provisional name.[73] There were no dissenting votes or abstentions recorded when the Security Council recommended admission and the General Assembly voted to admit.[74] The President of the Security Council said at the time—in a masterpiece of evasion—that

> The Council is clear that the reference in the resolution that has just been adopted to ' "The Former Yugoslav Republic" ' carries no implication whatsoever that the State concerned has any connection with the Federal Republic of Yugoslavia (Serbia and Montenegro). It merely reflects the historic fact that the State recommended for admission to the United Nations in the present resolution was in the past a republic of the former Socialist Federal Republic of Yugoslavia.[75]

*Aspekte der dauernden Neutralität* 527. But as with Austria, the view was taken that neutrality did not qualify admission. In 1981, the Federal Council, with reference to the admissions of Sweden (1946), Finland (1955) and Austria (1955), had determined that UN membership would not compromise neutrality: *Cotti in Boutros-Ghali Amicorum Discipulorumque Libe*, 350. See also Wildhaber (1970) 12 *Malaya LR* 140; Gunter (1976) 30 *Int Org* 129; Haug (1976) 95 *Zeitschrift für schweizerische Recht* 357; Ingravallo (2003) 58 *La comunità internazionale* 265.

[69] Sheehan (2002) 24 *Harv IR* 36; Ingravallo (2003) 58 *La comunità internazionale* 265.

[70] S/2002/801; SC res 1426, 24 July 2002, GA res 57/1, 18 September 2002.

[71] Ginther in Simma (ed), *Commentary*, 177, 178.

[72] SC res 817, 7 April 1993, preamble, para 1. On this unusual case of substantive language in a Security Council recommendation, see O'Keefe (2001) 1 *Baltic YIL* 167, 177–9.

[73] S/25541, S/25542.

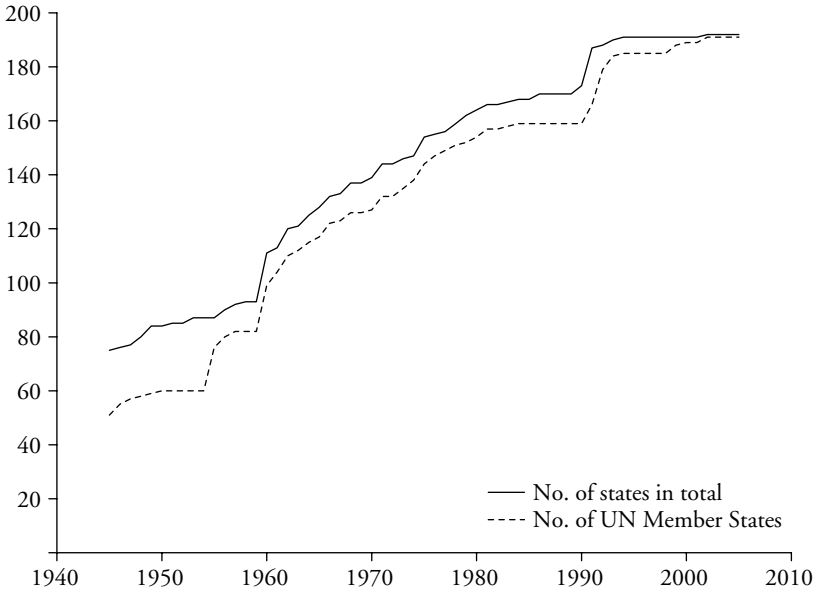
[74] SC res 817, 7 April 1993 (adopted without vote); GA res 47/225, 8 April 1993 (adopted by acclamation).

[75] S/25545.

**Table 3. Creation of States and UN admission, 1945–2005**[76]

| | Number of UN Member States | Approximate % of total number of States |
|---|---|---|
| Original Members (1945) | 51 | 68.0% |
| December 1950 | 60 | 71.4% |
| December 1955 | 76 | 87.4% |
| December 1960 | 99 | 89.2% |
| December 1965 | 117 | 91.4% |
| December 1970 | 127 | 91.4% |
| December 1975 | 144 | 93.5% |
| December 1980 | 154 | 93.9% |
| December 1985 | 159 | 94.6% |
| December 1990 | 159 | 91.9% |
| December 1995 | 185 | 96.9% |
| December 2000 | 189 | 99.0% |
| December 2005 | 191 | 99.5% |

**Figure 1.** Creation of states and UN Admission Compared




[76] For a list of members with dates of membership, see Appendix 1.

If the concern of Greece was that the name 'Macedonia' implied irredentism at its expense, the verbal formula adopted by the Council raised similar concerns on the Macedonian side with respect to the position of Yugoslavia. The insistence of the EU on an assumed name for Macedonia, unwelcome to the bearer, was unfortunate if not unique.

The controversy over Yugoslav membership was even more difficult. On 19 September 1992, the Security Council

> [c]onsider[ed] that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore recommend[ed] to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly.[77]

The General Assembly adopted the recommendation, considering that the FRY

> cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly.[78]

In earlier United Nations practice, cases had occurred where States merged and later divided back into their constituent units (the United Arab Republic), withdrew from the General Assembly (Indonesia) or had their rights of participation curtailed (South Africa): in no case were the States concerned required to apply for new membership. The situation of the FRY after 1992 was thus unique.[79] Democratic elections on 24 September 2000 established a new government in Yugoslavia, which applied and was admitted on 1 November 2000.[80]

That was not, however, the end of the matter. There remained the question of the status of acts and transactions of the FRY—not least, status within the

[77] SC res 777, 19 September 1992, para 1 (12:0–3 (China, India, Zimbabwe)).

[78] GA res 47/1, para 1, 22 September 1992 (127–6 (Kenya, Swaziland, Tanzania, Yugoslavia, Zambia, Zimbabwe):26). The FRY was also excluded from participating in the work of ECOSOC: SC res 821, 28 April 1993 (13:0–2 (Russian Federation, China)), GA res 47/229, 28 April 1993 (107:0–11).

[79] A number of States expressed concern over the legal basis for the resolutions: Russia (S/PV.3116, 3), India (ibid, 7), Tanzania (A/47/PV.7, 176), Jamaica (ibid, 194–5), Guyana (ibid, 195). As was noted at the time, GA res 47/1 neither terminated nor suspended SFRY membership: 1991 *UN Juridical Ybk* 460 (Legal Counsel's opinion); *Summary of Practice of the Secretary-General as Depository of Multilateral Treaties*, ST/LEG/7/Rev.1, paras 89, 297, 89, cited in *Repertory of the Practice of United Nations Organs*, supp no 8, 3 n 8. For the suggestion that declaring the extinction of a State is an implied power under the Charter see Wood (1997) 1 *Max-Planck Ybk UN Law* 231, 248.

[80] S/2000/1043; SC res 1326, 31 October 2000; GA res 55/12, 1 November 2000 (without vote).

United Nations and as a party to the Statute of the International Court—at a time when it was acknowledged to be a State but there was no agreement as to its identity. In the period between 1992 and 2000, the FRY was assessed and paid UN contributions, was sued and subsequently itself sued before the International Court, relied on treaties concluded by the SFRY and had those treaties invoked against it in UN forums. What was the fate of such transactions, having regard to the fact that the discontinuity, if any, occurred at the beginning of that period and not at the end? All that happened in 2000 was that a new government elected in a continuing State, the FRY, changed course on the question of the State's identity at the earlier time. The International Court, faced with the issue in a series of cases, showed initial adroitness and finesse before abandoning these virtues in favour of the view that the FRY's admission in 2000 wiped the slate clean, at least so far as its standing was concerned.[81] The decisions will be examined in Chapter 17.

The *Genocide* case tested the implications of UN membership also with respect to Bosnia and Herzegovina. Yugoslavia argued that Bosnia and Herzegovina had no standing under the Genocide Convention[82] on the basis that its independence was illegal, that it was not a State, and that it could not have succeeded to the Convention. The Court indicated that the 'circumstances of its accession to independence are of little consequence' in light of the admission of Bosnia and Herzegovina to the United Nations.[83] General recognition may in certain cases have a reparative effect, and this is also true of admission to the United Nations.[84]

### *(iv) Conclusions*

Not surprisingly the times of greatest stress in terms of United Nations admission were those in which the pace of the creation of new States were at their highest—namely, the period of sweeping decolonization from the late 1950s through the early 1970s and the period of the collapse of the socialist

[81] See *Bosnian Genocide Case (Preliminary Objections)*, ICJ Rep 1996 p 595; *Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia), Preliminary Objections (Yugoslavia v Bosnia and Herzegovina)*, Judgment of 2 February 2003; *NATO Cases (Preliminary Objections)*, Judgment of 15 December 2004.

[82] 78 UNTS 277.

[83] ICJ Rep 1996 p 595, 611 (paras 19, 20) (noting Provisional Measures of 8 April 1993, ICJ Rep 1993 p 3, 16 (para 25) ). Bosnia and Herzegovina had been admitted to the United Nations on 22 May 1992: SC res 755, 20 May 1992 (adopted without vote); GA res 46/237, 22 May 1992 (adopted without vote). Croatia and Slovenia were admitted the same day: SC res 753, 18 May 1992, GA res 46/238, 22 May 1992 (Croatia); SC res 754, 18 May 1992, GA res 46/236, 22 May 1992 (Slovenia).

[84] Türk (1995) 27 *NYUJILP* 625, 626.

federations in Central and Eastern Europe in the 1990s. The earlier period has been seen as one in which political tensions—associated with the 'Cold War'—made it difficult to separate extraneous political factors from the considerations permitted by Article 4. Even so, admissions practice in that period still could be described with reference to legal rules, if, as Higgins suggested in 1963, the appropriate method of legal analysis had sufficient regard to context and process. That the second period of difficulty in admissions practice came after US–Soviet competition had waned suggests that the difficulty relates not so much to politics as to the intricacies of the legal questions inherent in the sudden reorganization of peoples and territories into new or at least transformed States.

## 4.3 Statehood for other United Nations purposes

### (1) Statehood and dispute settlement: Articles 32 and 35(2)

Article 32 of the Charter provides that States not United Nations Members 'shall be invited to participate, without vote' in discussions in the Security Council relating to disputes to which they are parties. Article 35(2) provides that non-member States may bring disputes to which they are parties to the attention of the United Nations. The question of the status of entities parties to disputes under either of these Articles was raised quite frequently in the early years of the United Nations.[85] As the United Nations has approached universality, the application of the term 'State' in these Articles has proved less troublesome. However, some brief reference is in order.[86]

In 1947 the Security Council issued invitations on separate occasions to Indonesia[87] and Hyderabad,[88] although the status of each was the very point in issue. In the debate on the proposal to invite the Republic of Indonesia, it was argued that an entity could be a 'State' for the purposes of Article 32, or Chapter VII generally, even if it was not fully sovereign: 'while Article 32 referred to States, the plain intent of that Article . . . was that justice should be

[85] Albania and Bulgaria participated in discussions on Greece immediately after World War II, apparently on the basis of Art 35(2): Ginther in Simma, *Commentary*, 177, 188; as did Thailand (Siam) in 1946 (Schweisfurth in Simma, 512–13). The Republic of Korea, which participated in Security Council discussions on the matter of KAL Flight 007 in 1983: S/15948, cited in Schweisfurth. 613 n 31. No attempt has been made to use Art 35(2) in relation to the 'Turkish Republic of Northern Cyprus' or Taiwan, member States instead circulating communications on their behalf: ibid, 613 n 36.

[86] Higgins, *Development*, 50–2; Bailey and Daws, *The Procedure of the UN Security Council* (3rd edn), 154–9, 501–2.

[87] *SCOR* 181st mtg, 12 August 1947, 1940 (8–3:0).

[88] Eagleton (1950) 44 *AJ* 277; Cowen (1960–1) 109 *U Penn LR* 1127, 1165–6.

done to both parties to a dispute by requiring that both should have the chance to present their views.'[89] This is a reasonable position provided the entity has *some* status as a putative State; on the other hand the fact that a particular group is a 'party' to a 'dispute' being considered by the Council is insufficient, since it may have no international status at all.

In fact the extensive view of Article 32 has not been consistently applied.[90] A Russian proposal to allow Bangladesh to participate in debates on the 1971 war met with little support: the Russian representative was driven to rely upon Rule 39 of the Provisional Rules of Procedure.[91] On other occasions the Soviet Union has argued that Rule 39 was not an appropriate basis for invitations to governments as distinct from individuals.[92] Nor was practice relating to the divided States of Korea and Vietnam particularly consistent. The Council refused to admit the German Democratic Republic in discussions concerning the invasion of Czechoslovakia.[93]

It is suggested that the term 'State' in Articles 32 and 35(2) refers to territorial entities with some degree of international status, irrespective of the meaning of the term elsewhere in the Charter. However, in the light of the variable practice outlined above, this view cannot be asserted with much confidence.

### (2) Claims to be parties to the Statute of the International Court of Justice

Article 93(2) of the Charter provides that States not Members of the United Nations may become parties to the Statute of the International Court 'on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.' Once again, the importance of this paragraph has diminished greatly as the United Nations has approached universality of membership.[94] It was relevant to States, such as San Marino or

[89] *SCOR* 181st mtg, 12 August 1947, 1924 (Sen, India). At a subsequent meeting the UK representative argued that the decision to invite Indonesia to participate was a violation of Art 32: *SCOR* 184th mtg, 14 August 1947, 1984–5. Representatives from East Indonesia and Borneo were however refused a hearing under Art 32: ibid, 1992; 193rd mtg, 22 August 1947, 2172. But the UK voted to hear representatives of Hyderabad, the status of which for Art 32 purposes could hardly have been much better than that of Indonesia: *SCOR* 357th mtg, 16 September 1948, 10–11.

[90] On Rhodesia see Dugard, *Recognition*, 94–5; and Chapter 3, above.

[91] Rule 39 states: 'The Security Council may invite members of the Secretariat or other persons, whom it considers competent for the purpose, to supply it with information or to give other assistance in examining matters within its competence.'

[92] E.g., *SCOR* 193rd mtg, 22 August 1947, 217 (East Indonesia and Borneo).

[93] S/PV.1445, 24 August 1968, cited by Dolzer in Simma (ed), *Commentary*, 580, 581 n 7.

[94] Under Charter Art 93(1), UN Members are automatically parties to the Statute of the Court. See also Higgins, *Development*, 48–50; Reisman, *Puerto Rico*, 68–79; Gunter (1977) 71 *AJ* 110; Rosenne, *The Law and Practice of the International Court 1920–1966* (3rd edn), vol II, 616–20.

Nauru in the period until their admission as UN members. It retains relevance, if at all, with respect to certain 'Associated States' (Niue and the Cook Islands), which have not sought admission. It may be that the associating State could extend access to the Court to the associated State by a declaration under the Optional Clause, without the need for a separate admission procedure under Article 93(2), or even by a declaration in front of the Court, as France did in *United States Nationals in Morocco*.[95] The matter is, however, unclear.

Both Liechtenstein[96] and San Marino[97] were admitted as parties to the Statute of the Court before being admitted as UN Member States.[98] Arguments that these entities were not States because of their lack of independence met with little support. The institution of proceedings against Australia by Nauru was a conspicuous example of the use of Article 93(2).[99]

The standing of Yugoslavia in proceedings before the International Court is referred to above. The approach taken by the Court avoided reference to Article 93(2).[100]

### (3) Other cases

United Nations organs have often been faced with issues of statehood in areas unrelated to applications for admission: indeed the contribution of the United Nations to the development of the international law of statehood has been greater in such areas than in the context of Article 4. Problems of identity, continuity and extinction were at the heart of the controversies concerning the membership of Yugoslavia, and are analysed in Chapters 16 and 17.[101]

According to Dugard in 1987, the United Nations 'has for practical purposes become the collective arbiter of statehood through the process of

[95] The United States had sought 'to clarify the identity of the party or parties in whose name and on whose behalf the case concerning the rights of American nationals in Morocco had been brought,' ICJ Pleadings, *United States Nationals in Morocco Case (France v USA)*, vol I, 235–6. France accepted that the judgment would be binding on both France and Morocco: *Case Concerning Rights of Nationals of the United States in Morocco*, Order of 31 October 1951, ICJ Rep 1951 p 108, 110. See Chapter 7.

[96] *SCOR* 423rd mtg, 8 April 1949, 16–17; 432nd mtg, 27 July 1949, 3, 5; SC res 71 (1949) (9–0:2); GA res 363 (IV), 1 December 1949 (40–2:2). For Liechtenstein's participation in the PCIJ see Kohn (1967) 61 *AJ* 547, 555.

[97] *SCOR* 645th mtg, 3 December 1953, 2–4 SC res 103 (1953) (10–0: 1) (USSR) ); GA res 806 (VIII), 9 December 1953 (61–0:5).

[98] As was Japan (Mosler and Oellers-Frahm in Simma (ed), *Commentary*, 1171, 1173) and Switzerland.

[99] See *Certain Phosphate Lands in Nauru*, ICJ Rep 1992 p 240; Duursma, *Microstates*, 140–1.

[100] Mosler and Oellers-Frahm in Simma (ed),*Commentary*, 1171, 1172.

[101] For membership in specialized agencies see Higgins, *Development*, 42–8; Mendelson, 'Acquisition'; Gold, *Membership and Non-Membership in the International Monetary Fund*, 41–89; Imber, *The USA, ILO, UNESCO and IAEA*, 46–8 (ILO), 72–3 (IAEA), 98–9 (UNESCO); Kirgis

admission and non-recognition.'[102] In 1996 Duursma saw the situation as qualified by the existence of entities 'whose statehood cannot be legally denied' but which at that time had not become Members.[103] Both were writing before the attainment of nearly universal membership with the admission of Switzerland and Timor-Leste in 2002. Yet there remains nothing inevitable about United Nations membership: a Member State could withdraw or be expelled; a new State might not seek admission. While the practical coincidence of statehood with UN membership is now nearly an accomplished fact and legal consequences may well follow from the membership of individual States, statehood and UN membership are not to be conflated. It is one thing to say that statehood is regulated under law; quite another to claim that it has been bureaucratized under the auspices of an international organization.

## 4.4 UN observer status

The practice of the United Nations in extending observer status to entities such as the Palestine Liberation Organization (PLO) and the South West African People's Organization (SWAPO) 'n'est prévu par aucun texte constitutif et depend de la seule volonté des organes plénières.'[104] Through resolutions of the General Assembly accommodation has been made for certain entities to develop associations with the UN organs, though no procedure has been designated as covering all types of observer and the approach has varied from case to case.[105] As noted above, observer status had been suggested as an option for micro-States,[106] but this did not happen.[107] Rather, observer status has come to address two distinct needs. The first is relations between the United Nations and various

(1990) 84 *AJ* 218 (WHO); Beigbeder, *The World Health Organization*, 31–2, 36–41; Mehdi (ed), *La démocratisation du système des Nations Unies*.

[102] Dugard, *Recognition*, 126; to similar effect, ibid, 167 quoting Chen.

[103] Duursma, *Microstates*, 112.

[104] Pellet, Dailler and Dinh, *Droit International Public* (6th edn), 499; cf (7th edn), 525.

[105] The variable practice is summarized at http://www.palestine-un.org/mission/status.html.

[106] Secretary-General, Introduction to the *Annual Report 1966–1967*: GAOR 22nd sess supp no 1A CA/6701/Add.1, 20–1.

[107] Nor was the Secretary-General's suggestion taken up that a process be formalized for considering the granting of observer status (ibid). GA res 35/167, 15 December 1980 did support granting observer status to national liberation movements already recognized by the Organization of African Unity (OAU) or the League of Arab States, but did not do more; and again practice was inconsistent. Though the OAU recognized independence parties in the Comoros and Seychelles as national liberation movements, in neither case was observer status granted at the UN. Polisario under GA res 34/37, 21 November 1979, appeared before the Fourth Committee but had not been designated a national liberation movement by either the OAU or the League. Morgenstern 73.

non-State entities possessing a degree of international personality, including functional bodies such as the International Committee of the Red Cross[108] and multilateral organizations of political character such as the Commonwealth.[109] The second is representation of entities that, though displaying certain criteria of statehood, might be considered States in the process of formation or whose admission was otherwise impeded, for example by political factors. As can be seen, these categories are rather broad, as has been the variety of observers.

Under the second category, the divided States of Germany and Vietnam were early examples of entities granted observer status. West Germany and South Vietnam were granted observer status in 1952; East Germany in 1972; North Vietnam in 1975.[110] The delay in granting status between the sides suggests the differences of view possible in such cases.

More controversially, in 1974 the Palestine Liberation Organization was invited 'to participate in the sessions and the work of the General Assembly in the capacity of observer;[111] the same status was extended to SWAPO in 1976.[112] In 1988, the General Assembly authorized the Secretariat to circulate documents submitted by the PLO and SWAPO directly to Member States, which meant that the two observers no longer needed another Member State to act as intermediary.[113] The Assembly in the same year changed the designation of the PLO to 'Palestine'.[114] These developments resulted in a dispute with the United States, which sought to close the office of the PLO Observer Mission in New York.[115] The General Assembly indicated that PLO representatives should have access to UN Headquarters and to use their offices,[116] and sought an advisory opinion on the question of the arbitrability of the resulting dispute.[117]

[108] Asian–African Legal Consultative Organization, International Organization for Migration, International Seabed Authority, International Tribunal for the Law of the Sea, International Union for the Conservation of Nature and Natural Resources, International Federation of Red Cross and Red Crescent Societies, and Inter-Parliamentary Union. The Sovereign Military Order of Malta was granted observer status by GA res 48/265, 24 August 1994.

[109] African Union, Caribbean Community, European Community, International Organization of la Francophonie, League of Arab States, Organization of the Islamic Conference.

[110] See Ginther in Simma (ed), *Commentary*, 177, 189. As with the first observer State, Switzerland, observer status for the divided States was granted by plenary action without vote in the General Assembly.

[111] GA res 3237 (XXIX), 22 November 1974 (95–17:19), para 1.

[112] GA res 31/152, 20 December 1976.

[113] GA res 43/160, 9 December 1988 (117–2 (Israel, USA):31).

[114] GA res 43/177, 15 December 1988 (104–2 (Israel, USA):36).

[115] Anti-Terrorism Act of 1987, Title X of the Foreign Relations Authorization Act for Fiscal Years 1988–89. Pub L 100–204, §§ 1001–1005, 101 Stat 1331, 1406-07; 22 USCA §§ 5201–5203.

[116] GA resns 42/229A, 29 February 1988, 42/230, 29 February 1988.

[117] GA res 42/229B, 2 March 1988, respecting Agreement between the United States and the United Nations Regarding the Headquarters of the United Nations, GA res 169 (II), 31 October 1947, 11 UNTS 11.

The International Court held that the United States was bound to submit the dispute to arbitration;[118] a US District Court held that it fell outside its powers to direct the United States to submit to arbitration in a case 'involved with matters of international policy.'[119] However, the Court resolved the problem by holding that the legislation should not be interpreted as applying to the observer mission office, contrary to the Headquarters Agreement.[120] The executive branch decided not to appeal.[121]

Pellet and Daillier see the practice of according observer status to national liberation movements as preparatory to the emergence of States.[122] Whilst in the case of Namibia a State may be seen to have emerged from the chrysalis of a national liberation movement (SWAPO), it is too prescriptive to say that observer status is necessarily a step on the way to statehood. Rather it is a form of remedial action in certain cases where a group with legitimate grievances lacks recourse to appropriate forums elsewhere. The move towards greater international status is a possible but by no means inevitable outcome.

[118] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion of 26 April 1988, ICJ Rep 1988 p 12, 32–4 (paras 57–8).

[119] *US v Palestine Liberation Organization*, 695 F Supp 1456, 1461 (SDNY 1988, Palmieri J).

[120] Ibid, 1468–72.

[121] Cummings (1989) 13 *Hastings ICLR* 25, 69.

[122] Pellet Daillier and Dinh, *Droit International public* (6th edn), 499; (7th edn), 525.

# 5

# THE CRITERIA FOR STATEHOOD APPLIED: SOME SPECIAL CASES


**5.1 General considerations** 197

**5.2 Entities unrecognized as separates states: Taiwan** 198
(1) Historical background 198
(2) The international relations of Taiwan 200
(3) Judicial decisions 205
(4) The legal status of Taiwan 206
(5) Development of a Taiwanese claim to statehood 212
(i) Amendments to the law of Taiwan 212
(ii) Statements respecting international policy 216
(6) Conclusion 219

**5.3 Entities recognized as states 'for special reasons': the Vatican City and the Holy See** 221
**(1)** The international status of the Vatican City 222
**(2)** The international status of the Holy See 225
**(3)** The relation between the Holy See and the Vatican City 226

**5.4 'Internationalized territories': the Free City of Danzig and some modern analogues** 233
(1) The concept of 'internationalized territory' 233
(2) The Free City of Danzig 236
(3) Trends in internationalization since 1945: Cyprus 241

**5.5 Transitional autonomous entities: Hong Kong and Macao** 244
(1) Historical outline 245
(2) Arrangements for the government of the HKSAR 246
(3) The status of Hong Kong 248
(4) Relations between Hong Kong and China 250

**5.6 Conclusion** 252

## 5.1 General considerations

The criteria for statehood, examined in Chapters 2 and 3, are flexible enough to allow a variety of entities with differing circumstances to be classified as States. It cannot be assumed that all territorial entities will have the same rights and obligations or the same particular status; nor that because an entity has special or unusual characteristics, it cannot qualify as a State under those criteria. The recurring problem of 'special cases' in this field thus involves a relation between two fundamental principles: the principle that the status of an entity is to be determined not by reference to any overall concept but to the specific circumstances and constituent instruments[1]; and the principle that statehood is a general legal status with a certain, sometimes fairly nominal, set of consequences. It follows that in analysing the problems which arise here, general descriptions—such as 'internationalized territory', 'protectorate' or 'fief'—are unhelpful. Moreover, even if because of their 'special character' particular entities do not qualify as States (e.g., Andorra before 1993, Taiwan today), that does not end the inquiry. Distinct territorial communities must have *some* legal status; they clearly are not *terra nullius*, and there is no reason of principle or practice why they should not be subject to relevant international legal rules.[2] Moreover, many of these entities do in fact play, or have in the past played, a significant part in international relations.

Historically there have been many 'anomalous', '*sui generis*' or special cases[3] and it is neither necessary nor possible to deal with them all here.[4] But some raise

[1] *International Status of South West Africa*, ICJ Rep 1950 p 128, 150 (Judge McNair); *Tunis and Morocco Nationality Decrees*, PCIJ ser B no 4 (1920), 27.

[2] The Valleys of Andorra (prior to 1993) were a paradigm example both of the irrelevance of general descriptions ('fief') and of the difficulty of classification of *sui generis* entities. According to the Court of Appeal of Montpellier, Andorra was 'a "*co-seigneurie*" or vestige of feudal institutions which is under the joint protection of the President of the French Republic, as successor to the rights of the [French] Counts of Foix, and the Spanish Bishop of Urgel': *Re Boedecker & Ronski* (1962) 44 ILR 176, 178. In fact the term 'protection' is not strictly accurate: the co-princes are joint sovereigns over the territory. For the status of Andorra in this period see Crawford (1977) 55 *RDISDP* 259, arguing that, although proximate to statehood, Andorra was not independent of France in its international relations, in view of the uncertainty and ambiguity of the relation between Andorra and the French co-prince. See further Bélinguier, *La Condition juridique des vallées d'Andorre*; Rousseau, in *Symbolae Verzijl*, 337–46; Magnou, *Les Problèmes actuels des vallées d'Andorre*; Kiss, 2 *Pratique français* 469–79. The position has been transformed by a Treaty of Vicinage, Madrid/Paris/Andorra-la-Vieille (Spain–France–Andorra), 1 June 1993, reprinted (1994) 98 *RGDIP* 525, 1872 UNTS 185, helpfully analysed by Duursma, *Microstates*, 316–73. Andorra is now a UN member.

[3] The term 'special' is to be preferred: 'anomalous' implies a gratuitous assumption as to the political and social value of the entity in question, yet there is no reason why a community may not prefer some intermediate status on a long term basis (e.g., Puerto Rico). The term '*sui generis*', often used to describe situations not readily categorized, tends to pre-empt analysis; it is used to end discussion, not to advance it.

[4] See further Verzijl, *International Law*, vol II; Ydit, *Internationalized Territories*.

particular problems of difficulty and importance for the general law of international status; others have intrinsic historical and political importance. Moreover the question of the relation between special legal status and statehood requires consideration. Thus a number of special entities have been selected for treatment in some detail: Taiwan, the Vatican City (together with the Holy See), the Free City of Danzig (with which is compared Cyprus), and Hong Kong since 1997. References will be made to other cases where appropriate.

## 5.2 Entities unrecognized as separate states: Taiwan

The relation between recognition and statehood has been seen to be close but not inseparable. Entities which conform to the requirements for statehood are States, independently of recognition, although especially in borderline cases, recognition may be good evidence of conformity with those requirements. This view of the relationship is confronted with its most pertinent test in the case of Taiwan, which appears to comply in all respects with the criteria for statehood based on effectiveness but is universally agreed not to be a separate State and is recognized by no other State as such.

### (1) Historical background[5]

Taiwan (formerly known as Formosa) became part of the Chinese Empire in 1683 and remained so, despite internal vicissitudes, until the Treaty of Shimonoseki of 17 April 1895, by Article 2(b) and (c) of which 'Formosa and the Pescadores' were ceded to Japan.[6] The Japanese authorities were obliged to take possession by force because of local opposition. The islands remained Japanese until 1945. In the Cairo Declaration of 1 December 1943 the Allies declared their 'purpose . . . that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa and the Pescadores, shall be restored to the Republic of China'.[7] Paragraph (8) of the Potsdam Proclamation of 26 July 1945 affirmed that 'The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikuku, and such minor islands as we determine.'[8] In the Instrument of Surrender of 2 September 1945, Japan undertook to carry out the provisions of the Potsdam Proclamation.[9] The Japanese forces in Taiwan thereafter surrendered to the Commander-in-Chief of the Republic of China.[10]

[5] For a useful overview see Roy, *Taiwan: A Political History*; Davison, *A Short History of Taiwan*.
[6] 87 *BFSP* 799. [7] (1944) 38 *AJ Supp* 8. [8] 13 *DSB* 137.
[9] Whiteman, 3 *Digest* 486–7. [10] Ibid, 487–8.

Civil war within China between the Government of the Republic and the proclaimed People's Republic under Mao Tse Tung had been continuing since 1928. On 8 December 1949 the Republic of China's forces retreated to Taiwan, establishing there the provisional capital of that government. With certain exceptions other States remained neutral during the war,[11] and it is clear that the People's Republic was a genuine revolutionary government, not a 'puppet' of any other State.

The position of Formosa at this time was stated by the United Kingdom Government to be as follows:

> In 1943 Formosa was a part of the territories of the Japanese Empire and His Majesty's Government consider Formosa is still *de jure* part of that territory . . . On October 25th, 1945, as a result of an order issued on the basis of consultation and agreement between the Allied Powers concerned, the Japanese forces in Formosa surrendered to Chiang Kai-shek. Thereupon with the consent of the Allied Powers, administration of Formosa was undertaken by the Government of the Republic of China.[12]

On 25 June 1950 the Korean War broke out. Official Chinese participation in that war dated from November 1950. As an immediate result of the hostilities, President Truman ordered the Seventh Fleet to patrol the Taiwan Straits and to prevent attacks by either government on the other.[13] This unilateral action involved an intervention in the still continuing though consolidated civil war between the two Chinese governments,[14] although its justification appears to have been not 'collective self-defence' of Taiwan but individual action in a case of threats to the international peace and 'security of the Pacific area'.[15] Meanwhile negotiations for a peace treaty with Japan were proceeding.[16] The Peace Treaty was in fact signed on 8 September 1951 by Japan and forty-eight Allied Powers (excluding the USSR and China).[17] By Article 2(b) of the Treaty

[11] Although the USSR, in violation of the Treaty of Alliance and Friendship with the Republic of China, 14 August 1945, 149 BFSP 346, 388 did hand substantial amounts of war material to the PRC: see GA res 505 (VI), 1 February 1952 (25–9:24).

[12] *Civil Air Transport Inc v Chennault & Willauer* (1952) 34 HKLR 386, on appeal *Civil Air Transport Inc v Central Air Transport Inc* [1953] AC 70 (PC).

[13] 23 *DSB* 5.

[14] Cf USSR-PRC Joint Declaration, 12 October 1954, 226 UNTS 61, 64: '[The] policy and the overt acts of aggression committed by the United States against the People's Republic of China—especially the continued occupation by the United States of the island of Taiwan [sic], a part of the territory of the People's Reputle's Republic of China and also the military and financial support rendered to the Chiang Ka-shek clique which is hostile to the Chinese people—are incompatible with the task of maintaing peace in the Far East and reducing international tension' See also Hoyt(1961) 55 *AJ* 45, 58–71.

[15] In 1953 President Eisenhower amended the order to allow Nationalist attacks on the mainland: 'State of the Union' Address, 2 February 1953: 28 *DSB* 209.

[16] See Whiteman, 3 *Digest* 477–625.

[17] 136 UNTS 45 (in force 23 April 1952).

Japan renounced 'all right, title and claim to Formosa and the Pescadores', in whose favour was not stated. Secretary of State Dulles said at the time that 'the differences of opinion are such that [the disposal of Formosa] could not be definitively dealt with by a Japanese peace treaty to which the Allied powers, as a whole, are parties. Therefore the treaty merely takes Japan formally out of the Formosa picture, leaving the position otherwise unchanged.'[18]

In a separate peace treaty with the Republic of China (hereafter RoC), Japan 'recognized' its renunciation of title to Formosa without further specification.[19] The treaty was stated to apply to 'all the territories under the control of the Government of the Republic of China'.[20] A Joint Declaration of 1956 between Japan and the USSR ended the formal state of war between them, without referring to the problems of territorial disposition.[21] In 1954 a Mutual Defence Treaty was signed between the United States and the RoC, providing for collective self-defence of the Pacific territories of the two parties; the territory of the Republic was defined to mean Formosa and the Pescadores, with provision for extension to other territories by agreement.[22]

Thus by the mid-1950s, even though both parties continued to assert a right to use force in pursuit of a final settlement to the civil war, a territorial status quo had been reached between the RoC on Taiwan and the PRC. This status quo has endured, and the dispute between them limited in practice mostly to pacific means, though profoundly affected by a continuing PRC threat to reunify China by force in the event of a unilateral secession by Taiwan. Meanwhile major changes in the relations between Taiwan and third States have nonetheless occurred, tending to turn the RoC from a failed general government of China into a successful and democratic government of Taiwan. Some of these changes and their possible consequences must now be considered.

## (2) The international relations of Taiwan

In the period from 1949 to the 1970s, the question of Taiwan was bound up with two other issues: the recognition of the opposing governments, and the representation of China in the United Nations. A major reason for the entanglement of issues was the unequivocal insistence by both parties on the unity of all China (including Taiwan), the only difference between them being as to the government entitled to govern and thus to represent that China.[23] By the

[18] 25 *DSB* 461–3; Whiteman, 3 *Digest* 538.
[19] Taipei, 28 April 1952, 138 UNTS 38, Art 2.
[20] Agreed Minutes, para 1, ibid, 52. [21] Moscow, 19 October 1956: 263 UNTS 111.
[22] Washington, 2 December 1954: 161 *BFSP* 598, 248 UNTS 213, Art VI.
[23] For the various views see Jain (1963), 57 *AJ* 25–45.

mid-1970s, however, the PRC had been recognized by a considerable majority of States, although the RoC continued to be recognized by some, including the United States.[24] On the distinct point of United Nations representation,[25] the People's Republic was seated in the General Assembly and the Republic of China expelled by General Assembly resolution 2758 (XXVI) on 25 October 1971.[26] The United States changed its position in 1979, establishing diplomatic relations with the PRC and severing formal ties with the RoC. By 2005, a fluctuating group of twenty-six mostly very small States continued to recognize the RoC.[27] On the other hand, although it is increasingly isolated from formal 'diplomatic' relations, Taiwan continues to maintain strong informal and trade relations with some sixty other States, and, in this respect at any rate, the status quo has remained unchanged.

Several States have enacted legislation to enable relations to be carried on with Taiwan, or with corporations formed under the law of the RoC, in the absence of formal recognition or diplomatic relations. For the United States the basis for continued relations is the Taiwan Relations Act 1979.[28] This implements the policy of 'maintaining unofficial relations with the people on Taiwan' expressed in Executive Order No 12143 of 22 June 1979 and since

[24] No State has ever had formal diplomatic relations with, or recognized, the two governments at the same time. Cf (1975) 79 *RGDIP* 174–5, 791; Grant (2000) 36 *Stanford JIL* 221, 231–2.

[25] Formally distinct, that is: see GA res 396 (VI), 14 December 1950, para 4 (36–6:9). There is of course a clear practical connection between recognition by Member States and representation.

[26] A US draft resolution provided for dual representation of China. Ambassador Bush, in proposing the item, stated that 'the UN should take cognizance of the existence of both the People's Republic of China and the Republic of China . . . [It] should not be required to take a position on the respective conflicting claims . . . pending a peaceful reconciliation of the matter as called for by the Charter.' A/8442: (1971) 10 ILM 1100. The draft resolution was not put to the vote. For the follow-up to GA res 2758 (XXVI) in UN organs and specialized agencies see 11 ILM 561–73. See also 1972 *UN Jur Ybk* 154 (Note of Secretary-General on withdrawal of accreditation to the 'Central News Agency of China') para 8: ' . . . When the General Assembly . . . decides, for its purposes, that certain representatives are the only lawful representatives of a Member State to the United Nations, it follows automatically that the authorities accrediting those representatives constitute in the view of the General Assembly . . . the only lawful Government of that Member State . . . If the General Assembly were to determine questions of representation without reference to the status of the accrediting authority, no criteria would exist and decisions would be entirely arbitrary . . . [A] decision on recognition of a Government was taken when General Assembly resolution 2758 (XXVI) was adopted and it is irrelevant that, in their bilateral relationships, some Member States may take a different stand.'

[27] These are Belize, Burkina Faso, Chad, Costa Rica, Dominican Republic, El Salvador, Gambia, Guatemala, Haiti, the Holy See, Honduras, Kiribati, Malawi, Marshall Islands, Nauru, Nicaragua, Palau, Panama, Paraguay, Sao Tome & Principe, Senegal, Solomon Islands, St Christopher & Nevis, St Vincent & the Grenadines, Swaziland and Tuvalu. In 2003, the number had been 27: *Parent v Singapore Airlines Ltd* [2003] JQ 18068, para 20.4. For a tally of States recognizing the RoC and PRC each year from 1969 to 1992, see Kim, in Sutter and Johnson (eds), *Taiwan in World Affairs*, 145, 151 table 5.1.

[28] See for comment Chiang (2000) 23 *Fordham ILJ* 959, 977–80; Saleem (2000) 15 *AUILR* 527, 535.

maintained by the United States. It provides, *inter alia*, that '[t]he absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan', as they applied before derecognition, and that laws of the United States that refer or relate to foreign 'countries, nations, states, governments, or similar entities' shall apply with respect to Taiwan.[29] Treaties previously in force between the United States and 'the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978' are to continue in force.[30] The United States is committed to provide defence articles and services to Taiwan 'in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defence capability'.[31] 'Unofficial relations' are carried on through corporations of the two parties, which are accorded immunities equivalent to those of foreign states. Thus considerable efforts have been made to minimize the impact on Taiwan of non-recognition so far as the United States is concerned. At the same time, however, the United States resolutely maintains a 'one China policy'.

No other country has enacted legislation or adopted policies as explicit as the United States, but there are equivalents to it. For example the Foreign Corporations Act 1991 (UK), section 1, provides that:

(1) If at any time:
   (a) any question arises whether a body which purports to have or, as the case may be, which appears to have lost corporate status under the laws of a territory which is not at that time a recognised State should or should not be regarded as having legal personality as a body corporate under the laws of the United Kingdom, and
   (b) it appears that the laws of that territory are at that time applied by a settled court system in that territory,

that question and any other question relating to the body shall be determined (and account shall betaken of those laws) as if that territory were a recognised State.

(2) For the purposes of subsection (1) above:
   (a) 'a recognised State' is a territory which is recognised by Her Majesty's Government in the United Kingdom as a State;
   (b) the laws of a territory which is so recognised shall be taken to include the laws of any part of the territory which are acknowledged by the federal or other central governments of the territory as a whole . . .

Thus Taiwanese corporations are recognized under British law as having legal status, as entitled to own property and to be a party to litigation, and the law of

[29] 22 USC §3303 (a), (b). [30] 22 USC §3303 (c). [31] 22 USC §3302 (a).

Taiwan is treated as the law of a recognized State in determining the existence and capacity of such corporations. Taiwan is a territory whose laws are applied by 'a settled court system'. Accordingly the 1991 Act allows Taiwanese corporations to do business in the UK as if Taiwan were a recognized State. On the other hand, the 1991 Act differs in many respects from the Taiwan Relations Act 1979 (USA). It is general in its geographic scope, and does not mention Taiwan by name. It is limited in its substantive application, since it only deals with the question of corporate status.[32]

Taiwan has developed relations with several international organizations. The decision of the General Assembly in 1971 to seat the PRC and unseat the RoC applied to all United Nations agencies. Most of the organizations of which Taiwan is a member are either not limited to States[33] or made up exclusively of States that recognize the RoC as the government of China; or the RoC's membership is qualified in some key respect (e.g., by reference to its name). An exception in this regard, however, is the Asian Development Bank. The RoC was an original member of the Bank.[34] At that time it was recognized by the other members of the ADB as the government of China. In 1985 a Memorandum of Understanding was concluded between the PRC and the ADB, providing for the PRC's admission to the ADB as 'the sole legal government of China', but without Taiwan being expelled. Key provisions of the Memorandum were as follows:

1. From the date when the PRC is admitted as a member of the ADB and the sole legal representative of China, the authorities in Taiwan will remain in the ADB under the name of: 'Taipei, China' . . . There will be no amendment of the ADB Charter which will affect the status of any existing member of the ADB.
2. Upon the PRC's admission into the Bank, the authorities in Taiwan will be referred to as 'Taipei, China' in all the documents, papers, materials, statistics and other publications issued by the ADB. Should the designation in the documents, letters, and other publications sent by the authorities in Taiwan to the ADB be inconsistent with this arrangement, the ADB will change the designation to 'Taipei, China' when it circulates such documents, letters and other publications.

[32] See also the Australian equivalent, which is similar to the UK not the US model: Foreign Corporations (Application of Laws) Act 1989 (Cth).

[33] As with APEC, in which Taiwan participates, alongside the PRC, as an 'economy' under the title 'Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu'. On APEC generally, see Elek (1992) 46 *Austral J Int Aff* 161; Linnan (1995) 89 *AJ* 824; Castan (1996) 15 *U Tasmania LR* 52; Deng (1998) 22 *Fletcher F World Aff* 65; Yerkey (1999) 16 *Int Trade Rep*; Rüland, Manske and Draguhn, *APEC: The 1st Decade*; Fischer (2002) 13 *Duke JCIL* 339, 342; Huang (2003) 9 *Ann Surv ICL* 55, 58; Byung-Woon (2004) 11 *Ind J Global L Stud* 257, 273.

[34] Agreement establishing the Asian Development Bank, Manila, 4 December 1965, 571 UNTS 124.

3. In all statements to be made at the ADB's Annual Meetings and all other ADB meetings, should there occur any situation inconsistent with the above-described redesignation, it will be the responsibility of the ADB secretariat to take necessary measures to ensure consistency . . .
4. Upon the PRC's admission, the ADB will display only the flag of the ADB and the national flag of the host country as the occasion demands.
5. ADB members have the right to determine voluntarily the voting constituency which they will join. Upon the PRC's admission, however, 'Taipei, China' will be welcome to join the same voting group with the PRC.[35]

When the PRC became a member of the ADB in 1986, the ADB unilaterally changed the name of the 'Republic of China' to 'Taipei, China'. The Government of the RoC protested the change but has continued to participate as a full member of the ADB, paying an annual subscription, voting and holding capital in the Bank. This is despite the fact that Article 3 of the ADB's Constitution (which has not been changed) provides that:

> Membership in the Bank shall be open to: (i) members and associate members of the United Nations Economic Commission for Asia and the Far East; and (ii) other regional countries and non-regional developed countries which are members of the United Nations or of any of its specialized agencies.

It would appear that the RoC is regarded by the other States Members of the ADB as capable of carrying on international relations in its own right, even if under an imposed name, in parallel with the PRC. This is significant, even if the failure of the ADB to regularize the situation has all the marks of a political compromise *contra legem*.[36]

As to WTO membership, by a Ministerial Decision of 11 November 2001, the WTO decided that Taiwan could be admitted to the Organization as the 'Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu,' with the short form of 'Chinese Taipei'.[37] Chinese Taipei was admitted to the WTO on 1 January 2002. The People's Republic of China had been admitted the month before.[38]

[35] Unpublished.

[36] Taiwan is not a member of ECAFE or of any UN specialized agency; thus it is not eligible for membership of the ADB under Art 3. This is one of the circumstances in which the constitution of an international organization is effectively amended by the subsequent unanimous practice of its members (Taiwan included, since it has remained a member of the ADB while protesting the forced change in its name).

[37] WT/L/433. See also Report of the Working Party on the Accession of Chinese Taipei to the WTO Agreement, WT/ACC/TPKM/18, 5 October 2001; Cho, *Taiwan's Application to GATT/WTO*.

[38] See WT/L/432.

### (3) Judicial decisions

The question of the status of Taiwan has not been faced by any international tribunal since 1949. National courts have, however, had to deal with the question on a number of occasions. As is characteristic of national courts in the field of recognition, they have usually deferred to the position taken by their own government. The question has arisen most often in the United States, where the courts have applied the Taiwan Relations Act. Thus Taiwan is to be treated as a State for the purposes of sovereign immunity and the act of state doctrine under United States law,[39] and treaties in force before 1979 have continued to be given effect.[40] In one United Kingdom case the principle of contextual interpretation was applied to give continued standing to the RoC (Taiwan) for the purposes of the constitution of a non-governmental organization, the International Olympic Committee.[41]

Mostly these decisions were mandated by local legislation or by the local rules requiring deference to the position of the executive in matters of recognition. Of more interest is the question whether national courts will treat Taiwan as bound by treaties of the PRC which affect the rights of litigants. In *Mingtai Fire and Marine Insurance Co Ltd v United Parcel Service*,[42] the question was whether the PRC's adherence to the amended Warsaw Convention on Carriage of Goods by Air applied to a carriage of goods by air from Taiwan. If it did, liability for the loss of the package in question would have rested with the insurer rather than the carrier, both non-Taiwanese entities. There was no doubt that the Taiwanese consignee was entitled to redress; the only question was who would bear the loss. Consistently with the 1979 Act and United States policy towards Taiwan, the 9th Circuit noted that 'despite the absence of official relations, the United States continues to deal separately with Taiwan'. It referred to the separate listing of treaties with the PRC and the RoC in the Department of State publication *Treaties in Force*, and in particular to the argument of the United States as *amicus* 'that China's adherence to the Convention does not bind Taiwan'.[43] The Court concluded that:

> While Mingtai argues that the district court violated separation of powers by rejecting its position, it instead would be an intrusion into the political sphere for this court to

[39] *Millen Industries Inc v Coordination Council for North American Affairs*, 855 F 2d 879 (DC Cir, 1988). Cf *Parent v Singapore Airlines Ltd* (Superior Court of Quebec, 22 October 2003) [2003] JQ 18086. In Singapore a foreign ministry certificate was treated as determinative and sovereign immunity not afforded: *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] SGCA 3.

[40] *New York Chinese TV Programs Inc v UE Enterprises Inc*, 954 F 2d 847 (2nd Cir, 1992).

[41] *Reel v Holder* (1981) 74 ILR 105, noted in (1981) 52 *BY* 301. Taiwan now participates in the Olympics in the name of 'Chinese Taipei'.

[42] 117 F 3d 1142 (O'Scannlain, CJ) (9th Cir, 1999), 38 ILM 1274.

[43] Ibid, 1277.

rule in Mingtai's favor and effectively to hold, contrary to every indication of executive and legislative intent, that Taiwan has tacitly been recognised by the United States as a party to any treaty signed by China. We do not do so. We caution, however, that we do not independently determine the status of Taiwan; instead, we merely recognize and defer to the political departments' position that Taiwan is not bound by China's adherence to the Warsaw Convention.[44]

As this passage makes clear, the Court in *Mingtai* did not deal with the international law issues on their merits; it deferred to the position of the legislative and executive branches. But strictly speaking the outcome was not determined by the Taiwan Relations Act. The continuation in force for Taiwan only of treaties concluded before 1979 did not entail the non-recognition of the PRC's capacity after that date to enter into treaty relations for the whole of China, although it may have implied it. The position of the United States as *amicus* in *Mingtai* may be taken as an independent indication of the legal position, and thus as an item of state practice.[45]

Earlier United States decisions on the point are conflicting, but the implications of the language of the Taiwan Relations Act are likely to be followed, as they were in *Mingtai*.[46]

## (4) The legal status of Taiwan

Initially the literature on the legal status of Taiwan concentrated on the issue of the acquisition of territory by 'China'.[47] Little attention was paid to the question

[44] 117 F 3d 1142 (O'Scannlain, CJ) (9th Cir, 1999), 38 ILM. For an earlier decision the other way on the question of the application of the Warsaw Convention to Taiwan, *see Atlantic Mutual Inc v Northwest Airlines*, 796 F Supp 1188 (ED Wis, 1992), not followed in *In re Schwinn Bicycle Co*, 190 BR 599, 611 (US Bankruptcy Court, ND Ill, 1995).

[45] Even so, the position of the United States is a qualified one. Since 1979 Republic of China cannot enter into new treaties with the United States, since this would involve 'official' relations. Instead agreements made under the machinery in the Taiwan Relations Act since 1979 are reported to Congress as in force under the law of the United States. See, e.g., 50 FR 7867. Presumably the position of the PRC is that its treaties bind Taiwan although it is in no position to ensure compliance with them. As a matter of State responsibility, since the organs of the RoC are not organs of 'China' (cf ARSIWA, Art 4) the PRC is not responsible for the conduct of the RoC, which is an 'insurrectional movement' in terms of Art 10. But the PRC may have assumed obligations of result with respect to its territory, e.g., as to the treatment of persons or the law in force. Uniform law treaties such as the Warsaw Convention are presumed to apply to the whole of a State's territory. In relation to such an obligation, the PRC would presumably have to rely on *force majeure* (ARSIWA, Art 23) as a circumstance precluding wrongfulness if charged with failure to comply. Alternatively it may be that when a State enters into a treaty at a time when it notoriously does not control part of its territory and has no prospect of doing so, the presumption of territorial application is rebutted.

[46] Thus it has been held that Taiwan is not bound by the PRC's accession to the Hague Convention on Service of Process: *In re Schwinn Bicycle Co*, 190 BR 599, 611–12 (US Bankruptcy Court, ND Ill, 1995). See also *Taiwan v United States District Court*, 128 F 3d 712 (9th Cir, 1997).

[47] See especially Chiu (ed), *China and the Question of Taiwan*; O'Connell (1956) 50 *AJ* 405; Chen and Lasswell, *Formosa, China and the United Nations*; Chen and Reisman(1972) 81 *Yale LJ* 599;

why, even if Taiwan became Chinese territory in 1952 or at some other time, it has not since become a State. The refusal of both governments to contemplate a 'two China' position no doubt contributed to this neglect: however, earlier treatments of the subject did little to show in what way that refusal prevented or impaired the legal status which Taiwan would, presumably, otherwise have had.[48] Moreover, if a State has come into existence on Taiwan then questions of the previous disposition of the territory become irrelevant. But since it may be argued that the Republic of China's right to administer Taiwan is as delegate rather than as sovereign, the issue of territorial status must first be dealt with.

Assuming for the time being that Taiwan is not a separate State, three views are possible.[49]

First, it is arguable that Taiwan was returned to China by 1949 as a result of the cancellation by the Republic of China in 1941 of the Treaty of Shimonoseki, or, more plausibly, as a result of the transfer of administrative authority by Japan to the Republic of China pursuant to the Cairo and Potsdam Declarations. This is the view taken by both governments,[50] and also, apparently, by the United States prior to the outbreak of the Korean War.[51] On this view, all that remained to be done by the Japanese Peace Treaty was the confirmation of Japan's relinquishment of sovereignty in 1945.

It seems clear, however, that Taiwan remained formally Japanese territory until the Peace Treaty.[52] It is not necessary to regard the Cairo and Potsdam

Morello, *The International Legal Status of Formosa*; Bueler, *US China Policy and the Problem of Taiwan*; Weng in Leng and Chiu (eds), *Law in Chinese Foreign Policy*, 123.

[48] More recent works have addressed Taiwan statehood, or its absence, generally. Even so the question of how the 'one China' policy affects the status of Taiwan remains understudied. On Taiwan statehood, see, e.g., Chiang (2000) 23 *Fordham ILJ* 959, 974; Charney and Prescott (2000) 94 *AJ* 453, 464–5; Shen (2000) 15 *AUILR* 1101, 1125–40; Puder (2001) 34 *V and JTL* 481, 506–25; Huang (2003) 16 *NYILR* 99, 156; Chiang (2004) 28 *Fordham ILJ* 1, 43–65; Swaine (2004) 83 *For Affs* 39, 47; Acquaviva (2005) 38 *V and JTL* 345, 369–75. On the 'One China' policy, see Shen (2000) 15 *AUILR* 1101, 1125; Wei (2000) 23 *Fordham ILJ* 1169, 1176–78; Puder (2001) 34 *V and JTL* 481, 506–15; Huang (2003) 16 *NYILR* 99, 152–6; Chiang (2004) 28 *Fordham ILJ* 1, 80.

[49] Cf O'Connell (1956) 50 *AJ* 405, 406; Weng in Leng and Chiu (eds), *Law in Chinese Foreign Policy*, 126–35 (who enumerates six positions and rejects all of them). See also Chiang (2000) 23 *Fordham ILJ* 959, 1000; Charney and Prescott (2000) 94 *AJ* 453, 464–5.

[50] For details see Jain (1963) 57 *AJ* 25, 33–8. This view is supported by Phillips (1957) 10 *Western Pol Q* 276; Chiu, *China and the Question of Taiwan*, 171.

[51] On 5 January 1950 President Truman stated that 'the United States and the other Allied Powers have accepted the exercise of Chinese authority over the Island', and Secretary of State Acheson stated that 'when Formosa was made a province of China nobody raised any lawyer's doubts about that' (Chiu, 221–2). The State Department subsequently affirmed this position in replies to the Senate: ibid, 223–4. But cf USFR 1949/IX, 271.

[52] Jain (1963) 57 *AJ* 25, 32–8; Kirkham (1968) 6 *Can* YIL 144–63; Charney and Prescott (2000) 94 *AJ* 457, 461; Chiang (2000) 23 *Fordham ILJ* 959, 998; Shen (2000) 15 *AUILR* 1101, 1117; Huang (2001) 14 *NYILR* 167, 201; Huang (2003) 16 *NYILR* 99, 159.

Declarations as merely a 'statement of intent' in order to reject this first view.[53] The cession of territory at the end of a war must await the peace treaty, and this may be the case even though the terms of the treaty have been in part pre-arranged in binding form between the belligerents. In other words the peace treaty could have ceded Taiwan to no other than the State of China: the problem was that, in 1951, there was no agreement between the signatories as to which government represented that State. Until 1952 then, the position of the Republic of China in Taiwan was that of belligerent occupant and, after 1949, government-in-exile of China.

The second and the third alternatives referred to are in agreement on this point, but differ as to the effect of the Peace Treaty itself. The second view is that the Peace Treaty, by which Japan merely relinquished its title and claims, left the position otherwise unchanged, and thus left sovereignty over Taiwan undetermined. This view was once espoused by both British and United States governments. It was put in the following way, for example, by Sir Anthony Eden in a written answer in 1955:

> [The Cairo] Declaration was a statement of intention that Formosa should be retroceded to China after the war. This retrocession has, in fact, never taken place, because of the difficulties arising from the existence of two entities claiming to represent China, and the differences amongst the Powers as to the status of these entities. The Potsdam Declaration . . . laid down as one of the conditions for the Japanese Peace that the terms of the Cairo Declaration should be carried out. In September 1945, the administration of Formosa was taken over from the Japanese by Chinese forces at the direction of the Supreme Commander of the Allied Powers; but this was not a cession, nor did it in itself involve any change of sovereignty. The arrangements made with Chiang-Kai-Shek put him there on a basis of military occupation pending further arrangements, and did not of themselves constitute the territory Chinese. Under the Peace Treaty of April, 1952, Japan formally renounced all right, title and claim to Formosa and the Pescadores; but again this did not operate as a transfer to Chinese sovereignty, whether to the People's Republic of China or to the Chinese Nationalist authorities. Formosa and the Pescadores are therefore, in the view of Her Majesty's Government, territory the *de jure* sovereignty over which is uncertain or undetermined.[54]

[53] Cf 595 *HC Deb* col 1140, 19 November 1958.

[54] 536 *HC Deb* col 159 (wa), 4 February 1955. See also ibid, cols 158–64, 26 January 1955; 212 *HL Deb* 212 col 497–8, 13 November 1958; 213 *HL Deb* col 216, 11 December 1958; 278 *HL Deb* col 897, 5 December 1966; 738 HC Deb cols 185–6 (wa), 19 December 1966. For the US position see, e.g., Dulles (1954) 31 *DSB* 896: 'technical sovereignty over Formosa and the Pescadores has never been settled . . . [T]he future title is not determined by the Japanese peace treaty, nor is it determined by the peace treaty which was concluded between the Republic of China and Japan . . .' Compare Brownlie, *Principles* (2nd edn), 112–13 with later editions, in which he describes the position as 'the

The third view is that Japanese relinquishment in 1952 had the legal effect of transferring sovereignty with respect to Taiwan and the Pescadores to the government occupying the territory, that is, the Republic of China; although quite how this transfer came about is a matter of some obscurity. It cannot be argued, for example, that the Japanese relinquishment left Taiwan *terra nullius*:[55] after 1952 as before the island continued to be controlled by an effective, organized government. The better view is probably that Japanese relinquishment, which took place against a background of a commitment to return Taiwan to 'China', and the continued occupation of Taiwan by a recognized government of 'China', operated to re-vest sovereignty in China as a State without taking any position as to the government entitled to exercise that sovereignty.[56] As a mode of transfer of territory this may be unique, but it is very unlikely that Taiwan in 1952 became a condominium of the forty-eight signatories to the Japanese Peace Treaty, in particular where neither condominium nor a joint power of disposition was expressed or claimed by the parties. Nor did the Peace Treaty leave the status of Taiwan to be determined, for example, by the four Principal Powers: in the absence of specific enumeration or definition of such special dispositive authority, none can be presumed.[57]

However, this may be, it is clear that the present status of Taiwan (assuming still that it is not a separate State) is that it is Chinese territory, rather than territory subject to a *condominium* or territory the title to which is undetermined. Virtually every State in the world has more or less unequivocally recognized the status of Taiwan as Chinese territory. For example a Joint Communiqué issued by the United States and the People's Republic in 1972 stated:

> The China side reaffirmed its position . . . the Government of the People's Republic of China is the sole legal government of China; Taiwan is a province of China which has long been returned to the motherland; the liberation of Taiwan is China's internal affair . . . The United States acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The

former view' and concludes that 'since 1972 the British Government has acknowledged the position of the Chinese Government that Taiwan is a province of China.' (4th edn) 109; (6th edn), 64–5.

[55] O'Connell (1956) 50 *AJ* 405, 414; O'Connell (1952) 29 *BY* 423, 427. For the concept of *terra nullius* see Chapter 6.

[56] Harvey (1959) 30 *World Aff* Q 134, 144.

[57] To the same effect Kirkham (1968) 6 *Can YIL* 144, 150; Chiu, *China and the Question of Taiwan*, 130–2; Bueler (1971) 27 *The World Today*, 256, 263. The contrary view is argued by Wright (1955) 49 *AJ* 318; Chen and Reisman (1972) 81 *Yale LJ* 599, 654; Chen and Lasswell, *Formoso, China and the United Nations*, 77. Morello argues that the Republic of China has obtained title to Formosa by prescription, but the problem with this argument is that the Republic's title, in view of its claim to be 'the Government of China', is not adverse to the People's Republic. Cf Charney and Prescott (2000) 94 *AJ* 453, 462–4; Shen (2000) 15 *AUILR* 1101, 1109, 1150.

United States Government *does not challenge that position*. It reaffirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves . . . [58]

Despite protestations, the British position also changed in 1972. In announcing the exchange of ambassadors with the PRC the Foreign Secretary stated the position as follows: 'the Government of the United Kingdom acknowledge the position of the Chinese Government that Taiwan is a province of the People's Republic of China . . . We think that the Taiwan question is China's internal affair to be settled by the Chinese people themselves . . .'[59] If Taiwan is not part of China then the relation between China and Taiwan is not an internal affair.

Upon recognition of the PRC by the United States, the two States issued a further Joint Communiqué which stated, *inter alia*:

2. The United States of America recognizes the Government of the People's Republic of China as the sole legal Government of China. Within this context, the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan . . .
7. The Government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China.[60]

A further US–China declaration, in 1982, included the statement that 'the question of Taiwan is China's internal affair'.[61]

Thus even if before 1971 the Powers had retained dispositive authority with respect to Taiwan, their express recognition of the proposition that Taiwan remains part of China, together with the failure of any State to maintain diplomatic relations with both governments, entails general acquiescence in the continued Chinese claim that the territory is part of metropolitan China and a relinquishment of any dispositive authority. In any event Taiwan is, if not a separate State, part of the State of China.

But the question remains why Taiwan, which has for more than fifty years been a distinct and *de facto* independent territorial unit, does not constitutes a separate State in international law. In other words, what is the status of territory occupied by a government-in-exile claiming to do so as the government of an existing State? There are three difficulties with the view that, as a long established effective entity, Taiwan must be regarded as a State.[62]

[58] 11 ILM 445 (emphasis added).

[59] 833 *HC Deb* cols 31–8, 32, 13 March 1972. Chen and Reisman (1972) 81 *Yale LJ* 598, 619 note that the statement marks a reversal of the earlier British position.

[60] Joint Communiqué of 15 December 1978: 18 ILM 274.

[61] Joint Communiqué of 17 August 1982, para 4: 21 ILM 1147.

[62] A view adopted by Caty, *Statut Juridique des Etats Divisés*, 23–30; Kirkham (1968) 6 *Can YIL* 144; Wright (1955) 49 *AJ* 318; Carolan (2000) 75 *NYU LR* 429, 450–8; Huang (2001) 14 *NYILR*

First, if the Nationalists had by 1952 lost all claim to being the government of China, then effective cession to them of Taiwan would have been a violation of the agreed terms of the peace as well as intervention in the civil war in China. As has been suggested, the Peace Treaty did not render Taiwan capable of appropriation, even notionally, by just any State or government—the validity of continued Nationalist occupation hinged on the claim to be the 'government of China.' Secondly, if, as is suggested above, Taiwan became in 1952 a part of China, then continued American patrolling of the Straits of Taiwan would have constituted intervention in the civil war, and an attempt to disrupt the territorial integrity of China.[63] This might have brought into play the principle that an entity is not a State if created through a violation of the rules relating to the use of force.

However, this difficulty—as in the Manchurian crisis but for different reasons—did not really arise. For the third problem with the view that Taiwan is not a separate State has been determinative. The point is that there is even now widespread agreement that Taiwan is not a State but part of a larger China. China takes this view, other States take this view and Taiwan itself has by no means rejected it. The RoC and the PRC have long both insisted that there is only one Chinese State; and, notwithstanding the more ambiguous position communicated from time to time by officers of the Taiwanese government, that view has been acquiesced in, or even explicitly recognized, by all or almost all other international actors. As O'Connell pointed out in 1956, 'a government is only recognized for what it claims to be'.[64] Statehood is a claim of right. Claims to statehood are not to be inferred from statements or actions short of explicit declaration; and in the apparent absence of any claim to secede the status of Taiwan can only be that of a part of the State of China under separate administration.

167, 212; Wang (2002) 11 *Pac Rim L & Pol J* 531, 537; Huang (2003) 16 *NYILR* 99, 166–7; Elias (2004) 8 *Singapore Ybk* 93, 95.

[63] The change in the US position in 1950 was designed to give legal support to the unilateral US action in 'neutralizing' the Taiwan Straits: see Harvey (1959) 30 *World Aff Q* 134, 137–8; Philips, (1957) 10 *Western Pol Q* 276, 279–80. This point was frankly conceded by Dulles in a conversation with Ambassador Koo on 20 October 1950: 'If the United States already regarded Taiwan as purely Chinese territory, not only must the question of the representation of the Chinese government be solved immediately but the United States would lose her grounds for despatching the Seventh Fleet to protect Taiwan . . .' (Chiu, *China and the Question of Taiwan*, 237). The legality of the intervention was also based on this ground by a Department of State legal adviser: Maurer (1958) 39 *DSB* 1005.

[64] (1956) 50 *AJ* 405, 415. The contrary proposition is not of course true: a government may be recognized for *less* than it claims.

## (5) Development of a Taiwanese claim to statehood[65]

Since the early 1990s, the Government of Taiwan has changed its Constitution in significant ways and has gradually changed the way it describes its status. The question is whether any of these changes have effects in terms of the status of Taiwan in international law.

### *(i) Amendments to the law of Taiwan*

'Additional Articles' have been added to the Constitution, and these prevail over the original terms of the 1946 Constitution in case of conflict. Their effect is that the Members of the National Assembly, the Legislative Yuan, the President and Vice-President are now elected by 'the entire populace of the free area of the Republic of China', although there is provision for some representation in the National Assembly and the Legislative Yuan of 'Chinese citizens who reside abroad' and of 'the nationwide constituency' (see Articles 1 and 4 of the Additional Articles). In addition, Article 11 provides that: 'Rights and obligations between the people of the Chinese mainland area and those of the free area, and the disposition of other related affairs may be specified by law.' Commentators on the constitutional amendments have suggested that they give constitutional recognition of the PRC's rule over the Mainland and confine the effective application of the RoC Constitution to Taiwan. But it is difficult to regard the new article as an unequivocal declaration of separation. Clearly it envisages that cross-Strait relations may be regulated by special laws, but this does not necessarily imply that the RoC Constitution ceases to have any application whatever to persons and affairs on the mainland.

Legislation has in fact been enacted under Article 11, dealing separately with mainland relations and with the position of Hong Kong and Macau. A Statute Governing Relations between Peoples of the Taiwan Area and the Mainland Area[66] seeks, as its title suggests, to regulate relations between Taiwan and the Mainland, making provision for judicial cooperation, the movement of persons in both directions, work permits for mainlanders, entitlement to permanent residence in Taiwan (which requires, generally speaking, proof of some connection with the island and its inhabitants), double taxation, communications and transport between the two areas, investment and trade, broadcasting,

[65] On more recent changes, see Cohen and Teng (ed), *Let Taiwan be Taiwan*; Henckaerts (ed), *The International Status of Taiwan in the New World Order*; Chiang, *The International Legal Status of Taiwan* (PhD thesis, London University, 1996); Symposium (1998) 32 *NEngLR* 661; Carolan (2000) 75 *NYULR* 429; Lijun, *China and Taiwan Cross-Strait Relations Under Chen Shui-bian*; Fugarino and Zagoria (eds), *Breaking the China–Taiwan Impasse*; Bush, *Untying the Knot: Making Peace in the Taiwan Strait*

[66] Adopted 1992, amended 1997.

movement of currency, customs, etc. For certain purposes relations between the two areas are assimilated to foreign relations. For example Article 40 provides that:

> Articles or goods of the Mainland Area shipped or brought into the Taiwan Area shall be treated as imports, their inspection, quarantine, administration, the levying of custom duties and other taxes or surcharges and their handling shall be conducted in accordance with the provisions of laws and regulations relating to importation of articles and goods.

For other purposes cross-Strait relations are more strictly regulated than normal international transactions would be. For example Taiwanese residents are prohibited from contracting or trading with or investing in the Mainland land area except with a permit. The Statute also governs issues of applicable law. Of particular interest is Article 41:

> Except as otherwise provided for in this Statute, civil matters between Peoples of the Taiwan Area and of the Mainland Area shall be subject to the application of laws of the Taiwan Area. Except as otherwise provided for in this Statute, civil matters between any two or more of People of the Mainland Area and those between People of the Mainland Area and foreign nationals shall be subject to the application of laws of the Mainland Area.

In effect the Statute lays down conflicts of law rules applicable to residents of the Mainland area, including the rule that in their transactions with residents of the Taiwan area, the 'laws of the Taiwan area' prima facie apply. Some of these provisions appear to involve a continuing assertion of legislative authority over mainland affairs. For example, Article 43 provides that: 'Where, in accordance with the provisions of this Statute, laws of the Mainland Area shall apply, if there exist no express laws in the Mainland Area governing the legal relation at issue . . . then and in such event laws of the Taiwan Area shall apply.' Such a provision could be criticised as ethnocentric, although it may be noted that much the same effect is achieved by the English common law rule that foreign law is assumed to be the same as English law in the absence of proof to the contrary.

The Statute asserts an apparently wide ranging control over laws of the Mainland Area on grounds of public policy. Article 44 provides that: Where, in accordance with the provisions of this Statute, laws of the Mainland Area shall apply, if the applicable laws are contrary to the public order or good custom and morals in the Taiwan Area, then laws of the Taiwan Area shall apply.' A number of provisions relating to the application of laws similarly favour

Taiwan,[67] and some indeed involve a strict juridical separation, which is now unusual at the international level.[68] Other provisions are no different than the rules of conflicts of law applicable to foreign transactions in many countries.

The position as concerns the application of criminal law is stricter. The general rule is stated in Article 75:

> Offenses committed in the Mainland Area or on board vessels or aircraft of the Mainland, not withstanding punishment already received in the Mainland Area therefor, may still be dealt with and judged and punished according to law; provided, however, the execution of the punishment may be remitted in whole or in part.

Thus in a formal sense the criminal law of the Taiwan area continues to apply to conduct carried on wholly in the Mainland area which comes before the courts of the RoC, subject to remittal of punishment or a limited immunity from prosecution in certain identified cases (see, e.g., Article 77 (security offences)).

Legal opinion in Taiwan apparently draws from these provisions the inference that the RoC Constitution has no application to mainland affairs as such. Certain judicial decisions of the RoC courts hold that some connection is required between a transaction occurring on the mainland and the RoC before RoC law can be applied.[69] If this reading of the cases is correct, then the RoC legal system seems to be withdrawing its previous claim to apply to mainland affairs, and this may well have long-term significance.

A 1997 Statute Governing Relations with Hong Kong and Macau was enacted 'to regulate and promote trade, economic, cultural and other relations with Hong Kong and Macau' (Article 1). It covers broadly the same range of matters as the 1992 Statute but applies a generally more permissive regime. For example, Article 10 provides that:

> People of the Taiwan Area who travel to Hong Kong or Macau shall follow the general exit rules; however, for those entering the Mainland Area via Hong Kong or Macau,

[67] See, e.g., Art 45 (acts connected to both areas deemed to occur in Taiwan); Art 53 (laws of Taiwan apply to mixed marriages); Art 67 (limits on inheritance by heirs resident on the Mainland).

[68] See esp Art 70: 'Except by permission, no juristic persons, institutions, or other organizations of the Mainland Area may perform any juristic act in the Taiwan Area.'

[69] Thus in a decision of 5 November 1997 (1997) Tai-Shan-Tze-6403, the High Court declined to apply RoC law to an offence on board a boat engaged in smuggling in the absence of evidence that the boat concerned was registered in the RoC. The decision is surprising since the case involved nationals of the RoC, and in most legal systems a defendant could not exempt itself from otherwise applicable customs or quarantine legislation by using a foreign boat. In a decision of 7 July 1998 (1998) Tze-Tze-448, the District Court of Taipei noted that various provisions of the Cross Strait Statute would have been unnecessary if the territory of the RoC extended to the mainland, and asserted a strong distinction between the mainland territory and that of the RoC. See also, *inter alia*, decision of High Court (Keelung City), February 1999, (1999) Shan-Shu-Tze-48; decision of District Court (Shilin Branch), 30 September 1999, (1999) Shan-Yi-Tze-3571.

relevant rules in the Statute Governing the Relations Between People of the Taiwan Area and the Mainland Area shall apply.

There is no detailed list of criteria for the grant of temporary or permanent residence permits, such as applies under the 1992 Statute. Nor is there any general application of the criminal law of the Taiwan area to offences committed in Hong Kong and Macau (see Arts 43–46). In general the contrast with the 1992 Statute is clear.

Thus, from the perspective of an outside observer, it is rather a matter of inference that Article 11 of the Constitution and legislation enacted under it confines the effective application of the ROC Constitution to the Taiwan-area.[70] It is true that the legislation only enacts rules for the institutions of the RoC (including conflicts of law rules) and that it matters most how it is actually applied by those institutions. In fact the courts have apparently accepted the inference from Article 11 and subsequent legislation and only apply RoC law in cases where they decide there is a sufficient connection with territory or persons under the control of the RoC. But there is still some equivocation. After all, the Additional Articles amend a Constitution that was avowedly that of China, a State that has existed under a variety of constitutions and with many internal divisions and conflicts since the earliest times. The territory of mainland China is not treated as 'foreign' territory either in the original Constitution or the Additional Articles.[71] The state of 'China' to which the Constitution pertains has a 'free area' and a 'mainland area'.[72] The conflicts rules passed under Article 11 in some respects cover conduct by mainlanders on the mainland which it would be unusual for a completely independent legal system to cover. On the other hand, the current constitutional arrangements are clearly transitional, and the trend is clearly towards greater separation.

There is political and institutional significance in the sequence of constitutional reforms initiated on Taiwan in 1991. They provide a basis for the democratic accountability of the legislative and executive organs of the RoC to a constituency that is essentially Taiwanese. But while this may be a precondition to the establishment for a separate State of Taiwan, it is not sufficient. Many constituent units of States (e.g., Montenegro, Quebec) share this characteristic, and they command allegiance only in relation to their own territory and people. While in normal cases there will be coordination and even 'delegation' from a central or national constitution to the constituent unit, the links that can exist vary widely (as seen in Chapters 7 and 8). Of course, in the case of the

[70] In at least one place the 1993 Statute refers to 'the territory of the Republic of China' (as apparently distinct from 'the Taiwan area'): see Art 81.

[71] See Additional Articles, Art 1(3)

[72] See Additional Articles, Art 1(1), (2), Art 2, 1st para, 9th para, Art 4(1), (2).

RoC there is no constitutional link with the PRC, even of the most nominal kind. But the coexistence in fact of two distinct entities with their own constitutional systems and electorates on particular territory does not necessarily entail the existence of two States in international law (as seen in Chapter 10). The State in international law is not identified with its internal constitutional arrangements. Thus there is a single State of Cyprus, but two governments exist on its territory, neither accepting the constitutional legitimacy of the other. There is a single State of Bosnia-Herzgovina despite the fact that the constitutional arrangements for the linkage between the two federal units as provided for in the Dayton Agreement are minimal. For reasons that are different in the two cases, international law appears to exclude the possibility of secession or separation of the conflicting units within Cyprus and Bosnia-Herzegovina. These are special applications of the general principle that the international identity of the State is not the same as its constitutional identity.

*(ii) Statements respecting international policy*

At the same time as these constitutional and legislative changes have been introduced, the stated policy of the Government of the RoC has been changing. For example, in an interview on German radio on 9 July 1999, the then President of Taiwan said, *inter alia*, that the 1991 constitutional amendments:

> have designated cross-strait relations as a state-to-state relationship or at least a special state-to-state relationship, rather than an internal relationship between a legitimate government and a renegade group, or between a central government and a local government. Thus, the Beijing authorities' characterization of Taiwan as a 'renegade province' is historically and legally untrue.[73]

It is true that Taiwan is hardly a 'renegade province' of the PRC. The RoC was not part of and was never in fact brought within the governmental system of the PRC. Rather the PRC, while subduing the RoC on the mainland, failed for various reasons to achieve this with respect to Taiwan and certain offshore islands. The coexistence on the territory of 'China' of two rival governments for more than fifty years has been the result. However, the statement also addresses the question of the nature of the relations between the PRC and the RoC. It characterizes these as 'a state-to-state relationship or at least a special state-to-state relationship'. This is not, however, unequivocal. There are many and diverse examples of 'special' intergovernmental relations between entities which were still formally part of a single State. For example (as shown in

[73] For a transcript of the interview, see Interview of Taiwan President Lee Teng-hui on Deutsche Welle Radio, 9 July 1999: http://www.taiwandc.org/nws-9926.htm (last visited 15 November 2005).

Chapter 8) the relations between the British Dominions in the period from 1914 to approximately 1926 or even later were deemed under the *inter se* doctrine not to be international, and the separate statehood of the dominions was not established until, at the earliest, 1926. Yet it is clear that the United Kingdom government and the governments of the Dominions had intergovernmental relations throughout this period. Other examples could be drawn from the long history of international protectorates (outlined in Chapter 7). Within a single State, intergovernmental relations can exist based upon degrees of independence and without any necessary or systematic coordination of one entity to another. Further the President of Taiwan was presumably not declaring the independence of Taiwan in a newspaper interview with *Deutsche Welle*. Indeed he said as much: there was 'no need to declare independence' because 'the Republic of China has been a sovereign state since it was founded in 1912'. His statement is predicated upon continuity, and the continuity is that of a constitutional system *of China*, albeit a constitutional system now occupying only part of the territory of China and no longer entertaining claims to the whole.[74]

The same position was taken by the Mainland Affairs Council in its Statement of 1 August 1999, in which it referred to the fact that there is 'a special cross-strait relationship of a divided China' which 'has not changed'. The Statement explains the position of the RoC on 'One China' in the following terms:

> we have always maintained that the 'one China' concept refer[s] to the future rather than the present. The two sides are not yet unified, but are equals, separately ruled. We both exist concurrently. Therefore, the two sides can be defined as sharing a 'special state-to-state relationship', prior to unification. Cross-strait relations are 'special', because we share the same culture, historical origins, and ethnic bonds. The people on the two sides engage in exchanges in social, economic, trade . . . activities . . . which other divided countries cannot match. What is most important is that the two sides are willing to work in concert and engage in consultations on an equal basis to ensure the future unification of China . . .[75]

This Statement, for all its ambiguity, is inconsistent with the idea that the relations between Taiwan and China are simply State-to-State relations of the

[74] This element of continuity was stressed in the 'Explanation' issued on 9 July 1999 by Lin Bih-jaw, Deputy Secretary-General, Office of the President, Republic of China, and in a further statement by the President, 'Our Mainland Policy Remains Unchanged', 16 July 1999: http://www.taipei.org/press/s-to-s.htm (visited 14 July 2005).

[75] Statement by the Mainland Affairs Council, Executive Yuan, Republic of China, 1 August 1999, reported in *Chung Kuo Shih Pao* [*China Times*] (Taipei).

normal international kind. China is divided and the two sides of the divided China are not, according to the statement, in any relationship of subordination and supremacy. And that is true as a matter of fact. But it does not follow from this fact that Taiwan is a separate State as a matter of international law.

Nonetheless it is plain that Taiwan has been edging towards formal separation, and this has provoked corresponding reactions from the PRC. On the positive side the PRC has sought to develop, in Hong Kong and Macao, a form of constitutional pluralism which it hopes to apply equally to Taiwan: the status of Hong Kong under these arrangements is analysed below. On the negative side it has threatened sanctions including the use of force in response to any UDI. In particular an Anti-secession Law was adopted by China on 14 March 2005. The Law reaffirms that 'Taiwan is a part of China' (Art 2) and that the 'Taiwan question' is an 'internal affair' of China (Art 3). Article 8 purports to define certain conditions under which China may use force in relation to Taiwan: (1) attempted separation of Taiwan from China; (2) 'incidents entailing Taiwan's secession from China'; or (3) exhaustion of possibilities for peaceful reunification. The official response of the government of Taiwan to the Anti-secession Law included the statement that, 'based on the Montevideo Convention of 1933 . . . it is undeniable that the Republic of China is a sovereign and independent state.' According to the official response, the Chinese law 'infringes upon the sovereignty of the Republic of China.'[76] A further statement by the Minister of Foreign Affairs of the Republic of China indicated that:

> The status quo is that the Republic of China is independent and sovereign. The sovereignty of the Republic of China rests in the hands of the twenty-three million people of Taiwan. Only the twenty-three million people of Taiwan have the right to make the final decision on any change to the nation's status and future. The Republic of China and the People's Republic of China both exist and have no jurisdiction over each other . . .[77]

As with earlier statements, these, while reiterating the separateness of Taiwan as a self-governing unit, do not contain a declaration of independence from China. The government in Taiwan continues to characterize itself as the 'Republic of China' and to stress its continuity, while increasingly practising discontinuity. It is still the case that Taiwan has not unequivocally declared its

[76] Official Position of the Republic of China (Taiwan) on the People's Republic of China's Anti-Secession Law, 29 March 2005, http://www.mac.gov.tw/english/english/anti/mofa940329e.htm (visited 19 July 2005).

[77] Remarks by HE Dr Tan Sun Chen, 15 March 2005, http://www.mofa.gov.tw.

independence from China.[78] It is still the case that there is no general international recognition of Taiwan as a separate State.[79]

## (6) Conclusion

The conclusion must be that Taiwan is not a State because it still has not unequivocally asserted its separation from China and is not recognized as a State distinct from China. Its origins as a consolidated local *de facto* government in a civil war situation continue to affect it. But this does not mean that Taiwan has no status whatever in international law. Courts faced with specific issues concerning its status may treat it on a *de facto* basis as a 'well defined geographical, social, and political entity [with] . . . a Government which has undisputed control of the island'.[80] Conflicts between its limited status in international law and the policies of particular statutes or contracts may be reconciled or avoided, especially in a municipal forum, by interpretation.[81] Executive determination that Taiwan is not a State may result in denial of sovereign immunity but the capacity of Taiwan government instrumentalities to sue and be sued in national courts is widely accepted.[82] Taiwan is a party to

[78] Of course it is also true that the reason why Taiwan has not more clearly stated its position is concern, on its own part and that of its allies, at the likely consequences of doing so (i.e. a military attack from the mainland).

[79] States establishing or maintaining diplomatic relations with the Republic of China since 1991 presumably did so on the basis that the Republic of China claims no control over the mainland. The point is not clarified in the various communiqués, but may be inferred from the Explanatory Memorandum attached as Annex I to a Request from 12 UN Members for the inclusion of the question of representation of Taiwan on the agenda of UN General Assembly 54: A/54/194, 11 August 1999. The Explanatory Memorandum asserted that 'each of these two Governments can only speak for and represent the people actually under its jurisdiction on its respective side of the Taiwan Strait' (para 1). It repeatedly qualified 'The Republic of China on Taiwan' as a country and a 'Member' of the international community. It did not use the word 'State'. The Request was not accepted by the Assembly. For the PRC's position see A/54/228, 19 August 1999. But compare the Explanatory Memorandum attached to a later Request, 10 August 2004, A/59/194, 4: 'The Republic of China (Taiwan) is a sovereign State.'

[80] *AG v Sheng Fu Shen* (1959) 31 ILR 349.

[81] Thus for the purposes of the Immigration and Nationality Act 1952 (USA), s 242(a), providing for deportation of aliens, both mainland China and Taiwan were a 'country': *AG v Sheng Fu Shen* (1959) 31 ILR 349; *US v Shaughnessy*, 218 F 2nd 316 (2nd Cir 1954); *US v Murff*, 264 F 2nd 926 (1959). Prima facie 'Chinese nationals' were to be deported to Taiwan as the then-recognized 'government of China': *Lei Wei Fang v Kennedy*, 317 F 2d 180 (DCCA 1963), 34 ILR 21; unless they expressed affiliation with the People's Republic and the statute was complied with: *Rogers v Lu*, 262 F 2d 471 (DC Cir 1958). (The problem in *Rogers v Lu*, however, was that the Government of the PRC had not indicated its willingness to accept the prospective deportee). For the purposes of a charterparty, Taiwan, though unrecognized in any capacity by the UK, was a 'government': *Luigi Monta of Genoa v Ceckofracht Ltd* [1956] 2 All ER 769.

[82] E.g., *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] SGCA 3. But cf *Parent v Singapore Airlines Ltd* (Superior Court of Quebec, 22 October 2003), [2003] JQ 18086, para

various conventions binding its own territory.[83] In addition to the WTO, it is a fishing entity under the Convention for the Conservation of Southern Bluefin Tuna of 1993.[84] It participates in that Agreement not in the capacity of the old Republic of China (none of the States Parties to the 1993 Agreement recognizes the Republic of China), but as Taiwan, a 'Fishing Entity'.[85] For certain other purposes it may be a prosecuting entity; there is international judicial cooperation between Taiwan and other parts of the world. Taiwan may end up having many different personas: it may be a meteorological entity, an aviation entity, an investment entity[86] as well as a fishing entity. It is surprising it does not suffer from schizophrenia.

Not surprisingly it has also been asserted that the principle of self-determination applies, so that Taiwan may not be transferred to the control of the People's Republic without the consent of the Taiwanese people.[87] Whether or not there was such a people in 1947, the experience of a half century of separate self-government has tended to create one. In any case, attempts to solve the problem of Taiwan otherwise than by peaceful means must now constitute a situation 'likely to endanger the maintenance of international peace and security' under Article 33 of the Charter. Although the PRC denies that there is a 'juridical boundary' between the parties—a point reinforced by

53: Department of Foreign Affairs and International Trade of Canada could not issue a certificate indicating that Taiwan is a foreign State for purposes of the State Immunity Act (Canada), but Taiwan nonetheless is to be given benefit of immunity under the Act.

[83] Earlier these included the Peace Treaty with Japan, 28 April 1952, 138 UNTS 3, Art 10; Mutual Defence Treaty with the US, Art 6, 2 December 1954, 248 UNTS 213.

[84] See Serdy (2004) 75 *BY* 183.

[85] Convention for the Conservation of Southern Bluefin Tuna, 10 May 1993, Article 14, 1994 ATS No 16. Taiwan's membership of the Extended Commission under the Convention became effective on 30 August 2002: http://www.ccsbt.org/index.html.

[86] Taiwan is party to bilateral investment treaties with Singapore (signed and entered into force 9 April 1990), Philippines (signed and entered into force 28 February 1992), Panama (signed 26 March 1992, entered into force 14 July 1992), Paraguay (signed 6 April 1992, entered into force 11 September 1992), Nicaragua (signed 29 July 1992, entered into force 8 January 1993), Latvia (signed 17 September 1992, entered into force 8 October 1993), Malaysia (signed and entered into force, 18 February 1993), Vietnam (signed 21 April 1993, entered into force 23 April 1993), Nigeria (signed and entered into force 7 April 1994), Thailand (signed and entered into force 30 April 1996), and El Salvador (signed 30 August 1996, entered into force, 25 February 1997). BITs with the following States have been signed but are indicated as having not yet entered into force: Malawi (signed 22 April 1995), Honduras (signed 26 February 1996), Senegal (24 October 1997), Swaziland (3 March 1998), Costa Rica (25 March 1999). Source: Negash (ed), *Bilateral Investment Treaties 1959–1999*, United Nations Conference on Trade and Development, UNCTAD/ITE/IIA/2 (2000) (http://www.unctad.org/en/docs/poiteiiad2.en.pdf).

[87] See further Wright (1955) 49 *AJ* 318, 333–5; Chen and Lasswell, *Formosa, China and the United Nations*; Chen and Reisman (1972) 81 *Yale LJ* 599, 655–69; Charney and Prescott (2000) 94 *AJ* 453; Huang (2001) 14 *NYILR* 167. The self-determination argument has however received little support in State practice.

the Hong Kong courts[88]—the suppression by force of 23 million people cannot be consistent with the Charter. To that extent there must be a cross-Strait boundary for the purposes of the use of force.

## 5.3 Entities recognized as states 'for special reasons': the Vatican City and the Holy See

The legal status of the Vatican City and the Holy See has been the subject of much study, and some controversy.[89] Since the fourth century the Papacy has played a significant part in international relations. The temporal power of the Papacy dates from the ninth century, when the Papal States were created by Pepin-le-Bref and his son Charlemagne.[90] The territorial extent of the Papal States varied, but with brief revolutionary interruptions from 1793 to 1801 and 1809 to 1814[91] they continued as the territorial base for the central government of the Catholic Church.

Until 1870, therefore, the Roman States under Papal government constituted one of the ordinary independent States of Europe in a still disunited Italy. In 1870, as the final step in the *Risorgimento*, Italian troops occupied and after a plebiscite annexed the territories.[92] The Italian Law of Guarantees of 13 May 1871 extended personal inviolability to the Pope and established, *inter alia*, the freedom of the Apostolic Palaces,[93] but the Papal States from their annexation ceased to exist as a State:

> From [1870] onwards, until the conclusion of the Lateran Treaties, the Holy See could not be regarded as a foreign State. Although the Act of Guarantees treated the Pope as

[88] *Chen Li Hung v Tong Lei Mao* [2000] 1 HKC 461.

[89] The best older treatment is that of Kunz (1952) 46 *AJ* 308; but see now Duursma, *Fragmentation*, 374–419. See also Sereni, *The Italian Conception of International Law*, 188, 231–2, 292–4; D'Avack, *Vaticano e Santa Sede*; Abdullah (1996) 96 *Col LR* 1835; Arangio-Ruiz (1996) 29 *RBDI* 354; Benoit d'Onorio (1997) 28 *Revue General de Droit* 495; Bonet Navarro (1997) 54 *Revista Espanola de Derecho Canonica* 701; Rouxel, *Le Saint-Siege sur la Scene Internationale*; Banthon (2001) 34 *Vand JTL* 597; Dias (2001) 13 *Sri Lanka JIL* 107; Vedovato (2001) 68 *Rivista di Stodi Politici Internazaionale* 163; Theutenberg, *The Holy See, the Order of Malta, and International Law*; Breger (ed), *The Vatican-Israel Accords*.

[90] For the early history of the Papacy in international law see Pallieri and Vismara, *Acta Pontifica Juris Gentium usque ad Annum MCCIV*; Verzijl, *International Law*, vol II, 308–38.

[91] The Papal Dominions were returned to the Holy See by the Final Act of the Conference of Vienna, 9 June 1815, Art 103, 64 CTS 453, to which the Pope was not a signatory.

[92] See 62 BFSP 352 for documentation. The annexation was a violation of a Franco-Italian Treaty of 15 September 1864: 55 BFSP 461. Papal protest in the periods immediately before and after annexation is treated in Coppa, in Kent and Pollard (eds), *Papal Diplomacy in the Modern Age*, 33. See also Murphy (1987) 19 *Case WRJIL* 375, 377.

[93] 65 BFSP 638.

if he were a king not only with regard to ceremonial but also in other respects, such as the right to send and to receive diplomatic representatives, it cannot be said that between 1870 and 1929 the Pope had a territory of his own, however small, over which he could exercise his sovereignty . . . [U]ntil the conclusion of the Lateran Treaties, the Holy See cannot be called a foreign State, and consequently it is impossible to speak of a corporation created by the laws of that State.[94]

It was accordingly stated by various writers[95] that the Holy See had no international status after 1870. A settlement of the Roman Question was at length achieved in 1929, by the Lateran Treaty,[96] in which Italy recognized both 'the sovereignty of the Holy See in the field of international relations as an attribute that pertains to the very nature of the Holy See, in conformity with its traditions and with the demands of its mission in the world',[97] and 'the State of the Vatican City under the sovereignty of the Supreme Pontiff.'[98] The purpose of the Lateran Treaty was summarized in the Preamble:

And whereas it is a duty, for the purpose of assuring the absolute and visible independence of the Holy See, to guarantee to it an indisputable sovereignty in the international domain, it has been recognized as necessary to constitute, under special conditions, the Vatican City and to recognize the full ownership, and the exclusive and absolute dominion and sovereign jurisdiction of the Holy See over the same . . .

The status of the Vatican City is still regulated by the Lateran Treaty and the associated constituent documents.[99] Three issues arise: the status of the Vatican City, the status of the Holy See and the relation between them.

## (1) The international status of the Vatican City

The State of the City of the Vatican, as constituted in 1929, is the smallest area in the world that claims to be a State. Its population, which is official and

[94] *Thome Guadalupe v Assoc Italiana di S Cecilia* (1937) 8 ILR 151; Cf *Re Esposito* (1899) 2 *Rdi* 551, cited Ireland (1933) 27 *AJ* 271, 283–4. But see Cumbo (1948) 2 *ILQ* 603.

[95] E.g., Hall, *International Law* (7th edn), 308, 334. Oppenheim (1st edn), vol I, 252 described the Holy See as 'not an international person' but as possessing 'a quasi international position'. Of course Oppenheim's view that the only true legal persons were States, but 'quasi' was a mere evasion.

[96] Treaty between the Holy See and Italy establishing the Vatican State, with Financial Convention, Rome, 11 February 1929, (1929) 23 *AJ Supp* 187; 130 BFSP 791.

[97] Article 2.

[98] Article 26. Cf Art 3, which recognized 'full possession and exclusive and absolute power and sovereign jurisdiction of the Holy See over the Vatican, as at present constituted . . .' The right of active and passive legation was confirmed: Arts 12, 19. In addition certain Church properties outside the Vatican were privileged (Art 15): they remained however 'Italian territory': *Padri Benedetti v Nunzi* (1957) 24 ILR 214; *Trenta v Ragonesi* (Ct Rome, 1935) 8 ILR 235, 9 ILR 437 (Ct App Rome, 1938); *In re Moriggi* (1939) 9 ILR 436.

[99] Peaslee, *Constitutions of Nations* (3rd edn), vol III, 1184–230.

non-permanent,[100] is nominally 1,000. Italy carries out a number of governmental functions in respect of the Vatican City: Italian police patrol the Piazza San Pietro;[101] the Italian railway, water and sanitation systems support the enclave, which is also entirely dependent upon Italy for freedom of transit and communications. Moreover, unlike other States the Vatican City exists not to support its inhabitants but to provide a base for the central administration of a non-State entity, the Catholic Church: it is not a distinct society but an annex or appanage of the Papacy. For these reasons, some writers have denied that the Vatican City constitutes a State.[102]

It cannot be denied that the position of the Vatican City is peculiar and that the criteria for statehood in its case are only marginally (if at all) complied with. However, peculiarity is not of itself a ground for denying statehood where other factors point to the opposite conclusion. As we have seen, recognition by other States is of considerable importance especially in marginal or borderline cases. The chief peculiarity of the international status of the Vatican City is not size or population—or lack of them—but the unique and complex relation between the City itself and its government, the Holy See. The international status of the Holy See itself contributed to the acknowledgement of the statehood of the Vatican, once Italy had ceded the territory and recognized the Vatican City.[103] In effect whereas in some States (e.g., Somalia) the existence of territory and people have compensated for the virtual absence of a central government, in the case of the Vatican City the strength and influence of the government—the Holy See—have compensated for a tiny territory and the lack of a permanent population.

Moreover, it is not clear what legal consequence is sought to be drawn from the denial of the statehood of the Vatican City. Its sovereign immunity is, despite its special character, determined by the Italian courts in the same way as for other States.[104] It has exclusive legislative authority, and civil and criminal

[100] See the Law respecting Citizenship and Residence in the Vatican City of 7 June 1929: 130 BFSP 1018. Male children who reach the age of 25 normally lose Vatican nationality automatically: female children lose the nationality on marriage. Cessation of residence or of official employment in the Vatican City also determines nationality.

[101] Lateran Treaty, Art 3: cf also Arts 6 and 7.

[102] Rousseau (1930) 37 *RGDIP* 145–53, and *DIP* II, 375–7; Siotto-Pintor (1932) 41 *HR* 247, 319–32; Mendelson (1972) 21 *ICLQ* 609, 611–12.

[103] Fitzmaurice described the Vatican, for the purposes of the Draft ILC Convention on the Law of Treaties, as one of the 'entities recognized as being States on special grounds': *ILC Ybk* 1956/II, 107, 118.

[104] Hence medical contracts, having 'a technical and non-political character' are not immune, being acts *jure gestionis*: *Baronci v Ospedale del Bambino Gesu* (1957) 24 ILR 215; cf the immunity of the Sovereign Order of Malta in respect of the same class of matters: *Scarfo v Sovereign Order of Malta* (1957) 24 ILR 1.

jurisdiction within its territory.[105] Italy agreed in 1929 not to intervene in the 'exclusive jurisdiction' of the State of the Vatican.[106] The Holy See has jurisdiction 'in conformity with the provisions of international law' over all persons with a 'fixed residence within the State of the Vatican'.[107] As the government of the Vatican City, the Holy See is clearly independent: indeed it provides an unusual example of a small entity which is more independent in political than in the functional fields. It is a party to numerous treaties, multilateral and bilateral. Under Article 24 of the Lateran Treaty:

> With regard to the sovereignty pertaining to it in the field of international relations, the Holy See declares that it wishes to remain and will remain extraneous to all temporal disputes between nations, and to international congresses convoked for the settlement of such disputes, unless the contending parties make a joint appeal to its mission of peace; nevertheless, it reserves the right in every case to exercise its moral and spiritual power. In consequence of this declaration, the State of the Vatican will always and in every case be considered neutral and inviolable territory.

The neutrality of the Vatican was recognized by all the belligerents in World War II.[108] The Vatican City is a member of the Universal Postal Union[109] and the International Telecommunications Union.[110] It is not, however, a member of any political international organization. In 1944 tentative enquiries were made by the Holy See as to membership in the United Nations. Secretary of State Hull replied that:

> it would seem undesirable that the question of membership of the Vatican State be raised now. As a diminutive state the Vatican would not be capable of fulfilling all the responsibilities of membership in an organization whose primary purpose is the maintenance of international peace and security. In a number of cases diminutive states were refused admission to the League on this ground. Membership in the organization would not seem to be consonant with the provisions of Article 24 of the Lateran Treaty,

[105] *In re Dalla Torre* (1936) 8 ILR 250 (libel). The Piazza S Pietro remains part of the Vatican, despite Italian police power there under the Treaty: *Levantesi v Governor of Rome* (1940) 10 ILR 106.

[106] Lateran Treaty, Art 4. [107] Ibid, Art 9.

[108] On 10 July 1943 President Roosevelt assured Pope Pius XII that 'the neutral status of Vatican City as well as of the Papal domains throughout Italy will be respected' throughout the Italian operations: USFR 1943/II, 926–7. The Acting-Secretary of State, on 2 March 1944, stated that 'Germans, Japanese and other enemy diplomatic missions accredited to Holy See should be given the option of entering Vatican City upon the arrival of Allied troops in the Italian Capital': ibid, 1944/IV, 1315. The British view was that no such option should be given since, technically, Axis diplomats would lose their immunity if apprehended outside the limits of Vatican City. See also Wright (1944) 38 *AJ* 452; Carrillo, in Kent and Pollard (eds), *Papal Diplomacy in the Modern Age*, 137, 139–45.

[109] 186 UNTS 356; 639 UNTS 368 ('sovereign country').

[110] 193 UNTS 189 ('country' listed in Annex 1 ('État de la Cité du Vatican' is so listed); otherwise 'sovereign country': Art 1(2)).

particularly as regards spiritual status and participation in possible use of armed force. Non-membership would not preclude participation of the Vatican State in social and humanitarian activities of the organization nor impair its traditional role in promotion of peace by its usual influence.[111]

In other words, the status of the Vatican as a State was not denied; rather the (now outdated) precedent of Liechtenstein was relied on to preclude the possibility of United Nations membership.

It has been argued that the Vatican City is not a State because it is not independent of the Holy See.[112] But no State is independent of its government; independence as a criterion for statehood is concerned with external independence, not with the internal arrangements of the State itself. As Duursma notes:

> The criterion of independence aims to distinguish one State from another so that one territorial entity is not just the continuation of another territorial entity. The Holy See however is neither a State nor a territorial entity. Moreover, it is an authority which partly coincides with certain Vatican temporal governmental institutions and which operates from inside the Vatican City. Thus the presence of the Holy See cannot preclude the Vatican City's statehood, because the Vatican City is not subject to any *external* influence.[113]

For all these reasons, it is clear that the Vatican City is a State in international law, despite its size and special circumstances. However, before any definite conclusion can be reached some reference to the international status of the Holy See is necessary.

## (2) The international status of the Holy See[114]

The Holy See is the central authority and administrative organ of the Catholic Church. It consists of the Pope, the College of Cardinals and the central

[111] USFR 1944/I, 960–3, 962. He added that 'protection of the integrity of the Vatican as an independent State would not be increased by membership'. No formal membership application has ever been made. In 1964 the Holy See acquired observer status at the UN: see Lucien-Brun [1974] *AFDI* 536.

[112] See, e.g., Arangio-Ruiz (1996) 29 *RBDI* 354, 366–7: 'With regard to the Holy See as well as any State, what matters from the viewpoint of international personality and from the viewpoint of the person's organization is the factual situation. The factual situation is that the Vatican City is an entity dependent from the Holy See as a part of its effective organisation. It follows that on the one hand the Vatican City is not an international person; on the other hand, that any internationally relevant conduct of the Vatican City is a conduct of the Holy See (and/or the Roman Church). In other words, the status of the Vatican City does not differ, from the viewpoint of international law, from the status of a province or any other subdivision of a State. It is just a part of the person regardless of whatever legal status it may have within the internal law of the Holy See, of the Roman Church or of any State.'

[113] Duursma, *Microstates*, 413 (emphasis in original).

[114] See also de la Brière, (1937) 20 *RDI* 29; Le Fur, *Le Saint-Siège et le droit des gens*; Duursma, *Microstates*, 386–8.

departments that govern the Church. It is a non-territorial body with a long history in international affairs. Before 1870 that involvement was associated with the government of the Papal States so that no problem of the separate legal status of the Holy See arose in practice. However, it seems clear that the Holy See did have a separate international status before 1870.[115] After the annexation of the Papal States in 1870 other States continued to accredit envoys to and to receive Legates from the Holy See[116] and the Pope continued to make concordats with foreign States.[117] Though some writers denied that the Holy See had any international standing at all after 1870, the position is that it retained after the annexation of the Papal States what it had always had, a degree of international personality, measured by the extent of its existing legal rights and duties, together with its capacity to conclude treaties and to receive and accredit envoys.[118] Writers have differed as to whether this personality was particular[119] or general.[120] It does not appear that the status of the Holy See, as distinct from the Papal States under its government, was intended to be nullified by the events of 1870.[121] Certainly the Holy See then ceased to be the government of a State, but its international position had been, at least in part, independent of its territorial competence; as Palmerston pointed out, the territorial competence was justified by the international position of the Pope as head of the Catholic Church.[122]

### (3) The relation between the Holy See and the Vatican City

Since 1929 the State of the City of the Vatican and the Holy See have achieved general recognition at the interstate level.[123] The relation between them is, however, a matter of some perplexity. There are three possibilities: that the only

[115] To this effect see Kunz (1952) 46 *AJ* 307, 309–11; Sereni, *The Italian Conception of International Law*, 188; Ehler (1961) 104 *HR* 1, 8.

[116] Graham, *The Rise of the Double Diplomatic Corps in Rome*; Eustache, *Grotius SP 1972*, 90; *La Prassi Italiana di Diritto Internazionale (1861–1887)*, 303–34, 420–1.

[117] Concordats are, it has been held, 'international treaties' and so subject to rules of States succession: *Concordat (Germany) Case* (Fed Const Ct, 1957) 24 ILR 592. See also Wagnon, *Concordats et Droit International* (1935); de la Brière (1936) 63 *HR* 371; Ehler (1961) 104 *HR* 1.

[118] See Arangio-Ruiz (1996) 29 *RBDI* 354, 360–1.

[119] Brownlie, *Principles*, 63–4.

[120] Kunz (1952) 46 *AJ* 308, 310.

[121] Cf *Ponce v Roman Catholic Apostolic Church*, 210 US 296, 318 (1907): 'The Holy See still [*sc* after 1870] occupies a recognized position in international law, of which the courts must take juridical notice.' Accordingly the Church could hold property in Puerto Rico despite its non-incorporation under local law.

[122] Despatch of 5 June 1849 (FO 120/233 no 10), cited in Smith, *GB & LN*, vol I, 220–1.

[123] In 1973, 88 States maintained diplomatic relations with the Holy See. The USSR refused to recognize the legal status of either the Holy See or the Vatican State, but its practice was not always

international legal person is the Vatican City;[124] that the only legal person is the Holy See, which, as part of its activities, controls a certain territory and population;[125] or that there are two distinct legal persons, the Vatican and the Holy See.[126] In view of the nominal character of the statehood of the Vatican, the second alternative is attractive.[127] But the third hypothesis—that is, of dual personality—has been generally accepted in practice[128] and in the literature.[129] For example, both the Vatican City and the Holy See are parties to a number of multilateral treaties. The Universal Postal Union and the International Telecommunications Union already have been mentioned.[130] The Holy See is listed as a member of the International Atomic Energy Agency[131] and is nominated as a contributor to the work of the functional agencies of the United Nations.[132] It would be significant if accessions to multilateral treaties by the Vatican City

consistent with this profession: cf Okeke, *Controversial Subjects*, 70–2. In 2005, the Vatican Secretariat of State indicated that the Holy See maintains diplomatic relations with 172 States, the European Union and the Sovereign Military Order of Malta, along with 'relations of a special nature' with the Russian Federation and Palestine Liberation Organization.

[124] E.g. Higgins (1929) 10 *BY* 214. This was also the view taken in Oppenheim (8th edn), vol I, 254–5; in the 9th edn, 328, it is described as the 'strict' one.

[125] Siotto-Pintor (1932) 41 *HR* 247, 331–2; Mendelson (1972) 21 *ICLQ* 609, 611–12; Verhoeven, *Reconnaissance*, 170–6.

[126] Sereni, *The Italian Conception of International Law*, 231; Ehler (1961) 104 *HR 1*, 9; Anzilotti, (1929) 9 *RDI* 165; Pallieri, (1930) 53 *Riv Int di Scienze Sociali* 195.

[127] The Supreme Court of the Philippines appears to have taken something like this position: 'In the view of the wordings of the Lateran Treaty, it is difficult to determine whether the statehood is vested in The Holy See or in the Vatican City. Some writers even suggested that the treaty created two international persons . . . Inasmuch as the Pope prefers to conduct foreign relations and enter into transactions as The Holy See and not in the name of the Vatican City, one can conclude that in the Pope's own view, it is The Holy See that is the international person.' *The Holy See v Star Bright Sales Enterprises Inc* (1994) 102 ILR 163, 169 (Supreme Court, Quiason J).

[128] Cf Art III(1), Spanish Concordat, Vatican City, 27 August 1953, 160 BFSP 698.

[129] See also the works cited in Oppenheim (9th edn), vol I, 328 n 2; Okeke, *Controversial Subjects*, 65–78.

[130] But cf the discrepancy between 186 UNTS 656 (where the Vatican City is listed as having ratified the Brussels Postal Convention (23 September 1953) ) and 639 UNTS 368 (where the Holy See is listed as having ratified the 1964 Vienna Postal Convention (22 April 1968).) With respect to the ITU and UPU, the Secretariat of State indicates that the Holy See is a 'Member also in the name and on behalf of Vatican City State.' The same formula was applied with respect to membership of the International Grains Council, International Telecommunications Satellite Organization and the International Institute for the Unification of Private Law.

[131] But at 293 UNTS 359, the Statute of the IAEA is stated to have been ratified by the Vatican City (20 August 1957): cf Amendment to the Statute of the IAEA (1961), 471 UNTS 334, accepted by the Holy See, 11 January 1962.

[132] Cf GA res 3654 (XXV), 4 December 1970. Further international organizations of which the Holy See is a Member include various disarmament bodies (including OPCW), UNCTAD, UNHCR and WIPO. It is an 'observer' or an 'observer on an informal basis' of FAO, ICAO, IFAD, ILO, IMO, IOM, the Latin Union, the UN Centre for Human Settlements, the UN Committee on Peaceful Use of Outer Space, the UN Commission on Sustainable Development, the UN

had been restricted to cases where the primary application of the treaty was to the territory of the Vatican itself, whilst accession by the Holy See had taken place in cases of humanitarian treaties or treaties that were relevant to the more general religious or cultural purposes of the Holy See. To some extent (for example, with the functional international organizations) this may be the case, but practice with respect to multilateral treaties has not been entirely consistent. Thus the Vatican City signed the International Wheat Agreement of 1956[133] and the Convention on the Recovery Abroad of Maintenance,[134] but the Holy See signed the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[135] and the 1965 Convention on Transit Trade of Land-Locked States.[136] On the other hand, the Holy See has ratified the two Vienna Conventions on Diplomatic and Consular Relations,[137] various international humanitarian law conventions,[138] and various conventions relating to cultural property and copyright.[139] Some bilateral treaties are concluded with the Holy See,[140]

International Drug Control Programme, UNEP, UNESCO, UNIDO, the World Food Programme, WHO and WTO. It participates in or observes the work of a number of regional organizations.

[133] 270 UNTS 104 (ratified 9 July 1956); also Protocol for the Extension of the International Wheat Agreement, 22 March 1962), 604 UNTS 378 (accepted by Vatican City, 30 August 1965).

[134] 268 UNTS 32, 84 (ratified 5 October 1954).

[135] 330 UNTS 38 (acceded to, 14 May 1975).

[136] 597 UNTS 42 (unratified).

[137] 500 UNTS 95 (ratified 17 April 1964); 596 UNTS 261 (ratified 8 October 1970).

[138] E.g., Fourth Geneva Convention, 12 August 1949, 75 UNTS 287 (ratified 21 February 1951); International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966), 660 UNTS 195 (ratified 1 May 1969); 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, 10 October 1980, 1342 UNTS 137 (acceded to, 22 July 1997); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85 (acceded to, 26 June 2002); Convention on the Rights of the Child, 20 November 1989), 1577 UNTS 3 (ratified 20 April 1990); Comprehensive Nuclear Test Ban Treaty, 10 September 1996 (not yet in force), A/50/1027 (ratified 18 July 2001); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997, 2056 UNTS 211 (ratified 17 February 1998); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 13 January 1993, 1974 UNTS 45 (ratified 12 May 1999).

[139] Universal Copyright Convention, 6 September 1952, 216 UNTS 132 (ratified 5 July 1955); Convention and Protocol for the Protection of Cultural Property in the event of armed conflict, 14 May 1954, 287 UNTS 351 (acceded to, 24 February 1958); Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 29 October 1971, 866 UNTS 67 (ratified 4 April 1977); Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, 13 December 1979 (not yet in force) (signed 13 December 1979).

[140] Apart from the Concordats see, e.g., Fundamental Agreement (Israel–Holy See) 30 December 1993, 1775 UNTS 181 (entered into force 10 March 1994); Agreement on matters of common interest in the Holy Land (Spain–Holy See), 21 December 1994, 1890 UNTS 129 (entered into force 4 July 1995). The Holy See also ratified the Convention and Protocol relating to the Status of Refugees, 28 July 1951, 189 UNTS 137; and its Protocol of 31 January 1967, 606 UNTS 268. The 1951 Convention was ratified with the reservation that 'the application of the Convention must be compatible in practice with the special nature of the Vatican City State and without prejudice to the norms governing access to and sojourn therein . . .'

others with the Vatican State.[141] Argentina and Chile entered into an agreement under Papal auspices to mediate their dispute concerning the Beagle Channel; it was the Holy See that was party to the mediation agreement.[142] Though there may be discerned a division of labour in which the Vatican State enters into agreements of a strictly functional character[143] and the Holy See, agreements related to the special mission of the Roman Catholic Church, there does not appear to be much consistency in the terminology used.[144]

Given that there exist two legal persons—the Holy See and the State of the City of the Vatican—a further question arises as to the exact legal relation between them. This has variously been described as a real union,[145] or a form of vassalage.[146] The purposes of classification of this kind must, however, be borne in mind. Terms such as 'vassal' or 'real' or 'personal union', while they may accurately describe a particular state of affairs and thus aid in understanding, do not have any general or distinctive legal consequences. To some extent the desire to particularize or categorize the relationship between the two entities reduces itself to a semantic dispute. In any case the analogy with a real union does not seem useful;[147] that of vassal State, though better, is also

[141] E.g., Exchange of notes constituting an agreement concerning tax exemption for diplomatic agents of Italian nationality accredited to the Holy See by other States (Italy–Vatican City), 16 December 1955, 260 UNTS 319.

[142] Vatican City Agreement (Holy See–Argentina–Chile), 8 September 1982, 1292 UNTS 201. For the outcome see 24 ILM 1, 11: by a definitive Peace and Friendship Treaty, Vatican City, 29 November 1984, 1399 UNTS 102, Argentina and Chile accepted a boundary determination and navigational regime in the Beagle Channel (Arts 7–11 and annex 2), implicitly, it is said, with reference to the Arbitration award of 2 May 1977 (17 ILM 634, 52 ILR 93). See Introductory Note, 24 ILM 1, 2.

[143] E.g., International Convention on certain rules concerning civil jurisdiction in matters of collision, 4 February 1954 (Vatican); Agreement concerning subscriptions to newspapers and periodicals, 10 July 1964 (signed by Vatican).

[144] E.g., agreements with certain States to establish Catholic missions within the State armed forces: Philippines and Vatican City, Exchange of notes constituting an agreement concerning the establishment of a Military Vicariate in the Armed Forces of the Philippines, Manila, 20 September 1951, 28 March & 18 June 1952; Spain and the Holy See, Agreement concerning military jurisdiction and religious assistance to the Armed Forces, 5 August 1950. And see the list of agreements in Okeke, *Controversial Subjects*, 74–6. One writer suggests that the division is between 'service oriented contracts' and 'international agreements of a major nature': Murphy (1987) 19 *Case W'n Res JIL* 375, 378. Arangio-Ruiz (1996) 29 *RBDI* 354, 367 explains the relation as one of agency: 'The Holy See . . . may well in given areas of its international relations prefer to operate through the Vatican City. The Vatican City appears in fact formally the party also in some multilateral instruments of a technical nature . . . It seems obvious . . . that the acting or contracting party is always, from the viewpoint of general international law, the Holy See (or the Roman Church).'

[145] Sereni, *The Italian Conception of International Law*, 293; Ehler, (1961) 104 *HR 1*, 10–11.

[146] Kunz (1952) 46 *AJ* 308, 313; Cumbo (1948) 2 *ILQ* 603, 613–14.

[147] A real union is normally understood as a union of governments of two distinct territorial entities. This does not adequately describe the relation between the Vatican and the Holy See: cf Ehler, (1996) 104 *HR 1*, 10–11.

inappropriate, as the Holy See is not foreign to the Vatican City. The relation would appear to be that of State and government, but with the peculiarity that the government in question, the Holy See, has an additional non-territorial status which is much more significant in practice than its status *qua* government of the City of the Vatican.

This position has, however, been denied by Duursma (in the best modern study of the issue) on grounds derived from Canon law. According to her:

> The Holy See is not a State in international law, but has an international legal personality of its own which permits it to take international actions such as the conclusion of treaties and the maintenance of diplomatic relations . . . Although the Holy See has full sovereignty over the Vatican City, it is not the Government of the State of the Vatican City. According to the Code of Canon Law, the Holy See comprises the Sovereign Pontiff, the Roman Curia and that which appears from natural law or the context. The Roman Curia includes the Secretary of State, the Council for public ecclesiastic affairs, the Sacred Congregations . . . the ecclesiastic Tribunals and other institutions as defined by special law. The Sovereign Pontiff and the Secretary of State are positions which the Holy See and the worldly governmental institutions of the Vatican City have in common. Neither the Pontifical Commission, the 'Consulta', the State General Counsellor nor the secular judicial organs . . . can be considered a part of the Holy See, as they are not incorporated in the Roman Curia by special law and do not belong to the Holy See through natural law or the context due to their exclusively secular tasks. As a consequence, if the State of the Vatican City were to disappear, the governmental institutions of the Vatican City would cease to function too, except for the Sovereign Pontiff and the Secretary of State who are organs of the Holy See. The Vatican City and the Holy See are therefore two legal persons of which the former has been established for the better functioning of the latter.[148]

Duursma's position as to the government of the Vatican City is unusual, and appears to confuse the issue under Canon Law of organization of the Church with the identification under international law of the Government of the Vatican City. It is not disputed that the Pope is the Head of State of the Vatican City and has temporal sovereignty in that regard. The means by which that sovereignty is exercised in terms of the legal system of the Vatican City is a matter of indifference to international law.

Leaving to one side issues of internal organization, the position is then that the Holy See combines functions associated with its mission in the world with its role as the independent government of a populated territory; it is both an international legal person in its own right and the government of a State. A parallel would exist if the United Nations were granted sovereignty over some

[148] Duursma, *Microstates*, 386–7 (citations omitted).

small territory which was then recognized as a State.[149] In such a case the status of the United Nations as government of the territory concerned would not derogate from its general legal status as international organization.[150] Much the same has been true of the Holy See after 1929.

In this context the legal status of the Order of St John of Malta is also of interest.[151] The Sovereign Military Order of St John of Jerusalem, of Rhodes and of Malta is an ancient religious order dedicated to the provision of medical services.[152] During its long history[153] it was sovereign over the islands of Rhodes (1310–1528) and Malta (1530–1798). The latter was ceded compulsorily to Napoleon by a treaty of 12 June 1798,[154] over Russian protest.[155] Although Article 10 of the Treaty of Amiens of 27 March 1802 stated that 'les îles de Malte, de Gozo et Comino, seront rendue à l'ordre de Saint Jean de Jérusalem, pour être lui tenues aux mêmes conditions auxquelles il les possédait avant la guerre,'[156] the islands were in fact ceded by France to Britain by the Treaty of Peace of 1814.[157]

Despite the final loss of its territorial domains, the Order has continued to have a certain international personality: it exchanges envoys with, or is otherwise recognized by, more than eighty States. It has observer status in the General Assembly.[158] A special Papal Tribunal appointed to enquire, *inter alia*,

[149] This possibility was discussed in 1945 and rejected.

[150] The situation would be similar if Switzerland were to cede to the ICRC the territory in Geneva on which its headquarters are located. For the international status of the ICRC see Chapter 1.

[151] About which see generally Breycha-Vauthier and Potulicki (1954) 48 *AJ* 554; Farran (1954) 3 *ICLQ* 217; Verhoeven, *Reconnaissance*, 176–82; *Nanni v Pace & Sovereign Order of Malta* (1935) 8 ILR 2; *Répertoire suisse*, vol I, 498–9; de Fischer (1979) 163 *HR* 1; Paone (1979) 62 *Rdi* 233; Monaco (1981) 64 *Rdi* 14; Cremona, in Bernhardt (ed), 3 *Enc PIL* (1997) 278–80; Cox (2002) 6 *Mountbatten JL Stud* 26; Theutenberg, *The Holy See, the Order of Malta, and International Law*.

[152] The modern medical and charitable activities of the Order are described in Sire, *The Knights of Malta*, 268–79. See also Cardinale, *Orders of Knighthood Awards and the Holy See*, 81–92; McHugh, *The Knights of Malta. 900 Years of Care*, 2–33.

[153] Cardinale calls it 'the most ancient religious Order of Chivalry in Christendom:' *Orders of Knighthood*, 81.

[154] 53 CTS 375.

[155] For the appointment of Tsar Paul I as Grand Master of the Order and Russian protests at the annexation of Malta, see 53 CTS 359–409.

[156] 56 CTS 289.

[157] 56 CTS 289.

[158] At that time concerns were expressed as to the criteria for the granting of that status. Referring to the grant of observer status to the ICRC in 1990 (GA res 45/6, 13 October 1990), the United States stated that the ICRC case 'should not constitute a precedent for the granting of observer status to any other entity of a non-governmental character.' A/49/231, 21 (1994). A working group established to study the problem proposed that 'the granting of observer status in the General Assembly should in future be confined to States and to those intergovernmental organizations whose activities [cover] matters of interest to the General Assembly': Oral Report, Working group Chairman, A/C.6/49/SR.40 (1994), para 3. The Sixth Committee on 25 November 1994 adopted a decision to this effect: A/C.6/49/L./16. The Sovereign Order, which is not an intergovernmental organization, had already been granted observer status by GA res 48/265, 24 August 1994.

into the 'nature of its status as a sovereign Order' reported on 24 January 1953 that:

> [t]he status of the Sovereign Order . . . which has been repeatedly recognized by the Holy See . . . comprises the enjoyment of a number of rights which the Order possesses as a subject of international law. Such rights which are peculiar to sovereignty—according to the principles of international law—have, following the example of the Holy See, also been recognized by a number of States; they do not, however, constitute for the Order a complex of rights and privileges which are reserved to entities which are sovereign in the full sense of the word.[159]

While according to its Charter 'The Order is a subject of international law and exercises sovereign functions',[160] in practice its 'functions' are limited and specific. The Papal Tribunal added that '[t]he status of [the] sovereign Order . . . is functional, that is to say, intended to assure the fulfilment of the scope of activities of the Order and its development throughout the world.'[161] The Order is not a State.[162] Nor does its present status derive from its former position as sovereign of Malta; despite the Treaty of Amiens it is not a government-in-exile.[163] Nonetheless, according to the Italian Court of Cassation, it is on the basis of international law (rather than municipal dispensation) that its organs are not subject to taxation in Italy.[164] Judgments of its courts, for purposes of enforcement in Italy, are treated like those of a foreign State.[165] In countries that recognize it, the Order enjoys sovereign immunity 'corresponding to the needs of its autonomy'.[166] This immunity extends only to acts *jure*

[159] Text in Breycha-Vauthier (1954) 48 *AJ* 554, 561.

[160] Constitutional Charter and Code 1961, as revised 28–30 April 1997: Cox (2002) 6 *Mountbatten JL Stud* 26, 40–1.

[161] Breycha-Vauthier (1954) 48 *AJ* 554, 561.

[162] 'The United States, on its part, does not recognize the Order as a State': Office of Legal Advisor (1959), quoted in Cardinale, *Orders of Knighthood Awards and the Holy See*, 84. But cf Treaty of Amity of 1935 (San Marino-Sovereign Order), cited in Cox (2002) 6 *Mountbatten JL Stud* 26, 31 n 23.

[163] Farran (1954) 3 *ICLQ* 217; but see *Sovereign Order of Malta v Soc An Commerciale* (Tribunal of Rome 1954) 22 ILR 2.

[164] *Ministry of Finance v Association of Italian Knights of the Order of Malta* (Ct of Cass 1978), 65 ILR 320, 323: the Order described as 'a sovereign subject of international law'.

[165] *Piccoli v Association of Italian Knights of the Order of Malta* (Ct of App, Rome 1978), 77 ILR 613, 615: '[T]he Order has its own legal system, called the Maltese system, composed of two concurrent elements, one clerical and one lay . . . In this respect, therefore, in reserving to itself the right to determine such disputes, the Order demonstrates its very sovereignty.' Judgements of Vatican Courts would appear similarly to be treated in Italy as foreign judgements; and enforceable, if not inconsistent with obligations of Italy under the ECHR. See *Pellegrini v Italy* (2002) 35 EHRR 2, para 31: 'Under the terms of Article 8(2) of the Concordat between Italy and the Vatican, as amended . . . a judgment of the ecclesiastical courts annulling a marriage, made operative by the higher ecclesiastical control body, may be made operative in Italy at the request of one of the parties through a judgment of the competent appeal court.'

[166] *Sovereign Order of Malta v Brunelli, Tacali & Ors* (Ct of Cass, 1931) 6 ILR 46.

*imperii*,[167] but on the other hand what is an act *jure imperii* depends on its specific functions, rather than on what is proper for a State: thus a contract of employment with a doctor was held an act *jure imperii*, whereas a contract for the sale of grain was held an act *jure gestionis*.[168] It may be doubted whether the international personality of the Order is general rather than particular to recognizing States. Under the Geneva Conventions of 1949 its status is merely that of a 'relief society', as has been pointed out.[169] Its functions, important as they are, do not seem to warrant an extension of the *Reparations* Opinion reasoning. General international personality, though of practical and honorific value, can hardly be said to be 'indispensable' to the achievement of the Order's purposes.[170]

## 5.4 'Internationalized territories': the Free City of Danzig and some modern analogues

### (1) The concept of 'internationalized territory'

A persistent form of organization of territories disputed between States on strategic, ethnic or other grounds has been the establishment of autonomous entities under a form of international protection, supervision or guarantee. Such entities have been referred to generically as 'internationalized territories'.[171] But there appears to be no legal, as distinct from political, concept of 'internationalized territory', and the cases discussed vary considerably in nature and extent. Some, such as the Memel Territory (1924–39) or the Saar Territory (1920–35, 1945–57)[172] were established as autonomous areas

[167] *Sovereign Order of Malta v Soc An Commerciale* (1954) 22 ILR 1.

[168] Cf *Scarfo v Sovereign Order of Malta* (Tribunal of Rome 1957) 24 ILR 1. See also *Nanni v Pace & Sovereign Order of* Malta (1935) 8 ILR 2, 4: 'the Sovereign Order . . . is an international person existing apart from the national sovereignty of the State. It is, accordingly, by virtue of a customary norm of international law, received by our own internal law exempt from the necessity of obtaining the permission of the government for the acquisition of immoveable property for its own institutional purposes.'

[169] Brownlie, *Principles* (2nd edn), 86; (6th edn), 64. See also 75 UNTS 135. The Vatican, Liechtenstein, and Monaco, by contrast, were all signatories of the Conventions.

[170] Cf ICJ Rep 1949 p 170, 178. On the Teutonic Order and the Order of the Templars and the Jesuits in international law, see Verzijl, *International Law*, vol II, 32–7; Cardinale, 107–10.

[171] Ydit, *Internationalized Territories*; Marazzi, *I Territori Internazionalizzati*; Wilde, *Territorial Administration by International Organizations*; Fox, *Humanitarian Occupation*.

[172] There were indeed two different 'Saar Territories'. The first Saar Territory was ceded to France for 15 years (1920–35) by Arts 45–50 of the Treaty of Versailles, as compensation for war damage. Germany renounced 'the government of the territory' (Art 49) but remained residual sovereign. The territory itself was regarded, by German Courts at least, as still part of the Reich: Saar *Territory (Trade Marks) Case*, 7 AD No 24 (1934). Convictions in the Territory were convictions 'in Germany' for

within States but with a form of international protection. There are modern analogies such as Kosovo (1999–), where a United Nations administration was established with assurances respecting the territorial integrity of Yugoslavia[173]—though, as will be suggested below, it is distinct in key respects. Other 'international' territories, such as the International City of Tangier[174] or the International Settlement of Shanghai (1845–1944)[175] were rather an extension and institutionalization of the system of capitulations than a protectorate or other distinct entity, and, as such, have no latter-day analogy.

More significant for our purposes are those entities that are established on territory not part of another State and given substantial powers of internal self-government. For example, the Free City of Cracow was established by Article 6 of the Final Declaration of the Congress of Vienna as 'in perpetuity a free, independent City, strictly neutral, under the protection of Russia, Austria and Prussia'.[176] Perpetuity in this case lasted until 1846, when the territory was, by agreement between the protecting Powers (but without the consent of the organs of the Free City) annexed by Austria.[177] Ydit considers that it was 'never a viable State entity' in view of the threats to its independence from the protecting States on the one hand and Polish aspirations on the other.[178] But

the purpose of a law concerning recidivism: *Status of the Saar Territory Case* (*Reichsgericht* 1930), 5 AD No 18. Inhabitants of the territory under Art 296 of the Treaty of Versailles retained German nationality: *Muller v Roeckling Bros* (Franco-German MAT 1923) 3 Rep MAT 883. See also the Protocol between the German Government and the Saar Basin Territory, 3 June 1921, 5 LNTS 208 Art II. The Saar Territory was returned to Germany in 1935 after a plebiscite: see Ydit, *Internationalized Territories*, 44–5; Temperley, *A History of the Peace Conference of Paris*, vol II, 176–84; Bisschop, *The Saar Controversy*; Rousseau, *DIP*, 3 vol II, 414–18; Chesterman, *You, The People*, 18–20. However it was, after a fashion, reconstituted and given *de facto* autonomy in part of the French zone of occupation in 1945. See *Rendition of Suspected Criminal (Saar Territory) Case* (1955) 22 ILR 512; *Statute of Saar Territory Case*, ibid 630; Whiteman, 3 *Digest* 392–425; Freymond, *The Saar Conflict 1945–1955* (1960); Rousseau, *DIP*, vol II, 418–23. The Territory was reincorporated into the German Federal Republic from 1 January 1957. See French–GFR Agreement of 27 October 1956, 162 BFSP 957.

[173] SC res 1244, 10 June 1999, preamble: '[r]eaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia' and 'call[ing] . . . for substantial autonomy and meaningful self-administration for Kosovo.'

[174] For details see Ydit, *Internationalized Territories*, 154–84; Stuart, *The International City of Tangier* (2nd edn); Gutteridge (1957) 33 *BY* 296; Delore (1941) 35 *AJ* 140; del Castillo (1951) 20 *RIFDG* 18, 165–80; Rousseau, *DIP*, vol. II, 430–40.

[175] Ydit, *Internationalized Territories*, 127–53.

[176] Final Declaration of the Congress of Vienna, 9 June 1815, 2 BFSP 12. See also Additional Treaty relative to Cracow, ibid, 74; and Constitution, ibid, 80.

[177] Convention between Austria, Prussia and Russia for the Definitive Incorporation of Cracow in Austria, 15 April 1846, 35 BFSP 1088.

[178] Ydit, *Internationalized Territories*, 95–108, 107: cf Verzijl, *International Law*, vol II, 502–3. Poland, of course, was not a State at that time. However, if a Polish State had re-emerged, it is clear as a political matter that it would have made a claim to the territory of the Free City. It is unclear why Ydit drew legal consequences from this contingency.

statehood is not the same thing as viability, and the Free City survived for more than thirty years.

An abortive 'Free City' in modern times was the Free City of Trieste, which was to be constituted as an autonomous entity under Article 21 of the Italian Peace Treaty of 1947, with its 'integrity and independence' to be guaranteed by the Security Council.[179] Under its Permanent Statute a Governor, national of neither Yugoslavia nor Italy, was to be appointed by the Security Council to administer the territory in conjunction with a local executive and legislature but with considerable personal authority: the Governor was to be subject only to the direction of the Security Council.[180] The Territory was to have its own foreign affairs powers: it was not subject to the veto of any one State.[181] But, as the London Agreement of 1954 states, 'it . . . proved impossible to put into effect the provisions of the Italian Peace Treaty relating to the Free Territory . . .'[182] The particular difficulty was the appointment of a Governor, but this was symptomatic of irreconcilable differences of interest between the parties.[183] Accordingly, after seven uncovenanted years of Allied (United Kingdom–United States) Military Government in Zone 'A' of the proposed Territory and of Yugoslavian administration in Zone 'B', the parties principally concerned agreed that Zone 'A', with minor rectifications and including the port itself, should be reoccupied by Italy and that Zone 'B' should continue to be administered by Yugoslavia.[184] Despite the abandonment of the Trieste proposal, the Italian Council of State held in 1961 that Italy had not regained sovereignty over Zone 'A':

> If . . . the object of the Memorandum had been to renew the full, normal and final exercise of sovereignty by Italy over Zone A and in consequence to recognize that Yugoslavia had an absolute right of sovereignty over Zone B, then the Memorandum would have purported to modify the terms of the Treaty of Peace. But the Memorandum was not an instrument which could technically achieve such an object for the reason, if for no other, that the other signatories of the Treaty of Peace did not participate in the Memorandum . . . Though politically and in fact the Memorandum created a new state of affairs, in law it was based on Annex VII of the treaty, which

[179] Treaty of Peace with Italy, 10 February 1947, 49 UNTS 3, 137–9.

[180] Ibid, Annex VI, 186–97; see also Annexes VII–X (transitional and ancillary provisions).

[181] Since the Governor was only bound by affirmative directions of the Security Council in conformity with the Peace Treaty, the veto would have operated in favour of Trieste's independence.

[182] Memorandum of Understanding regarding the Free Territory of Trieste, 5 October 1954, 235 UNTS 99, art 1 (Italy, USA, UK, Yugoslavia).

[183] For an account of the circumstances see Ydit, *Internationalized Territories*, 231–72.

[184] Trieste was to remain a Free Port (Art 5). Minority guarantees were provided (Annex II): Schwelb (1955) 49 *AJ* 240.

gives the Allied military commands the right to administer their respective Zones . . .[185]

But, even if correct, this anomalous situation did not appear to have any significant international legal effects.[186]

Politically none of these earlier experiments in internationalization were very successful.[187] However, the classification of such territories as States, either generally or for specific purposes, is a matter of considerable interest, especially since new experiments in internationalization have been undertaken, for example in Bosnia, Kosovo and East Timor. Historically a significant and well-studied case of an internationalized territory was the Free City of Danzig; it was also the subject of not less than six decisions of the Permanent Court, enabling an authoritative analysis of its legal status.

## (2) The Free City of Danzig[188]

The Free City of Danzig, like the Memel Territory in respect of Lithuania, was established in 1919 to ensure Poland's access to the sea while safeguarding the interests of the mostly German-speaking inhabitants. On the other hand,

[185] *Società Teatro Puccini v Commissioner-General of the Government for the Territory of Trieste* (1961) 40 ILR 43, 47–8. Courts in the Territory have continued to be 'Italian' by the same process of redelegation: *CEAT v Società Hungaria* (Ct of Cass 1951) 18 ILR 81; *Soc Immobiliare Roma-Trieste v Stabilimento Tipografico Triestino e Soc Editrice del 'Piccolo'* (Ct of Cass 1952) 19 ILR 145.

[186] See further Whiteman, 3 *Digest* 68–109; Udina, *Scritti sulla Questione di Trieste*; Gervais (1947) 51 *RGDIP* 134; Conforti (1955), 38 *RDI* 568; de Leonardis, *La 'diplomazia atlantica' a la soluzione del problema di Trieste: 1952–1954*. In 1975 Italy and Yugoslavia announced their agreement to a 'final settlement' of the Trieste situation, accepting as permanent (with minor amendments) the 1954 interim settlement: (1976) 80 *RGDIP* 949. The Treaty of Osimo, 1 October 1975, 1466 UNTS 25, in force 3 April 1977 is apparently regarded as superseding the London Agreement of 1954, on what basis is not clear. See further Caggiano (1976) 2 *Ital Ybk* 248; Udina (1977) 60 *RDI* 405; Udina (1977) 83 *RGDIP* 301; Nodari (1977) 19 *Österreichische Osthefte* 161; Day (ed), *Border and Territorial Disputes*, 73–4. For the short-lived Free City of Fiume see Verzijl, *International Law*, vol II, 503–4; Ydit, *Internationalized Territories*, 51–9; *The Bathori* [1934] AC 91; 6 ILR 108 (PC); *Zannoni v Sbisà* (Milan CA 1920) 1 ILR 28; and the Agreement between Italy and the Serb-Croat-Slovene State, Rome, 27 January 1924, reciting 'l'impossibilité absolve de procéder à l'organization d'une façon pratique à l'État Libre de Fiume . . .' and terminating the status of the Free City: 120 BFSP 685.

[187] This is the theme of Ydit, *Internationalized Territories*.

[188] See Ydit, *Internationalized Territories*, 50–1, 185–230; Schwarzenberger, *International Law*, vol I, 109–12; O'Connell, *International Law*, (1st edn, 1965), 357–9 (not in 2nd edn); Verzijl, *International Law*, vol II, 500–2, 510–45. See also de Weck, *La Condition Juridique du Conseil du Port et des Voies d'Eau de Dantzig*; Hostie, *Questions de Principe relatives au statut international de Dantzig*; Lewis (1924) 5 *BY* 89; Morrow (1937) 18 *BY* 114; Mason *The Danzig Dilemma* (1946); Levesque, *La Situation internationale de Dantzig* (1924); Makowski (1923) 30 *RGDIP* 169; Redslob, *Le Statut international de Dantzig*; Piccioni (1921) 28 *RGDIP* 84; Rousseau, *DIP*, vol II, 423. More recent discussions include Skubiszewski, in *Menzel Festschrift*, 470; Berman (1993) 106 *Harv LR* 1792, 1878–93; Chesterman, *You, The People*, 20–1.

unlike the Memel Territory, Danzig was not ceded to the State in whose interests it was created but was put under a special regime. The nature of that regime may best be appreciated by first examining the distinct arrangement in Memel and some of its consequences.

The Memel Territory was transferred by the Principal Allied and Associated Powers to Lithuania pursuant to Article 99 of the Treaty of Versailles. Under Article 2 of the Convention Concerning the Territory of Memel,[189] '[t]he Memel Territory shall constitute, under the sovereignty of Lithuania, a unit enjoying legislative, judicial, administrative and financial autonomy within the limits prescribed by the Statute.' Nonetheless the Territory remained 'part of Lithuania' so as not to be a 'foreign country' (*pays*) for the purposes of, for example, customs legislation.[190] In *Interpretation of the Statute of the Memel Territory*, the Permanent Court applied the *Lotus* presumption in favour of Lithuania so as to imply into the Statute a provision as to dismissal of a public officer where the Statute was silent:

> [I]t certainly was not the intention of the Parties to the Convention that the sovereignty should be divided between two bodies which were to exist side by side in the same territory . . . Whilst Lithuania was to enjoy full sovereignty over the ceded territory, subject to the limitations imposed on its exercise, the autonomy of Memel was only to operate within the limits so fixed and expressly specified. It follows that the sovereign powers of the one and the autonomous powers of the other are of quite a different order in that the exercise of the latter powers necessitates the existence of a legal rule which cannot be inferred from the silence of the instrument from which the autonomy is derived, or from an interpretation designed to extend the autonomy by encroaching upon the operation of the sovereign power.[191]

Thus, referring to Article 2 of the 1924 Convention, the Court found it:

> impossible to adduce the silence of the Statute in regard to any matter in order to restrict the sovereignty of Lithuania in favour of the autonomy of Memel, or to deny to the former the exercise of certain rights simply because they are not *expressly* provided for in the Statute of Memel.[192]

On the other hand the Minority Opinion (Judges de Bustamante, Altamira, Schücking and Van Eysinga) denied the applicability of the presumption:

> It is true that the autonomous unit of Memel is under the sovereignty of Lithuania . . . But what does this . . . mean? . . . [T]his sovereignty is simply the residue

[189] Convention Concerning the Territory of Memel (British Empire, France, Italy, Japan and Lithuania), Paris, 8 May 1924, 29 LNTS 87, with annexed Statute, ibid, 95–7.

[190] *Administrator of Customs v Dewulf, Caillert & Sons* (Fr Ct of Cass) [1934] *Recueil Sirey* pt I p 303; 7 ILR 63.

[191] PCIJ ser A/B no 49 (1932) 313.

[192] Ibid, 314.

left to the exclusive jurisdiction of Lithuania by the Convention of Paris . . . In view of the extensive character of the Memel autonomy, Lithuania's sovereignty over this territory implies a very limited group of rights which . . . does not include the right to dismiss the President of the Directorate.[193]

The application of presumptions of this sort in cases of divided power is a matter of some delicacy. The more governmental authority the local unit possesses, the more it is like a State, and the less the application of the *Lotus* presumption against it would seem to be justified. But in this case the acts complained of (viz separate commercial negotiations between the Memel Directorate and the German Ministries of Foreign Affairs and Agriculture) were within the domain of foreign affairs reserved in its entirety to Lithuania. Moreover, their political implications, as the majority pointed out,[194] were completely contrary to the purposes for which the Territory was transferred to Lithuania. And, finally, the degree of local autonomy, though considerable, was not complete: the Lithuanian-appointed Governor of Memel had a power of veto over local legislation (Arts 2 and 16), and the power of appointing the executive, subject to the appointees obtaining the confidence of the legislature. These were real and not, as in the case of the British Dominions in 1920, nominal powers. The status of Memel would seem therefore to have fallen short of the point where local autonomy becomes international authority, and the Court's fairly strong application of the *Lotus* presumption against it was not, at least in principle, unjustified.[195]

The Free City of Danzig, by contrast, was located on a distinct territory, not part of either Poland, the beneficiary in terms of rights of access and transit, or Germany, the former sovereign. By Article 100 of the Treaty of Versailles, Germany renounced its rights over the territory in favour of the Principal Allied and Associated Powers, who in turn undertook by Article 102 'to establish the town of Danzig, together with the rest of the territory . . . as a Free City. It will be placed under the protection of the League of Nations.' The Constitution of the Free City, drawn up by its representatives in agreement with a High Commissioner appointed by the League, was also placed under League guarantee.[196] Differences as to the Treaty provisions were to be decided

[193] PCIJ ser A/B no 49 (1932), 56–7. [194] Ibid, 35.

[195] Schwarzenberger, *International Law*, vol I, 112–13. But for criticism on other grounds see Jenks (1938) 19 *BY* 67, 81–3. Memel was ceded, under coercion, by Lithuania to Germany by treaty of 22 March 1939, without the necessary consents being obtained under Art 15 of the Convention. It was occupied by the Soviet Army in 1945 and restored to Lithuania; which was itself annexed by the USSR. See further Ydit, *Internationalized Territories*, 48–50; Morrow, *Peace Settlement in German-Polish Borderlands*, 418–56; Kalijarvi, *The Memel Statute*; Kalijarvi (1936) 30 *AJ* 204; Blociszewki (1923) 30 *RGDIP* 143; Chesterman, *You, The People*, 23–4. [196] Ibid, Art 103.

in the first instance by the High Commissioner but ultimately by the League. By Article 104 the Powers undertook to negotiate a treaty between Poland and Danzig providing for Poland to undertake Danzig's foreign relations: this was done by the Treaty of Paris of 9 November 1920,[197] which, despite its enforced character, was 'an international agreement governed by international law' between Poland and Danzig.[198]

Two issues arose as to this rather complex set of relations: whether Danzig was a 'State', and whether the relationship between Danzig and the League, or Danzig and Poland, constituted a protectorate. But while there are various legal consequences attaching to statehood, the same cannot be said of 'protectorate'. The legal significance of the relationship between Poland and Danzig does not depend upon whether we term it a 'protectorate' or something else. Although Poland had important rights in respect of Danzig territory, the local administration did not cease to be independent in respect of all other matters. Moreover, while Poland had charge of Danzig's foreign relations, this was, as the Permanent Court held, a combination of an agency arrangement with a right of veto:

> . . . the rights of Poland as regards the foreign relations of the Free City are not absolute. The Polish Government is not entitled to impose a policy on the Free City nor to take any step in connection with the foreign relations of the Free City against its will. On the other hand, the Free City cannot call upon Poland to take any step in connection with the foreign relations of the Free City which are opposed to her own policy . . .[199]

In view of the express provisions of Article 102 of the Treaty of Versailles, there might be more basis for regarding the Danzig-League of Nations relationship a protectorate, but once again no legal consequences ensue from such a classification. As the Permanent Court held, 'the League of Nations, as guarantor of the Constitution of the Free City [had] the right . . . as well as the duty, to intervene in the event of an erroneous application by Danzig of its constitution . . .'[200] Thus 'though the interpretation of the Danzig Constitution [was] primarily an internal question of the Free City, it may involve the guarantee of the League of Nations, as interpreted by the Council and by the Court.'[201]

[197] 6 LNTS 190. [198] *Jurisdiction of the Courts of Danzig*, PCIJ ser B no 15 (1928), 17.

[199] *Free City of Danzig and the ILO*, PCIJ ser B no 18 (1930), 13.

[200] *Treatment of Polish Nationals in the Danzig Territory*, PCIJr A/B no 44 (1932), 21.

[201] *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, PCIJ ser A/B no 65 (1935), 13: but cf Judge Anzilotti (diss), 24: 'The question submitted to the Court is one purely of Danzig constitutional law: international law does not enter into it at all.'

On the other hand, although this was denied by most commentators,[202] it is clear that the Free City was a State in the sense in which that term is defined here.[203] Danzig had its own nationality.[204] It was bound by, and had the benefit of, 'the ordinary rules governing relations between States . . . With regard to Poland, the Danzig Constitution, despite its peculiarities, [was] . . . the Constitution of a foreign State.'[205] In contentious proceedings before the Court it was entitled to appoint a judge ad hoc under Article 71(2) of the Rules of Court, which refers to 'an existing dispute between two or more States or Members of the League of Nations'.[206] Complaints by Poland with regard to breaches by Danzig of its Constitution were matters of Danzig's 'domestic jurisdiction': the status of Danzig was not such as to eliminate 'the ordinary legal distinction between matters of a domestic and of an international character'.[207] Danzig was eligible for membership of international organizations such as the League, subject to the Polish right of veto. The obligations of membership would, of course, be 'international obligations for the Free City' and not for Poland.[208] Significantly, and in contrast to the Memel Territory, the *Lotus* presumption applied in Danzig's favour, in cases of doubt: 'The port of Danzig is not Polish territory and therefore the rights claimed by Poland would be exercised in derogation of the rights of the Free City. Such rights must therefore be established on a clear basis.'[209] And this *jurisprudence constante* in favour of the statehood, for purposes of international law, of the Free City is supported by decisions of national courts.[210]

[202] Morrow, *Peace Settlement in German-Polish Border Lands*, 126; Ydit, *International Territories*, 224; Lewis (1924) 5 *By* 89, 100 ('*sui generis*') Marek, *Identity and Continuity*, 168n; Skubiszewski, 'Gdansk and the Dissolution of the Free City' in Delbrück *et al.*, *Merzel Festschrift*, 469, 471–4; Bleimaier (1989) 2 *Hague Ybk* 69.

[203] Hostie, *Question de Principe*; de Weck *La Condition juridique*, 74; Keitner and Reisman (2003) 39 *Texas ILJ* 1, 10 n 37; and cf Orlow (1995) 9 *Temple ICLJ* 115, 122.

[204] Treaty of Versailles, Art 105.

[205] *Treatment of Polish Nationals in Danzig*, PCIJ ser A/B no 44 (1932), 23–4 and cf *Danzig Pension Case* (1929) 5 ILR 66 (Danzig H Ct): 'The Free City was an independent State, and for this reason, the Court has to apply to it the principles of international law in the matter of State succession.'

[206] *Polish War Vessels in the Port of Danzig*, PCIJ ser A/B no 43 (1931), 7.

[207] *Treatment of Polish Nationals in Danzig*, PCIJ ser A/B no 44 (1932), 23–4.

[208] *The Free City of Danzig and the ILO*, PCIJ ser B no 18 (1930), 15, 22 ( Judge Anzilotti, separate opinion). That Danzig, despite its association with Poland, was not assimilated to Polish territory appears from the provisions of the UK–Poland Agreement and Secret Protocol of 25 August 1939, providing, *inter alia*, that an attack on Danzig was an action threatening 'directly or indirectly the independence of Poland': see Agreement, Art 2(1), Protocol Art 2: Cmnd 6616.

[209] *Polish War Vessels in the Port of Danzig*, PCIJ ser A/B no 43 (1931), 18. In *Polish Postal Service in Danzig*, PCIJ ser B no 11 (1925), 39–40, the *Lotus* presumption was not applied in Danzig's favour because the relevant provisions as interpreted were clear.

[210] *The Blonde* [1921] P 155, 163–4 (Duke P); [1922] I AC 313, 338–9 (PC); *Danzig Pension Case* (1929) 5 ILR 66; *In re M (Danzig Conviction Case)* (1933) 7 ILR 59; *US ex rel Zeller v Watkins*, 167 F 2d 279 (1948); *In re Nix* (1951) 18 ILR 260; cf *In re Kruger* (1951) 18 ILR 258.

Danzig, like Poland, was invaded by Germany on 1 September 1939, although unlike Poland much of its German-speaking population welcomed the invader, and its institutions cooperated in the execution of German plans.[211] The City was annexed to Germany; but following the German retreat was committed to Polish administration in 1945 'pending the final determination of Poland's western frontier'.[212] The Polish Supreme Court in 1948 referred to Gdansk as 'united with the rest of the territory of the Polish State on a basis of complete equality'.[213] The British view in 1945 was that Gdansk would not come under Polish sovereignty until a final settlement.[214] As discussed in Chapter 12, a general settlement of the German question was achieved in 1990.[215] But much of its content was predetermined by earlier acts of the two German States, including boundary treaties. No one treated the Danzig question as a live issue after 1945.[216]

### (3) Trends in internationalization since 1945: Cyprus[217]

This practice suggests—and general principle supports—the conclusion that internationalized territories such as the Free City of Danzig may qualify as

[211] The Free City had been constituted a Nazi Party 'Gau', and Nazis controlled the Danzig Senate. Under its Gauleiter, Albert Forster and the Senate president, Artur Greiser, the party's influence by 1939 had become pervasive. Occasional objection by the League through its High Commissioner did not prevent implementation in Danzig of anti-Semitic legislation paralleling the 1936 Nuremburg Laws. Greiser, after annexation of the Free City in September 1939, was transferred, with elements of his Danzig staff, to Poznan, where he assumed the post of 'Gauleiter of the Warthegau' with power over annexed Polish territory. Levine, *Hitler's Free City*, 78–125. Greiser was tried and sentenced to death by a Polish tribunal in 1946: *Trial of Gauleiter Artur Greiser* (Sup Nat Trib Poland, 21 June–7 July 1946), 13 *Reports of Trials of War Criminals* 71, 117 (UN War Crimes Commission, 1949). He seems to have been the first person convicted of 'waging aggressive war': Taylor, *Nuremberg and Vietnam*, (1970) 87n.

[212] Protocol of the Proceedings of the Berlin Conference, 2 August 1945, 145 BFSP 852, 866 (VIII B, 'Western Frontier of Poland'). [213] *L & JJ v Polish State Rys* (1948) 24 ILR 77.

[214] 414 *HC Deb* 292–3, 10 October 1945 (Bevin); cf 415 *HC Deb* cols 406–7, 31 October 1945. Polish sovereignty over Gdansk was apparently acknowledged by Britain and the United States in 1976 when they agreed to return to Poland gold previously the property of the Free City: see (1977) 81 *RGDIP* 575.

[215] Poland–GDR Treaty of Görlitz, 6 July 1950, 319 UNTS 93; Poland-FRG Treaty of Warsaw, 7 December 1970, 830 UNTS 327; the Helsinki Final Act, 1 August 1975, 14 ILM 1292; the Polish–German Treaty of 14 November 1990, (1992) 31 ILM 1292, 1708 UNTS 383, which confirmed the 'existing border' between Poland and Germany.

[216] Whomersley argues that the principle of fundamental change of circumstances is inapplicable to treaties establishing a boundary, and thus inapplicable to Danzig. The case is instead one of desuetude or 'implicit termination'. Whomersley (1993) 42 *ICLQ* 919, 926–7. To similar effect on boundary treaties, see *Laguna del Desierto* (Chile–Argentina), Judgment of 21 October 1994, Galindo Pohl (dis op), para 14, 113 ILR 1, 84. See also Skubiszewski, 480–5.

[217] See generally Wilde (2001) 95 *AJ* 583; Caplan, *A New Trusteeship? The International Administration of War-Torn Territories*.

States under international law. However, they are usually artificial creations in every sense, and the political failures of internationalization since 1945, for example in the cases of Trieste and Jerusalem, have led to different structures being adopted to achieve substantially the same political ends.

A good example of this trend is the case of Cyprus, which, rather than being established under a particular regime, was granted independence subject to significant constitutional and treaty limitations.

The Republic of Cyprus became independent on 16 August 1960, at which time its population was divided into tightly organized and mutually antagonistic ethnic groups (eighty per cent Greek, and twenty per cent Turkish). Independence was preceded by drawn-out negotiations between the Governments of Greece and Turkey, resulting in a basic agreement,[218] which was then approved with certain amendments by the British Government, and accepted by representatives of the Greek and Turkish communities on Cyprus.[219] The Constitution thus framed was formally brought into effect by a United Kingdom Order-in-Council under authority conferred by a United Kingdom statute.[220] Britain retained two 'sovereign base areas' and certain other military rights.[221]

The 1960 Constitution itself had 199 articles, forty-eight of which were expressed to be unalterable.[222] By Article 181 (itself unalterable), the Treaties of Alliance[223] and Guarantee[224] were given constitutional force. As a result Cyprus was bound, apparently in perpetuity, to accept tripartite military forces on its territory.[225] The purpose of the force was stated to be 'to resist any attack or aggression, direct or indirect . . . against the independence or the territorial integrity of the Republic of Cyprus.'[226] Considered in isolation the Treaty of

[218] Basic Structure of the Republic of Cyprus, London, 19 February 1959: 164 BFSP 219.

[219] Emilianides, in *Mélanges Séfériades* (1961) II, 629–39. For discussion of the Cyprus problem in the UN prior to independence see 1955 *UN Ybk* 77–8; 1956 *UN Ybk* 121–5; 1957 *UN Ybk* 72–6; 1958 *UN Ybk* 71–6. Generally on Cyprus see also Thomas and Thomas (1975) 29 *Southwestern LJ* 513; Evriviades (1975) 10 *Texas ILJ* 227; Xydis, *Cyprus, Reluctant Republic*.

[220] The Republic of Cyprus Order-in-Council, SI 1960 No 1363 p 1174, under the Cyprus Act 1960, 8 & 9 Eliz II ch 52. The European Commission of Human Rights, dismissing by consent an Application (no 299/57) by Greece against the UK alleging breach of the European Convention, referred to 'the significance of the Zurich and London Agreements as a means of restoring to the population of Cyprus the full enjoyment of their rights and freedoms': (1959) 25 ILR 27, 32.

[221] 164 BFSP 219; Cyprus Act, s 2; Treaty of Guarantee, ibid 388, Art 3; Higgins, *Development*, 33–4; *Mizrihi v Republic of Cyprus* (1963) 41 ILR 25.

[222] Article 182 (1), Annex III; *Cmnd* 1093 (1960), 91–172. Although the present status of the Constitution is uncertain, it still serves to illustrate the limitations on Cypriot independence which are likely to continue, under whatever form. See further Polyviou, *Cyprus in Search of a Constitution*.

[223] 164 BFSP 557. [224] Ibid 388. [225] Treaty of Alliance, Art III.

[226] Ibid, Art II.

Alliance appears unexceptional, but some provisions of the Treaty of Guarantee raise doubts. By Article IV of the latter, in the event of breach by Cyprus of certain undertakings, and in default of common action by the three guarantor powers, each of them 'reserves the right to take action with the sole aim of reestablishing the state of affairs created by the present Treaty.' Cyprus undertakes to 'ensure' respect for its Constitution, to maintain its independence and security, and to prohibit 'any activity likely to promote, directly or indirectly, either union with any other State or partition of the Island.'[227] Interpreted liberally, the Treaty of Guarantee would appear to allow unilateral military intervention by each of the Powers in a wide variety of circumstances, and to demolish the domestic jurisdiction of Cyprus in the most important areas. Not surprisingly, the Government of Cyprus subsequently suggested that Article IV might be null and void as in breach of the Charter.[228] The prior argument, which avoids invalidity, is that Article IV, which 'reserves' the right to take unspecified action, must be interpreted by reference to the Charter so as not to include any right of intervention except where consistent, in particular, with Articles 2(4) and 51. But Turkey has claimed the right to intervene in Cyprus with armed force under certain circumstances, and has done so on a number of occasions, most significantly in 1974.

As a result of civil disturbances which erupted after independence, a United Kingdom Truce Force, with the consent of the Cyprus Government, was formed in an attempt to restore order: the British view was that this Force was not operating under Article IV of the Treaty of Guarantee, but only by consent of the territorial sovereign.[229] The Truce Force was, on 27 March 1963, replaced by the United Nations Force in Cyprus (UNFICYP), the activities of which are continuing.[230]

Cyprus was admitted by unanimous vote to the United Nations on 20 September 1960.[231] No question of its independent statehood has been raised by other States or in international organizations,[232] and (as described in

[227] Treaty of Guarantee, Art I.

[228] *SCOR* 1098th mtg, 27 February 1964, 15–31; *BPIL* 1964/I, 3–11. For contrary British argument see ibid, 11–12. Cf Schwelb (1967) 61 *AJ* 946, 952–3.

[229] Statement of Sir Patrick Dean, *SCOR* 1098th mtg, 27 February 1964, 13; BPIL 1964/1, 7–8. Cf *Nissan v AG* [1970] AC 179, 206 (Lord Reid), 215 (Lord Morris), 223 (Lord Pearce), 237 (Lord Pearson), 230 (Lord Wilberforce).

[230] See Bowett, *United Nations Forces*, 552–60; Seyersted, *United Nations Forces in the Law of Peace and War*, 79–85, 427–47. The mandate of UNFICYP has been periodically renewed: SC res 1604, 17 June 2005.

[231] SC res 155, 23 August 1960; GA res 1489 (XV), 20 September 1960.

[232] Higgins, *Development*, 33–4 considered that Cyprus was 'very close to the borderline of lack of true independence'.

Chapter 3) the principle of territorial integrity and political independence of the State of Cyprus was the basis of international responses to the Turkish invasion of 1974 and the subsequent *de facto* division of the island. Given the intractable nature of the Cyprus situation, it is doubtful that any more formal arrangement for international control would have been more successful. But it could equally be said that the various limitations on Cypriot sovereignty in effect introduced a form of internationalization by the back door.

A proposal for a new constitution and international arrangement was drafted under the auspices of the UN Secretary-General and put to referendum in Cyprus in 2004. The proposal was rejected by the Greek Cypriot electorate.[233] The Annan Plan proceeded like the 1960 Constitution on the basis of a single State of Cyprus with communal autonomy and extensive constitutional and international guarantees. There was to have been established a United Cypriot Republic, comprised of two constituent states, the rights of each guaranteed by a complex set of internal and external mechanisms. The international guarantees contained within the original 1960 independence agreements were to have been adopted *mutatis mutandis* and reinforced by the terms of a draft Treaty on Matters Related to the New State of Affairs in Cyprus. The United Cyprus Republic, the United Kingdom, Greece and Turkey were to have been parties. A Monitoring Committee was to have consisted of Members designated by the guaranteeing powers, the Cypriot federal government, the constituent states and the United Nations.[234]

## 5.5 Transitional autonomous entities: Hong Kong and Macao

The previous section dealt with entities that, whether or not States, were subject to high levels of international guarantee and government in order to maintain a balance between the local population and some international interest or between conflicting local groups. These arrangements were intended to be permanent although in practice they have, sooner or later, tended to break down. Another form of *sui generis* territorial arrangement is provided by distinct territories whose autonomy is guaranteed by international agreement or decision without prejudice to the sovereignty and territorial integrity of the surrounding State. Again there is no reason why such arrangements should be

[233] See press release, SG/SM/9269, 26 April 2004.

[234] Treaty on Matters Related to the New State of Affairs in Cyprus, Art 2. The Plan, its drafting, and problems are addressed in detail in Palley, *An International Relations Debacle*.

transitional or temporary: that for the Åland Islands, for example, has lasted for eighty years and shows every sign of enduring.[235]

Two recent cases, Hong Kong and Macao, show the variety of arrangements that can be made to secure local autonomy within a framework of the recognition of sovereignty of the metropolitan State. Both are avowedly transitional arrangements, for a minimum term of fifty years. Although the location of sovereignty is clear in both cases, the ultimate end point is less so—perhaps full integration (but in fifty years that may be unnecessary). The position of Hong Kong has attracted more attention and will be the focus of what follows.[236]

## (1) Historical outline

Hong Kong, consisting of Hong Kong island, associated islets and certain landward territory on the south coast of China, was settled by overseas merchants in the early 1840s. By the Convention of Chuenpi in January 1841, China granted Britain territorial and commercial rights on Hong Kong.[237] A British military base was established in 1841. After defeat in the 'Opium War' China ceded the island under terms of the Treaty of Nanking.[238] In 1860 the Treaty of Peking ceded the Kowloon peninsula, thus extending British control to the shore opposite the island. Britain in 1898 acquired a 99-year lease over the New Territories—the hinterland of Kowloon—with which was completed the territorial formation of the modern colony.[239] Hong Kong came to be a port and financial centre of great significance. Having regard to the coerced character of the original treaties, China insisted on the return not only of the leased territories but also the colonial territories on Hong Kong island.[240]

[235] Protocol No 2 to the Final Act concerning the conditions of accession of Finland to the European Union, '[t]aking into account the special status that the Åland Islands enjoy under international law', permits the regime to continue by which non-residents are restricted from owning real property in the islands: OJ 1994 C241/352, 24 June 1994 (entered into force 1 January 1995). See generally Hannikainen, in Hannikainen and Horn (eds), *Autonomy and Demilitarisation in International Law*, 57; Åkermark, 'The Åland Islands in International Law and Cooperation', ibid, 257.

[236] On the SARs in general see Gonçalves (1993) 45 *Rev Int de Droit Comparé* 817; Fifoot (1994) 12 *Int Rel* 25; Mushkat (1994) 24 *HKLJ* 828; Duursma, *Microstates*, 87–8; Santos Neves and Bridges (eds), *Europe, China and the two SARs*.

[237] For the background see Hsü, *China's Entrance into the Family of Nations*, 13–18.

[238] Treaty of Nanking, 29 August 1842: 93 CTS 465, 30 BSFP 389.

[239] These transactions have been described by various writers, e.g., Cohen and Chin (eds), *People's China and International Law*, 373; Buckley, *Hong Kong: The Road to 1997*, 2–3.

[240] The Nationalist Government in 1945 apparently raised the matter of 'liquidation' of foreign control over Hong Kong and Macao but did not pursue the matter: Cohen and Chiu, *People's 'China* 374. The People's Republic of China, however, did: see, e.g., Chinese statement of 17 January 1963, concerning British policy in Kowloon City, reprinted ibid, 377–9.

Without Chinese support Hong Kong could not survive, and in 1984, after protracted negotiations,[241] China and the United Kingdom adopted a Joint Declaration,[242] providing for return to China of the colony as a whole.

Pursuant to the Joint Declaration, China in 1990 promulgated a Basic Law[243] under which Hong Kong would be governed after the change of control. The United Kingdom ceased to administer Hong Kong at midnight on 30 June 1997, and China established in its place a new government for the Hong Kong Special Administrative Region (HKSAR).

### (2) Arrangements for the government of the HKSAR

The return of Hong Kong to China took place on terms. Annex I of the Joint Declaration provides, *inter alia*, that

> [t]he National People's Congress of the People's Republic of China shall enact and promulgate a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China . . . in accordance with the Constitution of the People's Republic of China, stipulating that after the establishment of the Hong Kong Special Administrative Region the socialist system and socialist policies shall not be practised in the Hong Kong Special Administrative Region and that Hong Kong's previous capitalist system and lifestyle shall remain unchanged for 50 years.

Further provisions of the Joint Declaration and of the Basic Law state that specific aspects of the social, economic, and legal system of the Special Administrative Region will remain essentially unchanged for the half century following transfer of control. Eight undertakings were specified in the Joint Declaration and in large part implemented by the Basic Law: (1) provision for local Government via the Hong Kong Special Administrative Region (the 'Hong Kong SAR') with its personnel of local inhabitants; (2) a high but not necessarily complete degree of autonomy; (3) independent judicial power including the power of final adjudication; (4) preservation of the rule of law (although the phrase itself was not actually used); (5) independent finances and no central taxation; (6) a certain capacity to conduct international relations; (7) control over entry and exit of persons and goods; and (8) internal control over public order.

Article 3 of the Joint Declaration set out these basic policies in the future tense, rather than as actual commitments: it takes the form of an apparently unilateral declaration by the People's Republic of basic policies regarding Hong

[241] About which see Buckley, *Hong Kong: The Road to 1997*, 104–26.
[242] 1399 UNTS 61, 23 ILM 1371. [243] 29 ILM 1511.

Kong which are spelt out further in Annex 1. But Article 7 is an agreement to implement them, and it apparently gives the United Kingdom a treaty right that the policies be implemented, notwithstanding the use of the word 'will' rather than 'shall' throughout Article 3. Article 8 specifies that the Joint Declaration and its annexes are equally binding, from which it can be inferred that the Joint Declaration itself is binding. There is, therefore, on the face of it, a treaty commitment as to the content of the basic policies of the People's Republic regarding Hong Kong.

Yet the position of the People's Republic is preserved or at least not denied. In 1984, and until 1997, the relationship between Hong Kong and China was international in character and the border between Hong Kong and China—never authoritatively demarcated—was an international border. But the reason was that Hong Kong was under British control. The question, one that is of a recurring kind in post-colonial situations, is whether British treaty rights survive the change of control, which, in the Chinese view was a restoration of sovereignty illegitimately acquired by the colonizer. Evidently the United Kingdom could have remained a party principal after its departure, but where such an arrangement has been adopted it has usually been expressed, as with respect to Cyprus under the Treaty of Guarantee. The Joint Declaration is, if not entirely silent, at least less than explicit and it leaves room for different views. The PRC's view is that the situation of Hong Kong after 1997 is an exclusively internal matter.[244] This could be sustained by treating the Joint Declaration as an instrument that did nothing but regulate the transition to a single state of affairs—the return of Hong Kong to China—and that was spent once this process was completed.

On the other hand the commitments in the Joint Declaration are not confined to the transition period and they are for the most part carried out by the Basic Law. If the former is blueprint and the latter delivery vehicle, nonetheless the link is clear enough. The United Kingdom has continued to take a mild interest in Hong Kong issues, apparently relying on its status as a party to the Joint Declaration.[245] One important aspect is a qualified

[244] See PRC Ministry of Foreign Affairs Press Release, 8 April 2004: 'Spokesman Kong Quan's Remarks on the UK Comment on the NPC HK Basic Law Interpretation', at http://www.fmprc.gov.cn/eng/xwfw/2510/2535/t83931.htm, cited in the UK Foreign and Commonwealth Office's *Six-Monthly Report on Hong Kong January-June 2004*, Cmnd 6292, para 36.

[245] See, e.g., Statement of Parl Under-Sec, FCO, 22 June 1999: '[W]e retain a political and moral commitment towards Hong Kong, and . . . we are committed to upholding the Sino-British Joint Declaration, which is an international treaty, until the year 2047' (*HL Deb*, vol 604, col 1128, reprinted in (1999) 70 *BY* 416); and reply of Min State, FCO, 14 Dec 1999: 'The Sino-British Joint Declaration on the Question of Hong Kong is a treaty registered at the United Nations which creates international rights and obligations for both parties to it. The Joint Declaration has no termination date' (*HC Deb*, vol 341, col 110W, reprinted in (1999) 70 *BY* 416).

guarantee of local democratic self-government. The Basic Law incorporates Article 25 of the International Covenant on Civil and Political Rights.[246] Moreover, the ICCPR as a whole is stipulated by both the Joint Declaration and the Basic Law to continue in force with respect to Hong Kong.[247] It does not matter for this purpose whether the ICCPR is binding on Hong Kong or only on China in respect of the territory of Hong Kong. In either case any State Party to the ICCPR is entitled to raise the issue as is the Human Rights Committee.[248] The transitional character of the HKSAR is thus limited by international guarantee—though one as yet untested in practice.

### (3) The status of Hong Kong[249]

Whatever the scope for future revision, the present international status of Hong Kong is of some interest. One view is that Hong Kong is a distinct international legal person with its own status under international law. The other view is that the Hong Kong SAR is an integral part of China with no separate international legal personality, and that separate legal relations of Hong Kong with other parts of the world are simply functional delegations from the PRC. At the basic level—the level of the Basic Law—the relations of Beijing and Hong Kong are those of superior and subordinate and are not international at all.[250]

[246] 999 UNTS 171, 179. The Basic Law, Art 26, provides: 'Permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with law.'

[247] Joint Declaration, annex I, art XIII, para 4: 'The provisions . . . shall remain in force'; Basic Law, Art 39: 'The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.' See Chan, 'Civil Liberties, Rule of Law and Human Rights,' in Lau Siu-kai, *The First Tung Chee-hwa Administration*, 90.

[248] On the protection of political rights and rule of law in Hong Kong see, e.g., Crawford, *Rights in One Country*, 3–19; Ghai, *Hong Kong's New Constitutional Order* (2nd edn); Chan, Fu and Ghai (eds), *Hong Kong's Constitutional Debate*; Chan, 'Civil Liberties, Rule of Law and Human Rights' in Lau (ed), *The First Tung Chee-hwa Administration*, 89; Chen, 'The Constitution and the Rule of Law', ibid, 69; Lam, *Understanding the Political Culture of Hong Kong*.

[249] About which see generally Mushkat (1992) 6 *Emory ILR* 105; Mushkat, *One Country*; Mushkat (1998) 22 *S Ill ULJ* 275; Yeung, in Lau, *The First Tung Chee-hwa Administration*, 237; Crawford, *Rights in One Country*, 21–41.

[250] This view has not been defended in any depth in the literature, but it is assumed in various statements from the mainland side. See, e.g., speeches by President Jiang Zemin, posted on the PRC's Ministry of Foreign Affairs' website at http://www.fmprc.gov.cn/eng/ljzg/.

On the eve of the termination of British control Hong Kong was not a non-self-governing territory for purposes of Chapter XI of the United Nations Charter, having been removed from the Chapter XI list in 1972.[251] Thus, the right of colonial peoples freely to determine the final disposition of their territories, connected as it has been to non-self-governing status, was not treated as determinative in relation to Hong Kong. Hong Kong was transferred in 1997, a transfer whose international acceptability was recognized or accepted by all States despite the absence of any act of self-determination.

The international status of Hong Kong is then to be determined by reference to the Joint Declaration and the Basic Law. The Joint Declaration is unequivocal in at least one respect. It says that Hong Kong is part of China, that it is being restored, that the autonomy of the SAR is without prejudice to the national unity and territorial integrity of China. Moreover, it gives China responsibility for the foreign and defence affairs of Hong Kong. Nonetheless, Hong Kong has a separate identity. It is a free zone, a separate customs territory, and it has its own regional flag and anthem. 'Using the name of "Hong Kong, China", [it] may on its own maintain and develop economic and cultural relations and conclude relevant agreements with states, regions and relevant international organizations.'[252] It has a separate immigration territory. Article XI, Annex I takes matters further, extending this international capacity not only to economic and cultural relations but to trade relations with all States and regions, and giving authority to establish official and semi-official missions. Under the Basic Law, Hong Kong is authorized to conduct 'relevant external affairs on its own in accordance with [the] Law'.[253] Thus the Basic Law establishes a separate territory of Hong Kong, which has some of the elements of an international legal personality but which is not independent of the central government because of the PRC's retained powers over foreign affairs and defence and because of the latter's acknowledged sovereignty.

The international relations of the SAR have been consistent with this position. Hong Kong has the right under Article 13 paragraph 4 of the Basic Law, to make agreements with other States. The Basic Law provides that such treaties are entered into by Hong Kong 'on its own': evidently they are to be counted as Hong Kong treaties, i.e., as treaties to which Hong Kong is a party as such. As the United Kingdom early in the period of Dominion status concurrently made treaties for Australia, Canada, New Zealand and

[251] GA res 2978, 14 December 1972. But cf Mushkat (1992) 6 *Emory ILR* 105, 112. Generally on non-self-governing territories see Chapter 14 below.

[252] Joint Declaration, Art 3(10). [253] Joint Declaration, Art 13 (3).

South Africa,[254] so can China make treaties for Hong Kong, although apparently it has done so on only one occasion.[255] For its part Hong Kong has concluded a large number of treaties since 1997.[256] As a matter of international law these are obligations of Hong Kong, and to that extent Hong Kong may be described as an international legal person.

### (4) Relations between Hong Kong and China[257]

The government of China appears to take the view that because the relationship between Hong Kong and China is a domestic relationship under the Constitution of China and the Basic Law, any possibility of international relations is excluded. Even though Hong Kong is a separate treaty area for the purposes of certain treaties, some relations that were previously international have ceased to be international. That is true, for example, of the Hague Convention of 1970 on Service of Documents, which has ceased to apply *inter se* between China and Hong Kong.[258] It also appears to be true in relation to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.[259] In such cases what was previously done under the treaty has had to be duplicated by creating an ad hoc mechanism.

But in the case of the World Trade Organization the argument for *inter se* application is strong. The World Trade Organization Members include separate customs territories and are not limited to States.[260] Hong Kong is a customs territory and it is listed as a separate member of the WTO. Both Hong Kong and China are listed as members, and the WTO Agreement and

[254] See Fawcett, *The British Commonwealth in International Law*, ch 4; and, below, Chapter 8.

[255] In relation to the United Nations Law of the Sea Convention of 1982, about which see Chen, in Lau (ed), *The First Tung Chee-hwa Administration*, 85, referring to the Law on the Exclusive Economic Zone and the Continental Shelf 1998 (PRC).

[256] As of May 2004, 130 agreements had been entered into on a state-to-state basis between the HKSAR and third States (in addition to many MoUs and informal agreements): see the treaty database on the website of the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong, http://www.hku.hk/ccpl/hktreaty/database.html.

[257] Fu, in Wacks (ed), *The New Legal Order in Hong Kong*, 95; Zhang, in Wacks, 183; Fu, in Chan, Fu and Ghai (eds), *Hong Kong's Constitutional Debate*, 96; Ling, in Chan, Fu and Ghai, 151.

[258] Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (1965) 658 UNTS 163, applied to Hong Kong from 1970 by virtue of UK ratification. The PRC ratified in 1991, but the Convention ceased to apply *inter se* in 1997: FU 'Form and substance' in wacks, *New Legal order in Hong Kong*, 108–9.

[259] *Ng Fung Hong Ltd v ABC* [1998] 1 HKC 213; Fu, 'Form and Substance' in wacks, *New Legal Order in Hong Kong*, 119. By contrast there is a legislative recognition scheme as between Taiwan and PRC: Fu, ibid, 119–20.

[260] Marrakesh Agreement establishing the World Trade Organization, 15 April 1994, Art XII. The HKSAR is also a member of APEC and the Asian Development Bank, membership of which is not limited to States.

its associated agreements apply to all members. But CEPA, the bilateral Free Trade Agreement between China and Hong Kong, has in effect sought to avoid *inter se* application of the WTO Agreements by concluding a separate comprehensive arrangement with its own dispute mechanism, which is much less formal and structured.[261]

Similar considerations apply to dispute settlement. Hong Kong cannot become a party to dispute settlement arrangements that are expressly limited to States,[262] but modern arrangements (especially those to which the EU is a party) are not so limited. A customs territory that is a party to the WTO thereby accepts the dispute settlement system; similarly, so do parties to the Law of the Sea Convention. In the case of Hong Kong the only indications of dispute settlement at the international level against both Hong Kong and China at present are cases involving the ILO, for which succession was also expressly provided. The Hong Kong Confederation of Trade Unions has initiated complaints against the SAR and China in respect of labour rights.[263]

The courts of Hong Kong have the power of final judicial determination of all disputes falling within their jurisdiction, and there is no mechanism for making exceptions to their jurisdiction in cases with international implications. There is the possibility of the interpretation of their decisions by the Standing Committee of the National People's Congress and there have been several such interpretations.[264] But the courts still have the power of final judicial determination, and any subsequent interpretation given by the Standing Committee cannot effect the actual outcome of those particular cases. It may be that for the most part the Hong Kong courts will be able to decide cases applying the common law, avoiding or ignoring any international implications. But this will not always be true. For example, the Court of Final Appeal has recognised decisions of Taiwanese bankruptcy courts, notwithstanding that the legal status of Taiwan in Hong Kong is that of a rebellious regime and not a foreign State.[265] The Court of Final Appeal has also had to apply human

[261] CEPA was duly and jointly notified under GATT Art XXIV:7(a) and GATS Art V.7(a).

[262] But Mushkat, *One Country*, 38 argues that the HKSAR has standing to become a party to the Statute of the International Court of Justice.

[263] For the ILO cases see *Case No 1550 v China*, 270th Report of the ILO Committee on Freedom of Association, ILO Doc vol LXXIII, 1990, Series B, No 1 (1990) paras 287–334; *Case No 1652 v China*, 28th Report of the ILO Committee on Freedom of Association, ILO Doc vol LXXVI, 1993, Series B, No 1 (1993), paras 674–728; *Case No 1942 HK Confederation of Trade Unions v HKSAR*, 311th Report of the ILO Committee on Freedom of Association, ILO Doc vol LXXXI, 1998, Series B No. 3 (1998). Available at http://www.ilo.org/ilolex/english/index.htm.

[264] See Crawford, *Rights in One Country*, 1, 8–16.

[265] *Chen Li Hung v Tong Lei Mao* [2000] 1 HKC 461.

rights treaties and has consistently given a progressive interpretation to them.[266]

The case of Hong Kong shows how territories which are part of a State can be given a distinct international voice with little or no apparatus of international control or even (on one view) of international obligation. One may contrast this with Kosovo, an unsettled province of Serbia and Montenegro temporarily under United Nations administration pursuant to a Security Council Chapter VII mandate. The installation in Kosovo of an international administration and its functional separation from Serbia and Montenegro illustrate how the principle of territorial integrity can exert only a nominal influence:[267] for the time being the arrangements made for the government of Kosovo almost totally exclude the territorial sovereign. But the stipulation in the constituent instruments that the final status of Kosovo remains to be settled[268] indicates the transitional character of the arrangement. Chapter 12 discusses Kosovo at greater length.

## 5.6 Conclusion

The instances gathered here are highly variable. Indeed that is the reason they are gathered here: had they been more readily classifiable they would have been dealt with elsewhere in this work. They reveal the wide variety of territorial arrangements that can be devised, or can evolve, to cope with conflicting claims to territory, transit, allegiance or affiliation. They also show how the general framework of the law of statehood and territorial sovereignty tends to suffuse the particular; how the standard model of the State continues to impose its pattern on the most diverse situations.

On one view, none of these *sui generis* arrangements can equate to statehood. Just as sovereignty prevails over obligation (States have obligations, obligations do not have States) so, it is said, the plurality of governmental authority or political power excludes the territory concerned from the circle of statehood. But the crucial thing, it seems, is not overlapping governmental authority, which is a recurrent phenomenon and is probably increasing (as with the European Union). It is secure title to territory. This can be seen from Table 4.

[266] See, e.g., *HKSAR v Ma Wai Kwan* [1997] HKLRD 761; *Ng Ka Ling v Director of Immigration* [1999] HKLRD 315; *Chan Kam Nga v Director of Immigration* [1999] HKLRD 304; *Lau Kong Yung v Director of Immigration* [1999] HKLRD 778; *HKSAR v Ng Kung Siu* [1997] HKLRD 907; *Director of Immigration v Chong Fung Yuen* [2001] 2 HKLRD 533.

[267] E.g., SC res 1244, 10 June 1999, preamble. [268] Ibid, para 11(a).

**Table 4. Characteristics of some special cases**

| Entity | Origin | Location of sovereignty | Autonomous/ controlled | Recognized/ unrecognized | Temporary/ permanent | Whether a State? |
|---|---|---|---|---|---|---|
| **Danzig** | Established by Treaty of Versailles | Own territory | Semi-autonomous | Recognized by treaty parties as such | Permanent (1919–45) | Yes |
| **Memel** | Established by multilateral treaty | Lithuanian territory | Semi-autonomous | Recognized by treaty parties as such | Permanent (1919–39) | No |
| **Taiwan** | Control retained after civil war; locally consolidated | Part of China | Autonomous | Unrecognized as a separate State | Apparently permanent | No |
| **Vatican** | Grant to Holy See by bilateral treaty | Own territory | Autonomous | Recognized | Permanent | Yes |
| **Hong Kong** | Established by legislation following bilateral treaty | Part of China | Semi-autonomous | Unrecognized as a State | 50 years minimum | No |
| **Kosovo** | Security Council-imposed | Part of Serbia and Montenegro | Semi-autonomous | Unrecognized | Pending final settlement | No |

Despite the variables, what practically determines status is whether the territory in question is regarded as belonging to the entity: if so, it is, or may be, a State. By contrast where (as with Memel, Taiwan, Hong Kong, Kosovo) the territory in question is recognized as the territory of another State, statehood is excluded and the entity is treated as an exception to that sovereignty. In many respects Danzig had more in common with Memel than it did with other entities listed here. Both were created by the same major multilateral treaty for much the same purpose. But like the Vatican City (with which it had nothing else in common) Danzig was created on its own territory and could be regarded as a State, albeit one created for special purposes.

But this does not mean that non-State entities cannot acquire a distinct international status or role. To postulate sovereignty as complete by definition (as Oppenheim did) immediately requires concessions to be made for entities that, lacking complete authority in some respect or other, nonetheless function more or less as equals in the unequal world of interstate relations. It is paradoxical that in the early part of the twentieth century, when the axiom was that 'States solely and exclusively are the subjects of International Law',[269] there were very many more *sui generis* entities functioning in their own terms at the international level: the array of protected States (Morocco, the Gulf States), vassal States, confederations, fiefs (Andorra), the British Dominions, etc. By contrast in the early part of the twenty-first century when international legal doctrine and theory are more open and pluralist and sovereignty is seen as a relative matter, the number of 'not-full-sovereign' entities has been enormously reduced. Despite the conclusion that statehood is not everything, the world has been homogenized into States.

[269] Oppenheim (1st edn), vol 1, 18 (§12).

# PART II

# MODES OF THE CREATION OF STATES IN INTERNATIONAL LAW

[T]he proposition that the origination of a State is always and necessarily an historical fact happening beyond the realm of international law is an unfounded doctrinal *a priori*, contradicted by the facts of international law itself.

Verzijl, *International Law* II, 62–4, 63.

Although international law does not, in general, 'create' States,[1] it does contain rules providing workable criteria for statehood, as we have seen. Moreover, by determining to some degree and in at least some cases the rights and duties of the participants during the process by which a State is formed, it also helps to regulate that process.[2]

In this part are examined the various contexts in which, and methods by which, new States are created. These include: the original creation of States on unoccupied territory (Chapter 6); the creation and status of dependent States and other entities (Chapter 7); grants by or forcible seizure of independence from a previous sovereign, termed respectively devolution and secession (Chapters 8 and 9); the consolidation of autonomous or separate parts of 'divided States' (Chapter 10), and the various forms of amalgamation or merger into 'unions of States' with distinct legal personality (Chapter 11). It must be emphasized that these distinctions between the various 'modes' of creation of new States do not provide a rigid, overriding formula. They are rather a convenient categorization of the various distinct ways in which, historically, new States have been created; and they thus provide a basis for discussion of particular problems, and for application of the basic and in some cases overriding criteria, which were discussed in Part I.

[1] Erich (1926) 13 *HR* 427, 442; Arangio-Ruiz (1975) *ÖZfÖR* 3, 7–8.
[2] Cf Marek, *Identity and Continuity*, 1–2; Kelsen (1929) 4 *RDI* 613.

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# Chapter 6

# ORIGINAL ACQUISITION AND PROBLEMS OF STATEHOOD


| | | | |
|---|---|---|---|
| **6.1** | **General considerations** | | 257 |
| **6.2** | **The status of indigenous communities** | | 260 |
| | (1) | Statehood of indigenous communities | 260 |
| | (2) | Legal personality of indigenous communities not regarded as States | 263 |
| **6.3** | **Acquisition of territory from indigenous communities** | | 268 |
| | (1) | Status of aboriginal treaties of cession | 268 |
| | (2) | Legal effects of aboriginal treaties | 269 |
| | (3) | Grants of territory to private persons | 270 |
| | (4) | Conclusions | 271 |
| **6.4** | **Original occupation of territory by a new State** | | 274 |
| | (1) | Liberia | 274 |
| | (2) | The Boer Republics | 275 |
| | (3) | The Free State of the Congo | 276 |
| | (4) | Israel | 277 |
| | (5) | Taiwan | 277 |
| **6.5** | **Original acquisition and indigenous rights** | | 278 |


## 6.1 General considerations

The question of the legal status of indigenous groups and other polities outside the ambit of the European political system was one of the great initial issues of international law. Victoria's *De Indis*,[1] written to vindicate the private and public rights of the Central American Indians, is only the best-known work of an extensive literature.[2] The point of the debate was twofold: to examine the

[1] *De Indis et de Jure Belli Relectiones* (1532, publ posth 1557), in *Political Writings* (ed Pagden and Lawrance, 1991), 231.

[2] Lindley, *Acquisition and Government*, 10–23 and works there cited. See also Alexandrowicz (1968–9) 43 *BY* 205; Alexandrowicz (1963) 39 *BY* 441; Alexandrowicz (1959) 35 *BY* 162; Williams,

moral propriety of European actions and to determine the legal effect of the various transactions of the explorers and colonizers. Given the relatively non-peremptory nature of international law at the time, the former was the more important issue. Nevertheless, State practice, with at least some consistency, did attach significance to the legal incidents of the acquisition of territory from and the government of indigenous States and other entities in the Americas, Africa and Asia. That it still may do so is evident from the advisory opinion of the International Court in the *Western Sahara* case.[3] At least a summary statement of the position is in order here.

The essential problem concerned acquisition of territory and its effects. Central to the traditional law was the notion of territory unoccupied and unacquired—*terra nullius*. Such territory could be acquired merely by an occupation sufficiently effective, accompanied by an intention to acquire sovereignty.[4] On the other hand where territory was already occupied or acquired, cession, conquest (and possibly prescription) were the appropriate modes.[5] But the category *terra nullius* was not self-defining nor did practice bear out the positivist assumption that territory was either *terra nullius* or part of an existing State. The category *terra nullius* was a residual one. Thus it is first necessary to determine in what cases territory was regarded as occupied whether by indigenous States or other entities with a degree of political organization. A second, in practice more controversial, issue was the legal effect of acquisition of territory by treaty on the status of the inhabitants: did they possess any continuing international legal rights under the treaties, whether of cession or protection,

*The American Indian in Western Legal Thought*; Anghie (1996) 5 *Soc & Legal Stud* 321; Anghie, *Imperialism, Sovereignty and the Making of International Law*, Pt 1; Lesaffer (2005) 16 *EJIL* 25, 42.

[3] ICJ Rep 1975 p 12.

[4] It has been argued that at least prior to 1800, discovery alone, or discovery accompanied by symbolic acts, was sufficient to establish title to *terra nullius*: Keller, Lissitzyn and Mann, *Creation of Rights of Sovereignty through Symbolic Acts 1400–1800*; Simsarian (1938) 53 *Pol Sc Q* 111. The better view is that neither was sufficient to create a valid title, although they might establish a right in the State concerned to perfect its title by effective occupation: cf *Island of Palmas Case* (1928) 2 RIAA 829, 845–6 (Arbitrator Huber); Jennings, *Acquisition of Territory*, 4, 29. In the various African arbitrations, discovery was never treated as decisive: see, e.g., *Island of Bulamu Arbitration* (1870) 3 RIAA 637; *Delagoa Bay Arbitration* (1875) ibid, 996. To the same effect *Johnson and Graham's Lessee v McIntosh* (1823) 5 L ed 681, 692–3 (Marshall CJ); Lindley, *Acquisition and Government*, 26.

[5] Similarly the common law distinguished between conquered or ceded and settled territory. In the former case existing laws and customs applied until changed; in the latter, the common law was so far as applicable in its entirety at the date of acquisition. See *Anon* (1722) 2 P Wms 75, 24 ER 646; *Blankard v Galdy* (1692) 4 Mod 222, 87 ER 359; Bl Comm I, 108–9. But *Calvin's Case* (1608) 7 Co Rep Ia, 77 ER 377, 398, which is sometimes cited in this context, only established a distinction between conquest of a Christian Kingdom and conquest of an infidel kingdom: cf also Littleton's note (1640) 1 Salk 49, 91 ER 46.

and if so, how were these to be exercised? Or was the new sovereign at liberty to ignore the restrictions upon its freedom covenanted for, either generally or in specific cases?

Comprehending these issues—the acquisition of more than half the world and its peoples by a handful of European States—presents numerous difficulties, especially since the same States largely controlled the rules of the game. Notions of absolute State sovereignty and of international law as the law of the (European) Concert of Nations gained currency in the nineteenth century, and these, together with the fact that the law allowed extensive freedom of action to the colonizer, tend to confuse and blur the issues. Appeal to particular treaty rights was misleading (and was sometimes intended to be) when general international law provided adequate though unpalatable grounds for action. There is a further difficulty in that the intertemporal law requires assessment in the light of the law as it was at the relevant time, so that concepts repugnant to modern international law may still produce important effects under that law.[6] But a distinction may be made between the actual legal effects of transactions entered into at a certain period[7] and the juristic principles or theories advanced to explain the transactions. The intertemporal law does not require the continued acceptance of the latter, except insofar as they were embodied in or controlled the transactions themselves. Nor does it require exclusive concentration on the older law. At the least, continued effective exercise is necessary for the retention of rights that by modern standards were wrongfully acquired:[8] such rights may therefore be more readily lost. Moreover, in certain cases new peremptory norms of general international law (in particular, the principle of self-determination), or new conventional rules, may require some degree of restitution of defeated rights or interests.

More fundamentally, three reservations may be made concerning the law as propounded by late-nineteenth-century writers.[9] In the first place, that view of the law was itself 'new'; the older writers were considerably more willing to

[6] Though modern decisions have resisted this: see, e.g., *Mabo v Queensland (No 2)*, (HCA, Brennan J) (1992) 107 ALR 1, 26 ff; 112 ILR 457, 490 ff. On the intertemporal law, as classically described, see *Island of Palmas Case* (1928) 2 RIAA 829, 845. Cf *Right of Passage Case*, ICJ Rep 1960 p 6, 37: 'the validity of a treaty concluded as long ago as the last quarter of the eighteenth century, in the conditions then prevailing in the Indian Peninsula, should not be judged upon the basis of practices and procedures which have since developed only gradually . . . ' See also Elias (1980) 74 *AJ* 307. In modern times many claims based on breach of colonial treaties or commitments are advanced; but the law of State responsibility is also subject to the intertemporal rule: ARSIWA, Art 13 and commentary, reprinted in Crawford, *Selected Essays*, 131–4.

[7] The early emphasis on treaty relations is discussed in McHugh, *Aboriginal Societies and the Common Law*, 61–116.

[8] *Island of Palmas* (1928) 2 RIAA 869, 845–6; 4 ILR 103, 104–5.

[9] E.g., Westlake, *Collected Papers* (ed Oppenheim, 1911), 139; Lorimer, I *Institutes of the Law of Nations*, 101.

accord legal personality to indigenous communities and peoples both before and after European penetration of their territories.[10] Moreover, it was a view of the law which, though dominant, was not unchallenged at the time, and was far from unchallengeable.[11] In the second place, State practice was by no means unambiguous. The common law's continuing insistence on even colonial protectorates as extraterritorial to the dominions of the Crown was an example of the influence of older doctrine.[12] Thirdly, colonial practice was, so far as legal basis existed for it, to a great degree conventional. By insisting on its version of paramountcy over the Indian Native States, Great Britain enforced agreement where none was necessary and the legal foundation of paramountcy was that very enforced consent. These points, so far as they relate to dependent statehood, will be discussed further in Chapter 7.

Finally brief mention will be made here of those rare cases where new States (as distinct from colonies or dependent entities) have been created on unoccupied or abandoned territory.

## 6.2 The status of indigenous communities

### (1) Statehood of indigenous communities

It is clear that some indigenous communities were regarded not only as legal occupants of their territory but as fully sovereign States in international law.[13] Although some writers required a certain degree of 'civilization' as a prerequisite for statehood,[14] it had long been established that the only necessary condition was a degree of governmental authority sufficient for the general maintenance of order, and subsequent practice was not sufficiently consistent or coherent in the opposite direction to change that position. Although in many cases an extensive system of capitulations and concessions was established,[15] Asian States such as (for example) China,[16] the Ottoman

[10] There is a full citation of authority in Lindley, *Acquisition and Government*, 17–20.

[11] Ibid and cf O'Connell (1960) 54 *ASIL Proc* 77, 81.

[12] Baty (1921–2) 2 *BY* 109, 109 stated that 'the conception of a Protectorate has vitally altered its character within our own memory'. See further Chapter 7.

[13] See the excellent discussion in Lindley, *Acquisition and Government*, 10–47; and Alexandrowicz, *Introduction*. See also Sinha, *New Nations and the Law of Nations*, 12–27; Syatauw, *Some Newly Established Asian States and the Development of International Law*, 48–52; Sastri (1953) 2 *Indian YBIA* 133.

[14] In particular Westlake in *Collected Papers* 139, 145, who required a 'native government capable of controlling white men or under which white civilization can exist.'

[15] Especially in the earlier, mercantile, period these were not always unequal: Alexandrowicz, *Introduction*, Ch 6; Alexandrowicz, *The European-African Confrontation*, 20–8, 83–91.

[16] Treaty of Commerce (Great Britain–China), July 1843, 5 NRG 504; and further treaties between China and USA, 3 July 1844, 7 NRG 134; China and France, 24 October 1844, 7 NRG 431; China

Empire,[17] Afghanistan,[18] Bukhara,[19] Burma,[20] Ceylon,[21] Japan,[22] Korea,[23] Thailand (Siam),[24] Brunei[25] and the Maratha Empire in India[26] were early recognized as independent States subject to international law. Treaty practice in particular reflected the position. This did not necessarily mean that the same rules were applied to or by such States as were applied by European States between themselves.[27] But that is to be explained not by any distinction between 'civilized' and 'barbarous' States but because many of those rules were what would now be called regional or local customs rather than general international law.[28]

Nor were African communities disqualified from statehood. The independence of the Kingdom of Swaziland, for example, was expressly recognized by

and Russia, 13 June 1858, 16 (pt 2) NRG 128; and the Hanseatic Cities of Bremen, Hamburg and Lubeck and Mecklenbourg-Schwerin and the Zollverein and China, 2 September 1861, 19 NRG 168. See also Hsü, *China's Entrance into the Family of Nations*, 3–18; Peyrefitte, *The Collision of Two Civilisations* (Rothschild trans, 1989).

[17] Treaty of Friendship & Commerce (Prussia–Ottoman Empire), 22 March 1761, 1 RRG 1; Treaty of Peace & Commerce (Spain–Ottoman Empire), 14 September 1782, 3 NRG 402; Russia–Ottoman Treaty, 10 June 1783, 3 NRG 615.

[18] Treaty of Peace (Great Britain–Afghanistan), 30 March 1855, 4 NRG 2nd ser 533.

[19] Commercial Convention (Russia–Bukhara), 23 May 1868, 20 NRG 91. See also Conventions between Russia and Kokhand, 10 February 1868, ibid, 90; and Russia and Khiva, 24 August 1873, ibid, 97.

[20] Treaty of Friendship & Commerce (Italy–Burma), 3 March 1871, I NRG 2nd ser 453.

[21] Treaty between King of Candy and the United Provinces/Dutch East India Co, 14 February 1766, 1 NRG 317.

[22] Netherlands–Japan, 9 November 1855, 16 (pt 2) NRG 392; Russia–Japan, 26 January 1855, 16 (pt 2) NRG 454; France–Japan, 9 October 1858, 16 (pt 2) NRG 439; Great Britain–Japan, 26 August 1858, 16 (pt 2) NRG 426.

[23] Japan concluded two agreements, establishing a protectorate over and then for the annexation of Korea: Japan–Korea, Protocol regarding the Situation of Korea, 23 February 1904, 195 CTS 75; Treaty of Annexation, 22 August 1910, 212 CTS 43; Lee (2002) 11 *Pacific Rim L & Pol J* 63, 92. See also Treaty of Friendship, Commerce and Navigation (Korea–France), 4 June 1886, 168 CTS 45. Though Korea was among several East Asian States which Lorimer and Oppenheim doubted were 'fully sovereign', the position actually taken by other States did not involve a denial of status. See Kingsbury (1998) 9 *EJIL* 599, 606.

[24] *Temple Case*, ICJ Rep 1962 p 6. And see Treaty for regulating the status of the Kingdom of Cambodia (France–Siam), 15 July 1867, 20 NRG 238; Treaty of Commerce (Austria–Hungary–Siam), 17 May 1869, 2 NRG 2nd ser 438; Treaty on Commercial Relations with the province of Burmah (Great Britain–Siam), 14 January 1874, 2 NRG 2nd ser 511.

[25] Treaty of Friendship, Navigation & Commerce (USA–Borneo (Brunei)), 23 June 1850, 15 NRG 417.

[26] *Right of Passage Case*, ICJ Rep 1960 p 6, 38.

[27] The assertion of particular values as universal was not confined to the Europeans: see Letter of 3 October 1793 from Emperor Qianlong to King George III (on the occasion of the Macartney mission to China): translated in Peyrefitte, 289–92.

[28] McNair, *International Law Opinions*, vol 1, 65; cf *Temple Case*, ICJ Rep 1962 p 6, 128 (Judge Spender (dissenting)). Cf the International Court's treatment of the relation between local and general customs, as between Portugal and the Maratha Emperors, in the *Right of Passage Case*, ICJ Rep 1960 p 6, 37, 91–2.

Great Britain and the South African Republic in 1881 and 1884.[29] Morocco, Algeria and Tunisia were regarded as independent States in the period prior to the institution of protectorates by France and Spain.[30] In the *Western Sahara* case, the International Court described Morocco in 1884 as 'a State of a special character', due to its decentralized structure.[31] Morocco was regarded as continuing that status subsequently.[32] Although France is sometimes said to have adopted a different policy, this is very doubtful—witness for example its treaties with Madagascar.[33]

[29] Pretoria Convention, 3 August 1881, 159 CTS 57, 72 BFSP 900, Art 24; Convention between Great Britain and the South African Republic for the Settlement of the Transvaal Territory, 27 February 1884, 163 CTS 345, 75 BFSP 5, Art 12. A further convention of 2 August 1890, Art 1 provided for the regulation of Swazi affairs 'with the consent of the Swazi Government': 82 BFSP 1062. Cf *Sobhuza II v Miller* [1926] AC 518, 522. The Sultanate of Zanzibar was another example: see the *Island of Lamu Arbitration* (1889) 3 Hertslet 891, 898: the Arbitrator, after rejecting geographical considerations, oral undertakings and an unsigned treaty, held that 'the Sultan has remained free to dispose of the exercise of his sovereign rights.' See further 1 Hertslet 300–30. For Abyssinia, 2 Hertslet 421–63; Pankhurst, *The Ethiopians*, esp chs 8–10.

[30] For example, the Bey of Tunis rejected the credentials of a consul from Austria, who arrived in North Africa with a firman from the Porte rather than instructions from Vienna specific to his post: Circular of the Bey of Tunis to Foreign Consuls, 21 August 1845, 7 NRG 497. See the earlier treaties between European States and North African rulers: Treaty of Peace (Sweden–Tunis), 4 September 1764, 6 NRG, Index; Treaty of Peace (Spain–Tunis), 19 January 1795, 6 NRG, Index; Treaty of Peace & Commerce (Netherlands–Tunis), 17 August 1713, 28 CTS 359, 1 NRG 92; Treaty of Peace & Commerce (Great Britain–Tunis), 30 August 1716, 1 NRG 147; Treaty of Peace & Friendship (USA–Tunis), August 1797, 2 NRG 178; Treaty of Peace & Commerce (Denmark–Algiers), 16 May 1772, 2 NRG 38; Treaty of Peace & Friendship (Spain–Tripoli), 10 September 1784, 3 NRG 760; Treaty (Portugal–Tripoli), 14 May 1799, 3 NRG Supp 165; Treaty (Great Britain–Tripoli), 19 July 1716, 1 NRG Supp 140; Treaty of Peace & Commerce (France–Morocco), 28 May 1767, 1 NRG 449; Treaty of Peace & Commerce (Great Britain–Morocco), 5 August 1761, 1 NRG 42; Treaty of Friendship & Commerce (USA–Morocco), 25 January 1787, 3 NRG 54; Convention between Great Britain and Tunis, 19 July 1875, 2 NRG 2nd ser 479. In total there were 367 treaties, declarations and agreements between the Barbary Powers and European States: Mössner, *Grotius SP 1971*, 197, 212–13. A number of Moroccan treaties up to 1906 are reprinted in the US-Counter-Memorial, annexes 1–32, *Rights of US Nationals in Morocco*: ILC Pleadings, vol I, 417–627. See also Alexandrowicz, *The European-African Confrontation*, 18–28; de Montmorency (1918) 4 *GST* 87; Bedjaoui, *Law and the Algerian Revolution*, 17–22; *The Madonna del Burso* (1802) 4 C Rob 169, 165 ER 574 (Sir Wm Scott); *The Magellan Pirates* (1853) 1 Sp Ecc & Ad 81, 164 ER 47, 52. Bynkershoek, *Quæstionum Juris Publici Libri Duo*, vol I, §§122–30, was emphatic: 'The peoples of Algiers, Tripoli, Tunis, and Salee are not pirates, but rather organized states, which have a fixed territory in which there is an established government, and with which, as with other nations, we are now at peace, not at war. Hence they seem to be entitled to the rights of independent states.' Gentili, cited by Bynkershoek as a proponent of the contrary view, seems to have regarded the Barbary pirates as distinct from the King of Barbary: *Hispanicæ Advocationis Libri Duo*, vol I, xv §§67–8.

[31] ICJ Rep 1975 p 12, 44–5.

[32] *United States Nationals in Morocco*, ICJ Rep 1952 p 175, 183. For the status of Morocco under French and Spanish protection see Chapter 7.

[33] Treaty of Commerce (Madagascar–France), 12 September 1862, 17(2) NRG 218.

In the Pacific, Hawaii,[34] Tonga,[35] the Maori Confederation in New Zealand[36] and, probably, Samoa[37] were also so recognized. In general, other States looked for communities with 'indisputable pretensions to independence',[38] wherever situated and governed under whatever forms: between such communities, with the reservations already made, the general rules of international law were applied.

## (2) Legal personality of indigenous communities not regarded as States

A further question was whether communities not possessing a sufficiently coherent and organized government to be termed States were nevertheless in law occupants of their territory, so that it might only be acquired by cession or conquest, and not by occupation. Classic international law had allowed, in Vitoria's words, that 'the aborigines undoubtedly had true dominion in both public and private matters, and … neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners.'[39] On the other hand, in a development parallel to those mentioned already, writers in the later nineteenth century inclined to the view that only 'sovereignty' was sufficient to preclude occupation, and that, to quote Westlake again 'an uncivilized tribe [could] grant by treaty such rights as it understands and exercises, but nothing more.'[40] At the Berlin Conference of 1885 this

[34] Treaty of Friendship, Commerce & Navigation (USA–Sandwich Islands), Honolulu, 23 December 1826, 16 NRG 1; Commercial Convention (USA–Hawaii), 30 January 1875, 1 NRG 2d ser 72, and see *Larsen v Hawaiian Kingdom* (2001) 119 ILR 566, 598–615.

[35] See the Treaties of Friendship with France, 11 January 1980, 1215 UNTS 13; 65 BFSP 373; Germany, 1 June 1977, 1109 UNTS 187; 67 BFSP 167, and Great Britain, 29 November 1879, 70 BFSP 9.

[36] 89 CTS 873. See Kingsbury, in Kawharu (ed), *Waitangi*, 121; McHugh, *The Maori Magna Carta*, 31–41, 45–63; Hackshaw, in Kawharu, *Waitangi*, 92, discussing *R v Symonds* (1847) NZPCC 387, which recognized Maori title in New Zealand. See also Brownlie, *Treaties and Indigenous Peoples* 4–13.

[37] See Moore, 1 *Digest* 27. For Samoan treaties see Treaty of Commerce (USA–Samoa), 17 January 1878, 4 NRG 2nd ser 552; Treaty of Amity (Germany–Samoa), 24 January 1879, 4 NRG 2nd ser 481. But cf McNair, *International Law Opinions*, 66 (Samoa not 'a foreign State' for the purposes of the Naturalization Act 1870, s 6). See also Johnston, *Sovereignty and Protection*, Ch 4.

[38] Stamford Raffles to Lord Minto, 10 June 1811 (Malay States) cited in Harlow and Madden (eds), *British Colonial Developments 1774–1834*, 65. The orthodox test of independence was applied, for example, by the King of Italy to the legal status of tribes in the area controlled by the Barotse Kingdom in 1905: 3 Hertslet 1074. Cf also *Foster v Globe Venture Syndicate Ltd* [1900] 1 Ch 811 (status of tribes of Suss (Morocco)).

[39] *De Indis* I, prop 24 §334 (1532).

[40] Westlake, *Collected Papers*, 151. To the same effect Huber in the *Island of Palmas Case* (1928) 2 RIAA 829, 858 stated that contracts with '*native princes* or *chiefs* of *peoples* not recognized as members of the community of nations … are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties …' As it stands,

conflict of opinion was explicit. A Declaration relating to conditions for effective occupation of African territory[41] provided merely for public notification of any annexation or protectorate, together with an obligation to assure a sufficient authority in the territory to protect acquired rights and freedom of trade.[42] Taken by themselves these conditions were unobjectionable but the omission of further conditions was significant. The United States delegate observed that

> Modern international law follows closely a line which leads to the recognition of the right of native tribes to dispose freely of themselves and of their hereditary territory. In conformity with this principle my government would gladly adhere to a more extended rule, to be based on a principle which should aim at the voluntary consent of the natives whose country is taken possession of, in all cases where they had not provoked the aggression . . . [The Declaration] only points out the minimum of the conditions which must necessarily be fulfilled . . . [I]t is reserved for the respective signatory powers to determine all the other conditions from the point of view of right as well as fact which must be fulfilled before an occupation can be recognized as valid.[43]

Both Lugard[44] and Alexandrowicz[45] argue that this view was tacitly accepted at the Conference, though in view of the reaction of some of the participants this is doubful.[46] When the *Institut de Droit International* examined the question of acquisition of territory at Lausanne in 1888, it endorsed substantially the same rules as established by the Berlin Conference,[47] but failed to accept the proposal '[t]hat occupation by a civilized State of territory in Africa not occupied by any other civilized State ought to have as its basis arrangements with the chiefs of the aboriginal tribes.'[48]

this is tautologous; and it does not exclude the possibility that in at least some cases such agreements could have direct legal effects. The indigenous groups in question were apparently at a very low level of organization: even then, their grants were capable of having 'indirect legal effects' (ibid). The Cayuga Indians of North America were also stated not to be a 'legal unit of international law': *Cayuga Indians Claim* (1926) 6 RIAA 173, 176: their treaty of cession of lands was treated as a contract (ibid, 186–7). Keller, Lissitzyn and Mann, *Creation of Rights*, 9, 140 treat 'the acts of natives' quite generally 'merely as facts that showed the actual situation as to possession', or as 'akin to symbolic acts of possession'. Cf also Fawcett, *British Commonwealth*, 113, 127n.

41 76 BFSP 4, 19: 'Declaration relative aux Conditions essentielles à remplir pour que des Occupations nouvelles sur les Côtes du Continent Africain soient considerées comme effectives.'

42 Articles 34 and 35.

43 Protocol of 31 Jan 1885, Pavl Paper C4361, 209; cited Westlake, *Collected Papers*, 140.

44 Lugard, *The Dual Mandate in British Tropical Africa*, 11.

45 Alexandrowicz, *The European-African Confrontation*, 47.

46 Cf the German reply: Westlake, *Collected Papers*, 141 ('delicate questions, upon which the conference hesitated to express an opinion').

47 Wehberg (ed), *Institut de Droit international, table général des resolutions 1875–1956*, 68–9.

48 (1886) 10 *Annuaire IDI* 181–2. On the other hand a resolution that aboriginal tribes and the territory inhabited by them are outside 'the community of the law of nations' was also defeated: ibid.

But it is one thing to deny an entity statehood on grounds such as lack of independence or coherent organization,[49] and another to determine that the territory on which the entity is established is *terra nullius*. Different criteria were—and are—applied to determine these issues. Thus land was *terra nullius* only if it was, in Blackstone's words, 'desart and uncultivated' or 'uninhabited'.[50] Thus the proposals not accepted in the 1880s do now represent—and in my view always have represented—general international law. Lindley, after a lengthy examination of the point, concluded that:

> in order that an area shall not be *territorium nullius* it would appear . . . to be necessary and sufficient that it be inhabited by a political society, that is, by a considerable number of persons who are permanently united by habitual obedience to a certain and common superior, or whose conduct in regard to their mutual relations habitually conforms to recognized standards.'[51]

Thus only 'an unsettled horde of wandering savages not yet formed into civil society',[52] or, more neutrally, only nomadic groups lacking all regular political organization were regarded as not legal occupants of their territory, and in fact treaty-making was the normal mode of acquisition wherever local leaders could be found with whom to treat. In the light of modern anthropological knowledge the territories that might even arguably have been so defined were few indeed: only Australia[53] and the South Island of New Zealand[54] seem to have

[49] Cf the status of the 'Mauritanian entity' in the late nineteenth century: *Western Sahara Case*, ICJ Rep 1975 p 12, 57, 63–4.

[50] *Bl Comm* I, 108. Keller, Lissitzyn and Mann, *Creation of Rights*, 4 state that 'the presence of a savage population, of aborigines, or of nomadic tribes engaged in hunting and fishing' is consistent with territory being *terra nullius*, but give a more extensive interpretation to that formula than the practice supports.

[51] Lindley, *Acquisition and Governments*, 22–3. Cf Allott in Widstrand (ed), *African Boundary Problems*, 15; O'Connell (1960) 54 *ASIL Proc* 77, 81 80–1.

[52] Wheaton, *Elements*, Pt I, ch 2, s 17; Moore, 1 *Digest* 15.

[53] *Cooper v Stuart* (1889) 14 AC 286, 291 (Lord Watson), cited Lindley, *Acquisition and Governments*, 40–1; Evatt, *Grotius SP 1968*, 16, 18–19. See also *White v McLean* (1890) 24 SALR 97, l00 (Boucaut J); *Winterbottom v Vardan & Sons Ltd* [1921] SASR 364, 369; *Coe v Commonwealth* (1978) 18 ALR 592, 596 (Mason J).

[54] Lindley *Acquisition and Governments*, 41–2. Evatt states that the position on South Island was 'uncertain as between occupation and cession': ibid, 38, 43. In a Colonial Office opinion of 1839 Sir James Stephen expressed the firm view that the Maoris had sovereignty at least over North Island; this was the basis for the Treaty of Waitangi, 6 February 1840: 89 CTS 873 and see (1840) 38 Parl Papers 238; 51 *Law Officers Opinions* 4–7, and *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308. Stephen's opinion concentrated on details of British recognition (legislative and executive) of 'New Zealand' as a 'Substantive and independent State'. See also: *Correspondence relative to New Zealand* 1840 no 38, 68–9. Pennington authoritatively stated British policy in an earlier letter to Stephen of 22 June 1839 (ibid, no 11, 33–4): 'any assumption of authority beyond that attaching to a British Consulate, should be strictly contingent upon the indispensable preliminary of the territorial cession having been obtained by amicable negotiation with, and free concurrence of, the native

been treated as falling within that category, apart from scattered islands or totally uninhabited tracts.[55]

Whatever the position in Australasia may have been, almost the whole of Africa was treated as occupied territory, and the method of acquisition was overwhelmingly that of cession or, in some cases, conquest.[56] Nor were the treaties so obtained always illusory or a sham.[57]

The restrictive view of the concept of *terra nullius* was affirmed by the International Court in the *Western Sahara* case. After succinctly defining the concept,[58] the Court continued:

Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers. On occasion, it is true, the word 'occupation' was used in a non-technical sense denoting simply acquisition of sovereignty; but that

chiefs.' Despite this clear policy, after 1840 New Zealand was treated as a settled colony in that English law applied: *WiParata v Bishop of Wellington* (1877) 3 NZ Jr (NS) 72, 77–8; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 235 (Blackburn J). Keller, Lissitzyn and Mann, *Creation of Rights*, 11 take the view that North America was *terra nullius* and so open to occupation, but that view is contradicted by the jurisprudence of the Supreme Court as well as by the fact that in an overwhelming number of cases cession by treaty was the mode actually adopted: O'Connell (1960) 54 *PAS* 77, 80–1.

[55] The latter category—territories devoid of population—is for modern purposes the only clear case of *terra nullius: Antarctic Legal Status Case* (Case No VIR 185/87) (FRG, Federal Fiscal Court) (1991) 108 ILR 654, 656 (although most of Antarctica is claimed by one or another State). Prior to the Spitsbergen Treaty, it was agreed that the Svalbard Archipelago was *terra nullius*. Indeed the Treaty was concluded in order to recognize Norwegian sovereignty while maintaining access to resources, other alternatives having been rejected. See Treaty concerning the Archipelago of Spitsbergen, 9 February 1920, 2 LNTS 8; Conférence de la Paix (1919–20), Recueil des Actes de la Conférence, Partie VII.C.II, *Commission du Spitsberg* (Paris, Imprimerie Nationale, 1924); Ulfstein, *The Spitsbergen Treaty*. For the struggle between the Colonial Office (influenced by British organizations such as the Aboriginal Protection Society) and the Australian settlers over indigenous land rights see Castles, *An Australian Legal History*, 20–5; Reynolds, *The Law of the Land*: McHugh, chs 2–4 and cf Crawford (1989) 59 *Oceania* 226.

[56] E.g., Southern Rhodesia: Samkange, *Origins of Rhodesia; In re Southern Rhodesia* [1919] AC 211. But for the infrequency of cases of occupation in Africa see Alexandrowicz, *The European–African Confrontation*, 12–13.

[57] Allott in Widstrand (ed), *Africa Boundary Problems*, 14, and for examples see Lugard (1893) 1 *Geographical Journal* 53; Brunschwig (1965) 5 *Cahiers d'études africaines* 5, 11. For citations to British treaties with a number of African communities, see 14 NRG 724–5. See also Conrad, *Die Geschichte der ungleichen Verträge im neueren Völkerrecht*.

[58] ICJ Rep 1975 p 12, 39 (para 79): 'a determination that Western Sahara was a "*terra nullius*" at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of "occupation".'

did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an 'occupation' of a '*terra nullius*' in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual 'cession' of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*.[59]

This formulation was approved or a substantially similar test adopted by Judges Gros,[60] Dillard,[61] Ammoun,[62] de Castro[63] and Judge ad hoc Boni.[64] Applying this test, the Court held unanimously that the presence of nomadic tribes with a degree of political and social organization precluded the territory from being regarded as *terra nullius*.[65] The *Western Sahara* Opinion provides a decisive refutation of the criterion of 'civilization' as a test for *terra nullius*.[66]

[59] Ibid, 39 (para 80).

[60] Ibid, 75 (para 9): 'the independent tribes travelling over the territory, or stopping in certain places, exercised a *de facto* authority which was sufficiently recognized for there to have been no *terra nullius*.'

[61] Ibid, 124: 'independent tribes with a degree of political and social organization'. The conclusion of treaties of protection was also regarded as relevant: 'you do not *protect* a *terra nullius*.'

[62] Ibid, 85–7.

[63] Ibid, 171: 'inhabited at the time of colonization by Spain by independent tribes.'

[64] Ibid, 173: 'Its population, although consisting mainly of nomads, was organized in independent tribes under the authority of democratically elected sheikhs.'

[65] ICJ Rep 1975 p 12, 34–40. For comment see Shaw (1978) 49 *BY* 118, 127–34; Levy (1976) 2 *Brooklyn JIL 289*; Knop, *Diversity and Self-Determination in International Law*, 109–67, 374–9; Prevost (1976) 103 *JDI* 831, 834–49; Smith (1977) 9 *Case W Res JIL* 135; Chappez (1976) 80 *RGDIP* 1132, 1160–4.

[66] Westlake's 'white civilization' view is defended by Green and Dickason, *The Law of Nations and the New World*. For a critique see Crawford, 'The Original Status of Aboriginal Peoples in North America' (Public Inquiry into the Administration of Justice and Aboriginal People, Manitoba, Working Paper, 1991). Green argues that '[w]hile there may have *occasionally* been references to arrangements with the "savages/Indians" and even attempts to protect their rights in so far as their person and property was concerned, *at no time* were they considered as the owners of their land or as being entitled to any role in connection with its disposition' (Green, 38–9, emphasis added). This view (a) relies far too much on the claims to sovereignty made by the 'explorers and their patrons' (cf Christian, in Green and Dickason, vii), as compared with their recognition by other States; (b) ignores the consistent practice of treaty-making in all continents except Australia; (c) underestimates the continuing influence of the universalist tradition of international law: Green, 66, refers to Vitoria as 'almost alone' in his universalism, but see, e.g., de Las Casas, *Tres Breve Relation sur la Destruction des Indes* (1552, reprinted Mouton, Paris, 1974 (trans J Garavito)), and for an account of the dominant tradition Williams (1983) 57 *S Cal LR* 1; Henderson, in Boldt, Long and Little Bear (eds), *The Quest for Justice*, 185; Brownlie, in Bull and Watson (eds), *The Expansion of International Society*, 357; Cohen, *Handbook of Federal Indian Law* (2nd edn), 221; (d) overlooks the consistent approach of the International Court, which has clearly preferred the universalist position: *United States Nationals in Morocco*, ICJ Rep 1952 p 176, 185, 188; cf *Nationality Decrees in Tunis and Morocco*, PCIJ ser B no 4 27 (1927); *Right of Passage Case*, ICJ Rep 1960 p 6, 38; *Western Sahara Opinion*, ICJ Rep 1975 p 12. See also the *Rann of Kutch* arbitration (1968) 7 ILM 633. Green relies instead on the passing reference made by the PCIJ to the aboriginal inhabitants of Greenland in the *Eastern Greenland* case, as well as on dicta of sole arbitrators in the *Island of Palmas* (1928) 2 RIAA 829, 858 (Huber) and *Cayuga Indians Cases* (1926) 6 RIAA 173, 176 (Nielsen). But *Eastern Greenland* was decided on other grounds

## 6.3 Acquisition of territory from indigenous communities

### (1) Status of aboriginal treaties of cession

In principle, then, it was a condition for the valid acquisition of inhabited territory that the indigenous rulers or peoples consented by treaty or otherwise.[67] To this extent aboriginal treaties had legal significance.[68] What other significance they had depended on the status of the local signatories at the time of signature. If the indigenous community was a State or other distinct entity the treaty was international in character and was governed by international law.[69]

However, that did not mean that the community retained its status subsequent to the treaty. Before cession or protectorate, the status of the treaty depended on the status of the community: subsequently the situation was reversed: the status of the community depended to a large extent on the treaty and on subsequent practice or usage. Even where the treaty purported to guarantee benefits to the community or its members in perpetuity, cessions of territory tended in practice to be regarded as absolute. Although the classic writers had agreed that such conditional treaties of cession (which were very common) were binding according to their terms, [70] the difficulty was that the

and in which the position of the aboriginal inhabitants of Greenland was not explored or discussed in argument. The Court said only that the principle of conquest 'does not apply where a settlement has been established in a distant country and its inhabitants are massacred by the aboriginal population', while doubting whether 'it is possible to apply modern terminology [*sic*] to the rights and pretensions of the kings of Norway in Greenland in the XIIIth and XIVth centuries': PCIJ ser A/B no 53 (1933) 47. The restrictive view of *terra nullius* was adopted and civilizational theories rejected, with reference to *Western Sahara*, in *Mabo v Queensland* (No 2): (1992) 107 ALR 1, 29; 112 ILR 457, 491–92.

[67] For an outright treaty of cession, see, e.g., German Treaty with Quafungo, 16 May 1885, 77 BFSP 14: 'The Sultan of Fungo, as absolute Ruler and possessor of the territory of Quafungo, resigns his country to the German East African Company for ever. He surrenders to it all the rights which, according to European ideas, are comprised in the sovereign rights of a Prince.' For the controversy over the Treaty of Waitangi in view of the discrepancy between its equally authoritative English and Maori versions see Ross (1972) 6 *NZJ Hist* 129; McKenzie, *Oral Culture, Literacy & Print in Early New Zealand*; Orange, *The Treaty of Waitangi*; Biggs in Kawharu (ed), *Waitangi. Maori & Pakeha Perspectives of the Treaty of Waitangi*, 300; Walker, 'Treaty of Waitangi', ibid, 263; McHugh, *The Maori Magna Carta*, 49–54; Brownlie, *Treaties and Indigenous Peoples*, 6–7, 9, 100.

[68] In *Mohegan Indians v Connecticut* (1705, 1743, 1773) the Privy Council clearly recognized the Mohegan people as a separate nation subject to the Crown: see Smith, *Appeals to the Privy Council from the American Plantations*, 422–42. In recognizing the Indian tribes as governmental units the courts were largely reflecting the settled policy of Britain and then the United States. Prucha emphasizes the continuity of Indian policy at this level before and after the Revolution: *American Indian Policy in the Formative Years*. The implementation of that policy at local level was another matter, as the *Mohegan* case showed: Smith, *Appeals*, 442.

[69] Hence in case of doubt the treaties were to be restrictively interpreted: *Right of Passage Case*, ICJ Rep 1960 p 6, 91–2 (Judge Moreno Quintana).

[70] Vattel, *Droit des gen*, vol I, Ch XVI §193; Wolff, *Jus Gentium*, Ch I §83 (although the latter allowed the possibility of prescription in favour of the new sovereign: §84).

ceding party became, upon the execution of the treaty, a municipal unit within a larger State; in Chief Justice Marshall's words, a 'domestic dependent nation'.[71] The binding nature of such stipulations could have been assured by treating them as essential conditions of transfer which bound the territory rather like a servitude, or that they constituted an equitable duty in favour of the previous occupants.[72] That line of argument was not pursued.

## (2) Legal effects of aboriginal treaties

If the direct effects of such treaties were of limited importance there remained the possibility of indirect effects. Vis-à-vis third States treaties were prime evidence of title to territory,[73] being both necessary and, subject to the Berlin Act,[74] sufficient for territorial sovereignty. Beyond that, their effects were limited, unless the indigenous community retained international status by means of a protectorate agreement. This was because a variety of rules—non-justiciability,[75] the Act of State doctrine[76] or the non-self-executing nature of treaties in common law courts[77]—precluded municipal courts from attributing legal consequences to or otherwise enforcing nominally international agreements. And this was so even where the 'treaty' concerned was concluded subsequent to the original cession, when the indigenous community had lost any international status.[78]

[71] *Worcester v State of Georgia*, 8 L Ed 483 (1832). See Snow, *The Problem of Aborigines in the Law and Practice of Nations*, 125 ff. [72] *R v Syliboy* [1929] 1 DLR 307, 314 (Patterson AJ).

[73] See, e.g., 76 BFSP 755 (German Cameroons), where the British Government recognized as valid a title by cession obtained, as against itself, under false pretences: cited Lindley, *Acquisition and Government*, 34–5.

[74] In the *Clipperton Island Arbitration* (1932) 26 *AJ* 390, the arbitrator declined to apply the Berlin Act to territory outside Africa as against a non-signatory (Mexico).

[75] *US v Kagama*, 118 US 228, 234 (1886); *Lone Wolf v Hitchcock*, 187 US 553, 564–6 (1903).

[76] *Ex-Rajah of Coorg v East India Co* (1860) 24 Beav 300.

[77] *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308. See the Treaty of Waitangi Act 1975 (NZ), confirming and adopting measures of implementation of 'the principles of the Treaty'. On the jurisprudence of the Waitangi Tribunal see Sorrenson, in Kawharu, *Waitangi*, 158, 160–78; Sharp, *Justice and the Maori*, 125–60; Oliver, *Claims to the Waitangi Tribunal*; Sorrenson (1995) 8 *Brit Rev NZ Stud* 21, 23–8; McHugh (2004) 570–8.

[78] In *Ol Le Ngojo v AG* (1913) 5 Kenya LR 70 (East African CA) agreements between the Crown and the Masai (in a colonial protectorate) were held to be 'treaties' and therefore non-justiciable because '[t]he agreements have not the appearance of being mere contracts relating to land … [and do] not seem to have been regarded as civil contracts by the parties': ibid, 94 (Carter CJ). According to the Court: 'an agreement between a civilized State and an uncivilized community … must be taken … to be governed by some rules analogous to International Law and to have similar force and effect to that held by a treaty, and must be regarded by Municipal Courts in a similar manner.' (ibid, 91–2). Green (1970–1) 4 *Ottawa Law Review* 101, 109–11 suggests that such agreements are governed by the 'general principles of law' applied by the arbitrator in the *Abu Dhabi Case* (1951) 18 ILR 144. In *Warman v Francis* (1958) 20 DLR (2d) 627, 631, such treaties were described as 'in the

The only possibility, a remote one, was recovery in an international forum under the ordinary rules of international responsibility.[79] So in general it remains true that the legal protection of indigenous communities was afforded not by the original instruments, [80] but by internal law [81] and, where applicable, international protection of minorities and colonial territories.[82]

### (3) Grants of territory to private persons

One of the legal consequences of the political organization of indigenous communities was their capacity to grant land to private persons for their use and occupation. [83] When the territory was ceded to or otherwise acquired by another State, the principle of acquired rights required due respect for those interests: the cases clearly demonstrate the capacity either of chiefs themselves[84] or of the tribe acting by its customary procedures to create proprietary interests requiring such respect. But restrictions upon that power included a strict application of the *nemo dat* rule, [85] and scrutiny of the transactions to ensure that they were freely and properly made for adequate consideration.[86]

nature of a special agreement based on goodwill and expediency made by the Crown with a body of inhabitants'.

[79] As in the *Cayuga Indians Claim* (1926) 6 RIAA 173, where Great Britain was awarded $10,000 on behalf of part of the tribe pursuant to the Treaty of Ghent, 24 December 1814, 63 CTS 421. The Indian treaty (with the State of New York in 1789) was held to create municipal rights. Contrast the international law rights under a trusteeship agreement: *Certain Phosphate Lands in Nauru*, ICJ Rep 1992 p. 240.

[80] A further difficulty was that of demonstrating identity of personality between the original parties and the claimants: e.g., *In re Southern Rhodesia* [1919] AC 211, 231–4; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 183–98 (Blackburn J).

[81] For US and Canadian authority see *Tee-Hit-Ton Indians v US*, 348 U.S. 272 (1955); *Calder v AG of British Columbia* (1973) 34 DLR (3d) 145; *City of Sherrill, NY v Oneida Indian Nation of New York*, 125 S Ct 1478 (2005); *Delgamuukw v British Columbia* (1997) 3 RCS 1010; See also Cohen (1947–8), 32 *Minn LR* 28; Wilkinson and Volkman (1975) 63 *Calif LR* 601; 41 ALR Fed 425; *Canadian Encyclopedic Digest*, §107 (Native People and Aboriginal Rights). For the position in PNG, *Administration of Papua and New Guinea v Guba & Doriga* [1973] PNGLR 603; *Madaha Resena v Independent State of Papua New Guinea* [1991] PNGLR 174.

[82] See Knop, *Diversity and Self-Determination in International Law*, 223–48, and further below.

[83] Cf the opinion of Pratt and Yorke (1720), in Chalmers, *Opinions of English Lawyers*, vol I, 195.

[84] *Fijian Land Claims (Burt Claim)* (1923) Nielsen 588, 596–7; and cf *In re Southern Rhodesia* [1919] AC 211, 235–6.

[85] *Webster Claim* (1925) Neilsen 540, 543: 'Conveyances from the native chiefs could give Webster no higher or different title than that which existed by native customary law.'

[86] See Lindley, *Acquisition and Government*, 316–21. For land grants subsequent to the acquisition of the territory by the new sovereign see, e.g., *Johnson & Graham's Lessee v McIntosh*, 5 L Ed 681; 8 Wheaton 543 (1823).

## (4) Conclusions

To summarize, at relevant times the position under international law has been the following:

(1) Discovery has never been as such a basis of title to territory. The most that discovery could do was to create some priority for the discovering State vis-à-vis other potential colonizers.[87] The notion that discovery in itself constituted a ground of sovereignty over lands already occupied is unfounded and ethnocentric.[88]

(2) To determine the status of any given entity in international law, it is necessary to look at the particular characteristics of that entity, rather than relying on generalized descriptions such as 'protectorate' or 'indigenous people'. The assertion, for example, that no group of American Indians had a sufficient degree of organization and structure to constitute legal persons is absurd. There was no distinct category of 'aboriginal peoples' in international law; international law applied to all peoples in all continents, insofar as it was possible to do so.[89]

(3) The test that was applied was the existence of a settled system of government with respect to a particular territory, whether or not that government was 'civilized', 'European' or 'Christian'. The position taken by the International Court in *Western Sahara* was generally the position applied both by the colonising powers in the eighteenth and nineteenth centuries and by third States called on to recognize the existence of sovereignty.

(4) The principle of the intertemporal law requires that transactions completed at a particular time be judged in accordance with the law in force at that time. But it does not require that one set of doctrinal or ideological justifications be preferred to another where these are not clearly incorporated in the transaction or practice in question. For the reasons given, the 'European civilization' test for the status of indigenous peoples was not accepted in international law at any relevant time.

(5) On the other hand the protection given by contemporary international law to indigenous States and their peoples was very limited. Their status might be recognized, but they could be subject to all sorts of pressures to acquire their

[87] Jennings, *Acquisition of Teritory*, 4, 29.

[88] *A fortiori* papal grants, whatever their effect as between States owing allegiance to the Pope, could never constitute a basis for title as against third parties. In fact the authority of the Pope with respect to undiscovered lands was not even conceded by other Christian Princes. On papal grants see Muldoon, *The Americas in the Spanish World Order*, 34–7, 96–167.

[89] But see Green, in Green and Dickason, *Law of Nations*, 99 who seems to adopt the category for the sole purpose of denying rights to the peoples so described.

land, including the ultimate pressure of war.[90] But this makes it even less necessary to explain the success of European colonialisation in legal terms by categorically denying the legal personality of aboriginal peoples. In fact territory in the Americas, Asia and Africa was acquired in a variety of ways, most commonly by treaties of cession or protection.

(6) It is necessary to distinguish carefully the question what law came to apply in a newly acquired or newly colonised territory from the question of the mode of acquisition of that territory in international law. The common law distinction between settled colonies and ceded or conquered colonies for the purposes of the application of law was a different question from that of the initial validity of the acquisition of territory. The latter was an act of State and non-justiciable in the domestic courts of the acquiring sovereign;[91] the former was a subsequent classification of internal law, which could be a matter of convenience. Thus a territory might be a settled colony for the purposes of the application of the common law, but a ceded or conquered territory for the purposes of its acquisition as a matter of international law. New Zealand, or at least the North Island, was undoubtedly a ceded territory in international law by virtue of the Treaty of Waitangi, notwithstanding that it was subsequently treated as a settled colony for the purposes of the application of the common law.

(7) Unless protectorate arrangements of an international kind remained in force, indigenous groups who had granted their territory to the colonizing power lost whatever international status they may have had, from an international law point of view the treaty or agreement under which the territory was transferred ceased to be an international agreement at the moment of transfer, by reason of the disappearance of one of the parties. It then became a matter for the internal law of the successor State what regard would be paid to its treaty commitment. But it did little credit to the successor sovereign or its courts to seek to evade treaty guarantees by reason that the other party had fulfilled them, and the modern tendency has been to seek to honour such commitments, as far as possible in very changed circumstances.[92]

[90] Even before the formal abandonment of the 'just war' doctrine, international law allowed colonial expansion to occur through a variety of pretexts: cf Vattel, *Le droit des gens*, Bk I, ch 18, §209.

[91] *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308; *Secretary of State for India v Surdar Rustam Khan* [1941] AC 356, 369–72; *Francis v Queen* [1956] SCR 618; *Coe v Commonwealth of Australia* (1979) 24 ALR 118; *New Zealand Maori Council v Attorney-General* (1987) 6 NZAR 353, 361 (Cooke P), 398–9 (Somers J).

[92] On indigenous rights in international law see Kingsbury, in Barnes, Gray and Kingsbury (eds), *Indigenous Peoples in Asia*; Anaya, *Indigenous Peoples in International Law*; Gray, *Indigenous Rights and Development*, vol 3; Cohen (ed), *The Human Rights of Indigenous Peoples*; Havemann (ed), *Indigenous Peoples' Rights in Australia, Canada, & New Zealand*; Thornberry, *Indigenous Peoples and Human Rights*; McHugh, *Aboriginal Societies*, ch 5.

(8) The loss of international status that followed from cession or (in some cases) conquest did not mean that international law ceased to be relevant at least as a source of guidance in the treatment by the Crown of indigenous peoples. Analogies with international law played a considerable role in the early development of United States Indian law. In *Johnson & Graham's Lessee v McIntosh* Marshall CJ commented that the notion that Indian inhabitants were mere occupants, with a protected right to possession but no title to grant land to third parties, was 'opposed to natural right and to the usages of civilized nations'.[93] In *Cherokee Nation v Georgia*[94] and *Worcester v Georgia*,[95] the Supreme Court relied on the analogy of the protected or dependent State, emphasising the continued existence of the Cherokee nation as such. It held that:

> the Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed . . .[96]

The emphasis here was not on the mode of acquisition of the North American colonies in international law but on the limited consequences of the acquisition of external sovereignty for the internal sovereignty of the indigenous groups concerned. The Indian tribes, having once been 'self-governing sovereign political communities',[97] remained in Marshall CJ's famous words 'domestic dependent nations'.[98] Legally this conferred on them a substantial measure of independence (although in fact, as the Cherokees found, things often turned out very differently.)[99] They were subject neither to State law nor to the general body of federal law.[100] They had the right to govern themselves under their own laws. Initially, Congressional power was limited to a monopoly control over relations with Indian tribes, a view reflected in the text of the United States Constitution which confers power to regulate 'trade and commerce . . . with the Indian tribes' (Art I, s 8(3)). These original doctrines have been subject to many modifications, both through legislation and through changes in the jurisprudence of the

[93] 21 US 543, 591 (1823). [94] 30 US 1 (1831).

[95] 31 US 350, 380; 6 Pet 515, 561 (1832), citing Vattel, *Le droit des gens*, Bk I, ch 1 §§5–8, ch 16 §§192–9. [96] 6 Pet 515, 519.

[97] *US v Wheeler*, 435 US 313, 322–3 (1978).

[98] *Cherokee Nation v Georgia*, 30 US 1, 17 (1831).

[99] On the aftermath of *Worcester* see Prucha, *American Indian Policy*, 244–9; Wilkins, *Cherokee Tragedy. The Ridge Family and the Decimation of a People* (2nd rev edn).

[100] *Ex parte Crow Dog*, 109 US 556 (1883); *Williams v Lee*, 358 US 217 (1959).

Supreme Court.[101] Nonetheless, federally recognized tribes in the United States continue to have an 'original' authority which extends not only to internal matters but to some matters affecting outsiders.

(9) There were greater problems in British territories where treaties were not part of local law and were not enforceable. In fact the Crown generally accepted an obligation to comply with the treaties as a matter of good faith or policy.[102] But the previous international status of the indigenous peoples parties to the treaties remained relevant, both for its symbolic significance and because the previous international status gave weight to the Crown's policy of continuity and respect for treaty rights.

## 6.4 Original occupation of territory by a new State

The two processes of occupation of territory and the creation of new States do not normally coincide. The effective and exclusive governmental control of territory necessary for its acquisition is rarely sustainable by a collection of individuals lacking a previous political organization. Colonization, direct or indirect, has been much the more usual method of acquisition and settlement. However, in a handful of cases new States have been established on territory previously not part of any State, or on territory abandoned or ceded by its previous occupants.[103]

### (1) Liberia[104]

The American Colonization Society for the Establishment of Free Men of Colour, a private society, established settlements in West Africa from 1821 onwards for the settlement of freed slaves.[105] The settlements were administered

[101] *US v Kagama*, 118 US 375 (1886); *Lone Wolf v Hitchcock*, 187 US 553 (1903); *Tee-Hit-Ton Indians v US*, 348 US 272 (1955). For a critique of these cases see Kronowitz, Lichtman, McSloy & Olsen (1987) 22 *Harvard CR-CL LR* 507.

[102] This was presumably the point of Lord Denning MR's comment in *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta* [1982] QB 892, 919; cf Crawford (1982) 53 *BY* 253. For the Royal Proclamation of 1763 see Clinton (1989) 69 *Boston ULR* 329.

[103] Verzijl, *International Law*, vol II, 64–5; Lindley, *Acquisition and Governments*, 89–90 citing Vattel, I §206; Verhoeven, *Reconnaissance*, 12.

[104] Lindley, *Acquisition and Governments*, 111–12; Alexandrowicz, *The European-African Confrontation*, 44–5; 3 Hertslet, *Map of Africa*, 1130–40. For a failed attempt at the private creation of a State see Horn (1973) 12 *Col JTL* 520.

[105] Several southern states of the United States had established colonies of freed slaves in West Africa prior to those of the Society: see Huberich, *The Political and Legislative History of Liberia*, 821–47. On Liberia generally see Staudenraus, *The African Colonization Movement 1816–1865*; Noonan in Salzman (ed), *Philanthropy and American Society*, 109; Beyan, *The American Colonization*

by the society as a 'colony' for some time. On 23 March 1844, Dodson reported that:

> . . . the settlers not being recognized as a subsisting State, by the nation from which they emanate or by the Government of any other Country, I am of opinion that they have no rights or powers over other previous settlers to whatever nation belonging and that under these circumstances they may be considered by Foreign Powers in the position of a mere private association.[106]

The Republic of Liberia was proclaimed as an independent State on 26 July 1847,[107] and was shortly thereafter recognized by Great Britain,[108] France,[109] and other European States. United States recognition was, however, delayed until 1862.[110] Despite continuing internal (in particular financial) problems, Liberia never became a colony of any other State. The United States, having no wish for a protectorate over it, professed instead a 'jealous concern that full respect should be paid to the independent and sovereign place of [Liberia] within the family of Nations.'[111] Liberia was a signatory of the Treaty of Versailles, and an original Member of both the League of Nations and the United Nations.

## (2) The Boer Republics

The complex history of the Transvaal (later the South African Republic) and the Orange Free State from 1848 to 1900 may also be mentioned. Dutch settlers in British South Africa had penetrated north in the 1830s, establishing fragmentary but fiercely independent communities. In the Transvaal, the Sand River Convention assured the settlers of 'the right to manage their own affairs, and to govern themselves, without any interference on the part of Her Majesty the Queen's Government.'[112] The South African Republic, as it became in 1856, was thus left to become a 'flourishing and self-sustaining State':[113] its failure to do so led to its annexation by Great Britain on 12 April 1877.[114] British

*Society and the Creation of the Liberian States*; Levitt, *The Evolution of Deadly Conflict in Liberia*, 31–88. For a slave owner's testamentary disposition to send former slaves to Liberia, see *McDonough's Executors v Murdoch*, 56 US 367, 369 (1853).

[106] McNair, *Law Officers' Opinions*, vol I, 135–6.

[107] 35 BFSP 1301. The constitutional history is summarized in *Bridgeway Corp v Citibank*, 45 F Supp 2d 276, 278 (SDNY 1999).

[108] 36 BFSP 394, 21 November 1848.

[109] 47 BFSP 1109, 17 April 1852.

[110] 52 BFSP 226, 21 October 1862; Moore, 1 *Digest* §42.

[111] 85 BFSP 634–5, protesting over French and British boundary arrangements to the disadvantage of Liberia: e.g., 85 BFSP 626.

[112] 54 BFSP 1111, 17 January 1852.

[113] For a late example of its treaty practice, see Treaty of Commerce (Belgium-Transvaal), 3 February 1876, 2 NRG 176.

[114] 68 BFSP 140. See also 1 Hertslet 222–49.

sovereignty lasted only four years; by the Convention of Pretoria the South African Republic was resuscitated, and granted 'complete self-government, subject to the suzerainty of Her Majesty'.[115] This suzerainty was greatly diminished by the Convention of London of 5 February 1884,[116] which will be referred to in Chapter 16.

The Orange Free State had a somewhat similar history. It was annexed by Great Britain in 1848, without having previously enjoyed any substantial political organization. Great Britain withdrew again in February 1854. Thereafter the Orange Free State was regarded as an independent State.[117]

Both Republics were prematurely annexed by Great Britain during the Boer War,[118] and became constituent provinces of the self-governing Colony of South Africa.

### (3) The Free State of the Congo

The Free State of the Congo was for twenty-three years recognized as a separate State in personal union with the Kingdom of Belgium. Founded by the International Association of the Congo under the patronage of the King of the Belgians, its status was the logical extension of the semi-independent rule of colonial companies over their acquisitions in Africa and Asia.[119] The International Association secured extensive though not unambiguous recognition of its position at the Berlin Conference of 1884 to 1885. It was recognized as a 'friendly Government', with the right to its own flag, by the United States, France, Britain, Italy, the Netherlands, Spain, Russia and Portugal and as a 'friendly State' by Austria-Hungary, Sweden and Denmark.[120] Germany referred to it as a 'new State which is to be created'; Belgium recognized its flag 'as on an equality with that of a friendly State'. By 26 February 1885, the date of the General Act of the Conference, all but one of the signatories (Turkey) had recognized it. It was true that, as the French plenipotentiary hinted at the meeting

[115] 72 BFSP 900, 3 August 1881. [116] 75 BFSP 5.

[117] See, e.g., 63 BFSP 893; US–Orange Free State Treaty, 22 December 1871, 1 NRG 2d ser 69; 1 Hertslet 212–17. See also Treaty of Friendship, Establishment & Commerce (Belgium–Orange Free State), 1 April 1874, 1 NRG 2nd ser 211.

[118] Proclamations of 24 May 1900 (Orange Free State), 92 BFSP 548; 1 September 1900 (SAR), ibid, 547: cf 94 BFSP 97, where Salisbury refers to the war as 'the penalty which Great Britain has suffered for having in recent years acquiesced in the existence of the two Republics.' On the municipal effects of annexation see *West Rand Central Gold Mining Co v R* [1905] 2 KB 391; for the same point in an international forum, *Robert E Brown Claim* (1926) 6 RIAA 120, 129–31.

[119] On the treaties of cession concluded with the Association see Nys, *The Independent State of the Congo in International Law*, 20–1.

[120] See also Reeves (1909) 3 *AJ* 99; Hall, *International Law* (8th edn), 110–13; Lindley, *Acquisition and Government*, 39, 112; 2 Hertslet, *Map of Africa*, 541–604.

of 23 February 1885, the Association had not yet extended its governmental control over the territories ceded to it.[121] Nevertheless, though recognized at the Berlin Conference, the Free State was not, as has sometimes been asserted, 'brought into existence by the General Act'.[122] It was not therefore liable to dissolution by amendment of the General Act under Article 36.[123] The Free State—which became notorious for abuses of personal authority by King Leopold[124]—was dissolved by two treaties of cession to Belgium,[125] although the latter attempted to ensure 'une personnalité distincte' to its new colony,[126] so as to limit its liability for the acts of the former Free State—without, it may be added, much success.[127]

### (4) Israel

One view of the creation of the State of Israel holds that British withdrawal from the Mandate rendered the territory *terra nullius*, and thus free to occupation by other States, existing or to be created. However, the Mandatory's position (especially in an 'A' Mandate) was not assimilated to that of territorial sovereign, and it is correspondingly unlikely that its withdrawal should render the territory *terra nullius*.[128] The method of creation of the new State of Israel is difficult to classify, but it will be dealt with under the rubric of secession in Chapter 9.

### (5) Taiwan

It has also been argued that the Japanese withdrawal from Taiwan and its subsequent renunciation by the Peace Treaty of 1951[129] rendered it *terra nullius* and thus subject to appropriation by the first comer. But as has been seen, the better view is that the government, which took the benefit of the Japanese abandonment, did so in its capacity as the government of China and that Taiwan is not—or not yet—a separate State.

[121] 76 BFSP 1034, 1035.

[122] Contrast *Colony of the Belgian Congo v Lehideux* (Comm Tr of the Seine 1933) 7 ILR 29; *Jamar v Kersten* (1934) 7 ILR 409.

[123] 76 BFSP 4. To the same effect Snow, *The Problems of Aborigines and the Law and Practice of Nations*, 129, 143. For the status of the General Act see the *Oscar Chinn Case*, PCIJ ser A/B no 63 (1934). For the accession of the Free State to the Act, see 76 BFSP 1053.

[124] Hochschild, *King Leopold's Ghost*; cf Conrad, *Heart of Darkness*.

[125] Treaties of 8 November 1907, 100 BFSP 705; 5 March 1908, 101 BFSP 728; Brunet, *L'annexion du Congo à la Belgique et le Droit International*.

[126] *Loi sur le Gouvernement du Congo Belge*, 18 October 1908: 101 BFSP 733, Art 1.

[127] See *Huttinger v Upper Congo Ry Co & Ors* (1934) 7 ILR 172; *Jamar v Kersten* (1934) 7 ILR 409; *Montefiore v Belgian Congo* (1955) 22 ILR 226, affd 23 ILR 191 (Paris CA).

[128] Blum (1968) 3 *Israel LR* 279, 283.

[129] 136 UNTS 45, Art 2(b); Lee, (2002) 11 *Pac Rim L & Pol J* 63, 134–5.

## 6.5 Original acquisition and indigenous rights

Responses by States to claims by indigenous groups in modern times have been essentially matters of internal law. This has been supported by the distinction, set out, for example, in *Mabo v Queensland (No 2)*, between acquisition of territory by a State under international law and abolition of acquired rights in land.[130] Nonetheless, in light of the devolution of authority to territories inhabited by groups identifying themselves as indigenous (e.g., Nunavut, the Färoes, Greenland) and the inclusion of 'indigenous people' as a category in certain international instruments, it is appropriate to put these issues in some international law perspective.[131]

In the post-1945 period indigenous groups began to seek greater representation within the States they inhabit, in certain cases in the form of devolved institutions or self-government. Where they have done so, such groups typically have made reference to questions of original acquisition. Defects in the process of original acquisition or breaches of the agreements under which settler States established themselves, especially in North America and Australasia, have been relied on as a basis for restitution or reparation in some form, in particular, to protect the identity of the aboriginal people in question. After a period in the 1950s and 1960s characterized by assimilationist measures, responses have included substantial land rights, by judicial decision and/or legislation, and steps towards forms of representation and (where the demographic situation allows) self-government. According to Kingsbury:

The legal basis under which ... independence was lost was often not accepted by the indigenous group involved, and even under the legal principles of contemporaneous

[130] *Mabo v Queensland (No 2)* (HCA, Brennan J) (1992) 107 ALR 1, 31; 112 ILR 457, 493: '[I]t is not a corollary of the Crown's acquisition of a radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants. If the land were ... truly a terra nullius, the Crown would take an absolute beneficial title (an allodial title) to the land for the reason given by Stephen CJ in *Attorney-General v Brown*: there would be no other proprietor. But if the land were occupied by the indigenous inhabitants and their rights and interests in the land are recognised by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land.' The Court went on to discuss *The Case of Tanistry* (1608) Davis 27; 80 ER 516; and *Witrong & Blany* (1674) 3 Keb 401, 402; 84 ER 789, 789 (which addressed extension of British rule, respectively, to Ireland and Wales and its impact on pre-existing title), and concluded: 'It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty.' 107 ALR 1, 34–6; 112 ILR 457, 496–98. See Ritter (1996) 18 *Sydney LR* 5; Scott (1996) 45 *ICLQ* 923.

[131] See ALRC 31, *The Recognition of Aboriginal Customary Laws* (1986) I, chs 9, 10; Lam (1992) 25 *Cornell ILJ* 603; Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights*; Ivison, Patton and Sanders (eds), *Political Theory and the Rights of Indigenous Peoples*; Iorns in *Land Conflicts in Southeast Asia: Indigenous Peoples, Environment and International Law*, ch 7.

international law espoused by the colonizers it may have been tainted by illegality . . . If Lithuanian sovereignty was never lawfully extinguished and could revive, why should not the same apply to Mohawk sovereignty, as some Mohawk have argued for centuries?[132]

Yet, as Kingsbury explains, such claims have been scarcely developed, raise acute problems of 'retrospective invalidation', and insofar as they are claims for independent statehood, may not even be widely espoused amongst indigenous groups,[133] quite apart from their lack of realism. In general claims for indigenous self-government in settler States more often rely on arguments about modern conditions than on historical antecedents: in Canada, for example, where the matter has been taken furthest, they are claims for self-government of a territorial community in which indigenous peoples are in the majority or are at least a significant and therefore potentially influential minority,[134] or they concern existing recognized Indian bands in relation to their own lands.[135]

A threshold question often presented is that of definition—who is an indigenous people? Indeed can the charged phrase 'people' properly be used, as distinct from 'population'?[136] Indigenous peoples are evidently distinct from ethnic or linguistic minorities; an indigenous people would not cease to have rights as such just because it became a majority in the territory in question, any more than it would lose such rights if it became a minority. The Human Rights Committee in the *Lubicon Lake Band* case declined to address it under Article 27 of the International Covenant of Civil and Political Rights, though it has dealt with indigenous claims under Article 27.[137] Where formulations have been offered, they have tended to be diffuse.[138] Nonetheless, indigenous peoples are coming to be recognized as a distinct category in United Nations practice, for example in the Draft Declaration on the Rights of Indigenous Peoples of

[132] Kingsbury in Alston (ed), *People's Rights*, 69, 100–1.

[133] Ibid, 102; cf Knop, 245. But compare Kingsbury's earlier, somewhat more expansive, statement concerning potential revision of borders on the basis of historical claims: (1992) 25 *Cornell ILJ* 481, 496.

[134] See esp Nunavut Act SC 1993, c 28.

[135] For Aboriginal self-government in Canada see Little Bear, Boldt and Lond (eds), *Pathways to Self-Determination: Canadian Indians and the Canadian State* (1984), chs 3–6; Peters, *Aboriginal Self-Government Arrangements in Canada*; Brock (1991) 34(2) *Canadian Public Administration* 272; Asch in Levin (ed), *Ethnicity and Aboriginality*, 29; Fleras and Elliott, *The Nations Within*, 23–9, 47–9, 55–72; see also Canadian Federal Policy Guide on Aboriginal Self-Government at http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html (visited 19 July 2005).

[136] Scheinin in Ghanea and Xanthaki, *Essays in Honour of Patrick Thornberry*, 3.

[137] *Ominayak & Lubicon Lake Band v Canada*, Communication 167/1984, 26 March 1990, A/45/40, 96 ILR 667; and see Raic, *Statehood and the Law of Self-Determination*, 259.

[138] See, e.g., Brölmann and Zieck in Brölmann, Lefeber and Zieck (eds), *Peoples and Minorities in International Law*, 187.

1994,[139] and in the work of the ECOSOC Permanent Forum on Indigenous Peoples.[140] The language of the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries should also be mentioned.[141] Article 1 provides:

(1) This Convention applies to . . .

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

(3) The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.[142]

The Convention is thus equivocal so far as concerns the existence of a distinct category of 'indigenous people'.

The further question, even assuming the existence of 'indigenous people' as a legal category, is what criteria establish a particular group as 'indigenous'. China and several other States in East Asia argue that the category does not exist with respect to their territories and is to be seen as a status associated with European colonization only. In discussions of the 1994 Draft Declaration, the representative of China stated

The declaration had often been portrayed as the first of a series of instruments in the protection of indigenous peoples' rights. It was therefore important to reach a clear understanding of the group of people to which the declaration would apply. In arriving at a definition of indigenous people, the following factors should be considered: (a) the issue of indigenous people had emerged under specific historic circumstances; it was mainly the result of the colonial policies pursued by the European countries in other regions of the world, particularly in the Americas and Oceania; (b) before the arrival of the colonialists or foreign dominators, the indigenous people had lived for generations in certain countries or geographical regions and had wholly or partly preserved their

[139] UN Commission on Human Rights, Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/SUB.2/1994/2/Add.1 (1994), 34 ILM 535.

[140] ECOSOC res 2000/22; see Castellino in Ghanea and Xanthaki (eds), *Essays in Honour of Patrick Thornberry*, 55, 57–8. The Permanent Forum replaced a Working Group on Indigenous Populations, established by ECOSOC resolution 1982/34 as a subsidiary organ to the Sub-Commission on the Promotion and Protection of Human Rights.

[141] ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, 28 ILM 1382.

[142] See also explanatory statement of the Committee of the adopting Conference: International Labour Conference, Provisional Record No 25, 76th sess (1989) 7, quoted Knop, *Diversity*, 241.

own social, economic, cultural and political characteristics; (c) indigenous people must not only identify themselves as such, but must also be recognized by the Government and people of the countries in which they resided. With regard to the issue of self-identification, that self-identification should be exercised through certain legal procedures in the context of national legislation.[143]

The category of 'indigenous people' would appear, then, to implicate original acquisition by the colonizing States, for original acquisition may be taken to be the 'critical date' for defining the category.[144] The particular legal consequences of the existence of an 'indigenous people' in a given State, however, are at present probably limited to those arising from conventional arrangements such as the 1989 ILO Convention.[145] Beyond this, the range of questions associated with indigenous rights and their recognition in international law falls outside the scope of this work.

[143] Report of the Working Group, E/CN.4/1997/102, para 37. See also CHR res 1997/31, 53rd Sess UN Commission on Human Rights, 11 April 1997. See further Kingsbury (2001) 34 *NYUJILP* 189; Naqvi (1996) 71 *Indiana LJ* 673.

[144] Greenlanders and the Kurds are examples: see Kleist in Skaale (ed), *The Right to National Self-Determination*, 95, 103–7; Gökay in Ghanea and Xanthaki, *Thornberry Essays*, 315.

[145] Though international human rights law may have some general effect on the treatment of problems of indigenous rights in national courts: 'The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.' *Mabo v Queensland (No 2)*, 107 ALR 1, 29, 112 ILR 457, 491–2 (Brennan J).

# Chapter 7

# DEPENDENT STATES AND OTHER DEPENDENT ENTITIES


| | | |
|---|---|---|
| **7.1** | **General principles** | 282 |
| **7.2** | **Protectorates and protected States** | 286 |
| | (1) Protected States | 288 |
| | (2) International protectorates | 294 |
| | (3) Colonial protectorates | 299 |
| | (4) Legal effects of protectorates | 303 |
| | (i) Protectorates and domestic jurisdiction | 303 |
| | (ii) Relations between protectorate and protecting State | 305 |
| | (iii) Opposability of protectorate arrangements | 307 |
| | (iv) Protectorates and State succession | 307 |
| | (v) Cession of protected territory | 310 |
| | (vi) International responsibility | 314 |
| | (vii) Treaty-making power with respect to protectorates | 315 |
| | (viii) Belligerency and protectorates | 316 |
| | (ix) Nationality in protectorates | 317 |
| | (x) Protectorates and State immunity | 318 |
| | (xi) Protectorates and international organizations | 318 |
| | (xii) Termination of protected status | 318 |
| **7.3** | **Other cases** | 320 |
| | (1) Special treaty relations | 320 |
| | (2) Vassal States and suzerainty | 321 |
| | (3) Autonomy and residual sovereignty | 323 |
| | (4) Spheres of influence | 327 |


## 7.1 General principles

A perennial problem in the law and practice of territorial status has been the various types of dependent entities. Precisely because of their dependence, many of these did not qualify as States under the criteria discussed in Chapter 2. Nonetheless they appeared to possess a legal personality distinct from any other

State, including the 'dominant' State. The existence of such 'dependent States' seemed to nineteenth-century writers strange and anachronistic. Oppenheim referred to their existence as an 'anomaly', language changed only in the ninth edition.[1] A legal puzzle, they were at least useful in providing a contrast with 'full-sovereign' States. Thus for Judge Anzilotti:

> The conception of independence regarded as the normal characteristic of States as subjects of international law cannot be better defined than by comparing it with the exceptional and, to some extent, abnormal class of States known as 'dependent States.' These are States subject to the authority of one or more other States. The idea of dependence therefore necessarily implies a relation between a superior State (suzerain, protector, etc) and an inferior or subject State (vassal, protégé, etc); the relation between the State which can legally impose its will and the State which is legally compelled to submit to that will. Where there is no such relation of superiority and subordination, it is impossible to speak of dependence within the meaning of international law.[2]

The older dependent States have now disappeared: modern practice has developed its own categories of shared governmental competence which are mostly different both in their purpose[3] and in the modalities through which they have been established,[4] and which can operate without the stigma of dependence, colonial or otherwise.[5] These categories include associated statehood, international administration of territory and special settlements involving groups of States or international organizations; they are dealt with elsewhere in this book.

Further, with the more liberal view of international personality taken in modern practice including UN membership practice, the notion of a 'half-sovereign' or 'dependent State' is unnecessary. But despite the disappearance of entities formally termed 'protectorates' or 'protected States', there still exist various territorial entities subject to divided competence or which are represented for various purposes by other States or by international organizations, and the concept of representation in international law deserves study. In addition, legal problems of dependent status continue to arise based on the earlier practice, in particular in land boundary disputes; and to that extent the old law and practice remain relevant.

[1] *International Law* (1st edn), vol 1, 101; cf (8th edn), vol 1, 119, omitting part only of the passage; see the more neutral language of the (9th edn, vol 1, 123–4: '[T]hese partially independent states are international persons and subjects of international law, although the extent to which they are such is a question of degree depending on the circumstances of particular cases.' See also the authorities cited in Kamanda, *Study of Legal Status*, 36–9; Rousseau, *DIP*, vol II, 290–300.

[2] *Austro-German Customs Union Case*, PCIJ ser A/B no 41 (1931) 57 (Judge Anzilotti). For the Austrian argument, PCIJ ser C no 53, 86–94.

[3] See Grant (1999) 28 *Georgia JICL* 9, 50.

[4] See Keitner and Reisman (2004) 39 *Texas ILJ* 1, 6.

[5] See the observations of Judge Ammoun, *Barcelona Traction (Second Phase)*, ICJ Rep 1970 p 3, 309.

The variety of dependent status in practice has been considerable: almost every permutation of rights and powers can be instanced from near-independence to practical absorption in another State. As a result, terminology in this field tends to be confused—perhaps inevitably so, since, even if an appropriate term is chosen to describe a dependency relationship at the time it was formed,[6] later changes could render the term confusing and inappropriate.[7] For this reason alone the cardinal principle is that the legal incidents of a given relationship are to be determined not by inference from the label attached to it ('protectorate', 'suzerain', 'vassal'. . .) but from an examination of the constituent documents and the circumstances of the case. This principle was affirmed by the Permanent Court in *Nationality Decrees in Tunis and Morocco*:

> The extent of the powers of a protecting State in the territory of a protected State depends, first, upon the Treaties between the protecting State and the protected State establishing the Protectorate, and, secondly, upon the conditions under which the Protectorate has been recognized by third Powers as against whom there is an intention to rely on the provisions of these Treaties. *In spite of common features possessed by Protectorates under international law*, they have individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development.[8]

Two other points of general principle should also be mentioned.

First, the distinction is often drawn between 'internal' and 'external' sovereignty, with the implication that international status depends only on the latter.[9] The distinction is certainly hallowed by use, but in this context at least its usefulness is open to serious question. In practice, the power to act externally is (especially in the case of protectorates) reserved to the metropolitan

[6] In some cases no description was attempted: e.g., Cyprus after 1878, as to which see below, this chapter.

[7] The Indian Native States were variously described (individually or collectively) as in no sense subjects of international law and 'not independent', (India Office Certificate, *Bishwanath Singh v Income Tax, Central & United* (1942) 10 ILR 43, 46, decision by the High Court of Allahabad), as governed by 'a sovereign ruler under the suzerainty of His Majesty' (ibid), as 'internally sovereign' (*Singh v State of Vinhya Pradesh* (1953) 20 ILR 3; *Magher Singh v Principal Secretary of the Jammu & Kashmir Government* (1953) 20 ILR 4), as governed by an 'Independent sovereign', though not 'independent in the full sense of the word' (*Maharajah of Tripura v Province of Assam* (1948) 22 ILR 64), and as a 'Sovereign State by the Law of Nations' (*Sirkar v Subramania Iyen* (1946) 13 ILR 20).

[8] PCIJ ser B no 4 (1923), 27. The words italicized in the authoritative French text of the judgment read: 'Malgré les traits communs qui présentent *les protectorats de droit international* . . .' This makes the point much more clearly.

[9] Cf Baty (1921–2) 2 *BY* 109, 111: 'The loss of control over foreign affairs is . . . an almost exclusive criterion of the loss of existence as an international personality.' See also Jenkyns, *British Rule and Jurisdiction beyond the Seas*, 166n.

State, but the question is what are the legal effects of such a power. It may involve responsibility for such relations and include the power to give effect to that responsibility internally; it may involve external responsibility without the power of internal execution, or it may involve merely responsibility for the *conduct* of such relations without either technical international responsibility or the power of implementation.[10] The situation can only be determined by careful examination of the particular case—not by any such formulas as 'internal' or 'external' sovereignty.[11]

A second point concerns the effect of internationalization, a quite common feature of dependent status. For example, Great Britain held a protectorate over the Ionian Islands between 1815 and 1863 pursuant to a multilateral treaty.[12] The autonomy of the 'vassal States' of the Ottoman Empire, such as Bulgaria and Crete, was guaranteed by the Treaty of Berlin 1878.[13] Perhaps most notably the French Protectorate in Morocco was subject to important international guarantees under the Act of Algeciras 1906.[14] As a result, in Judge van Eysinga's words:

> the regime in the Moroccan Protectorate is more complicated than that found where a single Colonial Power has to deal with a protected State . . . Disregarding the Spanish and Tangier zones, the case we have to consider is that of a State, whose international status is in a large measure determined by collective conventions and which is under the protection of one of the States parties to these conventions.[15]

Internationalization of a dependent entity may have several effects. The status of the entity in question is more likely to be clearly defined than in a bilateral (often not freely negotiated) arrangement. Moreover, the status of the entity is thus made the subject of rights and duties between the various signatories: it is thus less likely to be subjected to abrupt and especially unlawful change. The general effect is to consolidate and possibly to enlarge the extent of local against metropolitan powers: this was the case in each of the three examples given above. This earlier practice may be seen to have prefigured the administration of territory under United Nations authority (as to which see Chapter 12).

[10] Cf *ILC Ybk*, 1972/I, 270 (Waldock).

[11] To the same effect Kamanda, *Study of Legal Status*, 192.

[12] Treaty of Paris, 30 May 1814, 19 BFSP 86; 63 CTS 171.

[13] Treaty between Great Britain, Austria-Hungary, France, Germany, Italy, Russia and Turkey for the Settlement of Affairs in the East, 13 July 1878, 69 BFSP 749; 153 CTS 171.

[14] General Act of the International Conference at Algeciras relating to the Affairs of Morocco, 7 April 1906, 99 BFSP 141; 201 CTS 39. On the Free City of Tangier see Chapter 5.

[15] *Phosphates in Morocco*, PCIJ ser A/B no 74 (1938) 32 (Judge van Eysinga, dissenting).

This chapter will focus on the various forms of protectorate, both because this was the most common 'category' of dependent entity, and because the experience derived from it still helps to illustrate the general problems of analysis and classification. Some further categories are briefly noted in a concluding section.

## 7.2 Protectorates and protected States

Protection of one State by another is one of the oldest features of international relations. Grotius regarded an 'unequal alliance', with one State having rights of 'protection, defence and patronage' over another, as quite consistent with the sovereignty of the latter: a view which was shared by virtually all the classic writers.[16] In the nineteenth century, this flexible interpretation of sovereignty came to be regarded as archaic. According to Baty, 'the old conception of a really independent, but protected, State had disappeared' by 1815.[17] Instead various political forms were developed which sought to derive the greatest advantage for European States in terms of accessibility of markets or bases, and the non-availability of territory to competitors, with the least disadvantage in terms of actual administrative or financial responsibility. To these political forms the term 'protectorate' was usually applied, despite their diversity and the essential freedom of action of the protecting as against the protected entity. The result was doctrinal confusion.[18] If we are to discuss under the same rubric such diverse phenomena as the ancient protected States in Europe and the disguised colonies in Africa some initial distinctions are required.[19]

In the *Island of Palmas* case, Judge Huber distinguished between international and colonial protectorates, reserving to the former the title of a 'true protectorate'.[20] Much the same distinction has been made in British constitutional

[16] *De Jure Belli ac Pacis* I, ch 3, §§XXI–XXIII; Vattel, *Le droit des gens*, vol I, §§5–8, 192; Wolff, *Jus Gentium* (1764 ed), ch 1, §§80–1. Pufendorf is less categorical: *De Jure Naturae et Gentium* VIII, ch 9, §906.

[17] (1921–2) 2 *BY* 109, 116. In fact, the change occurred later in the century, in the period 1870–95. For a full account see Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century*.

[18] About which see Anghie (1999) 40 *Harv ILJ* 1, esp 43–50; Anghie, *Imperialism, Sovereignty and the Making of International Law*, esp ch 2.

[19] Kamanda, *Study of Legal Status*, 143–5 also distinguishes three types; but only after excluding a priori both European and colonial protectorates: ibid, 23, 25.

[20] He described African protectorates as merely 'a form of internal organisation of a colonial territory, on the basis of autonomy for the natives': (1928) 2 RIAA 829, 858.

practice between 'protectorates' (of the colonial type)[21] and protected States[22] under the British Nationality Act 1948.[23] But it will be seen that international protectorates fall again into two categories: those entities which, despite protection, themselves qualify as States under the criteria discussed in Chapter 2, and those which, while not so qualifying, still enjoy some separate legal personality, including legal rights vis-à-vis the protecting State. The former class will be referred to as protected States, the latter as international protectorates.

Whatever the eventual category into which they fell, protectorates began with a consensual transaction—most usually a treaty[24]—between two or more subjects of international law, whereby the dependent entity surrendered to the protecting State or States at least the conduct of its foreign relations, and often responsibility for such relations together with various rights of internal intervention, without being annexed or formally incorporated into the territory of the latter.[25] There is thus a difference between cases of protection and cases of devolved status—that is, where territorial entities separate themselves for practical purposes while remaining formally part of the territory of the metropolitan State. Of the latter, the constituent parts of the Ottoman Empire or the British Dominions provide good examples. The formal difference is accompanied by certain differences of principle: thus the rule that alterations in the status of territorial entities are not to be presumed works in opposite directions in the two cases.

More difficult to distinguish are so-called 'suzerain' and 'vassal' States. The terms derive from feudal practice but the statuses they are intended to represent are sometimes barely distinguishable from one or other of the types of protectorate. The Indian Native States, for example, were commonly referred to as

[21] In 1953 listed as Aden Protectorate & Kamaran, Bechuanaland, British Solomon Islands, Gambia, Kenya, Nigeria and Northern Rhodesia Protectorates; the Northern Territories of the Gold Coast; Nyasaland, Somaliland, Swaziland, Uganda and Zanzibar Protectorates.

[22] In 1953 listed as the Malay States, Brunei, Tonga, the Maldive Islands, the Persian Gulf States and the Trucial Sheikdoms of Oman.

[23] See British Nationality Act 1948 (UK), s 30; British Protectorates, Protected States, and Protected Persons Orders in Council, 1948 as amended: SI 1949 No 140, in Parry, *Nationality and Citizenship Laws of the Commonwealth and Ireland*, 356–63.

[24] For the case of a protectorate by unilateral declaration, see Egypt after 1914: 109 BFSP 436; Verzijl, *International Law*, vol I, 427–34; *The King v Graham Campbell, ex parte Moussa* [1921] 2 KB 473 (Div Ct). The protectorate was also unilaterally terminated: 116 BFSP 84, and then only with significant reservations: 119 BFSP 186.

[25] Cf Jenkins' definition of a 'British protectorate': 'although the protected country is not a British dominion, its foreign relations are under the exclusive control of the Crown, so that its Government cannot hold direct communication with any other foreign power, nor a foreign power with its Government.' *British Rule and Jurisdiction beyond the Seas*, 165: approved in *Sobhuza II v Miller* [1926] AC 518, 522–3 (PC).

cases of suzerainty, but could just as easily have been termed 'protectorates'. For the sake of convenience they will be dealt with under the former heading.

A case in which the difficulty of classification coincided with its necessity was *Parounak v Turkish Government*,[26] a decision of an Anglo-Turkish Mixed Arbitral Tribunal concerning the status of Cyprus after the Anglo-Turkish Treaty of Defensive Alliance of 1878.[27] The Tribunal held that Cyprus was 'a State or territory under the protection' of Great Britain within the meaning of Article 64(2) of the Treaty of Lausanne.[28] In fact Cyprus had in 1878 been placed under the 'occupation and administration' of Great Britain, with the Porte retaining both formal sovereignty and various important rights. The occupation, which was not described as a 'protectorate' by the parties,[29] was of fixed and limited duration. No doubt it was consistent with the object and purpose of the Treaty of Lausanne to include the confiscated property of Cypriots—but apart from the Treaty, it would have been difficult to qualify the regime of Cyprus in this period as a protectorate as defined above.[30]

It is proposed to discuss the three categories of protectorate separately, since the legal incidents of each vary substantially.

## (1) Protected States

We have seen in Chapter 2 that the legal independence of a State is consistent with a considerable degree of actual dependence. The priority of formal over actual independence in assessing whether an entity is a State means that quite extensive delegation of competences by treaty can coexist with statehood. Treaty provisions do not, in general, derogate from formal independence; the question is how extensive the loss of actual independence must be under a treaty of protection before the local entity can no longer be regarded as a State. As a general rule it may be said that the exercise of delegated powers pursuant to protectorate arrangements is not inconsistent with statehood if the derogations from independence are based on local consent, do not involve extensive powers of internal control and do not leave the local entity without some degree of influence over the exercise of its foreign affairs. For example, metropolitan authority to conclude treaties for the protected entity and to implement them in the latter's

[26] (1929) 9 Rec MAT 748, 5 ILR 25.

[27] 69 BFSP 744; see also Lindley, *Acquisition and Government*, 242–3.

[28] 28 LNTS 11, providing for restitution of property belonging among others to Allied protected persons, and seized by Turkey during the war.

[29] See Salisbury's letter of 30 May 1878: 69 BFSP 1342, 1344.

[30] Cf Verzijl, *International Law*, vol II, 413: 'obviously mistaken'. The UK Copyright Act 1911, s 28 was applicable 'to any territories under [HM's] protection and to Cyprus'. The difficulty was that Cyprus at this time was not a separate entity: if Great Britain had departed, it would not have been autonomous.

territory was generally seen as inconsistent with local statehood: since modern international relations may involve practically every aspect of governmental powers within a State, control of this sort implies a discretion to intervene internally over the whole range of governmental powers. But in practice there was a spectrum of cases from virtually complete independence to loss of actual independence such that statehood is in question.

At the most independent end of the spectrum is the case where the only obligation is to attend to the advice of the 'protecting' Government. Under its Treaty of Friendship of 8 August 1949, Bhutan agreed to be 'guided by the advice of the Government of India in regard to its external relations': in return, India undertook 'to exercise no interference in the internal administration of Bhutan'.[31] Bhutan's external relations remain its own and it satisfies the basic criterion of independence. It was admitted to the United Nations on 21 September 1971.[32] Equally clear is the case of San Marino, which has undertaken not to accept the protection of any other power than Italy.[33]

[31] 157 BFSP 214, Art 2; Whiteman, 1 *Digest* 451; Kamanda, *Study of Legal Status*, 140–3. The 1865 UK–Bhutan Treaty provided for 'perpetual friendship', with disputes between Bhutan and other States made subject to British arbitration: Treaty between the Viceroy and Governor-General of Her Britannic Majesty's possessions in the East Indies and Their Highnesses the Dhurm and Deb Rajahs of Bhootan, 29 November 1865, Aitchison, *Collection of Treaties*, (4th edn), vol II, 285. According to HMSO, *Index of British Treaties, 1101–1958*, vol II, 297, the Treaty is still in force. On consistency of the 1949 treaty with Bhutanese independence, see Nagendra Singh, *Bhutan: A Kingdom in the Himalyas* (2nd rev edn) 103–7. See also Kharat, *Bhutan in SAARC*, 4–17.

[32] SC res 292, 10 February 1971; GA res 2751 (XXVI), 21 September 1971. An *a fortiori* case was Nepal. Although it was at least politically dependent upon the British East India Co. in the nineteenth century, its dependence was of a rather nominal character. British recognition was accorded in 1923: 119 BFSP 448. On relations with Britain in this period see Collister, *Bhutan and the British*, 171–3, 185–6; Thapliyal, *Mutual Security: The Case of India-Nepal*, 17–27. However because of its isolation and non-involvement in international relations it remained largely unrecognized: see the US recognition of 5 March 1947, referring to 'the independence which [Nepal] has long enjoyed': Whiteman, 2 *Digest* 206–8. See also the Indian–Nepalese Treaty of 31 July 1950: 94 UNTS 3; Bhasin (ed) *Nepal's Relations with India and China*, see 38–40 for text of Treaty of Peace and Friendship, Kathmandu (31 July 1950). On the 1950 treaty, see Labh in Ramakant (ed), *India and Nepal*, 369. Nepal was admitted to the UN in 1955, SC res 109; GA res 918(X), 8 December 1955.

[33] Treaty of Friendship and *Bon Voisinage*, 31 March 1939: 143 BFSP 537, Art 1; revising an earlier Treaty of 1897; 90 BFSP 960, Art 46. Article 1 of the 1939 Treaty did not constitute San Marino a protectorate and in any case the treaty is subject to denunciation at six months' notice (Art 58). Sereni described San Marino as under Italian 'protection' but not as a protectorate: *The Italian Conception of International Law*, 290–1. cf *USFR* 1944/IV, 290: 'Since the Republic of San Marino has been generally recognized by this Government as an independent State . . . the Department knows no reason why we should not entertain representations directly from the accredited representative of the Republic.' San Marino was initially refused WHO membership, largely on financial grounds: Higgins, *Development*, 47. But it was admitted to the WHO in 1980, acquired the status of a permanent observer of the General Assembly in March 1987, and was admitted as a Member on 2 March 1992: SC res 744, 25 February 1992; GA res 46/231, 2 March 1992. See generally Duursma, *Microstates*, 207–60.

The next step, and perhaps the central case of protected statehood, is the conduct by the protecting State of the foreign affairs of the protected State as agent pursuant to agreement. Such representation may occur on an ad hoc basis only. For example, under the arrangement between Liechtenstein and Switzerland: 'Diplomatic steps of the Principality in its relations with other States are carried out by Switzerland only from case to case and inasmuch as they are the subject of a special instruction of the Government of the Principality.'[34] Liechtenstein has its own Department of Foreign Affairs, and this arrangement only operates in a residual way. There can be no doubt that it is entirely consistent with independence.[35]

The conduct of foreign affairs by the protecting State may be accompanied by a right to advise on other matters. Tonga before 1970 was an example. By a Treaty of Amity of 18 May 1900, the King agreed to have 'no relations of any sort with foreign Powers concerning the alienation of any land or any part of his sovereignty, or any demands for monetary compensation',[36] an agreement apparently restricting part only of the King's foreign affairs power. By Article II Great Britain undertook to protect Tonga, and was accorded access to the island 'for this, or for similar purposes'. A British Agent was given consular jurisdiction in certain criminal and civil cases involving non-natives.[37] The Agent was not to interfere in internal affairs unless the interests of British subjects or foreigners were concerned, although he might tender advice at the request of the King and his Government.[38] These arrangements were terminated by agreement in 1970.[39]

[34] Note of 18 June 1973: *SCOR* 29th yr, Sp Supp No 2, 120. For the Exchange of Notes of 21/24 October 1919 see 127 BFSP 844; cf 23 NRG(3d) 543. Liechtenstein is linked to Switzerland by postal (2 LNTS 306) and customs unions (21 LNTS 232). It became a separate party to the Statute of the International Court: GA res 363 (IV), 1 December 1949 (40–2:2); and was admitted as a member State of the United Nations on 18 September 1991. SC res 663, 14 August 1990; GA res 45/1, 18 September 1990. See Duursma, *Fragmentation*, 147–206; Raton, *Liechtenstein. History and Institutions of the Principality* (2nd rev edn); Kohn (1967) 61 *AJ* 547; *Répertoire suisse*, vol I, 305–12. On representation generally see Sereni (1948), 73 *HR* 69. For UN depositary practice cf 1975 UN *Jur Ybk* 196.

[35] Samoa (formerly Western Samoa) is another example: UNITAR Study 3, *Status and Problems of Very Small States and Territories*, 115–16; Davidson, *Samoa mo Samoa*. For the New Zealand–Western Samoan Treaty of Friendship, 1 August 1962, see [1962] NZTS No 5. For the Exchange of Letters concerning Diplomatic Representation, see [1963] NZTS No 11. Western Samoa was admitted as a Member State of the United Nations on 15 December 1976. SC res 399, 1 December 1976; GA res 31/104, 15 December 1976.

[36] 107 BFSP 521, Art 1.

[37] Articles IV, V. The jurisdiction was replaced by a further Agreement of 7 November 1928: 128 BFSP 272.

[38] Article III. Cf Kamanda, *Study of Legal Status*, 68–73; Whiteman, 1 *Digest* 450–1; *ILC Ybk* 1974/II (1), 25, 27–8; ibid, 1972/II, 4–10.

[39] *Keesing's Treaties and Alliances of the World* (1981) 268 refers to a treaty of friendship between Britain and Tonga, 25 August 1958, replacing the Treaty of 1900: [1959] UKTS 67, Cmnd 848. Tonga was admitted to the United Nations on 14 September 1999. SC res 1253, 28 July 1999; GA res 54/3, 14 September 1999.

Finally, in a number of cases a protectorate has been regarded as a State despite the existence of a right of exclusive representation in the conduct of foreign affairs combined with a right to veto. This was so with the Free City of Danzig (discussed in Chapter 5). However, such situations are close to the borderline of lack of independence: it would seem necessary to establish some degree of effective exercise of local authority despite the veto. The former British protected States in the Arabian Gulf were a case in point.[40] For example, by an agreement of 22 December 1880,[41] the Chief of Bahrain undertook

> to bind [himself] and [his] successors in the Government of Bahrein to the British Government to abstain from entering into negotiations or making treaties of any sort with any State or Government other than the British without the consent of the said British Government, and to refuse permission to any other Government than the British to establish diplomatic or consular agencies or coaling depots in [his] territory unless with the consent of the British Government.[42]

By a further Exclusive Agreement of 13 March 1892, the Sheikh undertook not to enter into any agreement or correspondence with any Power other than the British Government; not to consent, without British consent, to the residence in Bahrain of the agent of any other Government, and not to alienate in any way any part of his territory except to the British Government.[43] Subsequent agreements also provided for prior consultation or approval of the grant of concessions for sponge- or pearl-fishing, or oil exploration.[44] Similar

[40] Kuwait, Bahrain, Qatar and the Trucial States of Oman (now the United Arab Emirates). See in general Al-Baharna, *The Legal Status of the Arabian Gulf States* (2nd edn). The transactions leading to British protection in Bahrain and, later, Qatar were reviewed in some detail in *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain)*, ICJ Rep 2001 p 40, 54–8 (paras 36–48).

[41] 11 Aitchison 237. On Bahrain generally see Al-Baharna, *Legal Status*, 31–5; Whiteman, 1 *Digest* 440–2; Kamanda, *Study of Legal Status*, 76–8; E Lauterpacht (1958) 7 *ICLQ* 514, 518. Adamiyat, *Bahrain Islands. A Legal and Diplomatic Study of the British-Iranian Controversy* and (more dispassionately) Tadjbakhche, *La Question des Îles Bahrein* argue for the imprescriptibility of Iranian rights over Bahrain.

[42] The Agreement preserved local competence with respect to 'the customary friendly correspondence with the local authorities of neighbouring States on business of minor importance': 11 Aitchison 237.

[43] Treaty Between Great Britain and the Chief of Bahrain, 22 March 1892, 176 CTS 467: 'I, Esan bin Ali, Chief of Bahrain, in the presence of . . . , hereby solemnly bind myself and agree, on behalf of myself, my heirs and successors, to the following conditions, viz.: 1st. That I will in no account enter into any agreement or correspondence with any power other than the British Government. 2nd. That without the assent of the British Government, I will not consent to the residence within my territory of the agent of any other Government. 3rd. That I will on no account cede, sell, mortgage or otherwise give for occupation any part of my territory, save to the British Government.'

[44] Lauterpacht, *Recognition*, 110, 112.

agreements were made with Kuwait in 1899,[45] Qatar in 1916,[46] and the Trucial States in 1892.[47]

The position of the States under these agreements was a matter of some controversy. Although the British Government repeatedly qualified them as 'independent States under the protection of Her Majesty's Government',[48] commentators tended to deny their independence,[49] and even that they had any separate personality at all.[50] In view of British disclaimers of authority in or responsibility for the 'internal affairs of the British protected States in the Persian Gulf',[51] this certainly underestimated the degree of separate personality of the Gulf States.[52]

The equivocal nature of local independence in these types of case, and the need to resort to ancillary criteria such as recognition, is well illustrated by the Principality of Monaco, which was long recognized as an independent State[53] despite special treaty relations with France.[54] It conducts its own foreign relations

[45] 166 BFSP 111; Whiteman, 1 *Digest* 442–6; Kamanda, *Study of Legal Status*, 74–6; Al-Baharna, *Legal Status*, 40–6.

[46] Whiteman, 1 *Digest* 447; 11 Aitchison 258; Al-Baharna, *Legal Status*, 36–9.

[47] 12 Aitchison 165–86; Whiteman, 1 *Digest* 447; Kamanda, *Study of Legal Status*, 81–3; Al-Baharna, *Legal Status*, 25–30.

[48] E.g. 445 *HC Deb* cols 1681–2, 17 December 1947 (Bahrain). See also *Buttes Gas and Oil Co v Hammer* [1982] AC 888, 927 (Lord Wilberforce), quoting an FCO certificate characterizing Sharjah as 'an independent and sovereign State in special treaty relations with the United Kingdom.'

[49] Al-Baharna regards the Gulf States (Oman excepted) as having had some international status but as not independent States: *Legal Status*, 79–80. But they were, he argues, 'self-governing territories,' ibid, 155 with 'independent governments': ibid, 139.

[50] Kamanda, *Study of Legal Status*, 85–8, 158 (based on the erroneous assumption that the Colonial Laws Validity Act 1865 and the Foreign Jurisdiction Acts authorized plenary intervention in the affairs of the Gulf States). cf McNair, *Law Officers Opinions*, vol I, 42, 44; [1965] *BPIL* 108 (Tonga)); Pillai and Kumar (1962) 11 *ICLQ* 108, 125.

[51] 711 *HC Deb*, WA col 108, 3 May 1965; Al-Baharna, *Legal Status*, 30; [1965] BPIL 2.

[52] Cf Verhoeven, *Reconnaissance*, 14–15. The 1899 Treaty with Kuwait was terminated in 1961 (166 BFSP 112); those of 1880 and 1892 with Bahrain were terminated by an Exchange of notes constituting an agreement Concerning the Termination of Special Treaty Relations, 814 UNTS 29; and that of 1916 with Qatar was similarly terminated on 3 September 1971, 824 UNTS 101. After lengthy negotiations, the Trucial States federated in 1971 to form the United Arab Emirates: for an earlier, more extensive proposal, see the Agreement of 27 February 1968: Al-Baharna, *Legal Status*, 380–3. Their Exclusive Agreements were terminated as from 2 December 1971: Treaty of Friendship, 834 UNTS 273. Saudi Arabia did not recognize the UAE until 1974, and then only at the expense of certain concessions, which have remained controversial: Saudi-Arabia–United Arab Emirates, Agreement on the Delimitation of Boundaries, Jeddah, 21 August 1974, 1733 UNTS 23; 1774 UNTS 636. All four States are United Nations Members.

[53] For example, France treated it as such when negotiating a Treaty transferring to France the townships of Menton and of Roquebrune, 2 February 1861. The treaty, at least in form an ordinary treaty of cession, was not registered by France until 29 April 1994: 1775 UNTS 331.

[54] Under Agreements of 9 November 1865; 2 December 1865 (55 BFSP 407), 17 July 1918 (111 BFSP 727) and 18 May 1963, 1721 UNTS 26 (also in *Journal de Monaco*, no 5525, 729–55, cited in

subject to prior understanding with the French Government under Article 2 of the 1918 Treaty.[55] Its inclusion in the customs area of the European Community (and this is true also of San Marino) results from Article 299(4) of the Treaty of Amsterdam,[56] although France is not 'responsible' for its 'external relations'.

The doubt about Monegasque independence was not French influence over its external affairs but the extensive powers reserved to France over internal and constitutional matters. Under the 1918 Treaty Monaco undertook 'to exercise its rights of sovereignty entirely in accord with the political, military, naval, and economic interests of France' (Art 1), and not to alienate its territory except to France (Art 2). The succession to the Crown 'may only be transmitted to a person possessing French or Monegasque nationality, and agreeable to the French Government' (Art 2); in default of succession the territory of Monaco was to form, under the protectorate of France, an autonomous State called the State of Monaco.[57] The French Government could introduce armed forces into Monaco either by request or 'in an emergency, after notification . . . for upholding the security of the two countries' (Art 4), a provision reminiscent of the retained powers of the United Kingdom over the Caribbean Associated States (as to which see Chapter 14). The two States are united by an extensive customs union: transfer of gold from Monaco to a foreign State was held by the *Cour de Cassation* to constitute an export 'from French territory'.[58] The statehood of Monaco resulted not from any indisputable qualifications for statehood but of its widespread recognition and acceptance as a State. In particular it is a party to a substantial number of treaties, bilateral and multilateral,[59]

Gallois, *Le Régime International de la Principauté de Monaco*, 243–8). See also Kiss, *Pratique française*, vol II, 462–9; Rousseau, *DIP*, vol II, 332–9.

[55] On the 1918 Treaty generally see Duursma, *Microstates*, 277–80.

[56] Treaty establishing the European Community, Amsterdam, 2 October 1997, Art 299(4): 'The provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible' (previously Article 227 Rome Treaty). See Reg 1496/68: *JO des Comm Eur* 1968 No L.238/I, Art 2. France acting on behalf of the Community in December 2001 concluded an agreement with Monaco on the use of the Euro as currency. OJ L 142, 31.5.2002, 67. For a similar agreement concluded by Italy on behalf of the Community with San Marino, see OJ C 209, 27.07.2001, 1.

[57] 1918 Treaty, Art 3. This provision O'Connell called a 'contingent reversion of sovereignty': *International Law*, vol I, 290.

[58] *Ditzler, Reith & Buess v Customs Administration* (1940) 11 ILR 34. Cf *Bayetto v Administration d'Enregistrement* (1946) 13 ILR 22 (Monaco, by virtue of its relationship with France, a belligerent and not a neutral in World War II: its nationals not therefore subject to sequestration of property).

[59] See Gallois, *La Regime*, 260–8; Rollet, *Liste des Engagements Bilatéraux et Multilatéraux . . . Souscrits par la France*, 158–61.

and a member of many international organizations[60] including the United Nations.[61]

To summarize, the necessary prerequisites for independence under a regime of protection are the retention of substantial authority in internal affairs (including implementation of international obligations), some degree of control over the exercise of foreign affairs powers, and that metropolitan competences be based on delegation by treaty or other instrument. Where these elements are not present, in the absence of general recognition the entity in question should not be regarded as a protected State, even though it may continue to possess separate legal personality.

### (2) International protectorates

International protectorates are those territories the governments of which, having agreed to protection, retain separate international status but lack in some respect the qualifications for statehood as defined. This is a residual category, and the status of particular international protectorates can vary widely.

Perhaps the most controversial case was that of Morocco, which although generally recognized as a State was subjected to a fairly elaborate system of capitulations and spheres of influence. The Act of Algeciras provided for extensive reforms 'basées sur le triple principe de souveraineté et de l'indépendance de Sa Majesté le Sultan, de l'integrité de Ses Etats et de la liberté économique sans aucune inégalité.'[62] In 1912 the Treaty of Fez brought the major part of Morocco under French protectorate.[63] A much smaller coastal area was recognized as within the Spanish sphere of influence, and subsequently reduced to a Spanish protectorate.[64] Under the Treaty of Fez, French rights in Morocco included the right to station military forces in the territory at discretion to maintain order and the security of commercial transactions (Art II); the right to require necessary legislative reforms to be carried out by the Sultan, and the right to appoint a French Resident to be in charge of all matters concerning foreigners in Morocco, as well as to be 'le seul intermédiaire du Sultan auprès des

[60] Duursma, *Microstates*, 291–304.

[61] SC res 829, 26 May 1993; GA res 47/230, 28 May 1998. Duursma, *Microstates*, 303 argues that French powers under the 1918 Treaty are protective rather than intrusive but concludes: 'The importance of Monaco's admission to the United Nations lies in the fact that the other Member States did not consider that its relations with France precluded membership of this political organization.' On the revision of the 1918 Treaty see the note at p 328.

[62] General Act of the International Conference at Algeciras relating to the affairs of Morocco, 7 April 1906 (13 States including Morocco): 99 BFSP 141. Cf also the Madrid Convention of 1880: 71 BFSP 639, 814.

[63] 30 March 1912: 106 BFSP 1023; Kamanda, *Study of Legal Status*, 99–102.

[64] Franco-Spanish Convention of 27 November 1912: 106 BFSP 1025. For the Cherifian decree of 14 May 1913 constituting the protectorate, see De Martens, 8 NRG 3rd ser 143.

représentants étrangers et dans les rapports que ces représentants entretiennent avec le Gouvernement marocain' (Art V). Decrees of the Sultan required prior French consent (Art VI), as also did the grant by him of concessions or the making of public or private loans (Art VIII). By 1925 the French Zone had been brought under practically direct French control, only the judicial system remaining formally distinct.[65]

At first sight Morocco had by no means sufficient independence under these arrangements to be regarded as an independent State.[66] Even if (which is doubtful) it retained its formal independence, it was largely under the control of France and Spain. However, in *United States Nationals in Morocco* the International Court held that Morocco retained substantial international personality:

> It is not disputed by the French Government that Morocco, even under the Protectorate, has retained its personality as a State in international law. The rights of France in Morocco are defined by the Protectorate Treaty of 1912 . . . Under this Treaty, Morocco remained a sovereign State, but it made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco, and, in principle, all of the international relations of Morocco . . .[67]

The passage is well known but difficult to interpret. For the reasons already stated, it is difficult to regard Morocco after 1912 as a Protected State,[68] in the same category as Tonga or the Persian Gulf States, although the passage does confirm the possibility of protected statehood in the sense in which the term is used here. On the other hand, the widespread prior recognition of the Sultan, the complexity and internationalized nature of the arrangements in Morocco,[69] and the insistence by France (and by French courts)[70] on the continued statehood of Morocco may have tipped the scales in favour of its national independence. In particular, recognition may compensate for any lack of positive qualifications for statehood. But the recognition of Moroccan independence at Algeciras in 1906 antedated the Treaty of Fez, with which it can only be regarded as inconsistent.

[65] Kamanda, *Study of Legal Status*, 105–6. [66] Ibid, 108.

[67] ICJ Rep 1952 p 176, 185, 188. [68] Cf Verzijl, *International Law*, vol II, 451.

[69] Judge van Eysinga, dissenting, *Phosphates in Morocco*, PCIJ ser A/B no 74 (1938), 32.

[70] See, e.g., *In re Société des Phosphates Tunisiens* (1929) 5 ILR 28 (acts of French authorities in Tunisia in pursuance of treaties and thus outside the jurisdiction of the Conseil d'État); *Government of Morocco v Laurens* (1930) 5 ILR 116, 117 (Morocco accorded sovereign immunity in French courts); *Menier v PLM Ry Co* (1938) 11 ILR 43 (carriage of goods from Algeria to Morocco 'international'); *In re Grange & Le Glay* (1932) 6 ILR 47 (French Director of Public Debts not entitled to give orders to Moroccan Treasurer-General); *Ministère Public v Dame Nicoleau* (1950) 17 ILR 41 (matrimonial home in Morocco 'outside' France); *Re Hamou* (1955) 22 ILR 60 (expulsion of aliens).

Alternatively it might be argued that, while Morocco was a 'State' in international law, it was not a 'sovereign' or 'independent' State.[71] Certainly the term 'State' has no fixed, invariable meaning; it is sometimes used in practice to refer to territorial entities with a degree of international personality but without independence (as with the 'State of North Borneo' before 1946[72]). But the use of the term in two such different and distinct senses can only lead to confusion. The term 'State' may mean 'territorial legal entity' in particular contexts, but as a general rule it should be reserved for independent States as distinct from other legal persons. Moreover, the International Court in *United States Nationals in Morocco* does appear to have been using the term in the latter more general sense. How otherwise to interpret the phrases 'remained a sovereign State' and 'an arrangement of a contractual nature'?[73]

The position appears to be—and this is confirmed by the case of Kelantan discussed in Chapter 2—that where independent States become subject to protectorates which substantially restrict their independence, they are nevertheless, by a sort of convention, regarded as continuing as States for at least some purposes. For example, they continue the personality of the State before protectorate so that its treaties remain in force. Their international relations, the exercise of which is normally vested in the protecting State, remain formally distinct. Their rulers are normally accorded sovereign immunity, at least in the

[71] Kamanda, *Study of Legal Status*, 187; Fitzmaurice (1953) 30 *BY* 1, 2, proposing 'that not all States are fully independent sovereign States; and that statehood in the international sense may be possessed by not fully sovereign entities—that, in fact, statehood is an attribute of any territorial entity which enjoys some real degree of sovereignty [*sic*] in the *international* field' (emphasis in original).

[72] For British North Borneo see *Case concerning Ligitan and Sipadan*, ICJ Rep 2002, paras 20–9; Wright, *The Origins of British Borneo*, chs V–VI.

[73] In its Preliminary Objection of 15 June 1951, the United States had stated: '[T]he Application and the Memorial submitted by the French Government admit of three alternative possibilities in regard to the identity of the parties in whose name the present proceedings have been instituted: (1) the case may be brought by the Government of the French Republic in the name of and on behalf of the French Republic in its own right and capacity; (2) the case may be brought by the Government as Protector of the State of Morocco under the Treaty of Fez, dated March 30, 1912, on behalf of the State of Morocco; or (3) the case may be brought by the Government of the French Republic both in the name of and on behalf of the French Republic in its own right and capacity and as Protector of the State of Morocco under the Treaty of Fez, dated March 30, 1912, on behalf of the State of Morocco.' ICJ Pleadings, *Morocco Case (France v USA)*, vol I, 235–6. By letter of 6 October 1951 to the Registry of the Court and to the USA, France indicated that it 'was prepared, in order to dispel the doubts remaining in the mind of the Government of the United States of America, to supplement its observations and submissions in regard to the Objection by specifying that the French Republic was proceeding in the case both on its own account and as Protecting Power in Morocco, the judgment of the Court to be binding upon France and Morocco': *Case Concerning Rights of Nationals of the United States in Morocco*, Order of 31 October 1951, ICJ Rep 1951 p 108, 110. The letter of France itself was not included in the Pleadings volume.

protecting State's courts. They retain their own nationality, for municipal purposes at least, if not internationally. Their relations with the protecting State are 'contractual' in nature, and continue to be governed by international law. Their status is terminated in substantially the same way as that adopted for Protected States. They remain in international law the holders of their territory, which is not internationally part of the protecting State, and which, in the absence of agreement, the protecting State is generally incompetent to cede. They have a mixed status. And this is, upon reflection, a natural process. The protectorate relationship is not normally aimed at annexation but at secure separate government. An entity may well begin as a Protected State but gradually lose substantial independence: Zanzibar is an example.[74] Where the rights of other States are not infringed and given local consent or acquiescence, there is normally no point in further particularization of status which, moreover, local pride aims at retaining.

It may be concluded that international protectorates form a separate class of territorial entities with a distinct legal personality. Subject to the terms of the protectorate agreements, they are assimilated for many purposes to protected States. As well as Tunisia and Morocco,[75] almost all the protectorates in Asia, the Middle East and North Africa fell into this category.[76]

For example, Brunei was the last British international protectorate. The case is instructive in illustrating the possible relations a polity can have over time. The Sultanate was originally a protected State under a Protectorate Agreement of 17 September 1888, Article I of which provided that:

> The State of Brunei shall continue to be governed and administered by the said Sultan . . . and his successors as an independent State, under the protection of Great Britain; but such protection shall confer no right on Her Majesty's Government to interfere with the internal administration of that State further than is herein provided.[77]

Succession disputes and interstate disagreements were subject to British arbitration under Articles II and III respectively: Brunei agreed to abide by and carry into effect such decisions. Brunei's foreign relations were to be 'conducted by Her Majesty's Government' (Art III), and cessions of territory by Brunei

[74] Cf Kamanda, *Study of Legal Status*, 56–65.

[75] Kamanda, *Study of Legal Status*, 99–113; Whiteman, 2 *Digest* 204–6, 229–30; Verzijl, *International Law*, vol II, 443–52. The Moroccan protectorates were terminated by joint Declarations in 1956: 162 BFSP 958 (France); ibid, 1017 (Spain); and for Tunisia, by Protocol of 20 March 1956; ibid, 963. Both States were unanimously admitted to the UN: Morocco-S/3620: SC res 115, 20 July 1956, GA res 1111 (XI), 12 November 1956; Tunisia-S/3627, 26 July 1956, SC res 116, GA res 1112 (XI), 12 November 1956.

[76] Westlake, *International Law*, Pt I, 124.

[77] 79 BFSP 240.

required British consent (Art VI). Britain was granted consular jurisdiction over British subjects (Art VII). The decisive change from protected State to international protectorate came in 1906, when the Sultan agreed to the appointment of a British resident whose 'advice must be taken and acted upon on all questions in Brunei, other than those affecting the Mohammedan religion, in order that a similar system may be established to that existing in other Malay States now under British protection.'[78] Thereafter, although still classified as a Protected State, Brunei lacked actual independence.[79] But in 1971 a new agreement was signed by the United Kingdom and the Sultan of Brunei: under it Brunei had full internal self-government; the United Kingdom retained responsibility for external affairs with only a limited form of joint consultation.[80] Although the United Kingdom argued that under the 1971 Agreement Brunei was 'a sovereign state in treaty relationships with the United Kingdom' and not a Chapter XI territory,[81] this view was rejected by the General Assembly.[82] By an Exchange of Notes of 7 January 1979, the United Kingdom relinquished responsibility for the foreign affairs and defence of Brunei, the Treaty providing that '[t]he existing special treaty relations . . . , which are inconsistent with full international responsibility as a sovereign and independent State shall terminate with effect from five years from 31 December 1978.'[83] By an Exchange of Notes of 22 September 1983, the UK and Brunei agreed to terms by which a British garrison would remain in the territory with a view to its defence.[84] Brunei was admitted to the United Nations in 1984.[85]

Other examples of former international protectorates that had a certain guaranteed status but lacked sufficient independence to be considered States

[78] Supplementary Agreement, 2 January 1906: 25 *Hertslet* 32, Art 1. Cf the Agreement of 29 September 1959, in substantially the same terms: 164 BFSP 38; 1959 *Keesing's* 17066C.

[79] Lindley, *Acquisition and Government*, 193–4. See also Kamanda, *Study of Legal Status*, 91–4 (on the Malay States in general). For analyses of the extension of European protection over the Malay States see Rubin, *Piracy, Paramountcy and Protectorates* Marks, *British Acquisition of Siamese Malaya (1896–1909)*.

[80] See Agreement between Her Majesty the Queen of the UK etc and His Highness the Sultan of Brunei amending the Agreement of 29 September 1959: 23 November 1971, 1972 Cmnd 4932; *Keesing's*, 23 November 1971, 25036A; SI 1974 No 1895.

[81] (1978) 49 *BY* 341.

[82] E.g., GA res 32/27, 28 November 1977 (127–0: 14, UK not participating in the vote).

[83] Exchange of notes constituting an agreement terminating the special treaty relations between the United Kingdom and the State of Brunei: Misc No 5 1979, Cmnd 7496, Annex, Art 1; 1404 UNTS 249. See also contemporaneous Treaty of Friendship and Co-operation, 1404 UNTS 233.

[84] UKTS No 31 (1984), 1393 UNTS 275 (in force, 1 January 1984).

[85] SC res 548, 24 February 1984; GA res 39/1, 21 September 1984. See generally Saunders, *A History of Brunei*, 160–91; Hussainmiya, *Sultan Omar Ali Saifuddin II and Britain: The Making of Brunei Darusalam*, 372–84.

were Sikkim,[86] Zanzibar,[87] the French protectorates in Indochina,[88] the Maldive Islands[89] and the British protectorate over the Ionian Islands from 1815 to 1863.[90]

## (3) Colonial protectorates

Judge Huber in the *Island of Palmas* case described African (colonial) protectorates as merely 'a form of internal administration of a colonial territory on the basis of autonomy for the natives'.[91] This possibility is confirmed by section 1 of the Foreign Jurisdiction Act 1890 (UK), which provides that the Crown may enjoy 'within a foreign country' jurisdiction as ample 'as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory'. The Act clearly contemplates plenary jurisdiction over a 'foreign country' without that country becoming part of the dominions of the Crown.[92]

This conflict of characterization between municipal and international law in relation to colonial protectorates lay at the heart of the problem. According to Alexandrowicz,

> The transformation of the classic protectorate into the colonial protectorate was in its essence not a legal but a political development . . . It was the arrangement adopted behind the scenes of the Berlin Conference by which the signatory powers gave each other *carte blanche* to absorb protected States, which led to a deformation of the Protectorate as such. It has been emphasised that such an arrangement could not affect the validity of the treaties of protection with Rulers, for *pacta tertiis nec nocent nec prosunt*. The colonial protectorate is the outcome of a para-legal metamorphosis and has no place in international law as a juridically justifiable institution. It was at most a political expedient.[93]

[86] But see *Agarwala v Union of India* (Bhattacharjee, A-CJ) (S Ct India 1980) 118 ILR 422, 423: 'Sikkim was not included within [the territory of India] . . . and was, therefore, a foreign State in spite of its being a protectorate. Under the general principles of international law, both the protectorate and the protecting State enjoy jurisdictional immunities in the courts of each other.' See generally Whiteman, 1 *Digest* 451–2; Kamanda, 139–40, 143; Aitchison, *Collection of Treaties*, (4th edn), vol II, 309. On 26 April 1975 Sikkim was in effect incorporated into India: see Agreement of 8 May 1973; (1973) 13 *Indian JIL* 620; (1975) 79 *RGDIP* 536–8. Fischer [1974] *AFDI* 201 regards the situation as coming within Chapter XI of the Charter. For background to the troubled relations between India and Sikkim see Rao, *India and Sikkim 1814–1970*. See also Dixit (2004) 44 *Indian JIL* 319.

[87] Kamanda, *Study of Legal Status*, 56–65; *Jani v Jani* (1952) 18 ILR 54.

[88] Kamanda, *Study of Legal Status*, 113–28.

[89] Ibid, 73–4; 164 BFSP 390.

[90] Smith, *GB & LN*, vol I, 67–76.

[91] (1928) 2 RIAA 829, 858. Judge Al-Khasawneh, in a separate opinion in *Land and Maritime Boundary Between Cameroon and Nigeria*, rejects this, and its tendency to result in conferral of title on the European 'protecting' State, as a 'confusion of inequality in status on the one hand and inequality in power on the other': ICJ Rep 2002, separate opinion, para 5.

[92] Cf Report of the Resumed Nigeria Constitutional Conference, 1958, Cmnd 569, Annex II, 42; Al-Baharna, *Legal Status*, 89–90; Fawcett, *British Commonwealth*, 119.

[93] *The European-African Confrontation*, 69–81, 80–1, cf his (1968) 123 *HR* 117–214.

Justifiable or not, the colonial protectorate was not a distinct juridical institution at all. The whole point of identifying it as colonial was that the extent of governmental authority with respect to the territory was plenary. It is true that the territory concerned may have become in international law part of the metropolitan State's territory not upon the conclusion of the treaty but by subsequent 'grant, usage, sufferance or other . . . means'. But it is clear that such a transition could occur, so that an entity with some of the distinguishing marks of a protectorate would come to be classified internationally as part of the dominant State. As we have seen, it is a basic principle that the status of any dependent entity is to be determined by examination of its actual position, and not by inference from its title. The absence of formal annexation was not a barrier to characterizing a territory as part of a particular State, where the authority exercised was in fact plenary and permanent. The only qualification was that the metropolitan State, if it insisted on the separateness of the protectorate, might create unilateral legal obligations with respect to the protectorate. But, in view of the slight protection accorded to indigenous treaties by the international law of that time, even this is doubtful.[94]

The problems associated with colonial protectorates are then more properly dealt with under the rubric of acquisition of territory than in a study of statehood in the international sphere. Only a few comments are necessary to fill out the picture.

[94] On the question of indigenous treaties in the 19th century, see Anghie, *Imperialism, Sovereignty and the Making of International Law*, ch 2; McHugh, *Aboriginal Societies and the Common Law*, esp 98–108. But see *Worcester v State of Georgia*, 31 US 515, 6 Pet. 515, 559–61 (Marshall CJ) (1832): 'The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense . . . These newly asserted titles [by the state of Georgia] can derive no aid from the articles so often repeated in Indian treaties; extending to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence-its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.' See also Chapter 5.

Colonial protectorates were, with two exceptions,[95] restricted to Africa. If not entirely novel they were reinforced and underwritten by the General Act of the Berlin Conference, which assimilated colonies and protectorates, requiring for both effective occupation and notification to other powers.[96] Even though many protectorate agreements over what came to be regarded as colonial protectorates were treaties in international form made with recognized African States (for example, Swaziland),[97] or tribes with a certain legal status (for example, Somaliland),[98] the continuous accretion of powers by usage and acquiescence to the protecting State was—by virtue of the Berlin Act procedure—opposable to the parties to that Act and in practice a matter at the protecting State's discretion.[99] As a result, the protecting State had international full powers: it was competent, for example, to cede protected territory without consent and in breach of the protectorate agreements.[100] But that is not to say that international law was wholly irrelevant to the relationship. It is at least arguable that the continued affirmation of the terms of protection agreements bound the metropolitan State to those terms. This would explain the otherwise insoluble conflict between the British view that the protectorate agreements were 'binding and valid'[101] and the view that, as against third States, such

[95] Aden Protectorate and the British Solomon Islands. For the former, see Kamanda, *Study of Legal Status*, 88–91; Robbins (1939) 33 *AJ* 700. Even there the British view was that the protection agreements were 'of a kind recognized in international law, which imposed both legal and moral obligations on the signatories': [1963] *BPIL* 148; see also [1964] *BPIL* 12–20; [1966] *BPIL* 6–7, 50–2; [1967] *BPIL* 18–20. The protectorates became independent in conjunction with Aden Colony on 30 November 1967 as the People's Republic of South Yemen. For the latter, 78 BFSP 691; 21 *Hertslet* 1178.

[96] General Act of the Conference respecting the Congo, signed at Berlin, 26 February 1885, 165 CTS 485. See Johnston, *Sovereignty and Protection*, 167–225.

[97] Convention between Great Britain and the South African Republic, relative to the Affairs of Swaziland, 10 December 1894, 86 BFSP 61, 180 CTS 437.

[98] Agreement between Great Britain and the Habr-Awal, 14 July 1884 (non-cession of territory except to Great Britain; British vessels allowed to trade at Berbera, Bulhar, etc, suppression of slave trade), 76 BFSP 101, 164 CTS 209; Agreement with the Warsangali (British protection, suppression of slave trade, etc), 27 January 1886, 77 BFSP 1263, 167 CTS 313; Supplementary Agreement with the Habr Toljaala (British protection), 1 February 1886, 77 BFSP 1265, 167 CTS 323; Supplementary Agreement with the Habr Gerhajis (British protection), 1 February 1886, 77 BFSP 1266, 167 CTS 323; Supplementary Agreement with the Habr-Awal (British protection), 15 March 1886, 77 BFSP 1267, 167 CTS 361; Treaty between Great Britain and Socotra, extending British Protection to Socotra and its Dependencies, 23 April 1886, 77 BFSP 1269, 167 CTS 429.

[99] See Dr Lushington's opinion that 'between Oriental and Christian States . . . a cession of jurisdiction may be expressed by usage and acquiescence': *The Laconia* (1863) 2 Moo PC (NS) 161; cited Jenkyns, *British Rule and Jurisdiction*, 180–1.

[100] Thus the Solomon Islands Protectorate, described as 'belonging to Germany', was ceded without local consent to Great Britain by a Treaty of 1899: 21 *Hertslet* 1128.

[101] 537 *HC Deb* col 1683 (Somaliland).

agreements were, or had become, a basis for plenary title to the territory in question. The location of status vis-à-vis contract in a colonial protectorate was reversed.

Faced with this situation British courts for a long time applied rules designed to deal with genuine international protectorates in foreign States or countries, rules the reasons for which were inapplicable to protectorates of colonial type. Thus *habeas corpus* did not issue to examine a detention in a protectorate.[102] The Crown retained substantial freedom to derogate from rights granted by it.[103] The act of State doctrine, inapplicable as against British nationals anywhere or aliens within the dominions, was consistently applied against British protected persons within British colonial protectorates.[104] The justice[105] of holding an effective part of the dominions not protected in many respects by the ordinary guarantees of the common law was sometimes doubted but never seriously questioned.[106] It remained for the Court of Appeal in 1960 to cut the knot. Holding that *habeas corpus* would issue in respect of a detention in Northern Rhodesia, Lord Evershed MR stated:

> the question should not be determined by reference merely to the fact that the country in question bears the label 'protectorate,' but must, or at least may, depend on the extent to which the Crown (or the Crown and Parliament) has in fact assumed and exercises jurisdiction on and over the affairs (and particularly the internal affairs) of the country to the exclusion of any other, or other effective, jurisdiction . . . [A]s it seems to me, if upon a proper investigation of the facts, it appears that the internal governance of Northern Rhodesia is in effect indistinguishable from that of a British colony or a country acquired by conquest, then . . . I see for my part no reason for denying jurisdiction to the court.[107]

[102] *Ex parte Sekgome* [1910] 2 KB 576; and cf *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1928] AC 459; Kamanda, *Study of Legal Status*, 49.

[103] *North Charterland Exploration Co v R* [1931] 1 Ch 169; *Nyali Ltd v AG* [1955] 1 All ER 646.

[104] *Sobhuza II v Miller* [1926] AC 518 (PC); Fawcett, *British Commonwealth*, 113 and n 25; Polack (1963) 26 *MLR* 139; Kato [1969] *Public Law* 219.

[105] Its necessity was certainly questionable: the courts appear to have assumed that formal annexation was necessary to make a territory part of the Dominions, but this would seem not to be so. In *Attorney-General for British Honduras v Bristowe & Hunter* [1880] 6 AC 143, the Privy Council inferred annexation from acts of 'territorial dominion' without any express proclamation. That was not, however, protected territory.

[106] See Vaughan-Williams LJ, *Ex parte Segkome* [1910] 2 KB 576, 609–10: 'The idea that there may be an established system of law to which a man owes obedience, and that at any moment he may be deprived of that law, is an idea not easily accepted by English lawyers . . . It is made less difficult if one remembers that the Protectorate is over a country in which a few dominant civilized men have to control a great multitude of the semi-barbarous.' See ibid, 616 (Farwell LJ), 622 (Kennedy LJ).

[107] *Ex parte Mwenya* [1960] 1 QB 241, 297, 302, reversing the Divisional Court. For discussion see Fawcett, *British Commonwealth*, 130–4.

It was a pity that this sensible point should have been reached only at a time when it was ceasing to be relevant.[108] Only one colonial protectorate (British Solomon Islands) remained for any length of time thereafter.[109]

## (4) Legal effects of protectorates

This discussion of protected status would not be complete without at least a brief account of the main legal incidents of protectorates. These incidents vary substantially—as one would expect—between the three categories of protectorates.

### *(i) Protectorates and domestic jurisdiction*

Both the League of Nations and the United Nations have been faced with claims that the relations between a protecting and a protected State were matters of domestic jurisdiction so as to preclude discussion of them. The League referred the matter to the Permanent Court for an advisory opinion in the following terms: 'Is the dispute between France and Great Britain as to the Nationality Decrees issued in Tunis and Morocco (French zone) . . . and their application to British subjects by international law solely a matter of domestic jurisdiction or not?' The Court held unanimously that the dispute was not one within the domestic jurisdiction of France:

> The French Government contends that the public powers [*puissance publique*] exercised by the protecting State, taken in conjunction with the local sovereignty of the protected State, constitute full sovereignty equivalent to that upon which international relations are based, and that therefore the protecting State and the protected State may, in virtue of an agreement between them, exercise and divide between them within the protected territory the whole extent of the powers which international law recognizes as enjoyed by sovereign States within the limits of their national territory. This contention is disputed by the British Government. The Court observes that, in any event, it will be necessary to have recourse to international law in order to decide what the value of an agreement of this kind may be as regards third States, and that the question

[108] But *Mwenya* was cited and applied by the US Supreme Court in *Rasul v Bush* (2004), holding that *habeas corpus* was available to US and foreign citizens detained without trial by the US as suspected terrorists in Guantanamo Bay, a leasehold territory: 542 US 466; 124 S Ct 2686, 2697 (Stevens J, 2004). See also *Regina (Bancoult) v Foreign Secretary* [2001] QB 1067, 1086–92; 123 ILR 555, 569–75, citing *Mwenya* and *Sekgome* and holding that the Court has jurisdiction to issue the prerogative order of *certiorari* to the British Indian Ocean Territory.

[109] Established by German Ordinance in 1887 (78 BFSP 691); transferred to Britain by a Convention of 1899: 21 *Hertslet* 1178; granted independence 7 July 1978 by the Solomon Islands Act 1978 (UK), and admitted to the UN: SC res 433, 17 August 1978; GA res 33/1, 19 September 1978.

consequently ceased to be one which, by international law, is solely within the domestic jurisdiction of a State.[110]

The Opinion seems to assert that any dispute between two States as to the incidents of a protectorate relation—even where the dispute concerns a matter normally within domestic jurisdiction—is not a matter of domestic jurisdiction simply because a protectorate situation is involved. However, it is important to note exactly what the Court decided, for the view it took of 'domestic jurisdiction' has been misunderstood. It is not the case that a matter is only one of domestic jurisdiction if no breach of international law is involved: the question whether such a breach has occurred is the point of, and the conclusion to, any enquiry into the merits.[111] The plea of domestic jurisdiction under both the Covenant and the Charter is essentially preliminary, excluding only those matters as to which, at the outset, no relevant question of international law (customary or conventional) would appear to be involved.[112] Otherwise for an international body to assume jurisdiction would prejudge the very issues of the case. It follows that no dispute over the incidents of a protectorate relation can ever be a matter of domestic jurisdiction in this preliminary sense.[113]

Undeterred by the unanimous decision of the Court, France consistently pleaded Article 2(7) before United Nations organs in debates over Tunisia and Morocco, receiving a degree of support for its stand from Belgium and Australia.[114] The General Assembly, for a variety of reasons, twice failed to approve resolutions on self-determination in the two territories;[115] but the domestic jurisdiction argument did not meet with much support.[116] The conclusion that protectorate status cannot be a matter of domestic jurisdiction therefore stands.

[110] *Nationality Decrees in Tunis and Morocco*, PCIJ ser B no 4 (1923), 28. For the text of the decrees see 113 BFSP 1008 (24 April 1920).

[111] But see Lauterpacht, *Development*, 269–74.

[112] PCIJ ser B no 4 (1923), 23–4.

[113] Great Britain did not argue the merits of the question: see the argument of Sir Douglas Hogg (PCIJ ser C no 2, vol suppl, 47): 'If the rights which are claimed for France as resulting from her Protectorate were allowed to be good, what difference would there be left in effect between a Protectorate and an annexation? *But whatever may be the answer to that question*, it is submitted that the rights of France in protected territory, as against third Powers which have been invited to give their adherence to a specific document, must involve the close consideration of the actual terms and the effect of that document, as well as of the international law applicable . . . and that these are matters which affect third Powers equally with France herself, and therefore cannot be regarded as exclusively domestic matters for France' (emphasis added.)

[114] See Higgins, *Development*, 85–6, 93–5 for details.

[115] *GAOR* 8th yr, 455th mtg; ibid, 457th mtg, para 152; cited by Higgins, *Development*, 94.

[116] By contrast the domestic jurisdiction argument with respect to Algeria (a colony) had more success at this time: *SCOR* 11th yr, 730th mtg, para 85; Higgins, *Development*, 95.

### *(ii) Relations between protectorate and protecting State*

It is sometimes suggested—and was argued by France in the *Nationality Decrees* case—that the relations between a protectorate and the protecting State are necessarily domestic or internal. In his report of the *Spanish Zone of Morocco Claims* Judge Huber stated that:

> Les rapports entre le protecteur et le protégé sont donc à envisager comme une affaire intérieure entre ces deux Puissances; vis-à-vis de l'étranger, les responsabilités du protecteur et du protégé, *tout en étant juridiquement distinctes*, se fondent en une seule, à la charge de la Puissance protectrice.[117]

But this was in the context of international responsibility for an international protectorate, where it appears that claims for redress against the protectorate may be addressed to the Protecting Power in its representative capacity. For those purposes, the relations between the two entities are irrelevant: international responsibility for wrongful acts is not to be reduced as against third States and without their consent merely by reason of the existence of a protectorate.[118] Judge Huber was not asserting that all *inter se* relations are internal or 'municipal'. But that argument has been maintained by Fitzmaurice in a commentary on the *United States Nationals in Morocco* case:

> Since France under the Treaty [of Fez] had the conduct of Morocco's international relations, her own relations with Morocco could hardly be of that character, nor Morocco's with her, or France would have been in the position of, in effect, carrying on relations with herself—or with Morocco through herself. Franco-Moroccan relations must therefore lie on the internal, not the international, plane. The point would not be affected by the fact that the Treaty of Fez was itself an international instrument even if made between States both of which where *then* (and this is not certain) fully independent—for this very instrument created relations which were henceforth domestic or internal, just as a treaty between States merging them in a Union or Federation may be itself international, but the relations of the States under it are henceforth domestic or internal. Consequently, although France (or any other Protecting State in a similar position) is 'bound' by the instrument establishing the Protectorate, a dispute about its interpretation or application could not be an *international* dispute—or the Protecting State as conducting the Protected State's international relations would have to make a claim against itself and argue both sides of the controversy, an evident *reductio ad absurdum*

[117] (1928) 2 RIAA 615, 648 (emphasis added).

[118] Ibid: 'Les responsabilités qui existent en droit international et le droit qui en découle, pour les États tiers, de protéger diplomatiquement leurs ressortissants, n'ont pu subir aucune diminution à la suite d'accords bilateraux intervenus entre le protégé et le protecteur.'

that demonstrates the inherently non-international character of the relationship between Protecting and Protected State.[119]

But if the relation was 'inherently non-international' then presumably it was municipal, and presumably liable to be changed without the consent of the protected entity. Unless the relation was binding under international law, it was not legally binding at all, a view inconsistent both with international practice and the judgment of the Court in the *United States Nationals in Morocco Case* itself. If the relation was 'inherently non-international', the plea of domestic jurisdiction would be in principle a bar to international discussion of protectorate problems, which was not the case. Fitzmaurice's view assumes that the local authorities have no status to complain against infringement of the protectorate, a position almost the reverse of the truth, since although they may not possess distinct international standing, only their consent or acquiescence can validly alter an established protectorate relation. Moreover—and this was the case in Morocco—other States parties to protectorate agreements may protest against any violation of local rights even though their interests are not affected. In one class of cases only was the protectorate relation 'inherently non-international': that is, the colonial protectorates, which were treated as equivalent to annexed territories. In all other cases the protectorate relationship was in principle governed by international law.[120]

This view was emphatically confirmed in the *Rann of Kutch* arbitration. This concerned the relations between Sind, which in 1843 became part of British India, and the vassal State of Kutch. Although it was agreed that international law applied to the relations of the two entities before 1843,[121] Pakistan argued that it ceased to apply thereafter.[122] This argument was at least impliedly rejected in the Opinion of the Chairman, Lagergren (with whom Judge Entezam concurred): he regarded the 'Rao of Kutch and the British Government in Sind', before 1947, as 'contending sovereigns' for the purpose of claims to an exercise of jurisdiction over the disputed territory.[123] The decision was therefore reached by applying international law to the evidence of official acts and claims before 1947, and not on the basis of any *uti possidetis* rule as applied to purely internal boundaries. Judge Bebler, who dissented as to part of the boundary, agreed with the majority on this point:

the relations between the British and Kutch were those of suzerain and vassal as defined in specific clauses in treaties; these clauses replaced certain rules governing the

[119] (1953) 30 *BY* 2, 4–5 (emphasis in original).

[120] Kamanda, *Study of Legal Status*, 29; but cf 126. Fawcett, *British Commonwealth*, 138–40 takes an intermediate view.

[121] (1968) 7 ILM 633, 657.

[122] Ibid, 657–60.

[123] Ibid, 675.

intercourse of nations under International Law; rules of International Law not replaced by such clauses remained valid and equally binding on both partners.[124]

### *(iii) Opposability of protectorate arrangements*

In the *Nationality Decrees* case the Court stated that the extent of metropolitan power in a protectorate was dependent upon the treaties of protection, and also 'upon the conditions under which the Protectorate has been recognized by third Powers as against whom there is an intention to rely on the provisions of these Treaties.'[125] Classically, protectorate agreements were, as the British Law Officers on several occasions reported, non-opposable to third States.[126] That view was questioned only in the late nineteenth century when colonial protectorates were becoming the general rule. The Berlin Conference of 1885[127] established procedures of notification of African (by implication, colonial) protectorates: in practice this meant either rapid protest by other States or their implied acquiescence in a notified claim.[128] In the context of international protectorates, on the other hand, third party consent has always been regarded as a condition for opposability. The Treaty of Fez, for example, was followed by a series of bilateral agreements between France and the signatories of the Act of Algeciras providing for the abolition of the latter States' rights over Morocco.[129] The United States, which did not so consent, was held to have retained its rights intact over a lengthy period.[130] Practice thus supports the view contended for here, that protectorates of the international variety are 'arrangement[s] of a contractual nature,'[131] whereas colonial protectorates are types of territorial arrangement—matters of status, not contract.

### *(iv) Protectorates and State succession*

The problems of State succession with respect to protectorates are of considerable interest, and were a source of some controversy in the ILC's debates in respect of succession to treaties. For present purposes only a brief summary is possible.

Problems of State continuity or succession with respect to protectorates involve at least two distinct issues: the continuity of pre-protectorate treaties

[124] Ibid, 696; cf 699. [125] PCIJ ser B no 4 (1923), 27.

[126] See the reports cited by McNair, *Law Officers' Opinions*, vol I, 41–6.

[127] About which see Wesseling, *Divide and Rule*, 114–19, 124–30; Pakenham, *Scramble for Africa*, 239–55.

[128] General Act, Art 34: 76 BFSP 4, 14. McNair gives two examples of the change in view: a Colonial Office Memorandum of February 1891, based on the Berlin Act (ibid, 46–52); and a Report by Reid and Lockwood of 14 February 1895 concluding 'that the existence of a protectorate in an uncivilized country imports the right to assume whatever jurisdiction over all persons may be needed for its effectual exercise' (ibid, 54–5).

[129] See, e.g., 109 BFSP 317 ff.

[130] *United States Nationals in Morocco*, ICJ Rep 1952 p 176.

[131] Ibid, 188.

upon the commencement of a protectorate and the position of the fully independent State upon the termination of the protectorate.

The situation with respect to pre-protectorate treaties was the more straightforward. With fair consistency, practice supported the view that the treaties of a State in force before it entered into the protectorate continued to bind it afterwards and until annexation.[132] Formally this was a case of continuity, not succession. The rule was affirmed by the International Court in *United States Nationals in Morocco*,[133] and by the ILC Special Rapporteur on State Succession with respect to Treaties (Waldock), who proposed as a special rule that

> Unless terminated or suspended in conformity with its own provisions or with the general rules of international law:
>
> (a) A treaty to which a State was a party prior to its becoming a protected State continues in force with respect to that State . . .[134]

This provision was deleted from the 1972 draft Articles,[135] but there was little dissent from the proposition that pre-protection treaties remained in force so long as the protected entity retained its international status.[136]

A more difficult problem was that of the continuity of or succession to treaties with respect to 'new States' formed by the termination of a protectorate. Waldock's commentary on this point reflects the conflicting considerations:

> Logically, it may be urged, the same reasoning should be applied to treaties concluded with reference to a protected territory *during the period of protection*. In other words, if a treaty had been concluded by the protecting Power *on behalf of* or *in the name* of the protected State, the treaty should be considered as a treaty of the protected State itself and be binding upon it after independence. But if a treaty had been concluded by the protecting Power simply in its own name, and merely 'extended' to the protected

[132] O'Connell, *State Succession*, vol II, 31–4, 48–9 (Madagascar); 45 (Zanzibar); 46–8 (Tunisia); 49–50 (Korea); 50–3 (Morocco); Kamanda, *Study of Legal Status*, 214–18; Lindley, *Acquisition and Government*, 308–12; ILA, *The Effect of Independence upon Treaties*, ch 16; Pereira, *La Succession d'états en matière de traité*, 83.

[133] ICJ Rep 1952 p 179, 188: 'France, in the exercise of this function [of protection], is bound not only by the provisions of the Treaty of Fez, but also by all the treaty obligations to which Morocco had been subject before the Protectorate and which have not since been terminated or suspended by arrangement with the interested States.' See also *Spanish Zone of Morocco, Claim 51* (1925) 2 RIAA 722, 725; *In re Abdouloussen* (Conseil d'État 1936), 11 ILR 77.

[134] Draft Art 18(2)(a): *ILC Ybk* 1972/II, 3.

[135] *ILC Ybk* 1972/I, 133 ff.

[136] Although some members supported the inclusion of Art 18 in the Draft, a majority took the view that the Convention was only 'intended to deal with future cases of succession, which would not include many cases of protectorates.' There was no explicit disagreement with the substance of the draft article, although Bedjaoui thought that, in practice, the situation did not arise since prior treaties 'had ceased to be applied during the period of the protectorates': ibid, 137.

State, the treaty should not be considered as a treaty of the protected States itself, and the question of succession should be governed by the same rules as in the case of a treaty 'extended' to a colonial territory.[137]

Despite this logical consideration it was thought that the application of many treaties to protected States or territories was only formally the result of representation or agency, and was—with the possible exception of the 'non-colonial' protectorates in Europe[138]—politically indistinguishable from the application of treaties to colonies generally. As a result Waldock proposed that treaties to which a protected State became a party 'in its own name and by its own will' should continue in force, whereas those applied by the metropolitan State should be subject to the normal rules of succession.[139] Again the substance of this proposal received considerable support,[140] but a clear majority favoured its exclusion because of the difficulties of application,[141] inconsistency with recent practice,[142] the primacy of the principle of self-determination under the Charter[143] and the practical irrelevance of the problem for the future.[144] It was also pointed out that in particular situations theories of representation and agency could provide a sufficient degree of continuity.[145]

The question of continuance of treaty rights and liabilities after the conclusion of a protectorate of colonial type is also of interest, although in practice the problem has not often arisen because of the very limited treaty relations of the local entities prior to the protectorate. Where a protectorate began as one of international type and became colonial only by a process of gradual accretion of powers, it might well have been argued that the metropolitan State was estopped from denying the continued validity of prior treaties, at least if third States had relied upon their continuance after the commencement of the protectorate. The point does not appear to have arisen in practice.[146] On the other hand, in the case of colonial protectorates, the protectorate agreements

[137] Ibid, 1972/II, 5. Cf Zemanek (1965) 116 *HR* 181, 196–202.

[138] *ILC Ybk* 1972/I, 139 (Ushakov).

[139] Draft Art 18(1), (2)(b): *ILC Ybk* 1972/II, 3. For the earlier practice see O'Connell, *State Succession*, vol II, 141–50.

[140] *ILC Ybk* 1972/I, 134 (Tammes), 135 (Câmara), 136 (Quentin-Baxter), 139 (Bilge), 141 (Ago): cf 138 (Tsuruoka). In his summary, the Rapporteur reaffirmed that draft Art 18(2) 'reflected the relevant State practice': ibid, 148.

[141] Ibid, 137 (Bedjaoui), 146 (Reuter), 147 (Kearney).

[142] Ibid, 138 (Bedjaoui), 139 (Ushakov).

[143] Ibid, 135 (Reuter), 135–6 (Alcívar), 145–6 (Tabibi).

[144] Ibid, 134 (El-Erian), 137–8 (Bedjaoui), 140 (Ustor, Singh).

[145] Ibid, 135 (Reuter); but cf 138 (Bedjaoui).

[146] In his Commentary to draft Art 18 in 1972, the ILC Rapporteur excepted 'so-called colonial protectorates, which fall into the category of colonies': *ILC Ybk* 1972/II, 4.

themselves were apparently considered as passing to a new sovereign, for example on the annexation of the protecting State.[147]

The matter is accordingly not dealt with in the Vienna Convention on Succession of States in respect of Treaties of 22 August 1978,[148] which treats former protectorates as newly independent States, subject to the 'clean slate' rule in Article 16. On the other hand the Convention does not deal with situations of continuity or agency, leaving the argument roughly where it was before.

### *(v) Cession of protected territory*

The position with regard to cession by the protecting State of protected territory was clear. If the protectorate instruments provided for authority in the protecting State to cede protected territory there was no problem.[149] If, however, they were silent (and most were) the position seems to have been as follows: the mere delegation of a general power to carry out the protected entity's foreign relations was not, in principle, to be taken as including a power of cession of territory, either because a grant of jurisdiction by treaty was to be restrictively interpreted or because the express or implied undertaking of protection was inconsistent with any such power. Minor boundary adjustments were, however, not excluded: it was one thing to settle a boundary dispute, another to transfer the territory or a large part of it to a third State without local consent. The power of the protected State to settle boundary disputes was confirmed by the Court in *Qatar/Bahrain*.[150] But, where more substantial dispositions of territory are in issue, the position was as Jenner reported in relation to the Ionian Islands:

> the Treaties by virtue of which the Ionian Islands were placed under the protection of Great Britain are silent as to the power of alienating any part of the Territories of which

[147] *ILC Ybk*, 1972/II, 4. Thus the Swaziland Order in Council (*SR & O* 1903, No 531), consequent upon the annexation of the South African Republic, recited that 'all the rights and powers of the late . . . Republic with respect to Swaziland have, by virtue of the conquest and annexation of the said . . . Republic passed to His Majesty . . .'.

[148] Vienna Convention on Succession of States in respect of Treaties, 23 August 1978, 1946 UNTS 3 (in force 6 November 1996).

[149] Equally where ad hoc authority for a specific dispute has been granted, as with the Gulf States with regard to the various claims to their territory: see Al-Baharna, *Legal Status*, Pts III, IV.

[150] ICJ Rep 2001 p 40, 90–1 (para 165): finding 'that Qatar has sovereignty over Janan Island including Hadd Janan, on the basis of the decision taken by the British Government in 1939, as interpreted in 1947.' Cf as to maritime delimitation, ibid, 113–14 (para 240): 'The Court further observes that the British decision only concerned the division of the sea-bed between the Parties. The delimitation to be effected by the Court, however, is partly a delimitation of the territorial sea and partly a combined delimitation of the continental shelf and the exclusive economic zone. The 1947 line cannot therefore be considered to have direct relevance for the present delimitation process.'

the Ionian Republic is composed, nor does it appear . . . that such power necessarily belongs to the office of Protector; and as other nations were parties to these Treaties I am humbly of opinion that the proposed alienation can not be made without their consent.[151]

In the case of colonial protectorates, on the other hand, it appears that the validity of a cession by the Protecting State to a third State could not be impugned, although such cession was or might have been in breach of the conditions upon which the protectorate was assumed.[152] Thus in the *Cameroon/Nigeria* case, Nigeria argued that the cession of the Bakassi Peninsula to Germany by a treaty of 1913 was a breach of the earlier protectorate agreement between Great Britain and the 'Kings and Chiefs of Old Calabar'; since Britain did not have sovereignty over the protected territory it could not have transferred that sovereignty to Germany. The Court held that even if the Kings and Chiefs of Old Calabar had been a legal entity before 1884 when the protectorate agreement was concluded,[153] in the absence of any indication of a continuing political relationship with Great Britain, their territory was to be assimilated to that of a colony:

205. . . . [T]he international legal status of a 'Treaty of Protection' entered into under law obtaining at the time cannot be deduced from its title alone. Some treaties of protection were entered into with entities which retained thereunder a previously existing sovereignty under international law . . . In sub-Saharan Africa, however,

[151] FO 83.2286: Greece, 29 June 1833: McNair, *International Law Opinions*, vol I, 39.

[152] The point is directly raised by the still unresolved Ethiopia–Somalia boundary dispute. Great Britain and the Chiefs of five Somali tribes in 1884 and 1886 entered into agreements providing, *inter alia*, for British control over external relations. By an agreement of 1897, however, Britain ceded to Ethiopia certain traditional grazing lands of the Somali herdsmen under British protection: 89 BFSP 31, despite absence of local acquiescence or consent. On the political background to the cession see Pakenham, *The Scramble for Africa* 484–6; Vandervort, *Wars of Imperial Conquest in Africa*, 165–6. The areas were placed under the British Military Administration for Somalia after the defeat of Italy in World War II; and returned to Ethiopia by a further Agreement of 1954: UKTS No 1 (1955). In the House of Commons the validity of the 1897 Treaty was challenged: the Minister of State replied 'that the 1897 Treaty is an international instrument, whereas the other Agreements were not'. 537 *HC Deb* cols 1676–88, 1686 (25 Feb 1955). See also 562 *HC Deb* WA col 149 (19 Dec 1955); Brown (1956) 5 *ICLQ* 245; Kamanda, *Study of Legal Status*, 65–8, 205–14; Lindley, *Acquisition and Government*, 183–4; Lewis (1967) 66 *African Aff* 104; Hamilton, 'Ethiopia's Frontiers: The Boundary Agreements and their Demarcation, 1896–1956' (MS, DPhil, Oxford, 1974), 55–167; Miriam (1964) 2 *JMAS* 189; Castagno (1964) 2 *JMAS* 165. See also *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ Rep 1999 p 1045, 1073–4 (para 44); *Land and Maritime Boundary Between Cameroon and Nigeria*, ICJ Rep 2002 p 303, 498, sep op Judge Al-Khasawneh (para 7(c)).

[153] Great Britain–Kings and Chiefs of Old Calabar, Treaty of Protection, 10 September 1884, 163 CTS 182; referred to in the *Cameroon/Nigeria Case*, ICJ Rep 2002 p 303, 333 (para 37).

treaties termed 'treaties of protection' were entered into not with States, but rather with important indigenous rulers exercising local rule over identifiable areas of territory . . . Even if this mode of acquisition does not reflect current international law, the principle of intertemporal law requires that the legal consequences of the treaties concluded at that time in the Niger delta be given effect today, in the present dispute . . .

207. In the view of the Court many factors point to the 1884 Treaty signed with the Kings and Chiefs of Old Calabar as not establishing an international protectorate. It was one of a multitude in a region where the local Rulers were not regarded as States. Indeed, apart from the parallel declarations of various lesser Chiefs agreeing to be bound by the 1884 Treaty, there is not even convincing evidence of a central federal power . . . Further, from the outset Britain regarded itself as administering the territories comprised in the 1884 Treaty, and not just protecting them . . . The fact that a delegation was sent to London by the Kings and Chiefs of Old Calabar in 1913 to discuss matters of land tenure cannot be considered as implying international personality. It simply confirms the British administration by indirect rule.

Nigeria itself has been unable to point to any role, in matters relevant to the present case, played by the Kings and Chiefs of Old Calabar after the conclusion of the 1884 Treaty. In responding to a question of a Member of the Court Nigeria stated 'It is not possible to say with clarity and certainty what happened to the international legal personality of the Kings and Chiefs of Old Calabar after 1885.'

The Court notes that a characteristic of an international protectorate is that of ongoing meetings and discussions between the protecting Powers and the Rulers of the Protectorate. In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* the Court was presented with substantial documentation of this character, in large part being old British State papers. In the present case the Court was informed that 'Nigeria can neither say that no such meetings ever took place, or that they did take place . . .'.

208. . . . The Court further notes that there is no reference to Old Calabar in any of the various British Orders in Council, of whatever date, which list protectorates and protected States . . . Moreover, the Court has been presented with no evidence of any protest in 1913 by the Kings and Chiefs of Old Calabar; nor of any action by them to pass territory to Nigeria as it emerged to independence in 1960.

209. The Court thus concludes that, under the law at the time, Great Britain was in a position in 1913 to determine its boundaries with Germany in respect of Nigeria.[154]

[154] ICJ Rep 2002 p 103, 404–7. Cameroon had pleaded that 'the treaty signed on 10 September 1884 between Great Britain and the Kings and Chiefs of Old Calabar established a "colonial protectorate" and, "in the practice of the period, there was little fundamental difference at international level, in terms of territorial acquisition, between colonies and colonial protectorates." ' ICJ Rep 2002 p 303, 403 (para 202). The Court agreed, as to sub-Saharan Africa.

Judge Koroma dissented sharply, taking the view that the 1884 Treaty was plain in its meaning that Britain had only limited rights toward the territory in question, and that these did not include the right to alienate it:

The Treaty is . . . unambiguously clear. Great Britain undertook to extend 'her gracious favour and protection' to the Kings, Chiefs and people of Old Calabar . . . The creation of the protectorate . . . did not involve any cession or transfer of territory. On the contrary, the protecting Power—Great Britain—was only to protect the citizens of Old Calabar and not to dispossess them of their territory. Nor did the Treaty confer rights of sovereignty on Great Britain . . . Accordingly, since the Treaty was validly concluded and this has not been demurred, and Great Britain even raised it against other European States whenever their interests were in conflict in the region, Great Britain thus recognized the sovereignty of the Kings and Chiefs and people of Old Calabar over their territory and this cannot subsequently be denied . . . Therefore, to argue that the 1884 Treaty did not mean what it said would not only be inconsistent with the express provisions of the Treaty itself, but would also be contrary to the rule of *pacta sunt servanda* (the sanctity of treaties), a rule which forms an integral part of international law and is as old as international law itself . . . Thus, given that the 1884 Treaty was a treaty of protection and not one of cession involving the alienation of territory, it follows that Great Britain's authority in relation to the Kings and Chiefs of Old Calabar did not include the power to conclude on their behalf treaties which entitled the protecting State to alienate the territory of the protected State; therefore, the relevant parts of the 1913 Anglo-German Agreement, by which Great Britain purportedly ceded the territory of the Kings and Chiefs of Old Calabar to Germany, lay outside the treaty-making competence of Great Britain, and were not binding on the Kings and Chiefs of Old Calabar nor ultimately on Nigeria as the successor State.[155]

On similar ground, Judge Rezek declined to join the majority on the question of the cession of Bakassi.[156] Judge Al-Khasawneh took the view that it was unnecessary for the Court to investigate the 1884 and 1913 treaties at all:

3. Reversion to those treaties was not only unnecessary as I stated earlier, it was also unfortunate, for the attempt at reconciling a duty of protection on the one hand with, on the other, the subsequent alienation of the entire territory of the protected entity—regardless of whether that entity possessed international legal personality or not—cannot be an easy matter, not only due to the moral difficulties that such an attempt would

[155] Judge Koroma (dissenting), ICJ Rep 2002 p 303, 479–80 (para 15).

[156] Judge Rezek (separate opinion), ICJ Rep 2002 p 303, 490: 'Par la force du traité de 1884, la Grande-Bretange s'est dotée d' um *pouvoir de contrôle* sur les relations extérieures de la nation africaine, sans s'attribuer le pouvoir de négocier en son nom, moins encore celui d;aliéner une partie quelconque de son territoire. Le défaut de légitimité qui caractérise l'acte de cession fait que le traité anglo-allemand du 11 mars 1913 ne saurait être valuable là où, définissant le dernier secteur de la frontière terrestre, il décide du sort de Bakassi.'

entail, but also, as a matter of law, because the distinction between colonies, protectorates and the so-called 'colonial protectorates' is steeped in confusion both under international law and under the laws of the colonial Powers themselves, the confusion arising mainly from the fact that it was considerations of pragmatism and political convenience that determined the status of those territories, though problems of nomenclature are also a contributory factor . . . .[S]uch confusion engenders doubt as to whether the colonial/protecting Power possessed or even claimed title . . .

9. So far as I have attempted to demonstrate that the existence of a category of protectorates, the so-called 'colonial protectorates,' where the protecting Power was free to dispose of the protected territory at will, is a proposition that neither State practice nor judicial precedent supports and is, in all probability, no more than a fiction existing in the mind of some commentators who try to find *ex post facto* legitimization for unfathomable and illegal facts by the invention of sub-categories where normally applicable rules do not operate.[157]

Yet it is not so much a question of the existence of categories, which even in the clearest cases may be to an extent imposed, but rather the position which the parties themselves took and which were applied in practice. Respecting the Bakassi Peninsula, even if, after 1884, a party existed that might have espoused such a claim, no claim contrary to Britain's own claim appears to have been made, and at the international level the Kings and Chiefs of Old Calabar (acephalous federation or not) disappeared from view. On a continuum of possible relations, those involving more extensive competence on the part of the protecting State became indistinguishable from acquisition of territory.

### *(vi) International responsibility*

Again the question depended in the first place upon the specific instruments. In some cases the protection treaty provided only that correspondence with other States was forbidden except with metropolitan consent.[158] In others the protecting State was the sole channel for communications with the protected entity: this was the most common situation. The following conclusions may be derived from the practice:[159]

(1) Since international protectorates and protected States had separate legal personality, international obligations could be attributed to them separately.[160]

[157] Judge Al-Khasawneh (separate opinion), ICJ Rep 2002 p 303, 493–4 (para 3).

[158] For example, Egypt: *Baltzoudis v Souliotis* (1920) 1 ILR 41.

[159] See also Al-Baharna, *Legal Status*, 129–144.

[160] *Phosphates in Morocco*, PCIJ ser A/B no 74 (1938), 25, 26, 27, referring to the 'international obligations of Morocco and France.'

(2) The protectorate institution could not be used as a device to diminish the extent of international responsibility vis-à-vis third States. Where direct correspondence with the protectorate was excluded, the protecting State was responsible both for its own acts in the protectorate and, as representative, also for international wrongs attributable to the latter.[161]

(3) Normally therefore, international claims however arising were addressed to the protecting State; the position of protecting and protected States as between themselves in respect of any claim was considered for this purpose as an internal matter.[162]

(4) But the fact that in some circumstances the liability was that of the protected entity was capable of having legal consequences. For example, in such cases the exhaustion of local remedies rule applied only to remedies available in the protectorate itself.[163] Such international obligations could survive the termination of the protectorate. And there was no need for the conduct to be independently attributable to the protecting State for international responsibility to arise.[164]

(5) International actions for wrongs committed in respect of protectorates have always been brought against the protecting State alone. In no case has it been thought necessary to join the protectorate as a formal party to the proceedings.[165]

(6) These rules apply only to protectorates of international type. Colonial protectorates are for the purposes of international responsibility in the same situation as colonies.

### *(vii) Treaty-making power with respect to protectorates*[166]

To determine whether a particular treaty made by a protecting State bound its protectorates, two questions needed to be answered: first, whether the former had the international capacity to bind the other; and secondly, whether it had in fact done so. Since in most protectorates the protecting State had full power with respect to the protectorate's international relations, and although the latter may have remained juridically distinct, the point was largely one of

[161] *Spanish Zone of Morocco Claims* (1925) 2 RIAA 615, 648–9 (Judge Huber); 2 ILR 157; O'Connell, *State Succession*, vol II, 43. [162] Ibid, 324.

[163] *Studer Claim* (1925, Johore); *Nielsen* 547, 553; *Ziat Claim* (1924, Spanish Zone of Morocco) 2 RIAA 729, 731.

[164] See Judge Huber, (1925) 2 RIAA 615, 649 (*'une espèce de garantie'*).

[165] Muscat was not a party to the *Muscat Dhows Arbitration* (1904) 11 RIAA 83 (about which see Bressonet (1906) 13 *RGDIP* 145; Westlake (1907) 23 *LQR* 83), nor was Morocco a party to any of the cases concerning it, but see also Judge van Eysinga, *Phosphates in Morocco*, PCIJ ser A/B no 74 (1938) 32–3. [166] Al-Baharna, *Legal Status*, 84–112; Kamanda, *Study of Legal Status*, 200–18.

interpretation. Where a treaty expressly included protected territories,[167] or provided for their exclusion only by express declaration,[168] there was no problem. Where the convention directly concerned the interests of the protectorate, its extension to the latter could be presumed.[169] But where it was general in terms, it was arguable that it did not apply to protected States.[170]

### *(viii) Belligerency and protectorates*

For the same reasons, the question of the belligerency of a protectorate in a war in which the protecting State was involved was in the first place one of intent. It was possible for a protected State to remain neutral in such a case. Whether the war involved the direct interest of the protected territory was considered relevant,[171] assuming no clear declaration of belligerency.[172]

When the question of the belligerent or neutral status of Liechtenstein and the other European 'protected States' arose in 1944, the Department of State in the absence of any formal declaration of war applied the criterion of enemy use or occupation. Thus on 10 July 1944 the Secretary of State (Hull) declared that:

> Neither the Republic of Andorra nor Principality of Liechtenstein has been occupied or used by the enemy as far as is known. Therefore, they have the same neutral status as Spain and Switzerland which they respectively border . . . Monaco has been considered enemy-occupied territory since November 1942.[173]

More significantly the same rule was applied to San Marino which was also regarded as neutral, despite Italy's status as a belligerent. The Foreign Office was said to consider that 'treatment of San Marino should depend on whether it is still independent and neutral or has [a] puppet government set up by Germans or Fascist Italians and whether its territory is being used by them for military purposes.'[174] The attitude of other States, and the reality of neutrality, were what mattered.[175]

[167] E.g., Commercial Convention between Great Britain and Persia, 9 February 1903, 96 BFSP 51.

[168] Convention for the Unification of certain rules regarding International Transport, Warsaw, 12 October 1929, 137 LNTS 11, Art 40(1); *Ecoffard v Cie Air France* (29 April 1964) 39 ILR 453; Fawcett (1949) 26 *BY* 86, 95–100.

[169] *United States Nationals in Morocco*, 1952 ICJ Rep 179, 193–4, 196.

[170] For the debate on whether Morocco was bound by the instruments creating the Free City of Tangier, see Gutteridge (1957) 33 *BY* 296.

[171] Cf *The Ionian Ships* (1855) 2 Sp Ecc & Ad 212, 2 Spinks 212; 164 ER 394; Smith, *GB & LN*, vol I, 67–76.

[172] Al-Baharna, *Legal Status*, 114–19; Kamanda, *Study of Legal Status*, 225–8. cf *Hoogstraten v Low Lum Seng* (1934) 9 ILR 32 (Federated Malay States).

[173] *USFR* 1944/IV, 294.

[174] Ibid, 293–4.

[175] Cf *Katrantsios v Bulgaria* (1926, Greco-Bulgarian MAT) 3 *ILR* 38 (Samos neutral in war in which Turkey belligerent).

A more difficult problem is the characterization of an armed conflict between a protectorate and the protecting State.[176] In the case of protectorates of international type, the conflict would appear to have been an international armed conflict.[177] On the other hand, war with a colonial protectorate was treated as an internal conflict.

### *(ix) Nationality in protectorates*[178]

It was general practice for the inhabitants of protectorates not to be granted the nationality of the protecting State. Rather the protected entity retained its own nationality for municipal purposes, while its nationals became *protégés*,[179] or in British parlance protected persons, of the protecting State.[180] The latter status can best be described as combining alienage for at least some purposes of municipal law with nationality for international purposes.[181] An Anglo-Austrian Mixed Arbitral Tribunal stated:

> according to principles recognized in modern international law, a member of a protected nation, while he is not, by reason of the protection of the dominant State, a citizen of the latter for the purposes of its own municipal law, is, nevertheless, speaking generally, in regard to Foreign Powers and other citizens, in a position analogous to that of a citizen of the Protecting State. Such rights as he may enjoy, beyond those which he has in relation to the other members of the community to which he belongs, are secured to him by virtue of the international status of the Protecting State. It is accordingly in consonance with the principles now regulating the international system that, when two or more Powers are entering into a Treaty with one another, any one of the High Contracting Parties should stipulate for advantages to be enjoyed by the inhabitants of its Protectorates.[182]

So where a treaty used the term 'ressortissants' (usually though not correctly translated as 'nationals') it would normally have included protected persons.[183]

[176] Al-Baharna, *Legal Status*, 119–22; Kamanda, *Study of Legal Status*, 228–45.

[177] Kamanda, *Study of Legal Status*, 245, citing Oppenheim's *International Law* (7th edn), vol II, 249; Al-Baharna, *Legal Status*, 120–1.

[178] Kamanda, *Study of Legal Status*, 246–58; Al-Baharna, *Legal Status*, 122–8; van Panhuys, *The Role of Nationality in International Law*, 64–8; Mervyn Jones, *British Nationality Law and Practice*, 288–99. For nationality in Morocco under the protectorate, see Guiho, *La Nationalité Morocaine*, esp 9–11.

[179] Cf *Pablo Najera Claim*, (19 October 1928) 4 ILR 311.

[180] Parry, *Nationality and Citizenship Laws* ch 9; Mervyn Jones (1945) 22 *BY* 122; *Re Ho* (1975) 5 ALR 304.

[181] It is doubtful whether a protected person becoming a national of the protecting State would infringe the continuous nationality rule: Al-Baharna, *Legal Status*, 140–1.

[182] *National Bank of Egypt v Austria-Hungary Bank* (1924) 3 Rec Mat 236, 239.

[183] *National Bank of Egypt v German Government* (1925) 4 Rec Mat 233; *Falla-Nataf v Germany* (1927) 7 Rec Mat 642 (both concerning Arts 296–7 of the Treaty of Versailles); *Cabet de Chambine v Bessis* (Paris CA, 1951) 18 ILR 51.

### *(x) Protectorates and State immunity*

Sovereign immunity was invariably accorded the heads of protected States or international protectorates by the courts of the protecting State, whether independently or upon executive suggestion.[184] It is less clear whether this immunity was considered to be required by international law or was merely a concession.[185] On the analysis proposed here, immunity should have been required in the case of protected States but not otherwise. The chiefs of colonial protectorates were not accorded immunity.[186]

### *(xi) Protectorates and international organizations*[187]

Whether a protected territory is eligible for membership of international organizations depends both upon the nature of the protectorate and the qualifications required for membership. Where membership is reserved to 'States,' as with the United Nations, the position would appear to be that only protected States were eligible for membership.[188] No protected State was admitted to the League, nor, until comparatively recently, to the United Nations. There are various reasons for this, including the diminutive size of many protected States. In addition a majority of the General Assembly regarded with suspicion any delegation of foreign affairs power to a former metropolitan State.[189] Whether this view is compatible with the Court's Opinion in the *Admissions case*[190] may be open to question. But in any event this attitude ceased to prevail in the 1990s, with the admission of Monaco and several Pacific associated States to the United Nations.[191]

### *(xii) Termination of protected status*[192]

The way in which dependent status was terminated illustrates the status itself. Protected States usually achieved complete independence quite simply, either

[184] *Mighell v Sultan of Johore* [1894] 1 QB 149; *Statham v Statham & Gaekwar of Baroda* [1912] P 96; *Duff Development Co v Government of Kelantan* [1924] AC 797; *Government of Morocco v Laurens* (1929) 5 ILR 116; *Sultan of Johore v Abubakar* [1952] AC 318, 19 ILR 182.

[185] Fawcett, *British Commonwealth*, 128–9 tends to the latter view. Al-Baharna, *Legal Status*, 145–50 leaves the point open. See also Kamanda, *Study of Legal Status*, 222–5.

[186] *Chief Tschekedi Khama v Ratshosa* [1931] AC 784 (PC, Bechuanaland).

[187] There is a full discussion in Kamanda, *Study of Legal Status*, 259–94 (in which however European precedents are ignored), and see Al-Baharna, *Legal Status*, 151–64.

[188] Danzig was held to be qualified for membership of the ILO (equivalent to League membership), provided a previous arrangement was made with Poland, which exercised a veto over Danzig's foreign relations: *Danzig and the ILO,* PCIJ ser B no 18 (1930).

[189] Cf Higgins, *Development*, 33. The case of Muscat illustrates the point.

[190] ICJ Rep 1948 p 65.

[191] Monaco SC res 829, 26 May 1993, GA res 47/231 28 May 1993. Palau SC res 963, 29 November 1994, GA res 49/63, 15 December 1994. Federated States of Micronesia SC res 703, 9 August 1991, GA res 46/2, 17 September 1991. Marshall Islands SC res 704, 9 August 1991, GA res 46/3 17 September 1991. See further Chapter 4.

[192] See also Kamanda, *Study of Legal Status*, 295–304.

by a gradual process of transfer of power, the reverse of that by which the protecting State originally established its jurisdiction, or by treaties between protecting and protected States resulting in full and immediate independence. The case of Kuwait is instructive. The protectorate treaty of 1899 and subsequent instruments[193] were, it seems, superseded over a period of time. For example, Kuwait was admitted to UNESCO on 18 November 1960, after the United Kingdom Government in a letter to the Director-General had affirmed that Kuwait was 'responsible for the conduct of her international relations'.[194] An Exchange of Notes between Kuwait and the United Kingdom of 1961 provided:

1. The Agreement of the 23rd of January, 1899, shall be terminated as being inconsistent with the sovereignty and independence of Kuwait.
2. The relations between the two countries shall continue to be governed by a spirit of close friendship . . .[195]

Both Governments took the view that 'it was not the Exchange of Notes on 19th June which conferred independence on Kuwait. Kuwait was already independent and had been for some time . . .'.[196] This view was disputed both by commentators[197] and by the Soviet Union in the Security Council proceedings concerning Kuwait's United Nations admission.[198] But if jurisdiction can be acquired in a State by 'grant, usage and sufferance' there is no reason why it may not be relinquished in the same way.[199] The problem is one of evidence, not principle.

International protectorates including entities with much less international status than that enjoyed by Kuwait after 1899 were also as a rule granted independence by a process of consent. The Indian Native States are an example: they are discussed elsewhere in this chapter.[200]

The Constitution of the Malaysian Federation raised similar issues and was dealt with in the same way. In 1963 Brunei declined to join the Federation,

[193] 166 BFSP 111; Al-Baharna, *Legal Status* (1st edn), 322–4.

[194] Al-Baharna, *Legal Status* (2nd edn), 114. [195] 166 BFSP 112.

[196] 645 *HC Deb* col 952 (31 July 1961). Cf Whiteman, 2 *Digest* 182–4; Pearcy, (1961) 45 *DSB* 604, 606.

[197] Pillai and Kumar (1962) 11 *ICLQ* 108; O'Brien and Goebel, 'U.S. Recognition Policy', 165–7.

[198] *SCOR* 285th mtg, 30 November 1961, 9 (10–1:0). See further Chapter 4.

[199] Cf the Treaty of 26 July 1965 with the Maldives, by which the UK 'confirm[ed] their recognition of the State of the Maldive Islands as a composite sovereign and fully independent State possessing all rights to have direct relations politically and otherwise with all countries and international organizations.' UKTS 68 (1965) Art 2.

[200] The British Government did not regard the statutory termination of suzerainty over the Indian states as unilateral, because of the assent to that Act prior to its passage; 454 *HC Deb* cols 1719–40, 30 July 1948.

after a failure to agree among other things over oil revenues.[201] The British Government, while advising accession, regarded Brunei's constitution as an internal matter for the Sultan: no power existed to compel federation.[202] Brunei remained a separate 'State under British protection'[203] until the Treaty of Friendship and Cooperation of 1979 provided for resumption of its competence in international relations.[204]

On the other hand, termination of colonial protectorates followed a course much more like the granting of independence to colonial territories, although there existed certain differences in British constitutional law.[205] Consensual elements in the grant of independence, where they existed, could be explained on grounds of self-determination. For example, certain islands administered as part of the South Arabian Federation were, at the inhabitants' request, ceded to Oman rather than made part of the new People's Republic of South Yemen in November 1967.[206] But no option of separate independence was offered and Britain remained the only State competent to cede the protected territory. Colonial protectorates were, then, in the same position as colonies with regard to the grant of independence.[207]

## 7.3 Other Cases

### (1) Special treaty relations

In British practice the term 'special treaty relations' was often used to describe protected States with full powers of self-government and only peripheral legal

[201] *Keesing's* 1963, 19716.

[202] 669 *HC Deb* cols 31–6, 10 Dec 1962; 680 *HC Deb* cols. 1034–5, 9 July 1963.

[203] 756 *HC Deb* WA col 29, 11 Dec 1967.

[204] 7 January 1979, 1404 UNTS 233; see above, this chapter.

[205] Legislation was necessary to grant or authorize independence of a colony, but Her Majesty in Council was competent to terminate colonial protectorates by proclamation: 748 *HC Deb* col 1264, 19 June 1967 (South Arabian protectorates).

[206] [1967] *BPIL* 18–20; [1964] *BPIL* 12–20; [1966] *BPIL* 6–7, 50–2.

[207] Swaziland again provides an interesting example. Independence was granted in two stages: in 1967 the Swaziland Constitution Order (SI 1967 No 241) vested general authority in the King of Swaziland and local legislative and executive bodies, although the British High Commissioner retained substantial powers. Swaziland was reclassified as a protected State in British constitutional law under the new constitution. But that constitution was revoked and a new one established for the 'sovereign independent Kingdom' of Swaziland by the Swaziland Independence Order 1968 (SI 1968 No 1377 & Schedule), pursuant to the Swaziland Independence Act 1968. That the position of the local authorities before independence was derivative is confirmed by the unilateral form by which independence was granted. See further Poulose, *Succession in International Law. A Study of India, Pakistan, Ceylon and Burma*, 31–53.

links with the protecting State. Bahrain was referred to in 1947 as an 'Independent State under the protection of Her Majesty's Government and in special Treaty relations with them'.[208] The term was thus synonymous with legal independence, and implied links of alliance and guarantee based on consent. As a term of art it was, however, more than usually inexact. The Sultanate of Muscat and Oman, for example, was not described as 'in special treaty relations' with Great Britain, but rather as a 'sovereign and independent State'.[209] One would have thought that the relationship between the two States, which involved international guarantees of Muscat's independence,[210] an undertaking of non-alienation without British consent,[211] certain rights of extra-territorial jurisdiction,[212] and an arrangement for the conduct of (though not responsibility for) Muscat's foreign relations[213] was close enough to be termed 'special'. There was, however, no doubt about Muscat's legal independence.[214] United Nations controversy over Muscat concerned the status of the hinterland, and is discussed below.

## (2) Vassal States and suzerainty

The terms 'vassal' and 'suzerain' derive from feudal law; their translation into the field of international relations is a ready source of confusion.[215] The term 'vassal' referred sometimes to an entity subject to suzerainty, and sometimes to States gradually breaking away from an Empire, that is to say, devolving States. The latter problem is discussed in the next chapter.

Suzerainty may be defined as a relation between a dominant and a dependent State the incidents of which are in part defined by treaty or agreement, and in part by a *lex specialis* peculiar to that relation or that class of relations.[216] It differed from protectorate only in that certain of its incidents are more likely to be undefined or to involve general claims of supremacy. Suzerainty is now obsolete

[208] 445 *HC Deb* col 1681 (17 December 1947).

[209] *GAOR* A/C.109/SR409, 8 (26 April 1966).

[210] Franco-British Declaration (1862): 11 *Aitchison* 226.

[211] Declaration of 20 March 1891: 100 BFSP 591; renewed periodically and terminated 26 July 1958: 163 BFSP 490.

[212] UKTS No 44 (1951). See also Kamanda, *Study of Legal Status*, 78–81; Whiteman, 1 *Digest* 447–50; Al-Baharna, *Legal Status*, 47–53.

[213] *HC Deb* vol 574 cols 870–2 (29 July 1957).

[214] Al-Baharna, *Legal Status*, 47; *Muscat Dhows Case* (1904) 11 RIAA 83 (PCA); 1 Scott 95 (to which Muscat was not however a party); queried by E Lauterpacht, (1958) 7 *ICLQ* 92, 109 n 54.

[215] On the 19th century origins of the term in international relations, see Kelke, (1896) 12 *LQR* 215. Cf *Minquiers and Ecrehos Case*, ICJ Rep 1953 p 47.

[216] Cf *Statham* v *Statham & Gaekwar of Baroda* [1912] P 92, 96 (Bargrave-Dean J).

but one important example—the Indian Native States until 1947—deserves mention.[217]

Although the British Government regarded the Native States as extraterritorial and accorded their rulers sovereign immunity and the general right to internal self-government, they claimed certain generic rights, including 'the conduct of international relations, the exercise of jurisdiction over Europeans and Americans, interference to settle disputes as to succession to the State, the suppression of gross misrule in the State, and the regulation of armaments and the strength of Military Forces.'[218] Arrangements with the Indian States were substantially similar, although the tendency in British practice to regard 'paramountcy' as some specific legal condition irrespective of local consent should not obscure the point that their status depended on the specific agreements and consents in each case.[219] Equally the British claim that 'the principles of international law have no bearing upon the relations between the Government of India . . . and the native States under the suzerainty of Her Majesty. The paramount supremacy of the former presupposes and implies the subordination of the latter,'[220] was founded on the erroneous view that international law only governed the relations of fully independent States.[221] The Native States were not independent, and their status was not that of protected States as here

[217] See Warner, *The Native States of India*; Sen, *The Indian States*; Somervell (1930) 11 *BY* 55; Fawcett, *British Commonwealth*, 126–9; Poulose, *Succession in International Law. A Study of India, Pakistan, Ceylon and Burma*, 31–53; Singh, *Colonial Hegemony and Popular Resistance*: Copland, *The Princes of India in the Endgame of Empire 1917–1947*. Cf the definition of 'India' in the UK Interpretation Act 1889, s 18(5): 'British India together with any territories of any native prince or chief under the suzerainty of Her Majesty exercised through the Governor-General of India, or through any governor or other officer subordinate to the Governor-General of India.'

[218] *Maharaja Bikram Kishore of Tripura v Province of Assam* (1948) 22 ILR 64. The Court stated further that: 'the Maharaja of Tripura has been recognized by His Majesty as the Ruler of the Indian State of Tripura . . . His Majesty's Government do not regard or treat His Highness or His subjects as subjects of His Majesty and they do not regard or treat Tripura as being part of . . . His Majesty's Dominions . . . But though His Highness is thus not independent, His Majesty's Government accord to him the status of a sovereign Ruler under the suzerainty of His Majesty . . . As such he possesses various attributes of sovereignty, including internal sovereignty, which is not derived from British law, but is inherent in the Ruler, subject, however, to the suzerainty of His Majesty and to the exercise of His Majesty's Representative of such rights, authority and jurisdiction as have by treaty, grant, usage, sufferance, or otherwise passed to and are exercisable by His Majesty.'

[219] Maine in Ilbert, *The Government of India* (3rd edn), ch V; cited by Lindley, *Acquisition and Government*, 196.

[220] India, *Off Gaz*, 21 August 1891, cited by Fawcett, *British Commonwealth*, 126; Indian Statutory Commission Report, 1928–9, Cmnd 3302, §§18, 57. This view owed much to Warner, *Native States of India*, 28 ff, and Westlake, *International Law*. For criticism see Sen, *The Indian States*.

[221] *Rann of Kutch Award* (1968) 50 ILR 2, 6 ILM 633; and the argument of Burke at Hastings' impeachment, concerning the Raja of Benares, cited by Alexandrowicz, *Introduction to the History of the Law of Nations in the East Indies*, 20–3.

defined. But neither were they equivalent to colonial protectorates. Their status was analogous to that of international protectorates.[222] By 1947 the Crown had evidently changed its mind, because its position then was inconsistent with the view that the States were merely municipal units of the Empire. Despite 'paramountcy', the Indian States were regarded as free to accede to India or Pakistan or neither: no constitutional authority was thought to exist to force such accession, although the British Government advised in favour of that course.[223] The Indian Independence Act 1947, section 7 merely provided for the 'lapse' of suzerainty over the Indian States, so that it was arguable that those States which had not acceded were rendered fully independent.

The most important such case was that of Hyderabad, which had been in the 'most independent' class of native States prior to 1947. Its full independence was shortlived: Hyderabad was blockaded, invaded and annexed by India in September 1948. While hostilities were in progress, the Security Council accepted the Nizam's complaint of aggression as an agenda item and admitted his representative to the deliberations, apparently under Article 35(2).[224] Following Hyderabad's surrender, it took no specific action.[225]

### (3) Autonomy and residual sovereignty

Autonomous areas are regions of a State, usually possessing some ethnic or cultural distinctiveness, which have been granted separate powers of internal administration, to whatever degree, without being detached from the State of which they are part. For such status to be relevant for the purposes of this study it must be established as internationally binding upon the central authorities (as for example with the Memel Territory, discussed in Chapter 5). In such cases the local entity may have a certain status, although since that does not normally involve any foreign relations capacity, it is usually very limited. Until

[222] Great Britain had no power to act internally to carry out international agreements: *ILO Off Bull* vol XII, 172–3, cited by Kamanda, *Study of Legal Status*, 203–4. British cases on the States rest upon a distinction between those States which were separate from the Raj, the relationships with which were non-justiciable (e.g., *Sec of State in Council for India v Kamachee* (1859) 7 Moo Ind App 476; *Rajah Salig Ram v Sec of State* (1872) LR IA Supp 119; *Ex-Rajah of Coorg v East India Co* (1860) 29 Beav 300), and those States that had been taken over by the Raj, the relationships with which were municipally justiciable (e.g., *Forester v Sec of State* (1872) LR IA Supp 10).

[223] 439 *HC Deb* cols 2451–2 (10 July 1947); 452 *HC Deb* cols 1360–2 (23 June 1948).

[224] *SCOR* 3rd yr Supp, Sept 1948, 5 (S/986); Higgins, *Development*, 51–2; Eagleton (1950) 44 *AJ* 277; *contra* Das (1949) 43 *AJ* 57.

[225] *SCOR* 3rd yr No 109, 357th mtg, 16 September 1948: Eagleton, 277–81, 294–9. See also USFR 1948/V, 360–1, 373, 411, 417. On the Kashmir dispute see Gupta, *Jammu and Kashmir*; Mendelson (1996) 36 *Indian JIL* 1. On Hyderabad, Franck (1984) 78 *AJ* 811, 815; Popper (1986) 80 *ASIL Proc* 348, 360.

an advanced stage is reached in the progress towards self-government such areas are not States. Two examples—Tibet and Oman—illustrate some of the legal problems of this type of dependency.

The status of Tibet has long been uncertain and became a matter of some controversy with the Chinese 'invasion' of the territory in 1951.[226] Tibet had been said to be under the 'suzerainty' of China since the eighteenth century: the incidents of the relationship had remained obscure and fluctuated with the power of each side to impose or escape from its rights or obligations. By 1910 the weakness of central government in China made the separate independence of Tibet at least arguable.[227] In a treaty of 1904 with Great Britain, Tibet undertook not to dispose of territory, not to pledge its revenue and not to grant concessions to, or admit representatives of, any 'foreign Power' without British consent.[228] That Treaty was confirmed by a Convention of 1906 between Great Britain and China, the terms of which confirm that the phrase 'foreign Power' in the 1904 Treaty was not intended to include China.[229] This was further confirmed by the Russo-British Treaty of 1907 relating to Persia, Afghanistan and Tibet, by which the parties, 'reconnaissant les droits suzerains de la Chine sur le Thibet', agreed to respect the territorial integrity of Tibet, not to interfere in its internal affairs, and not to negotiate with Tibet except through the Chinese Government as intermediary.[230] The Agreement of 1908 amending Trade Regulations in Tibet between Great Britain, China and Tibet, was concluded with the 'representative' of the 'High Authorities of Tibet' acting 'under the directions of the Chinese plenipotentiary'.[231] In 1910, Tibet possessed a considerable degree of *de facto* independence but this was conditioned by Chinese power with respect to Tibetan foreign affairs, and by the claims of China (largely unexercised) to some greater degree of control. In 1911 the Manchu dynasty collapsed: with it, it has been argued, collapsed also the claims of China over Tibet, since these were based on a personal allegiance under feudal law.[232] In the event neither China nor Great Britain thought that this was the case.

[226] See Lamb, *The McMahon Line*; Rubin (1968) 35 *China Q* 110; International Commission of Jurists, Question of Tibet; Alexandrowicz (1954) 48 *AJ* 265; van Walt van Praag, *The Status of Tibet*; McCorquodale and Orosz (eds), *Tibet: The Position In international Law*.

[227] Alexandrowicz (1954) 48 *AJ* 265, 275; International Commission of Jurists, *Question of Tibet*, 85.

[228] 98 BFSP 148, Art 9. For the circumstances surrounding the conclusion of the Treaty see International Commission of Jurists, *Question Of Tibet*, 78–91.

[229] 99 BFSP 171, Art III.

[230] 100 BFSP 555. But cf McCorquodale and Orosz, *Tibet*, 147: 'The relationship of a tributary—sometimes contended for by China—necessarily implies the separate identities of the tributary and the dominant state. It is therefore inconsistent with a claim that Tibet was an integral part of China in the period prior to 1911.'

[231] 101 BFSP 170. Only Great Britain and China were to ratify the Agreement.

[232] Alexandrowicz (1954) 48 *AJ* 265, 275 270.

The crucial document of the period was the Simla Convention of 1914, intended to be signed by China, Tibet and Great Britain but because of disagreement over boundaries signed by the latter two only. The Simla Convention was not binding upon China but it is the best evidence of what the negotiating parties thought of Tibet's status at the time—or, perhaps, of what they hoped Tibet could successfully claim. Article 2 stated: 'The Governments of Great Britain and China recognizing that Tibet is under the suzerainty of China, and recognizing also the autonomy of Outer Tibet, engage to respect the territorial integrity of the country, and to abstain from interference in the administration of Outer Tibet . . .'.[233] Thus despite various possibilities,[234] Tibet was not in 1914 regarded as independent, even though at least part of the country possessed substantial autonomy. This has always been the British view,[235] and it was also the Chinese view in 1951.[236] The invasion of Tibet was thus not a case of invasion of an independent State, although Chinese actions in Tibet after 1951 may be criticized on other grounds.[237]

A rather similar controversy surrounded the status of Oman vis-à-vis the Sultan of Muscat and Oman.[238] The hinterland had long been an autonomous area with a separate government owing little allegiance to the Sultan at Muscat. The situation was affirmed by the secret Treaty of Sib of 25 September 1920, concluded through British mediation between the Sultan and 'the people of Oman'.[239] That agreement provided that the Sultan would not grant asylum to

[233] Simla Convention, 3 July 1914, 220 CTS 144, 144–5. The International Commission of Jurists, 85 concluded that 'the events of 1911–1912 mark the re-emergence of Tibet as a fully sovereign state, independent in fact and law of Chinese control.' It is true that the signatories in 1914 deleted from the draft agreement the declaration that 'Thibet forms part of Chinese territory' (ibid, 140). But if Tibet was not part of China in 1914 it is difficult to understand why Art 2 was allowed to stand between two parties in whose interests it was that Tibet should be as independent as possible. See, generally, Goldstein, *A History of Modern Tibet*, 1913–1951.

[234] On the disputed declaration of independence of 1912 see Rubin (1965) 59 *AJ* 586; (1966) 60 *AJ* 812; McCabe (1996) 60 *AJ* 369. The matter is also of importance in relation to the India-China boundary: see Rubin (1960) 9 *ICLQ* 96; Sharma (1965) 59 *AJ* 16. See also International Commission of Jurists, *Tibet and the Chinese People's Republic*, 139–66.

[235] 151 BFSP 89.

[236] China–Tibet Agreement on Administration of Tibet, 23 May 1951: 158 BFSP 731. Cf, however, the Sino-Indian Agreement of 29 April 1954 concerning Indian Trade and Intercourse with the 'Tibet Region of China': Lamb II, 638–41. The 1954 Agreement assumes either termination or cancellation of British treaties relating to Tibet.

[237] Cf GA res 1353 (XIV), 3rd preambular paragraph, 21 October 1959 (45–9:26), referring to 'the distinctive cultural and religious heritage of the people of Tibet and . . . the autonomy which they have traditionally enjoyed'; 1723 (XVI), para 2, 20 Dec. 1961 (56–11:29), referring to the 'right to self-determination' of the people of Tibet; 2079 (XX), 18 Dec. 1965 (43–26:22), referring only to the human rights issues. No further action has been taken. See also Higgins, *Development*, 123–5, 222; Rubin (1968) 35 *China Q* 110; Herzer and Levin (1996) 3 *Mich J Gender & Law* 551.

[238] Al-Baharna, *Legal Status*, 239–47; Kelly, 'Sultanate and Imamate in Oman', *Chatham House Memoranda* (1959) 13.

[239] Text in (1961) 10 *ICLQ* 552.

'any criminal fleeing from the justice of the people of Oman', that he would 'not interfere in their internal affairs'; and that, on the other hand, the tribes and Sheiks of Oman would be 'at peace with the Sultan. They shall not attack the towns of the coast and shall not interfere in his Government.' The Treaty is equivocal with regard to the status of the signatories; in the absence of any clear acknowledgment of their position, the status of the treaty depended on the position of the parties rather than the reverse.[240] In 1937 the Sultan, apparently without local protest, granted oil concessions over part of Oman. The status of Oman was raised in two different contexts before United Nations organs. In 1955 a rebellion in the hinterland was put down only after British military intervention at the invitation of the Sultan. The Security Council, after debate, refused to include on the agenda a complaint by eleven Arab League States of British aggression against Oman under Article 35 of the Charter.[241]

Of more consequence were the debates in the General Assembly on the problem of Oman. The matter was considered in 1960 to 1962, but for various reasons no action was taken. However, in December 1963 the Assembly created an 'Ad hoc Committee on Oman',[242] which reported in 1964 to the effect that Oman was 'an autonomous political entity that took steps to assert its competence in such important matters as the control of its foreign relations and its natural resources.'[243] Significantly it did not say that Oman was a State separate from the Sultanate of Muscat and Oman. In successive resolutions the General Assembly '[r]ecognize[d] the inalienable right of the people of the Territory as a whole to self-determination and independence in accordance with their freely expressed wishes.'[244] The reference to 'the territory as a whole' was regarded as including both Muscat and Oman, so that these resolutions did not support the view implied by the Arab League States proposal in 1957 that Oman was itself an independent State.[245] On 23 July 1970, the Sultanate of Muscat and Oman changed its name to the Sultanate of Oman.[246] It was admitted to the United Nations in 1971.[247]

[240] Al-Baharna, *Legal Status*, 243–4.

[241] S/3865 & Add 1, *SCOR* 12th yr supp, July-September 1957, 16–17; 783rd mtg, 20 August 1957, para 87 (4–5: 1 abst, 1 member not voting).

[242] GA res 1948 (XVIII), 11 December 1963 (96–1:4).

[243] 1964 *UNYB* 186–8.

[244] GA resns 2073 (XX), 17 December 1965 (61–18:32); 2238 (XXI), 20 December 1966 (70–12:28); 2302 (XXII), 12 December 1967 (72–18:19); 2424 (XXIII), 18 December 1968 (66–18:26); 2559 (XXIV), 12 December 1969 (64–17:24); and 2702 (XXV), 14 December 1970 (69–17:23).

[245] The UK intervention in 1957 could of course have been unlawful on other grounds: see Al-Baharna, *Legal Status*, 246–7.

[246] Department of State, GE-69, 9 September 1970.

[247] SC res 299, 30 September 1971; GA res 2754 (XXVI), 7 October 1971.

These two cases of what might be called 'autonomous regions' present certain similarities. In both, the normal classifications of sovereignty and statehood are only applicable with difficulty, and the facts are obscure and controversial. The case of Tibet, in particular, highlights the rather arbitrary way in which, for their own purposes, individual powers decided upon a particular course of action, and thus, in effect, determined the status of a people.

It is beyond the scope of this study to examine in more detail the large number of cases of residual authority claimed or exercised over autonomous territories. Such residual sovereignty may involve extensive rights, as with Turkey over Cyprus after 1878, or it may be so nominal that, as Sir Walter Scott said of Bengal, it 'hardly exists otherwise than as a phantom.'[248] In the modern period, too, various arrangements have been referred to in terms of autonomy, minority rights and regional devolution (e.g., Nunavut, Tatarstan, Catalonia, South Tyrol).[249] But these have resulted from grants of authority by the central government of the State and are probably revocable as a matter of international law.[250] Some of the considerations involved when territories separate themselves by degrees from metropolitan authority are examined in the next chapter.

## (4) Spheres of influence

Spheres of influence were agreements by two or more States delimiting the areas of territory, in particular in Africa and also in Persia and Siam,[251] within which each party would be permitted by the other party or parties to operate. Neuhold refers to spheres of influence as '[c]onceptually ill-defined and legally dubious'.[252] But they were part of the apparatus of territorial control, in effect giving the State whose sphere was recognized a free hand within that sphere to colonize or not. They were considered as strictly contractual[253] and gave no

[248] *The Indian Chief* (1801) 3 C Rob 11, 31; 165 ER 367, 374; and cf *Secretary of State for India v Sardar Rustam Khan* (PC 1941) 10 ILR 98, 165 ER 367, 374.

[249] See Hannum, *Autonomy, Sovereignty and Self-determination* (rev edn). Perhaps the best known modern case is that of Hong Kong after 1997, discussed in Chapter 5.

[250] Subject to treaty commitments, bilateral (e.g. agreement between Austria and Italy, Art 3(c), 5 September 1946, incorporated as Annex IV to and confirmed by Art 10 of Treaty of Peace with Italy (Italy–Australia–France–UK–USA–USSR), 10 February 1947: 49 UNTS 3, 11, 69–70)) or multilateral: e.g. Framework Convention for the Protection of National Minorities, 1 February 1995, (in force 2 January 1998), [1995] ETS 157, 34 ILM 351, 2151 UNTS 246.

[251] Convention between Great Britain and Russia relating to Persia, Afghanistan, and Thibet, 31 August 1907, Arts I–III, 100 BFSP 555; Declaration between Great Britain and France, with regard to the Kingdom of Siam and other matters, Art III, 88 BFSP 13, 14.

[252] Neuhold, IV *Enc PIL* (2000) 577.

[253] Cf US Memorandum of 22 June 1896 (Venezuela): 88 BFSP 1283, 1287, cited by Lindley, 212–13. To the same effect, *Western Sahara Case*, 1975 ICJ Rep p 12, 56.

legal rights over the territory itself as against its occupants, though in at least one instance an agreement concerning spheres of influence was accepted by parties before the International Court as evidence of the disposition of an international boundary.[254] The subject of spheres of influence is outside the scope of this study.[255]

NOTE: The account of Monaco's relations with France pursuant to the Treaty of 1918 (above, pp 292–4) must be read in light of a new Treaty Intended to Adapt and Confirm the Relations of Amity and Cooperation between the French Republic and the Principality of Monaco, Paris 24 October 2002; 48 AFDI 792. French Law no. 2005–1271 of 13 October 2005 (*Journal official*, 14 October 2005, 16297) authorises the ratification of the Treaty. When it enters into force, the Treaty will create, in the words of the preamble 'a legal framework better adapted to modern realities', and specifically to the principles of interstate relations contained in the Charter. In particular, France guarantees Monaco's defence and territorial integrity 'dans les mêmes conditions que le sien' (Art l); there will be consultation to assure coordination on international relations and other fundamental questions (Art 2); the succession to the Principality is referred to the Constitution of Monaco as amended in 2002, with notification to France of any modification and without any reversion of sovereignty (Art 3); and the French right to intervene on the territory of Monaco is significantly qualified (Art 4). The 2002 Treaty modifies but does not abrogate the 1918 Treaty. The spur to these developments was the Monegasque application of 1999 to join the Council of Europe, an application only acceded to in 2004 after the Treaty had been negotiated and in light of assurances given on other points. See CE Doc AS/Bur/Monaco (1999) 1 rev.2: CE Doc 10138, 14 April 2004; CE Parliamentary Assembly, Opinion No. 250 27 April 2004; Committee of Ministers Res (2004) 10, 2 September 2004. The episode suggests a more rigorous approach to membership of the Council of Europe than to the United Nations.

[254] *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ Rep 1999 p 1045, 1073 (para 43): 'While the treaty in question is not a boundary treaty proper but a treaty delimiting spheres of influence, the Parties nonetheless accept it as the treaty determining the boundary between their territories.' See also, ibid, 1060 (para 21). See also *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ Rep 1994 p 6, 17–18 (paras 25, 28); *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)*, ICJ Rep 2002 p 303, 331 (para 33).

[255] See generally McNair, *Law Officers Opinions*, vol 1, 55–8; Lindley, *Acquisition and Government*, 207–36; Rutherford (1926) 20 *AJ* 300.

# Chapter 8

# DEVOLUTION


**8.1 Introduction** 330

**8.2 Explicit grants of independence** 330

(1) Granting partial or incomplete independence 332

(2) Grants in violation of self-determination 333

(i) Grants to minority or unrepresentative governments within self-determination units 333

(ii) Grants disruptive of the territorial integrity of a self-determination unit 335

(3) Grants of independence in furtherance of fundamentally unlawful policies: the bantustans 338

(i) Origins of the bantustan policy 338

(ii) Denationalization through State creation 340

(iii) The status of the bantustans under international law 341

(iv) Dismantling the bantustan system 345

(4) Colonial enclaves and rights of pre-emption 348

(5) Derogations from grants of independence 348

**8.3 Relinquishment of sovereignty without grant** 349

**8.4 The gradual devolution of international personality** 349

(1) The 'unitary State' theory 351

(2) General principles of the status of devolving entities 353

(3) The principles applied: devolution of States within the British Commonwealth 358

(i) The self-governing Dominions 358

(ii) British India 366

(iii) Subsequent cases of Commonwealth independence 368

(iv) Southern Rhodesia pre-1965 368

(v) The elimination of post-Imperial links 371

(4) Other cases of devolution 372

(i) The Ottoman Empire 372

(ii) The Philippines 372

(iii) The French and Netherlands Unions 373

## 8.1 Introduction

Two important methods by which new States are formed are the grant of independence by the previous sovereign and the forcible seizure of independence by the territory in question.[1] These will be referred to as devolution and secession respectively. The key distinguishing feature is the presence or absence of metropolitan consent,[2] although in some circumstances this distinction is formal and may even be arbitrary.[3] In particular the relevance of metropolitan consent varies in different situations, especially when the principle of self-determination is at issue. The contrast between Biafra and Guinea-Bissau, or between Chechnya and Kazakhstan, demonstrates the difference. But it also demonstrates the importance attached in State practice to metropolitan consent to the formation of a new State. Since 1945, most new States have been created by explicit grant of independence from the previous sovereign.

Grants of independence can take different forms. In particular it is useful to distinguish between immediate grants of independence and gradual devolution or accretion of power in a local unit to the point where it is eventually seen as a separate State. Immediate or relatively immediate grant of independence is by far the most common modern method of transfer of governmental authority. The exercise of and limits on this power are considered in the next section. The process of gradual devolution of power was adopted—whether or not as a deliberate policy—for the British Dominions before 1945. Though less common than the relatively immediate formal transfer of power, gradual devolution has considerable historical significance and is considered in the following sections of this chapter.

## 8.2 Explicit grants of independence

Like the competence to cede territory, the competence to transfer governmental power to a new State on part of the metropolitan territory is an attribute of State sovereignty.[4] There is, however, this difference, that in the latter case a new legal person is created and the legal position of third States potentially affected. The power to grant independence is thus an important one but it

[1] International Law Association, *The Effect of Independence on Treaties*, 1; O'Connell, *State Succession*, vol II, 88, 100 ('revolutionary' and 'evolutionary secession').

[2] The term 'metropolitan' refers to the State on whose territory the new State is to be created, and in terms of the manifestation of consent, to the government of that State.

[3] Brownlie (1961) 8 *Rev Cont L* 19, 26–7.

[4] Pufendorf, *De Jure Naturae et Gentium Libri Octo*, vol VII, ch 3, §690.

would seem that there are few legal limitations to its exercise. That this is so is no doubt due to the absence of any political desire and, perhaps, any need to regulate the number of new States.

Various means have been used to transfer competence to the local entities: municipal legislation,[5] the termination of treaties of protection, the conclusion of an agreement in the nature of a treaty between the former sovereign and the new State,[6] or a combination of some of these methods. The fact that the constitution of a State results from, and is contained in, the legislation of another State might be thought a derogation from the independence of the former. In Kelsen's words, for a new State, 'ce qui importe, c'est que ces normes aient pour principe de validité une Constitution créé indépendamment des constitutions des autres États':[7] the question is how this can be when the constitution is the law of another State.

The issue arose in *Buck v Attorney General*,[8] where former citizens of the colony of Sierra Leone sought a declaration in a British court that the Sierra Leone (Constitution) Order in Council 1961 was *ultra vires* the British Settlements Act 1887 (UK) and void. The Court of Appeal denied that it had jurisdiction to determine the matter for several reasons: the independence of Sierra Leone was achieved not by the Order in Council but by the Sierra Leone Independence Act 1961; in any event a British court could not 'make a declaration impugning the validity of the constitution of a foreign or independent State, at any rate where that is the object of the action. This may be put as a matter of international comity, or upon the ground of effectiveness.'[9] But two more fundamental reasons could have been given.

In the first place it is necessary to distinguish between the validity of the grant of independence to a State and the validity of its constitution. In international law only the former is necessary: a State may be created without a formal constitution or may change its independence-constitution by municipally unlawful means without any discontinuity of international personality. The invalidity of the origins of the Sierra Leone Constitution in British law would have left unaffected the independence of Sierra Leone. The validity of the Constitution of Sierra Leone was a matter for the courts of Sierra Leone to decide.

[5] Cf Roberts-Wray in Anderson (ed), *Changing Law in Developing Countries*, 43; *Liyanage v R* [1967] 1 AC 259, 286.

[6] E.g. Articles of Agreement for a Treaty between Great Britain and Ireland, 6 Dec 1921, 26 LNTS 10.

[7] (1929) 4 *RDI* 613, 616; cf Fawcett, *British Commonwealth*, 92–106.

[8] [1965] Ch 745, 42 ILR 11.

[9] Ibid, 768 (Harman LJ). Leave to appeal was refused: [1965] 1 WLR 860, 42 ILR 11.

A second, related point was made by Diplock LJ:

As soon as Sierra Leone became independent, the Order in Council ceased to have any effect as an Order in Council, that is, as an exercise of the sovereign power of the United Kingdom Government . . . Whatever effect it then had was as part of the law of a foreign sovereign State, into the validity of which this court has no jurisdiction to enquire. Whether it was valid during the punctum temporis during which it was in force before Sierra Leone became independent is a subject-matter in which the parties have no interest. No legal rights or liabilities can depend upon it . . .[10]

The assumption by a new State of a constitution established by a law of the previous sovereign is thus a matter both formally and substantially distinct from the validity of that law under the internal law of the previous sovereign. The achievement of independence by grant thus complies with Kelsen's requirement, because the '*principe de validité*' of the new constitution is not its legality under the law of the grantor but the fact of its assumption as the constitution of the new State.[11]

The consent of the former sovereign is nonetheless an important element in the statehood of the newly emergent entity. In a study of United States recognition policies with respect to sixty new States, O'Brien and Goebel noted that forty-five were accorded 'instantaneous' or even 'anticipatory' recognition;[12] this recognition would have been premature or improper absent the consent of the previous sovereign. Although it has been said that 'the mere declaration by the metropolitan State that independence has been granted is not of itself sufficient',[13] modern practice demonstrates that *prima facie* a new State granted full formal independence by the former sovereign has the international right to govern its territory as a State. The question is what exceptions there may be to this principle.

## (1) Granting partial or incomplete independence

There is no general prohibition against a State granting a certain degree of autonomy, or certain rights to act in the international sphere without granting plenary competence. The status of an entity granted partial competence may be

[10] [1965] Ch 745, 771–2; cf 773 (Russell LJ). Cf *Sabally & N'Jie v Attorney-General* [1965] 1 QB 273, where the Court enquired into the constitutional validity of prerogative acts with respect to a self-governing but not then independent territory (Gambia), 42 ILR 11.

[11] Cf (less satisfactorily) de Smith, *The New Commonwealth and its Constitutions*, 6–7.

[12] O'Brien and Goebel, 'U.S. Recognition Policy', 207, esp 212. In only two cases (India and Burma) was recognition anticipatory of independence by more than a few days. Of the thirteen cases of delayed recognition, three (Senegal, Guinea and probably Morocco) were political; two, Nepal and Yemen, were probably the result of the isolation of the entities in question. In the other 8 cases subsisting disputes, or doubts about independence, were regarded as justifying the withholding of recognition. Cf also Myers (1961) 55 *AJ* 701, 703; Verzijl, *International Law*, vol II, 66–89; Verhoeven, *Reconnaissance*, 12–19.

[13] O'Brien and Goebel, 'U.S. Recognition Policy', 308n.

uncertain: the situation approximates to that of gradual accretion of power, discussed later in this chapter. Although the view has been taken that 'international law [makes] it impossible to create an "international person", responsible only for certain specific fields of external affairs of any one territory',[14] there are many examples of intermediate forms emerging from total dependence. Of course where a State has undertaken to grant full independence to a particular territory, a partial grant will not absolve it from and may be a breach of that obligation.[15]

## (2) Grants in violation of self-determination

The problem of attempted secession in breach of self-determination was discussed in Chapter 3, with special reference to the case of Rhodesia. The problem of grants of power in violation of self-determination also requires discussion. In practice, two different situations have arisen. A metropolitan State may seek to avoid the obligation of self-determination by granting independence to an unrepresentative fraction of the people of a territory. Or an attempt may be made to divide a particular territory so as to avoid an obligation to grant independence to the territory as a whole.

### *(i) Grants to minority or unrepresentative governments within self-determination units*

Where an obligation exists to grant self-determination to a particular territory, it is possible for an administering authority in effect to circumvent its obligation by granting independence to an entrenched and unrepresentative minority. On the other hand self-determination does not necessarily involve the establishment of a democracy based on the principle of 'one vote, one value', and the administering authority has a measure of discretion in determining the persons in the territory to whom the grant of authority will be made. Thus where the traditional authorities within the territory retain the support of the people, the General Assembly has endorsed transfers of power to those authorities (for example in Swaziland and the United Arab Emirates). It has also approved constitutional arrangements which gave a preferential position to an indigenous ethnic group (for example in Fiji[16] and, under the final settlement there, Zimbabwe[17]).

[14] Report of the Singapore Constitutional Conference, Cmnd 147 (1957), cited O'Connell, *International Law* (1st edn), vol I, 310n.

[15] The cases of Syria and Lebanon after 1943 are examples: see Chapter 2.

[16] Report of the Fiji Constitutional Conference, 5 May 1970, Cmnd 4389, p 1067, 1091 (para 78); SC res 287, 10 October 1970 (unanimous), GA res 2622 (XXV), 13 October 1970 (admission of Fiji to Membership of the UN). Cf Fiji's reservation to the International Convention on the Elimination of All Forms of Racial Discrimination, GA res 2106 (XX) 21 December 1965, 660 UNTS 195.

[17] Zimbabwe Constitution Order 1979 (SI 1979 No 1600 (UK) ), about which see Slinn (1980) 6 *CLB* 38, 1038; Cadoux (1980) 26 *AFDI* 9, 17, 20. Eighty of a hundred delegates to a House of

But it remains true that to be consistent with self-determination any transfer of authority must be to a government which has the support of, and thus can fairly be said to be representative of, the people. The cases of New Caledonia[18] and Guam[19] suggest the complications inherent in claims by indigenous groups to constitute 'the people' for these purposes. Even where there is agreement as to the identity of the relevant population, controversy may arise over the identity of the government to which independence is granted. The purported grant by France to 'hand-picked' governments in Syria and Lebanon was objected to on this ground. In the case of Southern Rhodesia, both the General Assembly and the Security Council repeatedly requested the United Kingdom Government 'not to transfer under any circumstances to its colony of Southern Rhodesia, as at present governed, any of the powers or attributes of sovereignty, but to promote the country's attainment of independence by a democratic system of government in accordance with the aspirations of the

Assembly were elected from a 'common roll'; twenty from a 'white roll,' this provision being entrenched in the constitution for seven years from the date of its entry into force. There were similar roll systems in Fiji, New Zealand, Cyprus and, briefly following independence, Malawi. Cf generally Rigo Sureda, *The Evolution of the Right of Self-Determination*, 182–3.

[18] The Nouméa Accord signed in May 1998 by France and by parties in New Caledonia favouring integration and independence expressly recognized the identity of the Kanak people, the indigenous people of the territory, in such a way as to imply a special, perhaps privileged, position for that group in deciding the future disposition of the territory. The Accord however also provided that 'participation of the other communities in the life of the Territory is essential.' (A/AC/109/211, Annex, para 4). The Accord requires in the second decade of the 21st century a 'vote of the populations concerned' to determine its final status (para 5). The term 'populations' would seem to indicate that Kanaks and French settlers will participate in the status referendum, though the aspect of collective rights will depart from the 'one vote, one value' principle.

[19] The Commission on Self-Determination, an organ of the local government in Guam, in 1986 drafted an act to establish Guam as a Commonwealth of the United States, on a basis similar to Puerto Rico and the Commonwealth of the Northern Mariana Islands (A/AC.109/2001/4). The draft Commonwealth Act was put to the inhabitants of Guam in an article-by-article referendum in August 1987: the voters rejected an article that would have granted the indigenous Chamorro people the right to determine the future political status of the Territory (A/AC.109/2002/8, para 12). Following inconclusive discussions with the US Government over implementation of the surviving articles of the Commonwealth Act, the Guam legislature returned to the issue in 1997 by establishing a Commission on Decolonization for the Implementation and Exercise of Chamorro Self-Determination: Guam Public Law 23–147. The Commission was to oversee establishment of a registry of voters of Chamorro ancestry in Guam; and then a plebiscite in which voters on the registry would choose among the three options set out in Principle VI of the Annex to General Assembly resolution 1541 (1960)—independence, free association, and integration. The Guam legislature in 2000 authorized the Guam Electoral Commission to set a date for the plebiscite, which would be non-binding but would set the course for future discussions as to the status of the territory. The process of voter registration, however, suffered repeated delay. In any event, US authorities had earlier made it clear that the US government would not support a plebiscite, binding as to the future political status of the territory in which only one group may vote to the exclusion of other US citizens resident in Guam (A/AC.109/2000/6, para 101).

majority of the population.'[20] On the view taken by the United Nations and by almost all States, the United Kingdom retained authority over Southern Rhodesia, and thus had the competence (and eventually the duty) to transfer power to the territory. However, the exercise of that competence was restricted, not only by the principle of self-determination but also by explicit United Nations resolutions to which the United Kingdom assented.[21]

### *(ii) Grants disruptive of the territorial integrity of a self-determination unit*

United Nations' practice in self-determination matters reveals two distinct and to some extent conflicting principles: that '[a]ll peoples have the right to self-determination',[22] and that '[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.'[23] According to the Declaration on Principles of International Law of 24 October 1970:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour. Every State shall refrain from any action aimed at the partial or total disruption of the national unity or territorial integrity of any other State or country . . .[24]

As shown in Chapter 3, the principle of self-determination is now clearly recognized in international law. The status of the principle of 'territorial

[20] SC res 202, 6 May 1965 (7–0:4), para 5. See also, e.g., SC res 253, 29 May 1968 (11–0:0), para 17; GA res 1883 (XVIII) (90–2:3), para 1; GA res 2138 (XXI) (86–2:18), para 1; GA res 2151 (XXI) (89–2:17), para 3.

[21] See also GA res 2023 (XX) (90–1 1:4), para 4 (Question of Aden) (90–11:10), para 4: 'Further deplores the attempts of the administering power to set up an unrepresentative régime in the Territory, with a view to granting it independence contrary to General Assembly resns 1514 (XV) and 1949 (XVIII), and appeals to all States not to recognize any independence which is not based upon the wishes of the people of the Territory freely expressed through elections held under universal adult suffrage.' The Assembly also condemned in general terms the imposition of 'non-representative régimes and arbitrary constitutions': e.g., GA res 2878 (XXVI), 20 Dec 1971 (96–5:18), para 6; 2908 (XXVII), 2 Nov 1972 (99–5:23), para 7.

[22] GA res 1514 (XV), para 2.

[23] Ibid, para 6.

[24] GA res 2625 (XXV), 24 Oct 1970 (adopted without vote). For a later but very similar formulation see Beijing Declaration, Joint Statement by PRC and Russian Federation, 18 December 1992: cited in Goldman and Sutter, CRS Report, 27 January 1997.

integrity', so far as it relates to self-determination units which are not States, is less certain. It is an established part of United Nations practice, and may be treated as a presumption as to the operation of self-determination in particular cases. Thus the division of a self-determination unit into fragments for the purpose of avoiding the principle of self-determination would be unlawful: for example, the division of South West Africa into 'bantustans' or native homelands was universally condemned.[25] For present purposes, the consequences of the 'territorial integrity' principle may be summarized as follows.

(1) Prima facie self-determination units must be granted self-determination as a whole. Only if the continued unity of the territory is clearly contrary to the wishes of the people or to international peace and security will schemes for partition meet with approval of United Nations organs.[26]

(2) Attempts to disrupt the territorial integrity of a self-determination unit so as to evade the principle of self-determination are excluded. By contrast, it appears that independent States may dissolve into their component parts without popular consultation: for example the so-called 'velvet divorce' in Czechoslovakia at the end of 1992 was not accompanied by any referenda but was carried out on the basis of legislation in the two component republics without attracting external criticism.[27]

(3) A further aspect of practice under the rubric of 'territorial integrity' has been the disapproval of the alienation of territory of self-determination units without local consent. For example, the General Assembly invited the United Kingdom as administering power 'to take no action which would dismember the Territory of Mauritius and violate its territorial integrity . . .'[28] Practice has not, however, been particularly consistent. For example, the transfer by the United Kingdom of the Cocos (Keeling) Islands and Christmas Island in 1955 and 1957 respectively from the Straits Settlement to Australia[29] was at least

[25] See, e.g., SC resns 323 (1972), para 2 (13–0:1); 366 (1974), para 5(6) (15–0:0). For the Odendaal Commission Report, see Dugard, *The South West Africa/Namibia Dispute*, 236–8, 431–5; D'Amato (1966) 4 *JMAS* 177–92; Umozurike, *Self-Determination in International Law*, 133–7. Cf also *Namibia Opinion*, 1971 ICJ Rep p 6, 57.

[26] Partition was approved in the cases of Rwanda and Burundi, Palestine, the British Cameroons, the Trust Territory of the Pacific Islands and the Gilbert and Ellice Islands. In the case of West Irian a majority of the Assembly applied the 'territorial integrity' rather than the self-determination rule: Rigo Sureda, *Evolution*, 143–51 and Chapter 14 for further discussion.

[27] Hošková (1993) 53 *ZaöRV* 689. Cf the dissolution of the USSR: Antonwicz (1991–2) 19 *Polish YBIL* 7; Yakemtchouk, (1993) 46 *Studia Diplomatica* 3.

[28] GA res 2066 (XX), 16 December 1965, para 4 (89–0:18).

[29] Transfer was effected by legislation of the UK and Australia: Cocos (Keeling) Islands (Request and Consent) Act 1954 (Aust); Cocos Islands Act 1955 (UK), Cocos (Keeling) Islands Act 1955 (1955); 536 *HC Deb* cols 1575–8, 31 Jan 1955. Subsequently the Cocos (Keeling) Islands was, but Christmas Island was not, treated as a non-self-governing territory. See below, Chapter 14.

tacitly accepted by the United Nations, despite the absence of formal consent by any indigenous government in the Straits Settlement, still less by the people affected by the transfer. Separation of the Chagos Archipelago from Mauritius as the 'British Indian Ocean Territory' though from time to time contested by Mauritius, appears also to have been accepted, at least as a temporary measure.[30] By contrast the division of the Trust Territory of the Pacific Islands into four separate units, though protested in the Trusteeship Council by the USSR, was accepted as the basis for the independence of three new States and the association of the Northern Marianas with the former administering power: in this case the relevant populations clearly supported the proposed division.

(4) Associated with the problem of cession of parts of self-determination units is the problem of reservations for military bases. These have been condemned by the General Assembly[31] but again practice has not been particularly consistent. For example, the 'sovereign base areas' reserved by the United Kingdom in Cyprus have been accepted by the Assembly.[32] The problem is outside the scope of this study.

(5) The problem of 'colonial enclaves' is sometimes treated as an aspect of the self-determination rule.[33] It is better regarded as an exception to the rule, and

[30] The British Indian Ocean Territory houses the US military and naval base of Diego Garcia. According to the Minister of State, FCO: 'The islands of the British Indian Ocean Territory are British, and have been since 1814 when ceded by France. We do not accept that they were ever an integral part of Mauritius. We do not therefore consider that General Assembly Resolution 1514, which was concerned with the partial or total disruption of the national unity and territorial integrity of a country, has any application to the Territory.' 307 *HC Debs*, WA, col 192, 24 Feb 1998. The British position is that the administration of the Chagos Archipelago as part of Mauritius before 1965 was an administrative convenience 'following French practice.' The UK paid Mauritius £3 million 'for the detachment of the islands', which received the assent of the Mauritius Council of Ministers: Cmnd 4264 (1999), 50–1. The UK has undertaken to cede the islands to Mauritius 'when they are no longer needed for defence purposes' and 'subject to the requirements of international law'. Min State, FCO, 367 *HC Debs* cols 337–8, 26 Apr 2001, (2001) 72 *BY* 633. See also (1992) 63 *BY* 722; (1994) 65 *BY* 582; (1997) 68 *BY* 587; Lynch (1984) 16 *Case W Res JIL* 101. Litigation by the Chagos Islanders before UK courts has achieved limited results: *R (Bancoult) v Secretary of State* [2001] QB 1067; noted Byers (2000) 71 *BY* 433; *Chagos Islanders v Attorney-General* [2003] EWHC 2222; noted O'Keefe (2003) 74 *BY* 486.

[31] E.g. GA res 2832 (XXVI) (Declaration of the Indian Ocean as a Zone of Peace), 16 December 1971, para 1. See also GA res 40/153 (on implementation of the Declaration of the Indian Ocean as a Zone of Peace), 16 December 1985, esp preambular paras.

[32] For Cyprus see Chapter 5. For continued presence of Russian troops in the Baltic States, Georgia, and other former republics of the USSR see *Heintschel* v *Heinegg* (1992) 34 *Neue Zeitschrift für Wehrrecht* (Frankfurt/Main) 45; Tiller and Umbach, *Kontinuität und Wandel der russischen Streitkräfte unter Jelzin*; Uibopuu in Benedek (ed), *Development and Developing International and European Law*, 175; Lang, *Vertrag über konventionelle Streitkräfte in Europa*.

[33] E.g. Rigo Sureda, *Evolution*, 218–19.

in this discussion of limitations on the competence to grant independence must be dealt with separately: see Chapter 14.

## (3) Grants of independence in furtherance of fundamentally unlawful policies: the bantustans

The question of the limits on the power of a State to grant independence to some part of its metropolitan territory—a power previously regarded as more-or-less unfettered—was raised squarely by the purported grant of independence by South Africa to the so-called 'independent homelands' or bantustans. The first of these was Transkei, granted independence on 26 October 1976.[34] Bophuthatswana followed on 6 December 1977;[35] Venda on 13 September 1979;[36] and Ciskei on 4 December 1981.[37]

### *(i) Origins of the bantustan policy*

The policy of 'separate development' of racial groups within South Africa had been long established: its ultimate expression was the dismemberment of areas of the Republic by the creation of self-governing 'bantustans', which would then be granted independence. This took place in stages. South African law had imposed restrictions on the residency and movement of the black population well before the articulation of a policy of 'separate development'. The Glen Grey Act of 1874 established representative councils, known as 'local boards', in the Transkei area for the government of Africans.[38] Reserves in various parts of the country were defined by statute in 1913.[39] A United Transkeian Territories General Council was established in 1931. Legislation in 1936 extended the reserves,[40] which 'eventually formed the cores of the territorial jurisdiction of the Black national states.'[41]

[34] Status of Transkei Act 1976 (Act No 100 of 1976), 15 ILM 1175. See Booysen (1976) 2 *S AfYBIL* 1; Richings (1976) 93 *SALJ* 119; Harding, *Unabhängigkeit der Transkei*; Vorster, in Vorster, Wiechers & Van Vuuren (eds), *Constitutions of Transkei, Bophuthatswana, Venda and Ciskei*, 21.

[35] Status of Bophuthatswana Act 1977 (Act No 89 of 1977); Wiechers and van Wyk (1977) 3 *SAYB* 85; Devenish in Vorster, Wiechers and Van Vuuren(eds), *Constitutions of Transkei, Bophuthatswana, Venda and Ciskei*, 83.

[36] Status of Venda Act 1979 (Act No 107 of 1979); Carpenter (1979) 5 *SAYB* 40; Ventor in Vorster, Wiechers and Van Vuuren (eds), *Constitutions of Transkei Bophuthatswana, Venda and Ciskei*, 1.

[37] Status of Ciskei Act 1981 (Act No 110 of 1981); Carpenter (1981) 7 *SAYB* 83; Cilliers in Vorster, Wiechers and Van Vuuren (eds), *Constitutions of Transkei Bophuthatswana, Venda and Ciskei*, 197.

[38] Welsh, *A History of South Africa*, 449.

[39] Black Land Act 1913; Festenstein and Pickard-Cambridge, *Land and Race: South Africa's Group Areas and Land Acts*.

[40] Development Trust and Land Act 1936.

[41] Venter, 'Perspectives on constitutions' in Vorster *et al*, *Constitutions*, 5. For discussion of the constitutional development of the Transkei to 1964, see Hill, *Bantustans: The Fragmentation of South Africa*, 53–88.

The Bantu Authorities Act 1951 recognized tribal councils based on 'their traditional equivalents of public law' and established these within a hierarchy of tribal, regional and territorial authorities governing areas reserved for the African population. The existing system of local government in the Transkei area served as the model for self-government in other parts of South Africa. The report of the Tomlinson Commission in 1955 set out a plan for a South Africa-wide system of black self-rule by way of 'separate development'.[42] The next step was the Promotion of Bantu Self-Government Act 46 of 1959, which provided

> Whereas the Bantu peoples of the Union of South Africa do not constitute a homogeneous people, but form separate national units on the basis of language and culture; and whereas it is desirable for the welfare and progress of said peoples to afford recognition to the various national units and to provide for their gradual development within their own areas to self-governing units on the basis of Bantu systems of government . . .

The Act introduced the concept that the ethnic groups of South Africa reflected 'national' divisions and enumerated the particular ethnic groups that were to form the bases for the homeland system. The Transkei Constitution Act 1963 formalized self-government in the Transkei,[43] while other territories were dealt with by framework legislation of a standardized sort. The Bantu Homelands Citizenship Act 1970 provided for citizenship for all South African blacks in one or another of the territorial authority areas, though South African citizenship was so far retained. The Bantu Homelands Constitution Act 1971 permitted the President to transform existing 'territorial authorities' into 'legislative assemblies'—i.e., ostensibly self-governing territories.[44] The Transkei had been established as a territorial authority in 1956 and 'promoted' to self-government in 1963; the other three future 'independent' bantustans were established as territorial authorities in 1961, and became self-governing in 1972 to 1973. The Group Areas Act 1966 led to the forced removal of some 3.5 million people.[45] Bantustanization became—if it was not from the first—'the central aim of *apartheid*.'[46]

[42] *Report on the Commission for the Socio-Economic Development of the Bantu Areas within the Union of South Africa*. See Hyam, *Failure of South African Expansion*, 192–7; Posel, *The Making of Apartheid, 1948–1961*, 31–2, 126–7.

[43] Kahn (1963) 80 *SALJ* 473.

[44] Venter, 'Perspectives on constitutions' in Vorster *et al*, *Constitutions*, 5–7.

[45] See, e.g., Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980–1994*, 385–433 (on the forced removal of the Magopa).

[46] Hill, *Bantustans*, 1.

The Status Acts purporting to convert the bantustans into independent States had a standard form. Thus section 1 of the Status of the Transkei Act 1976 provided as follows:

(1) The territory known as the Transkei and consisting of the districts mentioned in Schedule A, is hereby declared to be a sovereign and independent state and shall cease to be part of the Republic of South Africa.

(2) The Republic of South Africa shall cease to exercise any authority over the said territory.

In addition the Ciskei Constitution provided for the establishment of a confederation of African homelands across Southern Africa.[47]

### *(ii) Denationalization through State creation*

The bantustan programme was intended to justify the denationalization of those South Africans who historically 'belonged' to the ethnic group for which each bantustan was formed. Eventually a majority of black South Africans would become foreigners. Transkei may be taken as representative: the Status of the Transkei Act 1976 contained unusual provisions purporting to determine the citizenship of Transkei[48] and including broad categories of former South African citizens with little or no effective link with Transkei.[49] It was not clear that Transkei law automatically conferred local nationality on all the persons referred to in Schedule B of the South African Act but that it provided an option to register; someone who declined the option would become stateless.[50] Quite apart from the illegality of this form of mass deprivation of nationality, these provisions of the Act demonstrated with clarity the racially

[47] Venter, 'Perspectives on constitutions' in Vorster *et al*, *Constitutions*, 12–16. At one stage it was thought that the High Commission territories (Botswana, Lesotho and Swaziland) could also be incorporated into the bantustan system: O'Meara in Davies (ed), *Apartheid Unravels*, 213, 216–17. The Odendaal Commission proposed to divide South West Africa (Namibia) into ten bantustans: Hill, *Bantustans*, 104–7. Further non-independent homelands within South Africa were also established: Lebowa (2 Oct 1972); Gazankulu (1 Feb 1973); QwaQwa (1 Nov 1974); KwaZulu (1 Feb 1977); KwaNdebele (1 Apr 1981); KaNgwane (31 Aug 1984).

[48] Status of the Transkei Act 1976 (SAf), s 6(1), Sch B.

[49] Schedule B, paras (f) and (g) purported to revoke the South African citizenship of and to confer Transkeian citizenship on anyone who 'speaks a language used by the Xhosa or Sotho speaking section of the population of the Transkei' or who 'is related to any member of the population contemplated in paragraph (f) or has identified himself with any part of such population or is culturally or otherwise associated with any member or part of such population.'

[50] Dean (1978) 11 *CILSA* 57; cf Oliver (1976) 2 *SAYBIL* 143. On the relationship between the homelands and nationality policy see Dugard (1980) 10 *DenverJILP* 11, 21–35. On the Transkei in particular see Dugard, *Recognition*, 81–2, 98–108; Dugard, *Human Rights and the South African Legal Order*, 91–2, 94–6, 110–11.

discriminatory nature of the bantustan policy, aimed at preserving the bulk of South Africa for its minority white population.

The bantustan legislation, for all its defects, vested formal independence in the local authorities of the bantustan. The only qualification related to the citizenship provisions of the South African Act: for a State to control the grant of nationality by another State is a derogation from the formal independence of the latter. However, as a matter of local law it was uncertain whether the South African Act had this effect: the Transkeian Legislative Assembly had plenary authority,[51] the validity of its legislation could not be impugned in any court,[52] and the Constitution itself could be freely amended in the ordinary manner and form.[53] Thus the local authorities retained eventual control over who were to be regarded as its nationals under Transkeian law.[54]

### *(iii) The status of the bantustans under international law*

The General Assembly consistently condemned the bantustan policy and asserted that no independent bantustan would be recognized as a State. Resolution 2775E (XXVI) of 29 November 1971, condemned 'the establishment by the Government of South Africa of Bantu homelands (bantustans) and the forcible removal of the African people of South Africa and Namibia to those areas as a violation of their inalienable rights, contrary to the principle of self-determination and prejudicial to the territorial integrity of the countries and the unity of their peoples.'[55] Resolution 3411D (XXX) of 28 November 1975 called upon 'all Governments and organizations not to deal with any institutions or authorities of the bantustans or to accord any form of recognition to them.'[56] The Security Council also condemned the policy, in its application both to South Africa and to Namibia. Resolution 264 of 20 March 1969 stated that 'the actions of the Government of South Africa designed to destroy the national unity and territorial integrity of Namibia through the establishment of bantustans are contrary to the provisions of the Charter of the United Nations.' On 26 October 1976 the Assembly again condemned the bantustan policy and specifically rejected the 'independence' of the Transkei as 'invalid'.[57] The Security Council endorsed the resolution and commended Lesotho,

[51] Constitution, s 21. [52] Ibid, s 21(4). [53] Ibid, s 75.

[54] There were indications that Transkei had some degree of actual independence. Maj-Gen Holomisa took over the Transkei government in a coup in 1987 and allowed ANC activists safe haven on Transkeian territory. He was appointed to a deputy cabinet post in the cabinet formed after the elections of 27 April 1994. See Byrnes, *South Africa*, 347.

[55] Paragraph 1 (105–2:2). See also GA resns 2923E (XXVII), 15 Nov 1972, para 2 (100–4:21); 3151G (XXVIII), 14 Dec 1973, para 14 (88–7:2); 3324E (XXIX), 16 Dec 1974, para 10 (95–13:14).

[56] GA res 3411D (XXX), 28 November 1975, para 3 (99–0:8).

[57] GA res 31/6A, 26 October 1976, para 2 (134–0:1 (US)).

which shared a border with the Transkei, for declining to recognize it.[58] The Organization of African Unity (OAU) in July 1976 had invited 'all States . . . not to accord recognition to any bantustan, in particular, the Transkei whose so-called independence is scheduled for the 26 October 1976.'[59] Similar responses were given to the independence of the three later bantustans.[60] For example, the President of the Security Council, responding to the independence of Venda, stated:

> The Security Council condemns the proclamation of the so-called 'independence' of Venda and declares it totally invalid. This action by the South African regime, following similar proclamations of Transkei and Bophuthatswana, denounced by the international community, is designed to divide and dispossess the African people and establish client states under its domination in order to perpetuate *apartheid* . . . The Security Council calls upon all Governments to deny any form of recognition to the so-called 'independent' Bantustans; to refrain from any dealings with them; to reject travel documents issued by them; and urges Member Governments to take effective measures to prohibit all individuals, corporations and other institutions under their jurisdiction from having any dealings with the so-called 'independent' bantustans.[61]

No third State ever recognized any bantustan.[62]

In one case the status of a bantustan was an issue in domestic judicial proceedings. Sando Banda led a coup against the government of Bophuthatswana. The South African Defence Force intervened and on 10 February 1988 reinstated the government. Banda and his co-conspirators were charged with treason. Counsel for the defendants (John Dugard) argued that there could be no treason against an entity that did not constitute a State and that Bophuthatswana, in view of the violations of peremptory norms attending its creation, was not a

[58] SC res 402, 22 Dec 1976, paras 1, 2; also SC resns 407, 25 May 1977; 417, 31 Oct 1977; 556, 23 Oct 1984; 581, 13 Feb 1986. For attempts by Bophuthatswana to obtain recognition from Botswana, see Drummond and Manson, in Rumley and Minghi, (eds), *The Geography of Border Landscapes* 234–7.

[59] CM/RES 492 (XXVII), para 2; CM/RES 490 (XXVII), paras 21, 22, 23.

[60] Bophuthatswana: GA res 32/105N, 14 Dec 1977, para 2 (140–0:0); Venda: GA res 34/93G, 12 Dec 1979, para 2; Ciskei: S/14794, 15 Dec 1981; GA res 36/172A, 17 Dec 1981, para 9.

[61] S/13549, 21 Sept 1979, quoted by Dugard, *Recognition*, 101.

[62] Statement of US Deputy Permanent Representative to the United Nations, 30 Nov 1981: *Digest of US Practice in International Law, 1981–1988*, 272–6; statement of Lynda Chalker, Minister of State, FCO, 138 *HC Deb* col 641, 28 July 1988, reprinted 59 *BY* 438: 'Bophuthatswana does not meet the criteria for recognition as an independent state that have been followed by successive British Governments. Those criteria are based on international law.' See also *Australian Foreign Affairs Review* Nov 1976, 591–5; (1977) 33 *Annuaire Suisse* 166–7. Generally see Fischer (1976) 22 *AFDI* 63; Klein, (1979) 39 *ZaöRV* 469; Ginther (1980) 23 *GYBIL* 323; Erasmus, in *Festschrift für Wolfgang Zeidler* (1987), 2:1919; Strabreit, *Der völkerrechtliche Status der Transkei, Ciskei, Bophuthatswanas und Vendas während der Zeit ihrer formellen Unabhängigkeit von der Republik Südafrika*; Dugard, in *Boutros Boutros-Ghali amicorum discipulorumque liber*, 383.

State. Friedman J held that South Africa was 'entitled to diminish its territory by granting a portion thereof to the inhabitants who inhabit that portion.'[63] He went on to uphold the statehood of Bophuthatswana by reference to the Montevideo criteria.[64]

Courts in third States took a different view, although they were reluctant to deny all effect to transactions of the bantustans. In *Gur Corporation v Trust Bank of Africa Ltd* the question was whether Ciskei had standing to defend third party proceedings and raise counterclaims in a construction dispute.[65] In the event Ciskei was treated—as the German Democratic Republic had been in the *Carl Zeiss* case[66]—as a subordinate local government whose acts could be recognized as such:

> We . . . know the constitutional history of the territory of the Ciskei . . . and we can take judicial notice of the fact that the Republic of South Africa is a sovereign state, recognised by Her Majesty's Government, and that it was entitled to exercise sovereignty over the territory of the Ciskei until the passing of the Status of Ciskei Act 1981. If then we disregard section 1 of that Act, as we must, there are no materials from which we could infer that this situation has changed . . . [T]he Government of the Republic of the Ciskei has locus standi in the courts of this country as being a subordinate body set up by the Republic of South Africa to act on its behalf.[67]

The various resolutions and statements referred to above are diffuse in their justification for non-recognition.[68] It is clear that the non-recognition policy went to the status of the bantustans and was not simply a question of

[63] *State v Banda and 194 others*, 6 Feb 1989, SCt Bop, 58; (1990) 82 ILR 388. See Thomas (1990) 6 *SAJHR* 65; Devine (1990) 107 *S Af LJ* 434; Redgment (1989) 22 *CILSA* 233. Non-recognition did not preclude humanitarian aid to persons within the bantustans: 177 *HC Debs* WA col 628, 15 October 1990, cited (1990) 61 *BY* 463, 498–9; (1992) 31 ILM 522.

[64] In *S v Marwane* [1982] 3 SA 717(A), certain South African criminal statutes (respecting policing and security) were found by the Appellate Division to conflict with the Constitution of Bophuthatswana and to be unenforceable against the appellant: Forsyth (1983) 42 *CLJ* 5. But cf *Smith v Attorney-General, Bophuthatswana* [1984] 1 SA 196(B) (SCt Bop); Forsyth (1985) 44 *CLJ* 3.

[65] *Gur Corporation v Trust Bank of Africa Ltd* [1987] QB 599; 75 ILR 675.

[66] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853, 43 ILR 23 (HL); Grieg (1967) 83 *LQR* 96.

[67] *Gur Corporation v Trust Bank of Africa Ltd* [1987] QB 599, 75 ILR 675, 697 (Lord Donaldson MR). For comment see Marasinghe (1993) 42 *ICLQ* 827; Beck (1987) 36 *ICLQ* 350; Mann (1987) 36 *ICLQ* 348; Warbrick (1987) 50 *MLR* 84; Lloyd Jones (1987) 46 *CLJ* 7; Crawford (1986) 57 *BY* 405. Cf *Republic of Transkei v Immigration and Naturalization Service*, 923 F2d 175 (DC Cir 1991); *Du Toit v Strategic Minerals Corp*, 136 FRD 82, 87 (D Del 1991); *Achievers Investments, Inc v Karalekas*, 675 A 2d 946 (DC 1996).

[68] '[T]he fragmentation of the territory of Bophuthatswana within South Africa, the pattern of the population and the economic dependence on South Africa more than justify our refusal to recognise Bophuthatswana.' Statement of Minister of State, FCO, 105 *HC Deb* col 100, 12 Nov 1986.

policy. For example, GA resolution 2775E (XXVI) referred to the principle of self-determination and to 'the territorial integrity of the countries and the unity of their peoples'.[69] But self-determination, as we have seen, has only a limited application to independent metropolitan States. Nor does practice demonstrate any general requirement that the government of a State be representative of its people—even though it is for almost all purposes *the* representative of that people. The principle of 'territorial integrity' does not provide a permanent guarantee of present territorial divisions, nor does it preclude the granting of independence to part of its territory, even where such a grant is contrary to the wishes of the majority of the people of the State as a whole.

The second justification for non-recognition generally given is that the Transkei lacked independence in view of its economic and political reliance on South Africa:[70] thus the OAU resolution referred to its 'fraudulent pseudo-independence'.[71] Where the creation of an entity is attended by serious illegality it may be that the presumption in favour of the independence of entities granted full formal independence by the metropolitan State is displaced. Nonetheless, in cases of devolution the criterion of independence is predominantly formal, and there have been other cases of small States very substantially dependent on a former metropolis or a third State.

Even if one concludes that, as entities whose creation was attended by serious illegalities, which were not supported (as were the Congo, Lesotho and so on) by the principle of self-determination, and which remained substantially dependent on South Africa for their subsistence, Transkei and the other homelands were not independent for the purpose of statehood in international law, that is a contingent judgement, and it certainly could not have justified the *permanent* and categorical non-recognition that United Nations and OAU resolutions called for. What was wrong with the bantustans had nothing to do with their potential or not for independence over time; the bantustan policy was an attack on the majority population of South Africa itself.

Thus the third justification for non-recognition—that the Transkei was not a State because it was the embodiment of a fundamentally unlawful policy of *apartheid*—comes to the fore. As we have seen in Chapter 3, a similar position

[69] GA res 2775E (XXVI), 29 Nov 1971, para 1.

[70] The Transkei was 43,798 km$^2$ in area. It imported about 90% of its food supplies and was heavily reliant on remittances from workers in the Republic of South Africa for its income. But it had a seacoast, and unlike some other bantustans, a relatively coherent territory. See Southall, *South Africa's Transkei: The Political Economy of an 'Independent' Bantustan*; Nancy Charton (ed), *Ciskei: Economics and Politics of Dependence in a South African Homeland.*

[71] OAU res 493 (XXVII), para 4.

has been taken with respect to other serious violations of peremptory norms. *Apartheid* as such, though a particular institution adopted in one country, was a clear case of a policy predicated on a fundamental denial of equality on the grounds of race or ethnic origin.[72] There is considerable support for the principle of racial equality and non-discrimination as a peremptory norm of general international law, a conclusion now consolidated by the apt inclusion of apartheid and similar systematic acts as crimes against humanity for the purposes of the International Criminal Court.[73] The creation of the bantustans was an integral part of a policy which violated this fundamental principle.[74] Thus a third category of peremptory norms has been recognized as relevant to statehood.[75]

### *(iv) Dismantling the bantustan system*

The General Assembly on 23 December 1993 called upon South African authorities 'to take the necessary measures for the peaceful reincorporation of the "homelands" into South Africa.'[76] Section 1(2) of the Interim Constitution of South Africa[77] defined the national territory by reference to an annexed schedule including the territories of the homelands. A Commission on the Demarcation/Delimitation of States, Provinces and Regions was established to define new provinces, into which the homeland territories were to be absorbed.[78] On 27 April 1994, the Status Acts were repealed and the bantustans

[72] For the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, annexed to GA res 3068 (XXVIII), 30 Nov 1973 (91–4:26), 1015 UNTS 243. It makes no express reference to the bantustans: but cf Art 2(c). The International Convention on the Elimination of all Forms of Racial Discrimination, Convention adopted in GA res 2106 (XX), 21 December 1965, 660 UNTS 195 expressly and particularly prohibits 'racial segregation and *apartheid*' (Art 3).

[73] Statute of the International Criminal Court (UN Doc A/CONF.183/9), Art 7(1)(j) (apartheid), 37 ILM 999, 1004; ICC Elements of Crime, UNDoc PCNICC/2000/1/Add.2 (2000); ICC-ASP/1/3. For an early and influential reflection on non-discrimination as a fundamental norm see Judge Tanaka (dissenting) in the *South West Africa Cases (Second Phase)*, 1966 ICJ Rep p 6, 284–316.

[74] That racial equality and non-discrimination may have been observed within Transkei was not to the point: the illegality relates to the non-observance of the principle within South Africa as a whole. See, e.g., Secretary of State, 126 *HC Deb* cols 958–9, 3 Feb 1988: 'The very existence of Bophuthatswana is a consequence of apartheid, and I think that that is the principal reason why recognition has not been forthcoming'; 153 *HC Deb* cols 844–5, 5 Dec 1989: 'There are also exceptional cases when other factors, including relevant United Nations resolutions, may be taken into account. These considerations apply to the question of recognition of Bophuthatswana.'

[75] See also Norman (1977) 12 *New England LR* 585; Witkin (1977) 18 *Harv ILJ* 464, 605; Roth (1976) 9 *NYUJILP* 205; Heydt (1978) 10 *Case WRJIL* 167; Dugard, *Recognition*, 98–108.

[76] GA res 48/159A, 20 Dec 1993, para 3.

[77] Constitution of the Republic of South Africa Act 1993 (S Af), entered into force, 27 Apr 1994.

[78] Muthien and Khosa *J S'n Af'n Stud* 303, 304–7; Byrnes, *South Africa*, 265.

reintegrated as part of the territory of South Africa.[79] For example, Decree 5, 1994 of the Republic of Ciskei provided that Ciskei 'shall cease to be a sovereign independent state with effect from 27 April 1994' (s 1(1)); from that date 'the Constitution of the Republic of South Africa, 1993, shall have the force of law and be applicable [in Ciskei]' (s 2).[80] The citizenship statutes relating to each of the four homelands were repealed in 1995,[81] along with other statutes relating to their putative independence.[82]

It was debated whether the parliament of South Africa had the authority to reincorporate the homelands without their consent,[83] or whether the Status Acts could be repealed simply by act of the South African parliament.[84] In Ciskei and Bophuthatswana, homeland authorities resisted reincorporation, but they were unable to retain effective control over the local population,[85] and the government of South Africa appointed interim administrators.[86] In the event

> The Status Acts [were] treated as ordinary South African statutes whose repeal may be effected by the Parliament which passed them and whose repeal has internal implications only. The 1993 Constitution therefore seeks to avoid any suggestion that the TBVC states acquired statehood.[87]

The state of affairs in the independent homelands immediately before their winding down was summarized by the Constitutional Court of South Africa in the following terms:

> In the self-governing territories executive authority was exercised by Chief Ministers and Ministers. In the TBVC states only Bophuthatswana functioned under a Constitutional form of government at the time the Constitution was adopted. The other three states were ruled by military regimes who made laws by decree. Constitutional government collapsed in Bophuthatswana before the elections took place and the military regime in Ciskei abandoned its control of that territory. The vacuum in these two territories was filled by South African administrators, who also made law by decree.[88]

[79] See Constitution 1993, s 230(1), repealing *inter alia*, the laws adopted under homeland constitutions, the Self-Governing Territories Constitution Act 1971, and the Status Acts establishing each of the homelands. See Wiechers (1990–1) 16 *SAYBIL* 119; Cilliers (1993–4) 19 *SAYB* 93, 93–4.

[80] Decree 5, 1994, Reintegration of Ciskei into South Africa Decree 1994, in Cilliers in Vorster, Wiechers and van Vuvsen (eds), *Constitution of Transfer*, 105–6.

[81] South African Citizenship Act 1995, Sch 2, s 26, repealing, *inter alia* Citizenship of Transkei Act 1976 (Transkei)); Bophuthatswana Citizenship Act 1978 (Bophuthatswana); Citizenship of Venda Act 1980 (Venda); Ciskeian Citizenship Act 1984 (Ciskei).

[82] See Dugard [1994] *Ann Survey S Af L* 98, 105. See also Devine (1992–3) 18 *SAYBIL* 127.

[83] Cilliers (1993–4) 19 *SAYB* 93, 100–1.

[84] Dugard [1993] *Ann Survey S Af L* 61, 71.

[85] Guelke, *South Africa in Transition*, 61, 99; Murray, *Revolution Defered*, 183–4.

[86] Murray *Revolution Defered*, 65–6.

[87] Dugard [1994] *Ann Survey S Af L* 98, 71. See also Barrie (1994) 2 *J S Af L* 348.

[88] *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995(4) SA 877, 910 (para 72).

Only in Bophuthatswana did local authorities refuse to accede to reincorporation. The South African Government, following incidents of paramilitary violence, assumed emergency powers over Bophuthatswana on 12 March 1994.[89] Joint Administrators appointed by South Africa immediately issued a decree, providing, *inter alia*,

> Whereas on 11 March 1994 it became clear that governmental authority and state services and security services had become inoperative and ineffective in the Republic of Bophuthatswana and that a state of lawlessness had developed; Whereas on 12 March a delegation representing the South African State President and the Management Committee of the Transitional Executive Council informed President Lucas Mangope that in view thereof he and his government no longer exercised effective governmental control in Bophuthatswana, and that it was apparent that his government was no longer recognised by the civil service, including the security forces of Bophuthatswana, the South African Government, in consultation with the said Management Committee, had come to the conclusion that his presidency had lost legitimacy . . . [90]

The Decree suspended the Republic of Bophuthatswana Constitution Act 1977, and took steps to prepare for the entry into force of the interim South African Constitution of 1993. The courts of Bophuthatswana, including the Supreme Court, continued to operate. The former president applied to the Supreme Court for relief. The Court accepted that 'the replacement of the applicant and his Ministers by the joint administrators . . . constituted a breach of Bophuthatswana's then sovereign independence.'[91] However, drawing on Kelsen's theory of 'revolutionary legality', the Court determined that the Joint Administrators in turn had become the Government of Bophuthatswana, and had authority to abolish the homeland and reincorporate it into South Africa. As the process of reincorporation had continued, the matter rapidly became moot.

The removal of Mangope as president of Bophuthatswana led Brigadier Oupa Gqozo, head of government in the Ciskei, to request South African authorities to take over that homeland as well.[92] The chief minister of KwaZulu, Mangosuthu Buthelezi, appeared prepared to resist reincorporation more tenaciously but acceded to the new constitutional system shortly before

[89] On events leading to the dismantling of Bophuthatswana, see Byrne, *South Africa*, 83, 346–47; Barber, *South Africa in the Twentieth Century*, 303–4; Harvey, *The Fall of Apartheid*, 240–1; Schönteich and Boshoff, *'Volk', Faith and Fatherland*, 26–7; Murray *Revolution Defered*, 200–1; Seiler, (ed), *Transforming Mangope's Bophuthatswana*. [90] Cilliers, 106–9.

[91] *Mangope v Van der Walt* (1994) 103 ILR 6; 1994 (3) SA 850.

[92] Robert Harvey, *The Fall of Apartheid*, 241; Murray, *Revolution Deferred*, 201–2; Barber, *South Africa in the Twentieth Century*, 304.

the first national election, held upon the entry into force of the Interim Constitution on 27 April 1994.[93]

The reincorporation of the homelands into South Africa gave them better access to courts abroad. Bophuthatswana, for example, had been in dispute with its US lawyers, retained through an entity called Achievers Investments. A trial court held that as an instrumentality of an unrecognized State, Achievers Investments lacked capacity to sue. After 27 April 1994, the holding was vacated on the grounds that 'any bar that once may have existed stemming from [Plaintiff's] asserted status as an arm or instrumentality of an unrecognized government disappeared when [Bophuthatswana] was reincorporated into South Africa.'[94]

## (4) Colonial enclaves and rights of pre-emption

Where a State undertakes by treaty or otherwise not to dispose of territory except in a certain way, that undertaking may well limit its competence to grant independence to a portion of its territory. This may be true, for example, where there is a 'right of pre-emption', such as with Gibraltar.[95] A treaty right of this kind may constitute a legal barrier to grants of independence; a practical limitation arises with 'colonial enclaves'. The view taken by a majority of the General Assembly has been that colonial enclaves constitute in effect an exception to the self-determination rule, and that the only option is for the administering authority to transfer the enclave to the enclaving State. The wishes of the population of the enclave are not regarded as relevant. This practice, and its legal status, will be discussed in Chapter 14.

## (5) Derogations from grants of independence

Where a metropolitan State grants independence to a particular territory, it would seem to be necessary that it should grant the attributes necessary for the exercise of that independence. For example, it is established that State property in a territory automatically passes without compensation to the government of an independent State established in the territory.[96] One would have thought that the former sovereign would not be justified in removing or alienating a substantial proportion of State property in the territory prior to independence,

[93] Murray, *Revolution Deferred*, 198, 203–6; Byrnes, *South Africa*, 266; Barber, *South Africa in the Twentieth Century*, 304–6.

[94] *Achievers Investments, Inc v Karalekas*, 675 A 2d 946, 950 (DC 1996).

[95] Under Art X of the Treaty of Utrecht, 13 July 1713, 28 CTS 325.

[96] Vienna Convention on Succession of States in respect of State Archives, Property and Debts, 7 April 1983, 22 ILM 298, Art 11.

since that would be to derogate from the grant itself. Although there have been instances of this sort of depredation, it has been relatively infrequent and practice is undeveloped.[97]

## 8.3 Relinquishment of sovereignty without grant

If States are, in principle, free to relinquish sovereignty over territory in favour of another State, existing or to be created, they are also free to relinquish sovereignty without making any positive disposition of the territory in question. Whether such a territory immediately becomes part of another State by 'instantaneous occupation', or becomes *terra derelicta* and so susceptible of appropriation by another State or becomes subject to a power of disposition (not necessarily equivalent to territorial sovereignty) in a group of States or possibly the United Nations, then falls to be determined. These problems are discussed as they arise elsewhere in this study.

## 8.4 The gradual devolution of international personality

Where a grant of independence occurs, as it were, at the stroke of midnight, the situation is clear, and the before and after are simply determined. This is not so where there is gradual transfer to or accretion of powers in a local unit over a period of time.[98] To some extent these problems are similar to those, discussed in Chapter 7, that occur with dependent entities such as protectorates and vassal States; indeed, the terms 'vassal' and 'suzerain' are sometimes used to describe relationships of devolution. However, in the case of dependent entities, there are usually binding legal instruments in treaty form regulating the relationship at its outset, and the difficulty is usually one of reconciling assertions of continued legal personality with loss of actual independence. In the case of devolving entities, the relation tends to be poorly defined, or defined only in non-international instruments or understandings such as internal legislation or (in the case of the British Empire) constitutional conventions. Here the difficulty is that of reconciling formal dependence with substantial

[97] Cf *Certain German Interests in Polish Upper Silesia*, PCIJ ser A no 7 (1926).

[98] Cf Fitzmaurice's reference to the situation where the 'conclusion of a treaty may be part of a process (or even constitute the act) whereby the State not fully *sui juris* is becoming so, and is throwing off the status of dependency': *ILC Ybk* 1958/II, 33.

practical autonomy or independence. Prior to independence, then, the essence of the problem is that of divided responsibility; for from the time the local unit is accorded significant powers of self-government, the international responsibility of the metropolitan unit is attenuated in fact, with the consequent destruction, for many practical purposes, of the single 'international unit'. After independence, which may not be any clearly defined point in time, the problem is rather how to reconcile the fact of independence with the history of dependence, aspects of which may well survive. No doubt in principle this is only another application of the basic criteria for statehood: nonetheless the application of these criteria to an ill-defined and flexible process of transfer of power presents a range of issues that warrant separate consideration.

The devolution of the States of the British Empire has received the most attention from writers and will be taken as an example here. But other cases have occurred; in particular the States arising out of the gradual dismemberment of the French[99] and Ottoman[100] Empires. For example, the British Law Officers reported as follows concerning the treaty-making powers of Bulgaria after the Treaty of Berlin, 1878:

> Varna, a Bulgarian port, was no doubt, in a sense, a part of the Ottoman Empire, but that it was equally clear that Bulgaria had been made, for fiscal purposes, independent of the Porte, and might make her own Treaties with foreign Powers with reference to import and export duties.[101]

Most of the argument centred on the question of the 'personality' of the Dominions as against that of the Empire as a whole,[102] but that is not the point. 'Legal personality' is a compendious way of inferring certain capacities and powers in international law; it is the conclusion to be drawn from the answers to more fundamental questions as to the rights, powers and responsibilities of the particular entity. No doubt the reason why investigations into the status of the Dominions took the form of an enquiry into their 'personality' was

[99] On the French Union see Kiss, *Pratique Française, vol* II, 524–67; Whiteman, 1 *Digest* 544–82; Gonidec [1960] *Public Law* 177; O'Connell, *International Law* (2nd edn), vol I, 356–9. On the Netherlands Union, see ibid, 359–61; Van Panhuys (1958) 5 *NILR* 1.

[100] See Altug, *Turkey and Some Problems of International Law*, 108–36; Al-Baharna, *Legal Status*, 232–7. The Philippines in the period 1934–46 was also in this category: O'Brien and Goebel, 'U.S. Recognition Policy', 176–7; Fischer, *Un Cas de décolonization*.

[101] Report by Russell and Digby, 13 March 1894: McNair, *The Law of Treaties*, 54–7.

[102] The works of AB Keith are usually taken as representative of the old view: e.g., *The Sovereignty of the British Dominions*; *The Constitutional Law of the British Dominions*. The most important works are Noel-Baker, *The Present Juridical Status of the British Dominions in International Law* and Fawcett, *The British Commonwealth in International Law*. See also Dawson, *The Development of Dominion Status, 1900–1936*.

the view that the only international legal persons were fully sovereign States. Against a schema of this kind the Dominions presented considerable problems and commentators were forced into the extreme of either denying their independent statehood in the cause of the 'diplomatic unity of the Empire', or denying the reality of the various elements of shared status in the pre-1931 position (the *inter se* doctrine, the indivisibility of the Crown, the existence of matters of 'Imperial concern', the supremacy of the Westminster Parliament). What is needed, then, is an examination of the principles by which the international status of devolved units is to be assessed.

## (1) The 'unitary State' theory

According to one influential view of the devolutionary process, the position is clear: until all substantial legal links between the local and metropolitan territories are severed, the former remains subordinated for all international purposes to the latter. This view is implicit in an opinion given by Harding on 5 May 1860, in relation to a French approach to the Canadian Government concerning the status of French consuls there:

> The Colonies are integral portions of the Queen's Dominions, more especially for all International purposes; She is as fully and completely the Sovereign of Canada as She is of the Channel Islands; and the degrees of Legislative and Municipal independence which the Sovereign may tolerate or concede to any particular portion of Her Dominions, cannot place such portion in any separate or special position as regards either its relations with Foreign Governments or the determination of general questions of International Law; which are for Imperial and not for Colonial consideration and decision.[103]

It follows from this view that no matter how extensive the devolution of administration or governmental functions, the local unit remained subordinate and without status in international law until either devolution was complete or the entity was formally recognized as independent. This view of Imperial sovereignty continued to be asserted by Great Britain, with at least a degree of

[103] Report cited in Smith, *GB & LN*, vol I, 48, 49. The Channel Islands were not a good comparison. The right of the Great Britain to the Channel Islands derives by succession from the feudal claims of the Dukes of Normandy, who were subject to some degree to the suzerainty of the French Kings. See *Minquiers and Ecrehos Case*, ICJ Rep 1953 p 47, 20 ILR 94; *Anglo-French Continental Shelf Case*, (1977) 54 ILR 6, 92–103 (paras 171–202). The Channel Islands are not part of the EEC despite the provisions of Art 299(6)(c) (formerly Art 227(4)): 'This Treaty shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.'

acquiescence on the part of the Dominions, until well after the 1926 Imperial Conference. Its consequences in British municipal law continued at least until the Commonwealth Immigrants Act 1962 (UK) and the Fugitive Offenders Act 1967 (UK).[104] The corollary was that Great Britain, Ireland and the Dominions and Colonies, constituted together a single unitary State in international law, under the sovereignty of an indivisible Crown; the relation between the various territorial units being governed by municipal and not international law.[105]

But what happened in practice was by no means so simple. After the Durham Report (1839),[106] responsible government was introduced in Canada in 1848, and in South Africa and the Australian colonies shortly thereafter. This involved a substantial degree of local, especially fiscal, autonomy.[107] By 1900 the degree of autonomy included the negotiation of or optional accession to commercial treaties and agreements.[108] The Dominions became Members of the League of Nations, and three of them were mandatories under the League. They were accorded by Great Britain the right to separate diplomatic representation from 1920.[109] The legislative supremacy of the Westminster Parliament was conventionally restricted by 1926 and restricted in British law by 1931. In 1926 the Imperial Conference cited as established the principle of 'the equality of status existing among the Members of the British Commonwealth'.[110] But despite this equality, at no stage in the years before 1939 were the Dominions explicitly recognized as independent States.

There arises then, as Fawcett says, 'an antinomy between the dependent status of the overseas territories and their capacity for self-government',[111] or rather their actual and substantial self-government. But this is to assume the absence of any international status despite a substantial degree of autonomy. We may term this the 'unitary State theory'; it holds that no middle position is

[104] See de Smith, *The New Commonwealth*, 423, 441–55 for these developments.

[105] Keith, *Imperial Unity and the Dominions*; Oppenheim (9th edn), vol 1, 263.

[106] Report on the affairs of British North America from the Earl of Durham, Her Majesty's High Commissioner (1839), reprinted in Lucas (ed), *Lord Durham's Report on the Affairs of British North America*, vol II.

[107] Porritt, *The Fiscal and Diplomatic Freedom of the British Oversea Dominions* (dealing with the period 1778–1837 only); Keith, *Selected Speeches and Documents on British Colonial Policy 1763–1917*, vol II, 51–142. Cf Ewart (1913) *7 AJ* 268; O'Connell and Crawford in Ryan (ed), *International Law in Australia* (2nd edn) 1.

[108] For details see ibid, 2–16; International Law Association, *Effects of Independence on Treaties*, 22–8; Jacomy-Millette, *Treaty Law in Canada*, 5–13. But cf Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn), 119–20; and Introduction to the 10th edn, xxix–xxxii.

[109] For the evolution of Dominion diplomatic representation see Lloyd and James (1996) 67 *BYIL* 479.

[110] Cmd 2768.

[111] Fawcett (1949) 26 *BY* 86, 93.

possible between the continued sovereignty of the metropolitan State, and the plenary sovereignty of the local unit; local autonomy falling short of complete independence is a matter of exclusively domestic concern; local powers even in the international sphere exist merely by delegation from the sovereignty of the metropolitan State, and are therefore (in international law)[112] freely revocable.

But another view is possible. In a situation of substantial local autonomy, the exercise by the local unit of international competence could be regarded not as a delegation from the metropolitan State but as the exercise of distinct and independent powers, though limited to whatever degree by the position of the metropolitan State. On this view, the relations between the local unit and the metropolitan State could be international in the same way as relations between a suzerain and vassal State. The precise legal status of the devolving unit would remain to be determined and might well pass through several stages of development. Initially it would as a result of its actual exercise of certain limited competences in the international sphere be regarded as possessing a distinct though limited legal personality. Eventually, however, its autonomy would be such that it qualified as a State under the criteria discussed in Chapter 2, in which case continuing legal relations with the metropolitan State would be reinterpreted in international law as subsisting by consent. Initially the competence might well be revocable at least as a matter of international law. Eventually, however, the position of the devolved unit would have become irrevocable by virtue of the fact that it qualified as a State. The history of Dominion status is of interest in demonstrating that devolving entities can achieve statehood, as it were, along the way, before the full transfer of responsibility for all purposes from the metropolitan State.

## (2) General principles of the status of devolving entities

It is clear, first of all, that whether a territorial unit has separate international standing, or is merely a subordinate constitutional unit of a metropolitan State, is not a matter of domestic jurisdiction of the latter State, nor is it determined conclusively by the municipal law of that State. The fact that until the Statute of Westminster 1931, Canada was still, in British law, a 'colony'[113] was not decisive as to its international status. The extent of a particular State is not just a matter of assertion, legislative or otherwise.

[112] Not necessarily in municipal law: cf *Campbell v Hall* (1774) 1 Cowp 204 (Lord Mansfield); *Ndlwana v Hofmeyr* [1934] AD 229, 237 ('Freedom once conferred cannot be revoked').

[113] By the Interpretation Act 1889 (UK), s 18(2): 'any part of Her Majesty's Dominions exclusive of the British Islands . . .' with certain exceptions constituted a colony. This was not changed undtil the Statute of Westminster 1931 (UK).

The question is whether international law requires complete separation from the metropolitan State or whether some lesser degree of political separation will suffice before the local unit may be adjudged sufficiently independent to qualify as a State. The matter was considered by the Permanent Court of International Justice in *Lighthouses in Crete and Samos*.[114] The question was whether the Ottoman Empire, which had originally included the islands of Crete and Samos, retained power in 1913 to make a concession agreement in favour of a French company that purported to include lighthouses on the two autonomous islands. Since Ottoman rights over the islands were transferred to Greece by Article 12 of the Treaty of Lausanne,[115] Greece would ordinarily have been bound to respect the concessions. Greece contended that the Empire's power to make contracts binding the islands had ceased by 1913 by virtue of the autonomy and the internationalized status of the two islands. The Court held, by eleven votes to three (Judges Hurst, Hudson, and Judge ad hoc Séfériades dissenting) that Greece was bound by the concession over the lighthouse on Crete, and by thirteen to one (Judge ad hoc Séfériades dissenting) that Greece was also bound with respect to the lighthouse on Samos. The matter was complicated by the form of the question before the Court, which accepted as *res judicata* a previous decision holding that the concession contract was valid by Ottoman law.[116] The question ostensibly before the Court then was the date at which Crete and Samos were 'detached' from the Empire.[117] But this was not the fundamental issue, as Judge Hurst pointed out:

> If it is to be assumed as a consequence of the finding by the Court in its judgement of 1934 that the said contract was duly entered into because it was duly entered into according to the Ottoman law in force at the time, it must be shown that the Ottoman law in question was also in force in Crete and in Samos at that time. This is a question entirely independent of the date of the detachment of Crete and Samos from the Ottoman Empire.[118]

[114] PCIJ ser A/B no 71 (1937).

[115] 117 BFSP 543; see also 28 LNTS 11.

[116] PCIJ ser A/B no 62 (1934).

[117] Treaty of Lausanne, 24 July 1923, Protocol XII, Art 9, 28 LNTS 11.

[118] PCIJ ser A/B no 71, 109. That the form of the question was a mere confusion is clear. A State can no more grant a concession treaty where it has no jurisdiction in respect of the matter subject to the concession than it can cede territory not under its sovereignty or disposition: cf *Island of Palmas Case* (1928) 2 RIAA 829, 842. The real point at issue was expressly reserved by the Court in the previous case: *Lighthouses Case*, PCIJ ser A/B no 62, 28. Even if the majority view of the international law position was right, the concession might still have been invalid under Ottoman law; because different legal systems operated in the different territories, more might have had to be done by the Ottoman authorities before the concession became binding. It is to this possibility, as much as to the first, that Judge Hurst's comment is directed—but the point was in fact assumed in France's favour by all the judges. Cf *Dupire v Dame DuPire-Constantinoff* (1937) 8 ILR 93 (Bulgaria).

Despite this confusion, the matter was in substance dealt with by all the judges according to whether or not they accepted the implied view of the law in the question as argued by the parties. Thus the Court's judgment is an endorsement of the 'unitary State' theory:

> The issue, reduced to its essence, may be stated as follows: had every political link between the Ottoman Empire and the islands of Crete and Samos disappeared at the time of the conclusion of the contract in dispute . . . The Court finds that this has not been shown by the Greek Government. Notwithstanding its autonomy, Crete had not ceased to be a part of the Ottoman Empire. Even though the Sultan had been obliged to accept important restrictions on the exercise of his rights of sovereignty in Crete, that sovereignty had not ceased to belong to him, *however it might be qualified from a juridical point of view*. That situation persisted until the time when Crete was separated from the Ottoman Empire by treaties, which were treaties of cession . . . These treaties are subsequent to the conclusion of the contract in dispute.[119]

Judge Hurst dissented as to the validity of the concession with respect to Crete because 'at the date of the contract of 1913 Crete enjoyed a full measure of autonomy'.[120] Judge Hudson was even more explicit:

> It is unnecessary to attempt to place the Crete of this period in a precise legal category. Nor is it necessary . . . to set forth the complete extent of the Cretan autonomy. It will suffice to say that after 1899 the Ottoman Government exercised no governmental powers in Crete, and that although the Sultan's flag was ceremoniously flown in Crete until February 1913, the government of this island was entirely in the hands of the High Commissioner and the Cretans themselves, subject in certain respects to the approval of the four European States. In its external relations, the Cretan Government acted independently of the Ottoman Government also, and it concluded or acceded to various international conventions, among them those of the Universal Postal Union and the International Telegraphic Union . . . If it can be said that a theoretical sovereignty remained in the Sultan after 1899, it was a Sovereignty shorn of the last vestige of power. He could neither terminate nor modify the autonomy with which Crete had been endowed against his will and with the sanction of the four European States. A juristic conception must not be stretched to the breaking-point, and a ghost of a hollow sovereignty cannot be permitted to obscure the realities of this situation.[121]

Judge van Eysinga in his separate Opinion argued that, although in other areas Crete was autonomous and the Empire accordingly without power to make

[119] PCIJ ser A/B no 71, 103 (emphasis added). [120] Ibid, 109. [121] Ibid, 127.

valid concessions, lighthouses were a matter of 'Imperial interest' and accordingly reserved to the metropolitan power.[122]

The Court's judgment would seem to be decisive in favour of the unitary State theory. But it seems to ignore both the internationalized nature of Cretan autonomy (binding on the Porte) and the compelling force of the *nemo dat* principle in this context. If Crete enjoyed a 'full measure of autonomy' under international guarantee and that autonomy included the matter of lighthouses, the Ottoman concession was an intervention in Cretan affairs. Judge van Eysinga, whose judgment is not open to this criticism, made the same point:

> The administration of lighthouses is a service which in most States belongs to their domestic jurisdiction. But there are cases in which, on the one hand, lighthouses are imperatively demanded in the interest of international navigation, while, on the other hand, the State in whose territory the lighthouse would have to be operated, is not in a position to provide for its administration and maintenance . . . The lighthouse service covers the whole of the Ottoman Empire except in so far as certain parts of that Empire are excepted from it. Here we have a case of 'Imperial interest' which was primarily a matter of concern to international shipping . . . The international interest thus continuously manifested tended to preserve the character as 'Imperial interest' of all these services for which the Sublime Porte itself had to support the responsibility.[123]

It may be objected that this begged the question, which was whether Crete was a 'State' so as to have its internal affairs interfered with. But Judge van Eysinga certainly treated it as a State for all but Imperial purposes.[124]

The reasons given by the majority to support their view that the Empire was still competent with regard to Cretan affairs were not convincing. The test was formulated as follows:

> The wide forms of autonomy conferred on the territories in question could only be taken into consideration for the solution of the present dispute, if they justified the conclusion that the autonomous territories were already, at the date of the contract, detached from the Ottoman Empire to the extent that every political link between them and the Sublime Porte had been severed, so that the Sultan had lost all power to make contracts in regard to them.[125]

No doubt autonomy in one field (e.g., roads and railways) would not be sufficient to deprive the Sultan of the power to grant concessions within some

[122] PCIJ ser A/B no 71, 115. He added: '[I]t is not surprising, when a maritime country undergoes an evolution in the direction of decentralization . . . that it should be on the maritime coast that the power of the former central government continues longest to subsist, in the territories that have become autonomous', citing a British reservation relating to lighthouses in the Irish State Treaty, 6 December 1921, 26 LNTS 9, Art VII & Annex.

[123] PCIJ ser A/B no 71, 113–14.

[124] Cf Ydit, *Internationalized Territories*, 109–26.

[125] PCIJ ser A/B no 71, 103.

other area (e.g., lighthouses); this is Judge van Eysinga's view. But the Court seems to say that until 'every political link' had been severed the Sultan continued to have the power to grant contracts on any subject, and its subsequent formulation ('*no* link subsisted on that date') supports this reading.[126] But this cannot be correct. The fact that 'political links' continue to exist between Canada and Great Britain (e.g., the Queen, the Commonwealth, the North Atlantic Treaty Organisation) is no ground for allowing Great Britain sovereign power with respect to Canadian affairs.[127] The Court's reliance on the Treaty of London (regarded as 'decisive') was misplaced; as Judge Hudson pointed out.[128] The terms of Article 4 of the Treaty were quite consistent with an abandonment of any claim to territory (including residual jurisdictional competences) rather than a cession of territory which the Empire did not then in any real sense possess. No other evidence was adduced as to Crete's dependence on the Empire. As to Samos, on the other hand, the Court was in substantial agreement.[129]

The only basis on which the case can be upheld is that lighthouses constituted an Imperial interest, and a residual competence of the Empire, recognized by the protecting powers. Some confirmation of this conclusion is provided by *Claim No 11* in the subsequent *Lighthouses* arbitration, where the Permanent Court of Arbitration, refusing to hold the matter *res judicata* by the 1937 decision, held Crete jointly liable for actions before 1913 that caused damage to the claimant French company.[130] It is clear therefore that Crete was an 'international person' capable of being held internationally responsible for its acts, before 1913, and that the Court's judgment in the earlier *Lighthouses* case is not authority for the contrary proposition.

[126] Ibid. It is unfortunate that the arguments of the parties concentrated on the question when Crete and Samos were 'detached' from the Empire: Cf PCIJ ser C no 82, 77–8, 143–4, 146–50, 174–5, 219.

[127] For a similar point respecting Lesotho, see *Mokotso v HM King Moshoeshoe II* [1989] LRC (Const) 24, 75–6, 90 ILR 427, 467–8. If the term 'political' is given a narrower meaning, as relating to a single community, still the majority opinion in the *Lighthouses* case gives no indication of which links are to be 'political' in this narrower sense.

[128] Cf PCIJ ser A/B no 71, 103, and Judge Hudson, ibid, 127. By Art 4, the Sultan ceded to the Allied Sovereigns 'all rights of sovereignty and all other rights which he possessed over that island': 107 BFSP 656, 893.

[129] Samos, though internally autonomous, paid an annual tribute to the Sultan, and had considerably less external independence than Crete. But the factor regarded as most significant was Samian acquiescence in previous concessions granted to the French company (1860, 1879, 1894), and in the maintenance by it of the lighthouse, and collection of lighthouse fees, until 1915 and later: PCIJ ser A/B no 71, 111 (Judge Hurst). As to Samos, then, it may be said that the dissentients concurred in Judge van Eysinga's 'Imperial interest' view. But cf *Katrantsios v Bulgaria* (1926) 3 ILR 38 (Samian neutrality in Balkan war).

[130] (1956) 23 ILR 81, 83.

Thus when the stage is reached at which the local unit is substantially independent of the metropolitan State, not only internally but over a range of international matters, infringement by the metropolitan State of the local State's autonomy constitutes intervention. Since it is clear that international law does not require complete independence before regarding governmental units as 'States', we may take this point as the critical date for this purpose. When this point is reached is a matter of judgement. The test may be formulated as follows: a devolving unit is to be considered independent when it possesses virtually complete internal autonomy and some substantial competence in international relations, which the metropolitan State is bound by law, convention or treaty to respect,[131] and when the remaining restrictions *vis-à-vis* the metropolitan State in internal and external affairs are not such that, if they were consented to by an existing State, the restrictions so created would be inconsistent with its independence. After the critical date, remaining fetters on local autonomy are to be explained on grounds of agency, representation or consent. After this point remaining fetters are subject to political negotiation and the normal rules of acquiescence and consent.

## (3) The principles applied: devolution of States within the British Commonwealth

### *(i) The self-governing Dominions*

It is generally accepted that the Dominions (Canada, Australia, South Africa, New Zealand and Newfoundland) had not attained before 1914 any substantial

[131] It is sometimes argued that the local autonomy must be established by law, and that a conventional autonomy is insufficient. For example in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 723, the majority of the Privy Council, after referring to the convention of non-interference in the external affairs of Southern Rhodesia, stated that this 'was a very important convention but it had no legal effect in limiting the legal power of Parliament. It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid . . . Even assuming that this is possible under the British system, they do not find any indication of an intention to transfer Sovereignty or any such clear cut division between what is granted by way of Sovereignty and what is reserved as would be necessary if there were to be a transfer of some part of the Sovereignty of the Queen in the Parliament of the United Kingdom.' Lord Pearce, dissenting, agreed on this point: ibid, 732–3. On that view only a Statute, or instrument having statutory force, could effectively grant independence to a British territory. As a matter of British municipal law this may be so; but that does not determine the issue of international law. In particular, where a binding convention is recognised (which may, as with the Balfour Declaration, be an explicit intergovernmental agreement) and provides for the substantial independence of a territory such that it qualifies as a State, why should an Act of Parliament nonetheless be necessary to constitute the territory independent? On that basis Canada was dependent until 1982.

international status, though they were internally autonomous and exercised certain international competences.[132]

It was the events of 1914 to 1918, and in particular the issues of Imperial defence and finance, which brought about effective Dominion independence.[133] Imperial federation, mooted on various occasions, proved completely unacceptable on these grounds.[134] Rejection of the only alternative made rapid Dominion independence virtually certain. The question is at what point international practice accepted the implications of these events.

It is clear that the Dominions (apart from Newfoundland) had achieved independence within the British Empire, or the Commonwealth as it was coming to be called, by 1939. Canada and South Africa declared war upon Germany independently of Great Britain.[135] Eire remained neutral.[136] But these manifestations of independence were only the exercise of competences established long before.[137]

[132] Newfoundland, though a Dominion, cannot be placed in the same category as the other four. It was not a League Member. Its Constitution was suspended by consent in 1933 (Newfoundland Act 1933 (UK)); in 1949, after a plebiscite, it became a province of Canada: see Whiteman, 1 *Digest* 533–4; Gilmore (1980) 18 *Can YBIL* 201; *Reference re Newfoundland Continental Shelf* [1984] 1 SCR 86, 397–410; 86 ILR 593, 603–16. The Irish Free State was established by the 1921 State Treaty and associated legislation: its chequered relations within the Commonwealth are described elsewhere: Dawson, *Development of Dominion Status*, 230–3, 437–52; Hancock, *Survey*, vol I, Chs 3, 6; Whiteman, *Digest* 510–13. In 1948 it became the Republic of Eire and seceded from the Commonwealth, although retaining special relations with the UK under the Ireland Act 1949 (UK). See also *State v Hynes* (1961) 100 ILT 145.

[133] Cf *South West Africa Cases (Second Phase)*, ICJ Rep 1966 p 6, 397–9 ( Judge Jessup, dissenting): 'It must be remembered that prior to World War I, the British Dominions and India had no recognized separate international personality; they were merely parts of the British Empire. Due to their magnificent military contributions during the war, the leaders of the Principle Allied and Associated Powers were prepared to give the Dominions and India a special status at the Peace Conference and ultimately, to admit them as original members of the League of Nations.'

[134] See Cheng, *Schemes for the Federation of the British Empire*; Kendle, *The Round Table Movement and Imperial Union*.

[135] Joseph, *Nationality and Diplomatic Protection*, 42–3; Fawcett, *British Commonwealth*, 78; Mansergh, *Documents and Speeches on British Commonwealth Affairs 1931–1952*, vol I, 461–572. It had previously been thought that the Dominions could not declare war separately of the United Kingdom: see, e.g., Noel-Baker, *Present Juridical Status*, 229–30, 330–42; Dawson, *Development of Dominion Status*, 63–4 (distinguishing 'active' from 'passive' belligerency).

[136] Mansergh, *Documents and Speeches*, vol I, 512–13.

[137] In 1937 Lord Atkin referred, in the context of the implementation by Canada of an ILO Convention, to 'the international status which Canada has now attained, involving her competence to enter into international treaties as an international juristic person': *AG for Canada v AG for Ontario* [1937] AC 326, 349; 8 ILR 41. Cf *Jolley v Mainka* (1933) 49 CLR 242, 283–4 (Evatt J); *Theodore v Duncan* [1919] AC 696, 706 (PC): 'The Crown is one and indivisible throughout the Empire, and it acts in self-governing States on the initiative and advice of its own Ministers in these States.' But see Judge Anzilotti, *Danzig and the International Labour Organization*, PCIJ ser B no 18 (1930), 21–2.

The consequences of Dominion independence were various, and have been discussed elsewhere. The Dominions achieved plenary treaty-making power,[138] and the right of legation.[139] The Crown became in practice divisible with respect to each independent Dominion,[140] a development only reluctantly accepted by Empire theorists. The *inter se* doctrine (the doctrine that inter-imperial relations were governed by a form of municipal law rather than by international law) lost whatever independent validity it may have had.[141] The British Empire was in effect dissolved—or, perhaps more precisely, it continued its legal personality in the form of the United Kingdom and dependencies, while the Commonwealth of Nations, a kind of residual international organization, replaced it so far as relations between the United Kingdom and the various Dominions were concerned.[142] Where the British Government

[138] Apart from the Treaty of Versailles the Dominions were parties to multilateral treaties concluded under the auspices of the League. The first bilateral treaty entered into by a Dominion on its own authority seems to have been the Canadian–United States Halibut Fisheries Treaty, 2 March 1923: 117 BFSP 382; Lewis (1923–4) 4 *BY* 168; (1925) 6 *BY* 31; Mackenzie, ibid, 191. A Senate reservation seeking to apply the treaty to the Empire as a whole was abandoned upon Canadian insistence: see Dawson, *Development of Dominion Status*, 254–8. For Dominion treaty-making generally see International Law Association, *The Effects of Independence on Treaties*, Ch 3; Stewart, *Treaty Relations of the British Commonwealth of Nations*; McNair, *The Law of Treaties*, 67–76 and *The Law of Treaties*, 111–17; Noel-Baker, *Present Juridical Status*, 164–203; Fawcett, *British Commonwealth*, 209–10; Jacomy-Millette, *Treaty Law in Canada*, 13–22. The incidents of the treaty-making power vis-à-vis other Dominions and the United Kingdom itself were regulated by the Imperial Conferences of 1923 and 1926: Dawson, *Development of Dominion Status*, 272, 337–51. As a result Mackenzie King argued in 1924 that treaties, even if in heads-of-State form, which were negotiated by a particular government bound only that government: ibid, 285–6.

[139] Noel-Baker, *Present Juridical Status*, 147–56; Harvey, *Consultation and Co-operation in the Commonwealth*, 173–204; Fawcett, *British Commonwealth*, 197–201. It was announced in 1920 that Canada would appoint a Minister to the United States: Dawson, *Development of Dominion Status*, 202; but no appointment was in fact made until 1926. By then, the Irish Free State had already appointed a Minister to the United States: ibid, 314–15. Within the Commonwealth, diplomatic representatives were, and are, entitled 'High Commissioners', although their status, functions, and, since 1948, their immunities, are the same as those of foreign ambassadors: Jennings (1953) 30 *BY* 320, 321–4.

[140] O'Connell (1957) 6 *ICLQ* 103–25; Fawcett, *British Commonwealth*, 79–83.

[141] Jennings (1953) 30 *BY* 320; Wilson (1957), 51 *AJ*611; Noel-Baker, *Present Juridical Status*, 289–305. Fawcett, *British Commonwealth*, 144–94 concludes that the doctrine was never recognized either as a rule of customary international law or as part of the general law of the Commonwealth, but derived its validity from express stipulations; *contra* Keith, *The Constitutional Law of the British Empire*, 78–85. In *Re Labrador Boundary* [1927] 2 DLR 401, 415; 43 TLR 289, 294 the Privy Council determined a boundary dispute between Canada and Newfoundland by the application, *inter alia*, of the watershed rule, which was regarded as 'consistent with the doctrine of international law'. For a critique of the decision see Patenaude, *Le Labrador à l'heure de la contestation*.

[142] For the Commonwealth see Fawcett, *British Commonwealth*, 76–88; Noel-Baker, *Present Juridical Status*, 359–72; Latham in Hancock, *Survey of British Commonwealth Affairs*, vol I, *Problems of Nationality*, 510–630; Cowen, *The British Commonwealth of Nations in a Changing World*; Mansergh, *The Commonwealth Experience*; Ball, *The 'Open' Commonwealth*; Dale (1982) 31 *ICLQ* 451. Cf *Jayan Nath Sathu v Union of India* [1960] (2) SCR 784.

continued to perform acts on behalf of the Dominions, these were based upon relations of agency or representation.[143] The Dominions acquired their own citizenship, though Dominion citizens retained British nationality as well.[144] Problems of State succession were treated on the basis of a considerable political continuity—in some cases there was no succession at all but rather the continuation of treaties made by the Dominions prior to independence.[145] Certain other residual links remained.[146]

What was the 'critical date' of Dominion independence? In an evolution as gradual and ill-defined as that of the Dominions in the period 1919 to 1939 the search is rather for a *scintilla juris* than for a precise moment in time having significant legal effects. The continuity of political development minimized the legal changes, or rather diffused and spread them over time. But the changes did occur—moreover, it is only after the status of the various entities has been determined that precise analysis of the particular transactions becomes possible. The former, at least, may be attempted here.

Three different dates have been suggested as critical. Earliest is the separate signature of the Dominions to the Treaty of Versailles, and their separate membership of the League of Nations (1918–19).[147] Alternatively it is suggested that the political formulations, and the recognition of equality between Great Britain and the Dominions in the period 1923 to 1926 constitute a sort of 'recognition' by the former.[148] Thirdly, it might be said that the Statute of

[143] A degree of representation continued, for example, with respect to naval matters: Dawson, *Development of Dominion Status*, 359–62.

[144] The Report of the Conference on the Operation of Dominion Legislation, 4 December 1929, para 74, stated that the 'status of the Dominions in international relations . . . do[es] not merely involve the recognition of these communities as distinct juristic entities, but also compel[s] recognition of a particular status of membership of those communities for legal and political purposes' (Cmnd 3479, p 171, cited Dawson, *Development of Dominion states*, 387–8). The Report was approved by the 1930 Imperial Conference: ibid, 394. For Commonwealth nationality, see Joseph, *Nationality and Diplomatic Protection*, Fawcett, *British Commonwealth*, 182–6; Jones, *British Nationality Law* (rev edn); Parry, *Nationality and Citizenship Laws of the Commonwealth*.

[145] See generally O'Connell, *State Succession*, vol I, 36–57, and O'Connell in O'Brien (ed), *New Nations*, 7, 13–26 for the general argument relating to 'localized' treaties.

[146] Within the Commonwealth, rendition of fugitive offenders rather than extradition has been the procedure, though there are now no differences of substance between the two. Jennings (1953) 30 *BY* 330; Shearer, *Extradition in International Law*, 54–7. For the Judicial Committee of the Privy Council see Crawford, *Australian Courts of Law* (1st edn), ch 10; Keith (2005) 54 *ICLQ* 197.

[147] Fawcett, *British Commonwealth*, 88–106. For details see Dawson, *Development of Dominion status*, 178–201.

[148] In particular, the so-called 'Balfour Declaration' concerning the 'Status of Great Britain and the Dominions', 18 November 1926: Cmd 2758; Dawson, *Development of Dominion status*, 331–2; which read in part as follows: 'The Committee are of opinion that nothing would be gained by attempting to lay down a Constitution for the British Empire. Its widely scattered parts have very different characteristics, very different histories, and are at very different stages of evolution; while,

Westminster 1931 (UK), marking the renunciation by Great Britain of ultimate legislative authority over the Dominions, is the conclusive date.[149] It is convenient to treat these suggestions in reverse order.

The Statute of Westminster, despite its importance, neither established nor recognized Dominion independence in the international sense for the following reasons. First, it was expressly founded on the previous agreements of the 1926 and 1930 Imperial Conferences, and on the admitted equality of the Dominions.[150] Second, it was a measure of British internal law, which applied immediately to Canada, South Africa and the Irish Free State, but which, under s 10, did not apply as part of the law to Australia or New Zealand until adopted by the Parliaments of those Dominions.[151] Australia did not adopt it

considered as a whole, it defies classification and bears no real resemblance to any other political organization which now exists or has ever yet been tried There is however, one most important element in it which, from a strictly constitutional point of view, has now, as regards all vital matters, reached its full development-we refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relation may be readily defined *They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations* . . . Equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our Inter-Imperial Relations. But the principles of equality and similarity, appropriate to *status*, do not universally extend to function. Here we require something more than immutable dogmas. For example, to deal with questions of diplomacy and questions of defence, we require also flexible machinery-machinery which can, from time to time, be adapted to the changing circumstances of the world.' (Emphasis added.)

[149] The Statute, entitled 'An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930', referred to the 'established constitutional position' of non-interference, and provided that 'No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion was requested, and consented to, the enactment thereof' (s 4).

[150] But cf *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 722: 'It was necessary to pass the Statute of Westminster, 1931, in order to confer independence and sovereignty on the six Dominions therein mentioned . . .'. To the same effect Keith: cf his *Dominion Autonomy in Practice* (rev edn), 65–6: 'not ordinary States of international law'; with *The Constitutional Law of the British Dominions* (1933) 56–7: 'no adequate ground for denying international personality a State character'. But in a note on the Statute ((1932) 13 *BY* 115–16) HA Smith stated that 'its chief importance is constitutional rather than international'. Cf *GB & LN*, vol I, 47–67, which still appears to adhere to the indivisibility of the Empire. The Statute of Westminster was held to have no effect on pre-existing extradition treaties: *Ex parte O'Dell and Griffen* [1953] 3 DLR 207. In *Moore v AG* [1935] AC 484 (PC); 8 ILR 81, the Irish Free State was held legally competent to abrogate the Irish Free State (Agreement) Act 1922 (UK) as a result of the Statute of Westminster, and notwithstanding that to do so was a breach of the 'contractual' obligations of the 1921 Treaty. Wheare, *The Statute of Westminster and Dominion Status* (5th edn), does not discuss the international status of the Dominions (ibid, 94), but the effects of the Statute on the constitutional law of the Dominions and the Commonwealth.

[151] Cf Status of the Union Act 1934 (SAf): Dawson, *Development of Dominion Status*, 422.

until 1942 (retrospectively to 1939),[152] but it seems unnecessary to treat Australia in 1936 as 'dependent' while Canada was 'independent'. That the Statute constituted a relinquishment of legislative authority is of some force; but is not conclusive. A State cannot by internal law alone define the scope of its international authority. Equally one cannot merely from the relinquishment of an authority or power infer that the relinquishing State had the capacity that has been relinquished. And, crucially, it was accepted that the Statute of Westminster was repealable at will by the Westminster Parliament.[153] That it will not do so without Dominion consent is a matter of convention, not law. There is accordingly no ground for preferring the legal formulation of the rule by Great Britain to its conventional formulation by the parties concerned in 1926.

To determine which of the other two possible dates—1919 and 1923 to 1926—involved the emergence of the Dominions as independent States is more difficult. In 1919 the Dominions each signed, and the Dominion Parliaments separately approved, ratification of, the Treaty of Versailles, and four Dominions became separate members of the League. They thus acquired a distinct legal personality for all purposes of the League.[154] Mandates were entrusted directly to the various Dominions,[155] and not (with one exception)[156] to the Empire as a whole. Under Article 1 of the Covenant, a member was required to give 'effective guarantees of its sincere intention to observe its international obligations'. It is accordingly very difficult to argue that the Covenant did not apply to the relations of the Dominions *inter se*,[157] although in 1924 the contrary was indeed argued by the British Government.[158]

[152] Statute of Westminster Adoption Act 1942 (Cth); Statute of Westminster Adoption Act, 1947 (NZ).

[153] That is, it could be repealed as a matter of British law: *British Coal Corporation v The King* [1935] AC 500, 520 (Viscount Sankey). For the contrary argument, Cowen (1952) 15 *MLR* 282; (1953) 16 *MLR* 273; Fawcett, *British Commonwealth*, 98–9.

[154] Keith, *Dominion Home Rule in Practice*, 37; Keith, *The Constitutional Law of the British Dominions*, 47; Noel-Baker, *Present Juridical Status*, ch IV; Fawcett, *British Commonwealth*, 76–9. Smuts's view was that the Dominions were 'signatories as component independent States of the British Empire': Dawson, *Development of Dominion Status*, 219. On the other hand Salmond thought that the Treaty merely gave them 'a voice in the management of the international relations of the British Empire as a single, undivided unity': ibid, 226.

[155] Whiteman, 1 *Digest* 707–8; *In re Tamasese* [1929] NZLR 209, 7 ILR 42; *Jolley v Mainka* (1933) 49 CLR 242, 281–4.

[156] Charteris (1923–4) 4 *BY* 137, 146–7 (Nauru). The Mandate authority was delegated to Australia. See *Certain Phosphate Lands in Nauru* ICJ Reports 1992 p 240, 276–83, 291 (Judge Shahabuddeen), and see further Chapter 13.

[157] Fawcett, *British Commonwealth*, 76–7; Keith, *The War Governments of the British Dominions*, 157.

[158] For the exchange of views over Irish registration with the League of the Irish State Treaty, see Foreign Office Note, 27 Nov 1924, 27 LNTS 449; Dawson, *Development of Dominion Status*, 315–16.

The international status acquired by the Dominions in 1919 was thus considerable. However, neither separate Dominion signature of the Treaty of Versailles nor separate membership of the League of Nations was in itself unequivocal. The League Covenant allowed the admission to membership of any 'fully self-governing State, Dominion, or Colony' (Art 1), with the inference that Dominion status was something between that of 'Colony' and 'State'.[159] The process of conclusion of the Treaty was also equivocal: the separate Dominion signatures followed not in alphabetical order, but under the heading 'British Empire' and after those of the British delegation.[160] This may be regarded as a typographical incident rather than an acknowledgment of Dominion subordination, but the Canadian Prime Minister thought it conferred upon the Dominions 'the doubtful advantage of a double signature'.[161]

The Balfour Declaration itself was, so far as the independence of the Dominions is concerned, also equivocal. It referred to the equal status of the Dominions as *already* established in practice;[162] and it was regarded by some commentators as not having made a substantial difference to the existing position.[163] In view of its terms ('autonomous Communities . . . equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs'), however, it is difficult to accept that after 1926 the Dominions remained merely dependent entities. The importance of the events of 1923 to 1926, and in particular the Balfour Declaration, was its affirmation of an equality of status which had previously been under persistent, if not overt, challenge.[164] Thus the Chanak incident,[165] the controversies over the Treaties of Lausanne[166] and Locarno[167] and the recognition of the Soviet Union[168] were part of a Foreign Office campaign to assert the 'diplomatic unity of the Empire'. Typical of the uncertainties of this period was the controversy over

[159] In the Rules of the Paris Conference, the British Empire was treated as one of five 'Powers with general interests'; the Dominions and India as among the twenty-three 'belligerent Powers with special interests': Dawson, *Development of Dominion Status*, 181.

[160] Ibid, 178–99; Fawcett, *British Commonwealth*, 146–51. [161] Ibid, 148.

[162] But it went considerably further than the previous agreed statement, resolution IX of the Imperial War Conference, 1917 which referred to 'a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth . . .' with the 'right . . . to an adequate voice in foreign policy and in foreign relations': Dawson, *Development of Dominion Status*, 175–6. In the context, the words 'autonomous' and 'adequate' are less than fulsome.

[163] Keith, *The Sovereignty of the British Dominions*, 20–2; Smith (1926–7) 12 *Cornell LR* 1; Corbett and Smith, *Canada and World Politics*, 161; Hurst, *Great Britain and the Dominions*, 3–104. But the South African Prime Minister Hertzog stated, after the 1926 Conference, that 'As a result of the work of the Imperial Conference the old Empire no longer exists . . . All that remained was a free alliance of England and the six Dominions . . .': Dawson, *Development of Dominion Status*, 112. Contrast his view before the Conference: ibid, 104. [164] Dawson, *Development of Dominion Status*, 36–54.

[165] Ibid, 234–51. [166] Ibid, 258–72. [167] Ibid, 316–24. [168] Ibid, 295–6.

the negotiation and signature by Great Britain of the Treaty of Lausanne.[169] The Canadian Prime Minister, Mackenzie King, appeared at first to have taken the view that, although Canada would by ratification of the Treaty cease to be at war with Turkey, no other specific legal consequences would ensue.[170] This position could be explained on grounds of representation: in 1914, Britain's declaration of war automatically involved Canadian belligerency so a British conclusion of peace would automatically terminate that belligerency. But, since no further Canadian authorization existed with respect to the terms of the peace no further Canadian obligations were involved by its conclusion. However, the view taken by Mackenzie King remained unclear, since he subsequently distinguished between 'the purely legal and technical position in which this Dominion may be placed and the moral obligations which arise under treaties depending upon . . . the representative capacities' of the negotiating parties.[171] This latter view, as Keith pointed out,[172] was consistent with the continued unity of the Empire.

In the period 1919 to 1925, therefore, the situation remained uncertain. For some purposes, at least, the Dominions were or were treated as States:[173] for others, they seemed to remain portions of an ostensibly undivided Empire. Schwarzenberger put the position well. Referring to the terms by which the Mandate for South West Africa was conferred,[174] he wrote:

> Actually, the text of the Mandate Treaty puts side by side two different aspects of the state of devolution which the British Empire has reached. The first sentence gives expression to the international unity of the British Empire and the constitutional doctrine of the indivisibility of the Crown. It is in line with the description of the British Empire and the five Dominions in Annex I to the Covenant of the League of Nations. In the second sentence, the emphasis lies on the separate existence of the Union as a distinct member of the League and the position of the Crown as the head of each of these Dominions, thus anticipating a development which reached its culmination only in the Statute of Westminster of 1931. To express this dynamic situation in terms of

[169] 117 BFSP 543. [170] Dawson, *Development of Dominion status*, 260–1.

[171] Ibid, 268–9, cf 265: 'We have never stated that the Lausanne Treaty would not bind the whole Empire.' But in 1927, Mackenzie King stated flatly that 'Canada has not ratified the pact of Locarno and is not a party to it': ibid, 320. [172] *The Sovereignty of the British Dominions*, 390–6.

[173] Cf the Paris Convention for the Regulation of Aerial Navigation, 1919: 112 BFSP 931, Art 40: 'The British Dominions and India shall be deemed to be States for the purpose of the present Convention.' The Paris Convention was signed in the same way as the Treaty of Versailles, and separately ratified. See also 226 CTS 246.

[174] The Mandate was, in para 2 of the Preamble, conferred on His Britannic Majesty 'to be exercised *on his behalf* by the Government of the Union of South Africa.' But in para 3 it was said that 'His Britannic Majesty, for and *on behalf of* the Government of the Union of South Africa, has agreed to accept the Mandate': 113 BFSP 1109.

agency was to invite confusion. The British Empire had already ceased to be an absolute international personality. It had become a merely relative international unit, that is to say, a unit for such purposes only for which it chose to regard itself as such, and an association of sovereign States for purposes of which it preferred such diversity. By accepting the membership of the Dominions in the League on this footing, the other members of the League recognised this relativity of the international personality of the British Empire. The pragmatic and self-contradictory formulation of this state of affairs in the Mandate Treaty is symptomatic of the novelty of this legal phenomenon and the hesitation of legal draftsmanship to find congenial legal moulds for apparently unprecedented situations.[175]

The importance of the Imperial Conferences of 1923 and 1926, then, was the reaffirmation by the various governments of the principle of Dominion equality in the form of a binding convention. To be sure, formal independence was still lacking, and steps were taken, pursuant to the 1926 Declaration, to remove the various derogations from formal independence.[176] But, after 1926 it became possible, as it had not been before, to express inter-Dominion relations with certainty and clarity on the basis of agency and representation. For these reasons, the Balfour Declaration can properly be taken as the critical date of the independence of the Dominions,[177] although in view of their pre-existing legal personality for League and other purposes the difference was only one of degree.

### *(ii) British India*

In addition to the four self-governing Dominions, British India became a separate Member of the League and thus achieved a distinct, though anomalous, international status.[178] Its status within the Empire was at that time regulated

[175] Schwarzenberger, *International Law*, vol I, 90–1. To the same effect Harvey, *Consultation and Cooperation in the Commonwealth*, 279–80.

[176] Dawson, *Development of Dominion Status*, 354–421 for details.

[177] In addition to Noel-Baker, *Present Juridical status*, the following writers take this view, though with hesitation in many cases: Dunn (1926–7) 13 *Virginia LR* 354, 365–6, 373; Scott (1927) 21 *AJ* 95, 99; Verzjil, *International Law*, vol II, 208–10, 220; O'Connell in *International Law in Australia* (1st edn), 18 and see O'Connell and Crawford, 2nd edn, 18); Brownlie (1961) *Rev Cont L* 19, 34. Cf Johnston (1927), 21 *AJ* 481. Latham 'Law and the Commonwealth' in Hancock, *Survey*, vol I, 510, 530 after citing Hertzog's view of the Balfour Report, describes it as 'legitimate and, in the event, correct'. The Balfour Declaration was followed by a wider acceptance of the distinct general legal personality of the Dominions. They were, for example, separately invited to become original parties to the Pact of Paris 1928: Dawson, *Development of Dominion Status*, 357–9. For the official British view see 208 *HC Deb* cols 535–8, 29 June 1927. Cf the more reserved account of Rousseau, *DIP*, vol II, 214–64.

[178] Resolution IX of the Imperial War Conference 1917 referred to the need for recognition of India 'as an important portion' of the Imperial Commonwealth, and Resolution VII provided for the 'Representation of India at future Imperial Conferences': Dawson, 175. On India's legal status prior to 1947 see generally Poulose (1970) 44 *BY* 201; Sunderam (1931) 17 *GST* 35; Mehrota, *India and the Commonwealth 1885–1924*.

by the Government of India Act 1919 (UK), which referred to British India 'as an integral part of the empire' and affirmed the overriding responsibility of the Imperial Parliament 'for the welfare and advancement of the Indian peoples'.[179] British India was not a Dominion and was not included in the operative parts of the 1926 Report.[180] Although it had a government constitutionally distinct from that in the United Kingdom,[181] this was in all respects subordinate to the British Cabinet and Parliament.[182] Its international status both in the period of the League and upon its becoming an original Member of the United Nations was thus the same as Byelorussia and the Ukraine: it was part of another State accorded by membership in a political international organization a distinct status for essentially political reasons.[183]

In 1946, Acting Secretary of State Acheson wrote in response to a suggestion for an upgrading of diplomatic representation in India that

> the proposed exchange of fully accredited diplomatic representatives with India would be tantamount to a public announcement that this Government considers India at the present time self-governing and in effective control of its external relations and also would be interpreted as indicating US approval of present unrepresentative G[overnment] O[f] [I]ndia.[184]

However, later in the same year it was considered that following an agreement between the Viceroy (Mountbatten) and 'representative Indian leaders' the latter would be both 'capable of speaking in the name of the great majority of the Indian people' and 'in effective *de facto* control of the affairs of India in view of the violent repercussions which would probably follow a decision of the Viceroy to act contrary to the advice of this new Cabinet on any important issue.'[185] Exchange of Ambassadors was accordingly recommended: this took place in February and April 1947. A Circuit Court of Appeal held that this exchange 'amounted at least to de facto recognition, if not more. To all intents

[179] Government of India Act 1919 (UK), Preamble, substituted by the Government of India Act 1935 (UK).

[180] The Report merely referred to the 'Special Position of India' as defined in 1917 and 1919: Dawson, *Development of Dominion Status*, 332.

[181] Cf Noel-Baker, *Present Juridical Status*, 452, *HC Deb* col 1362, 23 June 1948.

[182] *TP Sankara Rao v Municipal Council of Masulipatam* (1957) 26 ILR 104, 106; but see *Dabrai v Air India Ltd* (1953) 20 ILR 41, 44. In 1941 the British Ambassador to the United States informed the Under Secretary of State that 'owing to the constitutional position the reception of a Diplomatic Minister in India, or the establishment of direct diplomatic representation between India and the United States is not possible at this time': *USFR* 1941/III, 171.

[183] The Majority Report of the US Senate's Committee on Foreign Relations on the League of Nations (1919) objected to Indian membership—though not to that of the self-governing Dominions: see Poulose, 207.

[184] *USFR* 1946/V, 78.

[185] Ibid, 92–3 (Acheson to Truman, 30 Aug 1946).

and purposes, these acts constituted a full recognition of the Interim Government of India at a time when India's ties with Great Britain were in the process of withering away.'[186] On 15 August 1947, separate independence was granted to the two Dominions of India and Pakistan.[187]

### *(iii) Subsequent cases of Commonwealth independence*

Subsequent cases of Commonwealth independence are easier to deal with, because international recognition and Imperial relinquishment have usually occurred at the same time, and because the newer Commonwealth States did not have the extensive history of partial international relations of the older Dominions. The form of relinquishment has varied depending on whether the new State remained within the Commonwealth or not. For example Burma left the Commonwealth on independence: Ceylon did not. The respective provisions may be contrasted: 'On the appointed day, Burma shall become an independent country, neither forming part of His Majesty's Dominions nor entitled to His Majesty's protection.'[188]

(1) No Act of the Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to Ceylon as part of the law of Ceylon, unless it is expressly declared in that Act that Ceylon has requested, and consented to, the enactment thereof.
(2) As from the appointed day His Majesty's Government in the United Kingdom shall have no responsibility for the government of Ceylon.[189]

The independence of States within the Commonwealth is marked by provisions like those of the Statute of Westminster. Where the former colony leaves the Commonwealth at independence, this is achieved by a straightforward relinquishment. In view of the distinctly nominal nature of Commonwealth membership, however, no important legal difference results from the different forms by which independence is granted.

### *(iv) Southern Rhodesia pre-1965*

The analysis of the status of devolving entities applied to the older Dominions may be tested against the experience of Southern Rhodesia before 1965. Southern Rhodesia was annexed to the Crown in 1923, and by 1964 had achieved considerable autonomy. It was not, formally, a 'Dominion', but the

[186] *Murarka v Buckrack Bros*, 215 F 2d 547, 552 (1954); 20 ILR 53. See further O'Brien and Goebel, 'U.S. Recognition Policy', 159–62; Myers (1961) 55 *AJ* 711.
[187] Indian Independence Act 1947 (UK).
[188] Burma Independence Act 1947 (UK), s 1(1).
[189] Ceylon Independence Act, 1947 (UK), s 1.

Constitution of 1961 gave it almost complete internal autonomy; and the United Kingdom Government expressly accepted the convention of non-interference with respect to Southern Rhodesia's internal affairs, including, it seems, amendments to the Constitution.[190]

This autonomy raised the question whether Southern Rhodesia was to be considered non-self-governing under Chapter XI of the Charter. The General Assembly said that it was;[191] the United Kingdom refused to accept this view until the unilateral declaration of independence (UDI), when, in its view, Southern Rhodesia 'reverted' to colonial and thus non-self-governing status.

Some of the issues were tested in the courts after UDI. In *Madzimbamuto v Lardner-Burke* the Appellate Division of the Rhodesian Supreme Court argued in effect that prior to 1965 Southern Rhodesia possessed, independently of the United Kingdom, full internal sovereignty on which a unilateral declaration of independence could be based, and that the unilateral declaration had converted Southern Rhodesia from a semi-dependent into an independent State.[192] On this view, the convention of non-interference in Southern Rhodesia's internal affairs had the effect of creating a partial, but irrevocable, international status. By contrast the Privy Council, on appeal, held that the existence of the convention of non-interference could not create any independent status for which United Kingdom legislation was necessary.[193] Thus the position of Southern Rhodesia prior to 1965 was regarded as—at least for constitutional purposes—merely a matter for political judgement on the part of the United Kingdom Parliament.

Whatever the position as a matter of constitutional law (and whether the Privy Council on appeal from Southern Rhodesia was a Rhodesian, a British or some other court), as a matter of international law this reasoning was inadequate, for reasons which have been given already. Only convention established the formal independence of Canada until 1982, yet that it was a State long before cannot be doubted. The better view would seem to be that the status of Southern Rhodesia prior to 1965, though it did involve substantial internal autonomy, was precarious in a key respect: UDI, which was a violation by Southern Rhodesia of the conditions upon which that autonomy was granted,

[190] See de Smith, *The New Commonwealth and its Constitution*, 38–43; Palley, *The Constitutional History and Law of Southern Rhodesia*; Devine [1973] *Acta Juridica* 40.

[191] GA res 1747 (XVI), 28 June 1961 (73–1:27, 2 np).

[192] (1968) 39 ILR 61, 198–9, 209 (Beadle CJ): 'Rhodesia before the revolution was . . . a semi-independent *State* Today, she is a *State* which has rebelled, but nevertheless she still continues to possess the characteristics of a State.' (italics original). Cf ibid, 278–9 (Quénet JP), 289–90 (MacDonald JA). See also Coetzee, *The Sovereignty of Rhodesia and the Law of Nations*, 31–7.

[193] [1969] 1 AC 645.

involved the abrogation of the convention and a reversion to the legal position of Southern Rhodesia as a Crown colony. This was the view taken by the United Kingdom Government,[194] and adverted to both by the Privy Council[195] and Lewis J at first instance.[196] It follows from this view that the status of Southern Rhodesia after 1965 was unrelated to its conventional status before 1965.

The difficulty lies in reconciling it with the conclusions already reached with respect to the older Dominions. The status of Southern Rhodesia in 1964 had been compared—and even compared favourably—with that of the Dominions in 1918,[197] yet it has not been suggested that the international personality of the Dominions was subject to revocation or reversion.

But there were important differences between the old Dominions in 1926 and Southern Rhodesia. Southern Rhodesia had little or no international status, whereas the Dominions were League Members and were expanding their participation in international affairs.[198] Moreover (apart from Newfoundland) they were governed in 1918 under constitutions that could fairly be termed 'independence constitutions'.[199] This was not the case with Southern Rhodesia, both formally[200] and materially, since the restrictive franchise and the entrenched position of the minority government made the constitutional status quo quite inappropriate as a basis for a grant of independence in 1961 or in 1965.[201] This was the basis of British refusal to grant independence to Southern Rhodesia, alone of the territories which had constituted the Federation of Rhodesia and Nyasaland.[202] Moreover, it was at least arguable in

[194] Rigo Sureda, *Evolution*, 88–9.

[195] [1969] 1 AC 645, 723: 'It may be that it would have been thought, before 1965, that it would be unconstitutional to disregard this convention. But it may also be that the unilateral Declaration of Independence released the United Kingdom from any obligation to observe the convention. Their Lordships in declaring the law are not concerned with these matters. They are only concerned with the legal powers of Parliament.'

[196] 39 ILR 61, 93: '[I]t was an implied term of the observance of this convention . . . that this country continue to honour and observe the 1961 Constitution. It is clear that the unilateral repudiation of the 1961 Constitution . . . was such a "fundamental change of circumstances" entitling Britain, legally, to reassert its sovereignty over this country in regard to its external affairs.'

[197] Ibid, 195–6 (Beadle CJ).

[198] Portugal refused to accept a Rhodesia diplomatic mission with independent diplomatic status: Fawcett, 106.

[199] In the case of Australia see *Baxter v Commissioner of Taxation* (1907) 4 CLR 1087, 1104, 1121.

[200] Palley, 726 argues that Southern Rhodesia possessed no legislative power with respect to external affairs, in direct contrast to the Australian Constitution 1900, s 51(xxix).

[201] Fawcett, *British Commonwealth*, 104–5 argues that constitutional legislation was outside the scope of the convention. The history of Newfoundland, whose status was similar to that of Southern Rhodesia in many respects, bears out this distinction.

[202] It is unlikely that Southern Rhodesia enjoyed any greater international status than the Federation of Rhodesia and Nyasaland (1953–63) of which it was part: the latter was not considered a State: see Secretariat Opinion, 21 September 1963: [1963] *UN Jur Ybk* 170.

1918 that the Dominions had, at least in certain circumstances, a right of secession or withdrawal from the Empire.[203] Although Southern Rhodesia had a certain degree of competence with respect to external affairs in 1964,[204] that competence was certainly not as extensive as that of the Dominions in 1918, but rather approximated to the pre-1914 position. Southern Rhodesia was not a Member of any political organization, nor a signatory in its own name to any significant international agreement. Its status in 1964 is properly compared to that of the Dominions in 1914, when they still constituted, for international purposes, autonomous areas of an undivided Empire.

### *(v) The elimination of post-Imperial links*

Despite independence, Member States of the Commonwealth retained links to the United Kingdom of various types. The lengthy process by which the old Dominions shed these links may be briefly recounted.[205]

#### (a) Canada

The British North America Act 1867 (UK) is still the core constitutional text of Canada. As a UK statute, it could only be amended by the British Parliament, though in practice it did so if and only when requested to do so by the Canadian Parliament. The Constitution Act 1982 (UK) renamed the 1867 Act and 'patriated' it, enabling local amendment on a complex formula. The controversies attending its enactment were essentially Canadian ones.[206]

#### (b) Australia

The Commonwealth of Australia Constitution Act 1900 (UK) established the Commonwealth of Australia; the federal Constitution was a schedule to the Act and contained its own domestic amending formula. But the six States of the Commonwealth apparently had separate constitutional arrangements and retained direct links with the Crown and the United Kingdom, including direct appeals to the Judicial Committee of the Privy Council in matters of

[203] Dawson, *Development of Dominion Status*, 124–5, 428–31.

[204] For details, see Palley, *Constitutional History*, 702–47.

[205] South Africa is the exception. Concerns about its racial policies led to it leaving the Commonwealth on 31 May 1961, after which all links were severed: Republic of South Africa Constitution Act of 1961 (SAf). After the transition to majority rule South Africa rejoined the Commonwealth.

[206] See, e.g., *Re Resolution to Amend the Constitution* [1981] 1 SCR 753. See Allan (1986) 45 *CLJ* 305; Hood Phillips (1982) 98 *LQR* 194. The claim that the Canada Act 1982 had improperly repudiated obligations of the Crown in right of the UK to Indian tribes in Canada under 19th century treaties was rejected as non-justiciable in a British court: *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta* [1982] QB 892, noted Crawford (1982) 53 *BY* 253. See also Romanow, Whyte and Leeson, *Canada . . . Notwithstanding*; McWhinney, *Canada and the Constitution*.

State law. Conferences in 1982 and 1984 addressed the matter of these remaining constitutional links and restrictions. The result was a set of agreed enactments by the Commonwealth, each State and the United Kingdom, referred to compendiously as the Australia Acts. The Australia Act 1986 (Cth) and Australia Act 1986 (UK) entered into force on 3 March 1986. Sections 2 and 3 of the Australia Act (Cth) ended the remaining links between the UK and State law.[207]

**(c) New Zealand**

The Constitution Act 1986 (NZ) provided that the New Zealand Constitution Act 1852 (Westminster) would cease to have effect, and that '[n]o Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend to New Zealand as part of its law.'[208] The Supreme Court Act 2003 established a Supreme Court to serve as final court of appeal for New Zealand.[209] Its entry into force on 1 January 2004 marked the end of Privy Council jurisdiction in the former Dominions.

## (4) Other cases of devolution

The British Dominions provide the most significant example of independence by gradual devolution. Certain other instances may be briefly mentioned.

### *(i) The Ottoman Empire*

Like the Dominions, but for different reasons, the various component territories of the Ottoman Empire achieved their independence gradually and without any express declaration or recognition by the Porte.[210] Diplomatic practice with respect to the Ottoman Empire was, however, quite inconsistent: for example, Britain unilaterally declared terminated the suzerainty of Turkey over Egypt but protested at similar French action in Morocco.[211]

### *(ii) The Philippines*

Although the Philippines achieved independence by explicit United States withdrawal and recognition in 1946,[212] it had enjoyed for some time before an

[207] This involved statutory structure is summarized by Watts (1987) 36 *ICLQ* 132. See also Lindell (1986) 16 *FLR* 29, 37–49 (1986); Goldring [1986] *Public Law* 192.

[208] Constitution Act 1986 (NZ), s 15(2). The Act enumerated further UK acts that, from its entry into force on 1 January 1987, would cease to have effect in New Zealand, including the Statute of Westminster 1931.

[209] Supreme Court Act 2003 (NZ) s 3(1)(a)(i) ('to recognise that New Zealand is an independent nation with its own history and traditions').

[210] See Altug, *Turkey and Some Problems of International Law*, 108–36; White, *The Status in International Law of the Fragments of the Ottoman Empire* (dissertation, Chicago, 1935); Al Baharna, *Legal Status*, 232–7; Yavetz in Dinstein (ed), *Models of Autonomy*, 85.

[211] See 108 BFSP 185; 109 BFSP 436–9; 114 BFSP 200.

[212] (1946) 15 DSB 66.

intermediate legal status with certain international incidents. Under the Philippine Independence Act of 24 March 1934,[213] the Philippines became a 'self-governing Commonwealth'. As such it was treated by United States courts as a 'foreign country' for many purposes.[214] It was admitted as an original Member of the United Nations.[215]

### *(iii) The French and Netherlands Unions*

By explicit constitutional schemes adopted after World War II, both France and the Netherlands established an apparatus for Union of their respective dependent territories on a basis of self-government. Although both States thereafter ceased to report on those territories under Chapter XI of the Charter, the territories concerned did not achieve any substantial separate legal status, but were subsequently granted independence in the normal manner.[216]

[213] 48 Stat 456.

[214] *Bradford v Chase National Bank*, 24 F Supp 28 (1938), 9 ILR 35; *Suspine v CTC*, 37 F Supp 268 (1941), 9 ILR 38; *Barber v Gonzales*, 347 US 637, 641–2 (1954), 20 ILR 276; *M/V Nonsuco, Inc v CIR*, 234 F 2d 583 (1956). But cf *Posadas v National City Bank of New York*, 80 L Ed 351 (1936); *Rabang v Boyd*, 1 L Ed 2d 456 (1957).

[215] See further O'Brien and Goebel, 'U.S. Recognition Policy', 176–7.

[216] On the French Union see Kiss, *Pratique Française*, vol II, 524–67; Whiteman *Digest*, I, 544–82; Gonidec [1960] *PL* 177. On the Netherlands Union see van Panhuys (1958) 5 *Ned T* 1. cf also the case of Iceland (1918–44): Weigert (1944–5) 23 *For Aff* 112, 114; Jones (1947) 24 *BY* 360, 368–9; Kearney (1975) 69 *AJ* 591, 600.

# Chapter 9

# SECESSION


**9.1 Secession as a method of the creation of States** 375

**9.2 The traditional approach: secession and recognition 1815 to 1945** 376

(1) The relevance of recognition 376

(i) Metropolitan recognition 376

(ii) Recognition by third States 379

(iii) Recognition of belligerency 380

(2) The traditional test of independence in a secessionary situation 382

**9.3 Independence and secession in modern international law** 383

(1) The secession of a self-determination unit 384

(i) Secession in furtherance of self-determination 384

(ii) Secession in violation of self-determination 388

(2) Secession outside the colonial context 388

(i) Cases of secession or dismemberment post-1945 391

(ii) Unsuccessful attempts at secession 403

(iii) Summary of post-1945 practice 415

**9.4 Certain incidents of secession in international law** 418

(1) Belligerency and insurgency in secession struggles 418

(2) Application of international humanitarian law in internal conflicts 420

(3) Military and civil aid to seceding regimes 421

(4) Problems of continuity and commencement 421

**9.5 The former Palestine Mandate: Israel and Palestine** 421

(1) Historical introduction 421

(i) The Mandate for Palestine 422

(ii) The abandonment of the Mandate and its aftermath 424

(2) The creation of the State of Israel 425

(i) The validity of the Mandate for Palestine 428

(ii) Validity and legal effects of the Partition Resolution 430

(iii) The creation of Israel (1948–9) 432

(3) The creation of the State of Palestine (1988–) 434
(i) Palestine prior to the Oslo Accords: the 1988 Declaration 435
(ii) Alternative conceptions of statehood: Montevideo and other criteria 436
(iii) The authority of the General Assembly 440
(iv) The position of dissenting or opposing States 442
(v) The road to Palestinian statehood since 1993 442
(vi) Conclusion 446

## 9.1 Secession as a method of the creation of States

Until 1914, secession was the most conspicuous and probably the most common method of the creation of new States. The period 1776 to 1900 saw, amongst other cases, the American War of Independence, the revolution of the former Spanish colonies of South and Central America, the secession of Greece from the Ottoman Empire and of Belgium from the Netherlands. In the period since 1919, new States have been more often created with the consent of the former sovereign, especially in course of decolonization. But attempts at secession—which may be defined as the creation of a State by the use or threat of force without the consent of the former sovereign[1]—have been frequent and some of these have succeeded, in particular Indonesia, North Korea, North Vietnam, Bangladesh, Guinea-Bissau and Eritrea. In addition, there are the exceptional cases of Israel and a putative Palestinian State; the creation or attempted creation of these States has occurred without the consent of the previous administration and as a result of armed conflict. Many more attempts at secession have failed—for example, Katanga and Biafra—or are still contested—for example, Somaliland and Chechnya.

It bears repeating that the distinction between devolution and secession may be artificial in some circumstances. Elements of forcible seizure and free grant of independence may be combined (as with Indonesia and Eritrea). Other elements—a process of consolidation (as in Vietnam and Korea), the intervention of a group of Great Powers (as in Greece and Belgium) or the dissolution of the predecessor State (as with the former Yugoslavia)—may be present. Nonetheless certain questions arise specifically in relation to secession. In particular the application of the criteria for statehood to situations where

[1] Cf Marek, *Identity and Continuity*, 62. This work does not discuss the issue of revolutionary or forcible change of government within a State, as to which see Petersen, *Recognition of Governments* Roth, *Governmental Illegitimacy in International Law*; Fox and Roth (eds), *Democratic Governance and International Law*.

statehood is disputed by the previous sovereign; the relation between third State recognition and status; the legality of secession in modern international law, and the legal incidents of the process by which a seceding unit attains international status—these questions require consideration here.[2] In the first place the application of the criteria for statehood—and in particular the criterion of independence—to cases of secession must be dealt with.

## 9.2 The traditional approach: secession and recognition 1815 to 1945

### (1) The relevance of recognition

Politically recognition of secessionist regimes has always been important. Its precise legal effects however require examination. In this context three types of recognition—recognition of statehood on the part of the previous sovereign ('metropolitan recognition'), recognition of statehood on the part of third States and belligerent recognition—must be distinguished.

#### *(i) Metropolitan recognition*

It is clear that if the former sovereign recognizes as a State a local unit exercising actual control over certain territory then that entity is, at least prima facie, a State. The question concerns the status of a *de facto* entity effectively controlling certain territory, in the absence of metropolitan recognition. As we have seen, there was a conflict in the early doctrine on this point. Pufendorf, arguing from the notion of allegiance to the former sovereign, regarded metropolitan recognition as necessary to statehood: Vattel, on the other hand, took the view that at least in some situations metropolitan recognition was unnecessary.[3] The question was not entirely settled by the American War of Independence since

[2] There is now a considerable literature. For works before 1985, see bibliography in Haverland, 10 *Enc PIL* (1987) 384, 388–9. More recent works include Brilmayer (1991) 16 *Yale JIL* 177; Franck in Brölmann and Lefeber (eds), *Peoples and Minorities in International Law*, 5; Murswiek (1993) 31 *AdV* 307; Musgrave, *Self-Determination and National Minorities*, 180–210; Buchanan in Moore (ed), *National Self-Determination and Secession*, 14; Crawford (1998) 69 *BY* 85, reprinted in *Selected Essays*, 199; Orentlicher (1998) 23 *Yale JIL* 1; Moore (2000) 13 *Can JL & Jur* 225; Crawford in Alston (ed), *People's Rights*, 7, 47–66; Tancredi, *La Secessione nel Diritto Internazionale*; Knopp, *Diversity and Self-Determination in International Law*, 40–1, 53–65, 77–80, 179–86; Raic, *Statehood and the Law of Self-Determination*, 308–97; Dahlitz, *Secession and International Law*; Macedo and Buchanan (eds), 45 *Nomos*; Kohen (ed), *Secession: International Law Perspectives*. Buchanan, *Secession*, addresses moral and constitutional issues. See also Bartkus, *The Dynamic of Secession*, who attempts 'a general explanation for the occurrence of the phenomenon'. For judicial discussion of secession see *Reference re Secession of Quebec* [1998] 2 SCR 217, 161 DLR (4th) 385, 37 ILM 1340 (SCC).

[3] Vattel, *Le Droit des Gens*, vol I, s 202, cited in Frowein (1971) 65 *AJ* 568, 569 n 11.

on any view French recognition of the United States of North America was premature (involving a declaration of war against Great Britain)[4] and since British recognition in 1782[5] was not long delayed.

Any doubts that might have remained were settled by the controversy over the independence of the former Spanish colonies in South America. The colonies declared their independence at various times after 1809, and despite fluctuating fortunes maintained that independence against Spain for a considerable time without being accorded any formal recognition.[6] By 1822 several of the secessionist regimes were subsisting without any effective Spanish opposition and with relative stability: nonetheless Spain refused to countenance recognition.[7] The question of third State recognition was thus squarely raised. In June 1822 President Monroe extended United States recognition of Colombia.[8] British recognition of Buenos Ayres followed on 2 February 1825, of Colombia on 18 April 1825, and of Mexico on 28 December 1826.[9] In response to Spanish protests, Canning distinguished three 'descriptions of Recognition':

> 1st. The Recognition *de facto* which now substantially subsists.
>
> 2nd. The more formal Recognition of Diplomatic Agents.
>
> 3rd. The Recognition *de Jure*, which professes to decide upon the Title, and thereby to create a Certain Impediment to the Rights of the former Occupant.[10]

As to the third of these, in his view it was: 'for the two Contending Parties themselves to settle the Question of Title,—not for third Parties to interfere … The practical question, then, is,—How long should the *de facto* System of Recognition be maintained, to the Exclusion of the Diplomatic, and when should the latter be adopted?'[11] To which, in a later dispatch, the answer was given that:

> To continue to call that a possession of Spain, in which all Spanish occupation and power had been actually extinguished and effaced, could render no practical service to

[4] Treaty of Amity and Commerce of 6 February 1778, 46 CTS 477, and Separate and Secret Act of the same date: ibid, 457.

[5] Preliminary Articles of Peace, Paris, 30 November 1782, 48 CTS 225; Definitive Peace Treaty, Paris, 3 September 1783: ibid, 489, pursuant to an Act to enable His Majesty to conclude a peace or truce with certain colonies in North America therein mentioned 1782 (22 Geo III c46). The Netherlands extended recognition in a Treaty of Amity and Commerce, The Hague, 8 October 1782: ibid, 135: 48 CTS 137.

[6] See Smith, *GB & LN*, vol I, 115–20; McNair, *Law Officers Opinions*, vol II, 327–37; Moore, 1 *Digest* 74–84; Paxson, *The Independence of the South American Republics*; Webster, *Britain and the Independence of Latin America 1812–1830*; Bethell (ed), *The Independence of Latin America*; Rodriguez, *The Independence of Spanish America*.

[7] Smith, *GB & LN*, vol I, 142 ff.

[8] Moore, 1 *Digest* 85–96.

[9] Smith, *GB & LN*, vol I, 151–2.

[10] FO 139/49, 8 August 1822 (ibid, 124–6); repeated, *inter alia*, Canning to Ward, FO 50/9, 9 September 1825 (ibid, 126).

[11] Ibid.

the Mother Country;—but it would have risked the peace of the World. For all political communities are responsible to other political communities for their conduct:—that is, they are bound to perform the ordinary international duties, and to afford redress for any violation of the rights of others by their citizens or subjects.

Now, either the Mother Country must have continued responsible for acts over which it could no longer exercise the shadow of a controul; or the Inhabitants of those countries, whose independent political existence was, in fact, established, but to whom the acknowledgment of that independence was denied, must have been placed in a situation in which they were either wholly irresponsible for their actions, or were to be visited for such of those actions as might furnish ground of complaint to other Nations, with the punishment due to Pirates and Outlaws . . . [N]o other choice remained for Gt. Britain, or for any other Country having intercourse with the Spanish American Provinces but to recognize, in due time, their political existence as States, and thus to bring them within the pale of those rights and duties, which civilized Nations are bound mutually to respect, and are entitled reciprocally to claim from each other.[12]

Canning's distinction between *de jure* and diplomatic recognition and his application of it to the Spanish-American colonies are significant. It has been suggested that his third description of recognition—that relating to the 'question of right' between the belligerents—is equivalent to modern *de jure* recognition,[13] but it is clear that this was and is not so: rather this recognition 'of right' reflected the then influential principle of legitimacy,[14] in a sense the successor to Pufendorf's principle of allegiance.[15] No international legal consequences—at least so far as third States were concerned—were to be deduced from the failure of metropolitan recognition, provided that the local entity was effectively independent, and the military opposition of the metropolitan State had to all intents and purposes ceased. The point was made with even greater clarity by Dr Lushington in 1820:

His own opinion on the subject was, that when colonies had once acquired independence for themselves, it was at the option of other governments either to acknowledge their independence or not, according to the views of policy which they might entertain. It was indeed a matter of pure necessity to make such an acknowledgment on account

[12] FO 139/49, 162, 166–7 (25 March 1825). Cf (to the same effect) Adams, 6 April 1822: Moore, 1 *Digest* 87–8.

[13] Smith, *GB & LN*, vol I, 126–7.

[14] Before the Congress at Aix-la-Chapelle in 1818, there was a distinct possibility of European intervention to secure Spanish sovereignty in South America. By the combined efforts of the United States and Great Britain this was avoided, but fear of intervention was the major factor behind the Monroe Doctrine of 1822. See generally Webster, *Britain and the Independence of Latin America*, I, 14–15; Oppenheim (8th edn), vol I, 313–19, (9th edn), vol I, 449–50; Moore, 6 *Digest* 373–9, 401–4.

[15] Smith, *GB & LN*, vol I, 168–9; Kane, *Civil Strife in Latin America*, 21; and cf Webster, *Britain and the Independence of Latin America*, I, 26–34.

of the great inconvenience and injustice that would otherwise attend the existence of an unsettled and unrecognized State . . . [N]either the law of nations, nor any peculiar relations between England and Spain, withheld us from recognizing the independence of South America.[16]

Canning's second description of recognition was the equivalent of modern *de jure* recognition, and it followed from the South American precedents that metropolitan recognition was not a precondition for statehood if effective independence had been achieved.

### *(ii) Recognition by third States*

Although it was established that absence of metropolitan recognition did not preclude statehood, diplomatic recognition by third States was treated as important and indeed seems to have been regarded as constitutive. Canning's memorandum of 25 March 1825 had a distinctly constitutive aspect, as did his famous boast that he had 'called the New World into existence to redress the balance of the Old'.[17] The memorandum of 1825 had seemed to infer that the existence of a separate 'political community' was insufficient and that recognition was required before such a community was brought within the 'pale of those rights and duties' involved in international law. In practice the South American States had, however, been regarded as legally responsible for their acts before recognition: indeed all political contacts short of formal recognition were regarded as legitimate and desirable.[18] Whatever view of recognition may have been entertained,[19] in practice recognition of the South American republics was substantially declaratory of an existing situation.[20]

[16] 2 *Parl Deb NS* 378–80, 11 July 1820; cited Paxson, *Independence of South American Republics*, 196–8.

[17] 16 *Parl Deb NS* col 397, 12 Dec 1826; Temperley, *The Foreign Policy of Canning 1822–1827*, 154.

[18] Christopher Robinson reported on 6 Feb 1817 (Smith, *GB & LN*, vol I, 268–70) that it was 'allowable for any Nation . . . to maintain public relations with Countries in the situation of the Insurgent Provinces, after a certain Time. But it will be a Question of general expediency, when and under what, Modifications, that right should be asserted'. The flags of the various seceding States were also recognized for commercial purposes, and vessels flying those flags were not treated as piratical (cf Monroe, 19 Jan 1816, 3 BFSP 119; Smith, *GB & LN*, vol I, 271–5). Consuls were appointed; and, of course, seceding territories were not treated as *terra nullius:* Moore, 1 *Digest* 43–5. Lushington accurately stated that, 'mercantile concerns were conducted as if we had recognized the independence of South America'.

[19] It may be that the point did not trouble contemporary statesmen: cf Canning to Stuart, 1 Dec 1825: 'I . . . continue to think this mode of Recognition better calculated for the advantage and dignity of the State to be recognized than any form of words distinctly expressing Recognition . . . because the assumed Independence is therein admitted, not created . . .' (Webster, *Britain and the Independence of Latin America*, I, 292).

[20] See Harcourt's distinction between recognition and intervention: *Letters by Historicus on some Questions of International Law* (1863), 6; cf ibid, 4 where the status of revolted subjects is said to be 'a question of mixed law and fact'.

### *(iii) Recognition of belligerency*

A third form of recognition in situations of insurgency or secession was recognition of belligerency. Where a secessionary movement had achieved a certain degree of governmental and military organization, issues of responsibility and the desire to remain neutral in the conflict while maintaining commercial relations with both parties impelled a certain *de facto* recognition of the situation even though the conflict was continuing. This gradually emerged as a distinct mode of recognition: by virtue of recognition of belligerency third States were entitled to maintain a strict neutrality between the parties to the conflict and the insurgents achieved a separate though temporary status. Recognition of belligerency was established only towards the end of the South American conflict—and then in a situation where full recognition would have been justified.[21] It found its most significant application in the American Civil War.[22] The position was authoritatively formulated by Wheaton:

> Until the revolution is consummated, whilst the civil war involving a contest for the government continues, other States may remain indifferent spectators of the controversy, still continuing to treat the ancient government as sovereign, and the government *de facto* as a society entitled to the rights of war against its enemy; or may espouse the cause of the party which they believe to have justice on its side. In the first case, the foreign State fulfils all its obligations under the law of nations; and neither party has any right to complain, provided it maintains an impartial neutrality. In the latter, it becomes, of course, the enemy of the party against whom it declares itself, and the ally of the other; and as the positive law of nations makes no distinction, in this respect, between a just and an unjust war, the intervening State becomes entitled to all the rights of war against the opposite party. If the foreign State professes neutrality, it is bound to allow impartially to both belligerent parties the free exercise of those rights which war gives to public enemies against each other; such as the right of blockade, and of capturing contraband enemy's property. But the exercise of those rights, on the part of the revolting colony or province against the metropolitan country, may be modified by the obligation of treaties previously existing between that country and foreign States.[23]

Recognition of belligerency became permissible in two situations: where the metropolitan government itself unequivocally treated the insurgents as an organized belligerent force, in particular by exercise of belligerent rights on the

[21] For the development of the notion of belligerent rights see Smith, *GB & LN*, vol I, 265–81. US recognition of belligerency was effected by a neutrality proclamation of 1 Sept 1815: Moore, 1 *Digest* 171–2. British recognition was effected by an Order-in-Council of 12 July 1819: Smith, *GB & LN*, vol I, 276.

[22] Ibid, 302, 322–5; McNair II, 358–65; Moore, 1 *Digest* 184–93.

[23] Wheaton's *Elements* (8th edn, 1866 (ed Dana)) Pt I, §23.

high seas;[24] or where, in the judgement of other States, the insurgent force had achieved the character of an organized government, capable of carrying on hostilities in accordance with the laws of war and of accepting responsibility for its actions.[25] Recognition of belligerency was, however, considered as a form of intervention unless the third State's interests were materially affected: it tended in practice to be restricted to civil wars fought at least in part on the high seas since the main legal incident of belligerency was the right of both parties to search neutral ships for contraband on the high seas.

For present purposes, belligerent recognition is of peripheral importance, but certain points may be made. In the first place, in secessionary situations belligerent recognition was sometimes used as a substitute for, rather than an intermediate step towards, recognition of the entity in question as a State. This was certainly so with the South American territories, and to some extent with Greece.[26]

Secondly, even in the absence of recognition of belligerency the insurgents—so long as they maintained a certain degree of territorial and administrative effectiveness—had certain rights. Their ships were not to be treated as pirates, nor were they so far as third States were concerned common criminals.[27] On the other hand, third States were not entitled to assist or foment the rebellion—or rather, since war was legally permissible, they had the option of non-intervention or the commission of an act of war against the metropolitan State. The effect of recognition of belligerency was thus threefold: it formalized the legal status of the insurgents; it gave rise to a duty of non-intervention with respect to both parties and it entailed the acceptance of the exercise of belligerent rights by both.

In nineteenth-century international law non-intervention in such cases was an option rather than a duty. It followed that recognition of belligerency was, in a fundamental sense, voluntary, and the obligation of neutrality with respect to both parties entailed by such recognition was self-imposed. Since third States retained the right to make war, neutrality in civil as well as international conflicts remained discretionary. Recognition of belligerency was not a

[24] The US proclamation of a blockade of the Confederate States was regarded by Britain as justifying recognition of belligerency: this view was upheld, by implication, in the *Alabama Arbitration* (1872): 1 Moore *IA* 653. See also Oglesby, *Internal War and the Search for Normative Order*, vi–vii; *Smith v Stewart* (1869) 2 *Am ILC* 66, 68.

[25] Report of Karslake, Selwyn and Phillimore, 14 Aug 1867 (Crete): McNair I, 143.

[26] Dana in a note to §23 of Wheaton's 8th edn gave as the first of the tests of belligerency 'the existence of a *de facto* political organization of the insurgents, sufficient in character, population and resources, to constitute it, if left to itself, a State among the nations, reasonably capable of discharging the duties of a State . . .' It was thus, in his view, 'a *quasi* political recognition'.

[27] Cf Lauterpacht, *Recognition*, ch 18.

peremptory institution but a permissible expression of a certain legal relation—neutrality. Only where the metropolitan Government itself unequivocally recognized local belligerency was recognition by third States in any way enjoined. For this reason, neutrality between belligerents could be set aside if there existed, for example, a treaty of alliance or other commitment with the metropolitan State.[28] Again, since the legal incidents of recognition of belligerency—and in particular the duty of neutrality vis-à-vis the metropolitan government—were self-imposed, recognition of belligerency could be said to be constitutive.[29] Even in its heyday in the nineteenth century, the status of recognition of belligerency in civil war situations was thus precarious.

## (2) The traditional test of independence in a secessionary situation

It remains to determine just when third State recognition became permissible; in other words, when the seceding entity qualified as a State. Nineteenth-century practice—apart from cases of intervention to secure independence, such as Belgium and to some extent Greece—established that a seceding territory could properly be recognized as a State if it governed its territory effectively and with sufficient stability, such that there was no real likelihood of the previous sovereign reasserting its position: this could occur because of the latter's virtual relinquishment of the struggle or its defeat in the field. In a letter to Lieven concerning the prospective Austrian recognition of Greece, Canning formulated the test as follows.

> It is to be presumed that when the Austrian Plenipotentiaries speak of the acknowledgement of the Morea and the islands as an independent State, they intend that acknowledgement to be subject to the qualification that such State shall have shown itself substantially capable of maintaining an independent existence, of carrying on a Government of its own, of controlling its own military and naval forces, and of being responsible to other nations for the observance of international laws and the discharge of international duties. These are questions of fact. By acknowledgement we can only acknowledge what is. We have never recognized in Spanish America any State in whose territory the dominion of the mother-country has not been practically extinguished, and which has not established some form of government with which we could treat.[30]

[28] The Portuguese alliance was one of the reasons for the British treatment of Brazil, which differed from that accorded the Spanish American States: cf Smith, *GB & LN*, vol I, 180–97.

[29] Charpentier, *Reconnaissance*, 95–109; *contra* Chen, *Recognition*, 333–51. Cf *ILC Ybk* 1975/I, 45 (Reuter), 49 (Ushakov).

[30] 40 BFSP 1216, 4 Sept 1826; reaffirmed ibid, 1222. Cf the Marquis of Landsdown, 10 *Parl Deb NS* col 974, 15 Mar 1824, cited Paxson, *Independence of South American Republics*, 224. The Earl of Liverpool, for the Government, agreed that 'there could be no right [to recognize] while the contest was actually going on . . . so long as the struggle in arms continued undecided' (ibid, col 999). But the

The position was summarized by Harcourt:

When a sovereign State, from exhaustion or any other cause, has virtually and substantially abandoned the struggle for supremacy it has no right to complain if a foreign State treat the independence of its former subjects as *de facto* established; nor can it prolong its sovereignty by a mere paper assertion of right. When on the other hand, the contest is not absolutely or permanently decided, a recognition of the inchoate independence of the insurgents by a foreign State is a hostile act towards the sovereign State . . . [31]

The strictness of this position is in marked contrast to the position in the case of States granted independence by the previous sovereign, where a minimal degree of *de facto* control may be sufficient. This strict view—which was normally applied to particular cases in a cautious and conservative manner—represented the position at the beginning of the twentieth century. It was reaffirmed in the *Åland Islands* case, described in Chapter 3. Its status in modern international law is discussed in the following section.

## 9.3 Independence and secession in modern international law

The cautious application of the criteria for independence, which was a feature of nineteenth century practice, became much more variegated in the twentieth century. Indeed the question is whether the criteria themselves have remained the same. It will be seen that there is now an important distinction between secession within a metropolitan State and the secession of a self-determination unit and, in particular, of a non-self-governing territory. On the one hand the secession of a self-determination unit, where self-determination is forcibly prevented by the metropolitan State, will normally be reinforced by the principle of self-determination, so that the degree of effectiveness required as a

timing of the actual decision, he asserted, was peculiarly a matter for the Government. In August 1823 the US had also declined to recognize or aid the Greeks, pleading the constitutional incapacity of the President to declare war on Turkey and the fact that Greek independence was not yet 'undisputed, or disputed without any rational prospect of success', 11 BFSP 300 (Adams). In an opinion of 6 June 1844, Dodson advised that 'in December 1830 . . . the course of events had shown that the separation between Belgium and Holland consequent on the Revolution in the former country would be final . . .' However, the 'independent political existence of Belgium had not . . . at that time assumed any definite shape'. It was, in his view, impossible to determine whether Britain had recognized Belgium as at 6 August 1831: Smith, *GB & LN*, vol I, 245–7. The same strict test was applied by the British government to the Confederacy: e.g., Russell to Mason, 2 Aug 1862: 55 BFSP 733, cited Lauterpacht, *Recognition*, 17. See also Wright in Falk, (ed), *The International Law of Civil War*, 30–109.

[31] *Letters of Historicus*, 9. Cf Moore, 1 *Digest* 78 (Adams, 1818).

precondition to recognition will be much less extensive than in the case of secession within a metropolitan State. On the other hand international law has extended its protection of the territorial integrity of States at least so far as external use of force and intervention are concerned—though not to the point of providing a guarantee. The result of these contrasting developments is that there is no longer one single test for secessionary independence.

## (1) The secession of a self-determination unit

It is necessary to distinguish between secession in pursuance of and in violation of self-determination. Where the territory in question is a self-determination unit it may be presumed that any secessionary government possesses the general support of the people: secession in such a case, where self-determination is forcibly denied, will be presumed to be in furtherance of, or at least not inconsistent with, the application of self-determination to the territory in question.[32] On the other hand, it is possible for a seceding government manifestly to lack general support of the people concerned.

### *(i) Secession in furtherance of self-determination*

State practice since 1945 in relation to secessions of this type has not been entirely consistent. However, in three of the earlier cases of seceding territories, at least some degree of international recognition was extended at a relatively early stage.

The Indonesian situation was the first of these. Indonesian nationalist leaders declared the Republic of Indonesia independent on 17 August 1945: there followed a protracted conflict, military and diplomatic, with the Netherlands before sovereignty was formally transferred on 27 December 1949.[33] The events of this period have been described elsewhere.[34] What is of interest here is that, although Indonesia was probably not a fully independent State before December 1949, it was accorded a certain—even considerable—legal status during the conflict. It was recognized as a *de facto* government by the Netherlands itself[35] and by a number of other States: in addition several States accorded *de jure* recognition. The Security Council consistently assumed

[32] Cf *Western Sahara Case*, ICJ Rep 1975 p 12, 99–100 (Judge Ammoun, sep op).

[33] Round Table Conference Agreement, 2 Nov 1949: 69 UNTS 200. The agreement refers to the 'Government of the Republic of Indonesia' (cf Art 1). For the Linggadjati Agreement of 25 March 1947, see Taylor, *Indonesian Independence and the United Nations* (1960), Appendix 3. For the Renville Agreement of 17 Jan 1948 see ibid, Appendix 4.

[34] See also Rajan, *The United Nations and Domestic Jurisdiction*, 139–51; Hyde (1949) 49 *Col LR* 955; Sastroamidjojo and Delson, ibid, 344; Verzijl, *International Law*, vol II, 82–5; Jessup, *Birth of Nations*, 43–92.

[35] Linggadjati Agreement, Arts 1, 17

jurisdiction with respect to the dispute, basing this in part at least on the status of the Republic, which was permitted to participate in those proceedings as a 'State' under Article 32 of the Charter.[36]

The status of the Democratic Republic of Vietnam (DRVN) after the declaration of independence in 1945 was complicated by the conflicting grants of authority by France to various local governments, and by the claims of both governments to represent Vietnam as a whole. As in the Indonesian case, various States recognized the DRVN: France also extended a somewhat equivocal *de facto* recognition.[37] The DRVN was a participant at the Geneva Conference of 1954 that temporarily partitioned the country. This 'divided State' situation and the right to reintegration provided for in the 1954 Agreements, further complicated the situation. Nevertheless, in the events which occurred, the DRVN became a separate State in the territory north of the line of partition: its separate statehood must probably be dated from 1956.

These complicating features were not present in the case of Algeria. The Algerian Republic was proclaimed on 19 September 1958 and after protracted hostilities was granted formal independence by France on 3 July 1962.[38] After some hesitation,[39] the General Assembly took the matter up in 1960 and 1961, calling upon the parties to negotiate 'with a view to implementing the right of the Algerian people to self-determination and independence respecting the unity and territorial integrity of Algeria.'[40] Algeria had also been recognized, before 3 July 1962, by a certain number of States.[41]

[36] Rajan, *UN and Domestic Jurisdiction*, 139–51.

[37] 149 BFSP 657. Further on divided Vietnam see Chapter 10.

[38] Whiteman, 2 *Digest* 133–4, pursuant to the Evian Agreements of 13 Mar 1962 (1962), 66 *RGDIP* 686. Pt III of the Agreements would appear itself to have recognized Algerian statehood ('A défaut d'accord sur ces procédures, chacun des deux États pourra saisir directement la Cour international de justice'). See generally Bedjaoui, *Law and the Algerian Revolution*; O'Ballance, *The Algerian Insurrection 1954–1962*; Gordon, *The Passing of French Algeria*; Fraleigh in Falk, (ed), *The International Law of Civil War*, 179; Yakemtchouk, *L'A frique er droit international*, 36–40; Belkherroubi, *La Naissance et la reconnaissance de la République Algérienne*; and the notes by Charpentier, Flory and Touscoz in *AFDI* 1954–63.

[39] The question of Algeria was deleted from the agenda in 1955: GA res 909 (X), 25 Nov 1955 (adopted without vote). In 1957 two innocuous and uncontroversial resolutions were accepted: GA resns 1012 (XI), 1184 (XII). In 1958 a considerably stronger draft resolution failed to be adopted (35–18:28): *UN Ybk* 1958, 79–82.

[40] GA res 1724 (XVI), 20 Dec 1961 (62–0:38, France np); cf GA res 1573 (XX), 19 Dec 1960 (63–8:27, France np).

[41] Twenty-nine States recognized Algeria by April 1961: Bedjaoui, *Law and the Algerian Revolution*, 112–38. Belkherroubi, *La naissance*, 85–98 argues that the creation of Algeria was a case of secession rather than devolution, and that the Evian Accords were an international agreement between France and the GPRA, a belligerent government with a degree of international personality. Cf Zorgbibe, *La guerre civile*, 136–40, who is critical.

Two successful secessions taking place in the 1970s may be compared with these earlier cases. The Bangladesh situation has been discussed in Chapter 3. Despite the presence of Indian troops on its territory, its doubtful stability, the refusal of Pakistan's recognition until 1974 and the probable illegality of Indian intervention, Bangladesh was rather rapidly recognized as a State (although its UN admission had to wait until a settlement with Pakistan). More in point, for present purposes, is the case of Guinea-Bissau. The African Independence Party of Guinea and the Cape Verde Islands was formed in September 1956 by Amilcar Cabral; it took up overt armed resistance in 1963 and by 1970 claimed to have liberated a large part of the country.[42] Security Council resolution 322 (1972) recognized the PAIGC as 'legitimate representative' of Guinea-Bissau.[43] On 26 September 1973 the PAIGC formally proclaimed the independence of Guinea-Bissau. By the end of 1973, it had been recognized by forty States including the Soviet Union, the People's Republic of China and India.[44] General Assembly resolution 3061 (XXVIII) welcomed 'the recent accession to independence of the people of Guinea-Bissau, thereby creating the sovereign State of the Republic of Guinea-Bissau.'[45] General Assembly resolution 3181 (XXVIII) approved 'the credentials of the representatives of Portugal, on the clear understanding that they represent Portugal as it exists within its frontiers in Europe and that they do not represent the Portuguese-dominated Territories of Angola and Mozambique nor could they represent Guinea-Bissau, which is an independent State.'[46] By 31 May 1974 (five weeks after the overthrow of the former Portuguese government) Guinea-Bissau had been recognized by eighty-four States. Its admission to the United Nations was recommended unanimously by the Security Council on 12 August 1974.[47] But an Agreement Granting Independence between Portugal and Guinea-Bissau was not concluded until 26 August 1974:[48] pursuant to paragraph (i) of that agreement, Portugal extended *de jure* recognition on 10 September 1974. It is quite clear, and is implicit in the Agreement of 26 August 1974, that Guinea-Bissau was very widely recognized as a State well before its recognition by Portugal. This would not have been so had the traditional criterion for secessionary independence, discussed above, been applied.[49]

[42] Davidson, *The Liberation of Guiné*. [43] *SCOR* 1677th mtg, 22 Nov 1972 (15–0:0).

[44] See Rousseau (1974) 78 *RGDIP* 1166; Zorgbibe, *La guerre civile*, 140–1.

[45] GA res 3061 (XXVIII), 2 Nov 1973, para 1 (93–7:30).

[46] GA res 3181 (XXVIII), 17 Dec 1973 (amendment referring to Guinea-Bissau adopted 93–14:21; resolution as a whole adopted 108–0:9). [47] SC res 356 (1974).

[48] 18 ILM 1244. The Agreement is phrased in terms of recognition rather than grant of independence; it refers, e.g., to 'the territory of the Republic of Guinea-Bissau' (para (3)).

[49] Cf Rousseau (1974) 78 *RGDIP* 1166, 1168–9. But see the rather equivocal statements about recognition in *US Digest* 1973, 17; ibid, 1974, 8–9, 14; (1976) 12 *Rbdi* 334; [1975] *Italian YIL* 299.

The following conclusions may be drawn:

(1) In principle, self-determination is predicated on a free and effective choice by the people of the territory concerned.[50] Where such a choice is available, no particular problem arises with respect to secession.

(2) Where, however, the metropolitan State forcibly denies self-determination to the territory in question, this primary option is not available. In such cases the principle of self-determination operates in favour of the statehood of the seceding territory, provided that the seceding government can properly be regarded as representative of the people of the territory. In such a case recognition may be extended even though the independence of the territory is not 'disputed without rational hope of success'.[51]

(3) However, the practice in the cases reviewed has not been either unequivocal or consistent[52] and it is difficult to accept that the normal requirement of effective government has been entirely displaced. Rather, the criterion in this type of case would appear to be one of qualified effectiveness: the metropolitan government cannot rely on the advantages of incumbency against a liberation movement which is supported by the population and controls substantial territory (e.g., Guinea-Bissau). In such a case the principle of self-determination legitimizes what might otherwise be premature recognition by other States.

(4) It is not clear at what stage during a liberation conflict recognition becomes permissible, a situation which is exacerbated by the decline of neutrality in situations of established civil war. In both Vietnam and Guinea-Bissau there was intervention in favour of both parties to the conflict. Recognition of statehood in such cases seems to have replaced recognition of belligerency, and the notion of reciprocal intervention has been influential.[53] It may be that the effect of self-determination on the criteria for secessionary independence is twofold: in situations such as Guinea-Bissau or Algeria, where the insurgents' control is substantial and their legitimacy or representativeness is acknowledged, self-determination may legitimize recognition that would otherwise be premature. In any event, where a self-determination unit achieves actual independence, recognition may be immediate: the requirements of stability and permanence emphasized in nineteenth-century practice do not seem to apply. Bangladesh,

[50] *Western Sahara Case*, ICJ Rep 1975 p 12, 32. [51] Adams, 11 BFSP 300.

[52] E.g., in the Vietnamese situation, both for ideological reasons and because of the factors enumerated above. Another possible situation to which the traditional criteria were applied was that of Tibet in 1951, although it may be doubted whether Tibet was a self-determination unit or whether an indigenous government ever exercised more control or authority than that traditionally accorded to Tibet as an autonomous area. On Tibet see Chapter 7.

[53] Falk, *Legal Order in a Violent World*, 124–5; and cf Kaplan in Rosenau (ed), *International Aspects of Civil Strife*, 92; Schrijver in Dahlitz (ed), *Secession and International Law* 97, 100–4.

the stability and permanence of which must have remained in question, was rapidly recognized by almost all States.[54]

(5) These considerations only apply in the case of secessionary movements by a self-determination unit. Different considerations may apply to secessions of fractions of self-determination units.[55]

### *(ii) Secession in violation of self-determination*

The situation is quite different where the secession occurs in derogation of the principle of self-determination as applied to the territory as a whole. The Rhodesian situation, which is the most significant example of this, has been discussed in Chapter 3. The principle of self-determination does not qualify the operation of the principle of effectiveness in such a case; it operates as a peremptory requirement, suspending statehood until the constitutional and governmental structure of the territory is brought into line with the principle of self-determination.

## (2) Secession outside the colonial context[56]

It has been seen that in the pre-1945 period it was always considered possible for a group to separate from a State and to achieve independence by achieving secure control over its territory—if necessary, by winning a war of independence. Secession of this kind was a process that could take years and which might or might not lead to a successful outcome. From the perspective of different participants it might be seen either as an expression of an inherent right to be free from oppression or as an act of treason. But however described, unilateral secession did not involve the exercise of any right conferred by international law. The government of a State was entitled to oppose the unilateral secession of part of the State by all lawful means. Third States were expected to remain neutral during such a conflict, in the sense that assistance to a group that had not succeeded in establishing its independence could be treated as intervention in the internal affairs of the State in question, or as a violation of

[54] For the civil war in the Yemen see Boals in Falk (ed), The *International Law of Civil War*, 303.

[55] This was the case with North Korea and East Germany, although in both the 'divided State' situation was a complicating factor: see Chapter 10. For the attempted secession of Anguilla see Chapter 14.

[56] Various unsuccessful attempts have been made, inspired by notions of monarchical or democratic legitimacy, to outlaw revolutions aimed at changes of government within a State: see Marek, *Identity and Continuity*, 51–5. These have taken the form of refusal of recognition rather than denial of the effectiveness of the new government, and it remains true that, in the matter of governments, international law looks to '*de facto* sovereignty and complete governmental control', rather than to 'illegitimacy or irregularity of origin': *Tinoco Arbitration* (1923) 1 RIAA 369, 381 (Taft CJ); Roth, *Government Illegitimacy*.

neutrality, as in the *Alabama Arbitration*.[57] But on the other hand international law was prepared to acknowledge political realities once the independence of a seceding entity was firmly established and in relation to the territory effectively controlled by it. As the Canadian Supreme Court put it in the *Quebec Secession* reference in 1998:

> Although there is no right, under the Constitution or at international law, to unilateral secession . . . this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.[58]

It is true that the hostility by all governments to secession in respect of their own territory has sometimes led to language implying that secession might be contrary to international law. In various resolutions relating to both the Katangan and the Rhodesian secessions, the Security Council characterized secession as illegal. For example, SC resolution 169(1961) '[s]trongly deprecate[d] the secessionist activities illegally carried out by the provincial administration of Katanga, with the aid of external resources and manned by foreign mercenaries . . .' and '[d]eclare[d] that all secessionist activities against the Republic of the Congo are contrary to the *Loi fondamentale* and Security Council decisions and specifically demand[ed] that such activities . . . cease forthwith.'[59] In the case of Southern Rhodesia, from the very first United Nations resolutions referred to the Smith government as an 'illegal racist minority regime'.[60] But this language does not imply the existence of an international law rule prohibiting secession, for the following reasons. First, if the seceding entity is acting illegally under international law, it follows that the entity is a subject of international law, although the main object of the resolutions cited was to deny to the entities in question any international status. Secondly, in the debates on the resolutions there is no reliance on international law rules prohibiting secession;[61] rather, reference is made to the internal law

[57] (1872) 1 Moore's *Int Arb* 495.

[58] *Reference re Secession of Quebec*, 1998 SCJ No 61, para 155, 115 ILR 537, 595.

[59] SC res 169, 24 November 1961 (9–0:2), paras 1,8.

[60] SC res 216, 12 November 1965 (10–0:1), para 2.

[61] The only reference to the issue in the debates on SC res 169 (1961) referred the illegality to the municipal law of the Congo: *SCOR* 974th mtg, 15 Nov 1961, 9 (Loutfi, UAR).

of the metropolitan State.[62] Any international concerns associated with secession movements relates to the existence of foreign intervention (as in Katanga) or the existence of a threat to international peace and security (as in Rhodesia). The position is that secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally. As Lauterpacht pointed out '[i]nternational law does not condemn rebellion or secession aiming at the acquisition of independence.'[63] This position was affirmed by the International Law Commission in its discussion of the principle of non-recognition of territorial acquisition by illegal force. Article 11 of the Draft Declaration on Rights and Duties of States, which embodied that principle, was amended by limiting it to acquisition 'by another State' so as to deal with the case of secession.[64]

Nonetheless, by comparison with the acceptance of self-determination leading to the independence of colonial territories covered by Chapters XI and XII of the Charter ('external self-determination'), the practice regarding unilateral secession of non-colonial territories is very different. Since 1945 the international community has been extremely reluctant to accept unilateral secession of parts of independent States if the secession is opposed by the government of that State. In such cases the principle of territorial integrity has been a significant limitation. Since 1945 no State which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor State.[65] By contrast there are many examples of failed attempts at unilateral secession, including cases where the seceding entity maintained *de facto* independence for some time.

It is necessary to distinguish unilateral secession of part of a State and the outright dissolution of the predecessor State as a whole. In the latter case there is, by definition, no predecessor State continuing in existence whose consent to any new arrangements can be sought. But the distinction between dissolution of a State and unilateral secession of part of a State may be difficult to draw in particular cases. The dissolution of a State may be initially triggered by the secession or attempted secession of one part of that State. If the process goes beyond that and involves a general withdrawal of all or most of the territories concerned, and no substantial central or federal component remains behind, it

[62] Elias in ch 6 ('The legality of illegal regimes in Africa') of his *Africa and the Development of International Law* discusses only the legal position of revolutionary governments, and makes no reference to secession. Cf Bennouna, *Le Consentement*, 60–3.

[63] *Recognition*, 8; and (1928) 22 *AJ* 105, 128.

[64] *ILC Ybk* 1949, 112–13 (9–1).

[65] Bangladesh applied for UN admission in 1972 (S/10759) but was not admitted until 1974, subsequent to its recognition by Pakistan.

may be evident that the predecessor State as a whole has ceased to exist: this was the position generally taken in the case of Yugoslavia. Nonetheless even the successful secession of one part of a State will not normally produce that result.[66]

Thus the distinction between unilateral secession and dissolution is clear in principle. It is adopted, for example, in the two Vienna Conventions on State Succession.[67] The main difference is that in cases of dissolution, no one party is allowed to veto the process. By contrast where the government of the predecessor State maintains its status as such, its assent to secession is necessary, at least unless and until the seceding entity has firmly established control beyond hope of recall. Bangladesh is the only clear case in international practice since 1945. The position stated by the Commission of Jurists appointed by the League of Nations to examine the *Åland Islands* situation remains true, notwithstanding subsequent developments in the principle of self-determination: 'Positive international law does not recognise the right of national groups, as such, to separate themselves from the State of which they form a part by the simple expression of a wish.'[68]

### *(i) Cases of secession or dismemberment post-1945*

Since 1945, the only new States emerging from situations which were not formally recognised as colonial, i.e. as covered by Chapters XI or XII of the Charter, have been:

- Senegal (1960);
- Singapore (1965);
- Bangladesh (1971);
- the three Baltic States: Latvia, Lithuania, Estonia (all 1991);
- the eleven successor States of the former Soviet Union: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kirgizstan, Moldova, Tajikistan, Turkmenistan, Ukraine, Uzbekistan (all 1991);
- the five successor States of the former Yugoslavia: Slovenia, Macedonia, Croatia, Bosnia-Herzegovina, Federal Republic of Yugoslavia (Serbia and Montenegro) (1991–2);
- Czech Republic and Slovakia (1993); and
- Eritrea (1993).

[66] E.g., Pakistan after the secession of Bangladesh maintained its continuity and UN membership notwithstanding the loss of over 50% of its population.

[67] Vienna Convention on Succession of States in Respect of Treaties, 23 August 1978, 17 ILM 1488, 1946 UNTS 3 (entered into force 6 November 1996) Arts 34, 35; Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 8 April 1983, 22 ILM 306, A/Conf.117/14 (not yet in force), Arts 17, 18.

[68] LNOJ, Sp Supp 3 (1920), 5; see Chapter 2.

The list excludes the so-called 'divided States' formed in the aftermath of World War II (North Korea, South Korea and East Germany): these are discussed in the next chapter.

### (a) Senegal

Senegal emerged from the dissolution of the Mali Federation, a federal arrangement formed between it and Soudan. Under the French Constitution of 1958, the former colonies of Senegal and Soudan became 'autonomous States' within the French Community. Subsequently, it was agreed that the Mali Federation would be established, and Senegal and Soudan agreed to join it. Under the Constitution of the Mali Federation of 17 January 1959, its constituent units were regarded as 'sovereign', as was the Federation itself. Shortly after the Federation was inaugurated, serious difficulties arose between Senegal and Soudan and on 20 August 1960 Senegal purported to withdraw. This was initially opposed by Soudan but was accepted on 22 September 1960 when Soudan asserted its independence outside the French Community under the name of Mali. The situation was described in different terms by different members of the Security Council when it considered the applications for United Nations membership by Senegal and Mali on 28 September 1960. But it was common ground that the two entities had resolved their differences, that each had achieved separate independence, and that the Federation of Mali had thereby ceased to exist.[69]

### (b) Singapore

Singapore was another former colony that became independent after a short-lived attempt at federation. This was done pursuant to a Separation Agreement, which recited that:

> it has been agreed by the parties hereto that fresh arrangements should be made for the order and good government of the territories comprised in Malaysia by the separation of Singapore from Malaysia upon which Singapore shall become an independent and sovereign state and nation separate from and independent of Malaysia and so recognized by the Government of Malaysia.[70]

[69] For the Security Council debate see *SCOR*, 907th mtg, 28 September 1960. Generally see Borella (1960) 6 *AFDI* 925, 945; Cohen (1960) 36 *BYIL* 375; Gandolfi (1960) 6 *AFDI* 881.

[70] See Government of Malaysia–Government of Singapore, Agreement Relating to the Separation of Singapore from Malaysia as an Independent and Sovereign State, 7 August 1965 (entered into force 9 August 1965), 563 UNTS 89. On Singapore see Turnbull, *A History of Singapore 1819–1988* (2nd edn); Ramcharan, *Forging a Singaporean Statehood 1965–1995*; Lau, *A Moment of Anguish: Singapore in Malaysia and the Politics of Disengagement*.

Pursuant to this agreement, Singapore separated from Malaysia, which retained its international identity and United Nations membership. Singapore was forthwith admitted unopposed to the United Nations.[71]

**(c) Bangladesh**

The case of Bangladesh was described in some detail in Chapter 3. Despite the military defeat of Pakistan (complete by December 1971), Bangladesh was not admitted to the United Nations until 1974. This was shortly after its recognition by Pakistan, which occurred on 2 February 1974, although it had before then been individually recognized by many States.[72]

Different views can be held as to whether in the circumstances of 1970, the people of East Bengal had a right of self-determination, whether this was a case of 'remedial secession' or whether the acceptance of its secession following the withdrawal of the Pakistan Army after the ceasefire of 16 December 1971 merely produced a *fait accompli*, which in the circumstances other States had no alternative but to accept. Under the criteria enunciated in GA resolution 1541(XV), East Bengal clearly qualified as a non-self-governing territory in 1971, after the election result had been cancelled and the territory placed under a repressive military rule from Islamabad. But the fact is that it was not designated as such a territory at the time nor treated as one by the General Assembly. On the other hand despite the violence of the military response to UDI, the large numbers of dead and displaced persons, and the sympathy for the position of East Bengal thereby generated, no State other than India was prepared to recognize Bangladesh prior to the surrender of the Pakistan forces in East Bengal in December 1971. GA resolution 2793 (XXVI) made no mention of the right of self-determination, and the Security Council took no action at all until after 16 December 1971, when it called for the withdrawal of 'all armed forces to their respective territories', with emphasis on the 'western theatre'.[73] By that stage the 'eastern theatre', that is, East Bengal, had finally fallen outside the control of Pakistan.

**(d) The Baltic States**

The Baltic States were separate States during the inter-war period and were members of the League of Nations. They were, however, occupied and annexed by the Soviet Union in 1940 in circumstances involving the use of force and duress. There was little express recognition on the part of third States of the

[71] See SC res 213 (1965), 20 September 1965; GA res 2010 (XX), 1 September 1965.

[72] See SC res 351, 10 June 1974; GA res 3203 (XXIX), 17 September 1974.

[73] See SC res 307 (1971), 21 December 1971; India–Pakistan, Agreement on Bilateral Relations, Simla, 3 July 1972, 11 ILM 954. On Bangladesh see further Chapter 3.

extinction of the Baltic States, and this was a relevant factor when those States sought to regain their independence in the changed circumstances of the Soviet Union after 1990.

- Lithuania declared its independence on 11 March 1990. In January 1991 it resisted a half-hearted attempt on the part of Soviet Interior Ministry troops to force it to withdraw its UDI. In an ensuing referendum in February 1991, 90.47 per cent of valid votes cast favoured independence from the Soviet Union.
- In Estonia, after several transitional measures and a March 1991 referendum in which 77.83 per cent of valid votes cast supported independence, the Supreme Soviet declared independence on 20 August 1991. By this stage it had become clear that a hard-line coup attempt in Moscow had failed.
- In Latvia, a referendum in March 1991 showed 73.68 per cent of valid votes cast in favour of independence. The Latvian Supreme Soviet declared independence on 21 August 1991.

On 6 September 1991, the State Council of the Soviet Union voted unanimously to recognize the independence of the Baltic States. On 12 September 1991, the Security Council without dissent recommended their admission to the United Nations. Speaking after the adoption of the resolution, the President of the Security Council stated:

> The independence of the [Baltic States] was restored peacefully, by means of dialogue, with the consent of the parties concerned, and in accordance with the wishes and aspirations of the three peoples. We can only welcome this development, which obviously represents progress in respecting the principles of the Charter of the United Nations and in attaining its objectives.[74]

The twin emphasis on restoration of independence and on the 'consent of the parties concerned' was clearly significant. The Security Council did not consider the applications for recognition made by the Baltic States until 12 September 1991, six days after the Soviet Union had agreed to recognize them. Thus the position of the Soviet authorities was treated as highly significant even in a case of suppressed independence. Individual Member States emphasized that, since the independence of the Baltic States had been unlawfully suppressed, they had the right of self-determination. But this was seen not as a

[74] *SCOR*, S/PV/3007, 12 Sep 1991 (Merimée (France)). See Security Council resns 709–11, 12 September 1991; Committee on Admission of New Members, *Report*, S/23021, 11 September 1991. On the Baltic States see Yakemtchouk (1991) 37 *AFDI* 259; Pullat (1991) 2 *Finnish YBIL* 512; Rich (1993) 4 *EJIL* 36; Cassese, *Self-determination*, 258–64.

right of unilateral secession, rather as a right 'to resolve their future status through free negotiation with the Soviet authorities in a way which takes proper account of the legitimate rights and interests of the parties concerned.'[75]

**(e) Successor States to the USSR**

The eleven successor States of the former Soviet Union achieved independence by a form of break-away from the Soviet Union, a process that soon acquired the support of all twelve constituent republics, including the Russian Federation. The position of the Russian Federation was crucial since, despite initial uncertainty and some discontinuity of government personnel with the former Soviet Union, it was rapidly recognized as continuing the latter's legal personality, both by the other constituent republics[76] and by the United Nations.[77] At the same time the Russian Federation accepted the emergence to independence of the other republics and supported their applications for United Nations membership. Moldova, Kazakhstan, Kirgizstan, Tajikistan, Turkmenistan and Uzbekistan were admitted to the United Nations on 2 March 1992, as were Armenia and Azerbaijan (despite the fact that they were then at war over Nagorny-Kharabakh). Ukraine and Belarus were original Members of the United Nations, a position they retained after independence. On 31 July, Georgia became the last of the former Soviet republics to be admitted to the United Nations, having also been the last to apply (on 6 May 1992). In all cases, admission to the United Nations was unopposed.

**(f) Successor States to the SFRY**

The successor States of the former Yugoslavia came into existence through a complex and violent process, beginning in late 1990 and reaching a certain, by

[75] 525 *HL Debs* WA col 9 (23 January 1991), in (1991) 62 *BYIL* 573 (Minister of State, FCO). See also (1991) 37 *AFDI* 976.

[76] On 8 December 1991 the presidents of Belarus, the Russian Federation and Ukraine signed an Agreement establishing the Commonwealth of Independent States (CIS), declaring in the preamble that 'the Union of Soviet Socialist Republics as a subject of international law and as a geopolitical reality no longer exists': (1992) 31 ILM 143. This Agreement was modified by a Protocol of Alma Ata of 21 December 1991, signed by 11 of the Republics (but not by Georgia): ibid, 147. An accompanying 'Decision' by the Council of the CIS (ibid, 151) recorded the agreement of the CIS to 'support Russia's continuance of the membership of the Union of Soviet Socialist Republics in the United Nations, including permanent membership of the Security Council, and other international organizations'. By letter of 24 December 1991, President Yeltsin informed the UN Secretary-General of the view of Russia and the other republics: see (1992) 31 ILM 138. On the dissolution of the Soviet Union see Bothe (1992) 96 *RGDIP* 811; Rich (1993) 4 *EJIL* 36; Mullerson (1993) 42 *ICLQ* 473; Czaplinski (1993) 26 *Rbdi* 374; Juviler (1993) 3 *Trans L & Cont Pr* 71; Scharf (1995) 28 *Cornell ILJ* 29.

[77] No resolution was passed. The USSR seat was taken up without objection by the Russian Federation following President Yeltsin's letter of 24 December 1991: see Scharf (1995) 28 *Cornell ILJ* 29, 46–7.

no means complete, conclusion at the time of the Dayton–Paris Peace Agreement of 14 December 1995.[78] A breakdown in the constitutional arrangements occurred in May 1991, when the normal rotation arrangements for the federal presidency were rejected by the Government of Serbia. On 25 June 1991, following earlier plebiscites, Slovenia and Croatia declared their independence and civil war broke out; by this stage the Yugoslav National Army was effectively in Serb hands. By an agreement signed at Brioni on 7 July 1991, the two constituent republics suspended their declarations of independence for three months. In the absence of any agreement on the restructuring of the federation, those declarations were, however, renewed on 8 October 1991, and further armed conflict occurred in Croatia and Bosnia (which declared its 'sovereignty' on 15 October 1991). Macedonia adopted a new constitution proclaiming its independence, following a referendum, on 17 November 1991. Through seizing control of the Yugoslav National Army and by other means, Serbia and Montenegro sought to maintain the territorial integrity of Yugoslavia, and they claimed legal continuity with the former Yugoslavia. In their view, the other four constituent Republics were in secession from Yugoslavia.

The international response to the Yugoslav crisis was largely articulated through the Conference on Yugoslavia established on 27 August 1991 by the European Communities. The Conference on Yugoslavia established an Arbitration Commission presided over by Robert Badinter, President of the French Constitutional Court, to advise it on legal issues in relation to the crisis. In its Opinion No 1 of 29 November 1991, the Commission expressed the view that the situation in Yugoslavia was one involving the dissolution of the Federal Republic and the consequent emergence of its constituent republics as independent States, although that process was not yet complete.[79] The underlying rationale of Opinion No 1 was that, in the absence of a reconstituted federal government that represented the population of Yugoslavia as a whole, there was no government that had the authority to seek to prevent the separation of the constituent republics, and that such separation would lead

[78] See further Chapter 12. On the Yugoslav crisis see, e.g., Pellet (1992) 38 *AFDI* 220; Bieber (1992) 86 *Proc ASIL* 374; Blum (1992) 86 *AJIL* 830; Bothe (1992) 96 *RGDIP* 811; Charpentier (1992) 96 *RGDIP* 343; Czaplinski (1993) 26 *Rbdi* 374; Müllerson (1993) 42 *ICLQ* 473; Rich (1993) 4 *EJIL* 36; Eastwood (1993) 3 *Duke JCIL* 299; Burdeau and Stern (eds), *Dissolution, Continuation et Succession en Europe de l'Est*; Craven (1995) 15 *Aust YBIL* 1; Craven (1995) 66 *BYIL* 333; Scharf (1995) 28 *Cornell ILJ* 29; Gray (1996) 67 *BYIL* 155; Stern (ed), *Le Statut des États Issus de l'ex-Yougoslavie à l'ONU; Weller* (1991) 86 *AJIL* 596.

[79] Conference on Yugoslavia, Arbitration Commission, Opinion No 1, 29 November 1991: 92 ILR 162, 164–6.

inevitably to the disappearance of the Socialist Federal Republic itself. The Commission did not use the phrase 'self-determination': rather its focus was on the breakdown of the federal arrangements for power sharing, arrangements that involved the representation of the constituent republics as such, and in a context where the breakdown of the federal system was accompanied by widespread ethnically motivated violence and displacement of persons ('ethnic cleansing').

Following Opinion No 1, the European Community issued Guidelines on Recognition of New States in Eastern Europe and the Soviet Union, and an associated Declaration on Yugoslavia, both dated 16 December 1991. The Guidelines on Recognition referred to 'the principles of the Helsinki Act and the Charter of Paris, in particular the principle of self-determination', as well as to 'the normal standards of international practice [on recognition of new States] and the political realities in each case.' They laid down various preconditions for recognition of new States in Eastern Europe and the Soviet Union, including respect for minority rights and maintenance of existing boundaries. The Declaration on Yugoslavia invited the constituent republics to apply for recognition on the basis laid down in the Guidelines, and all except Serbia-Montenegro did so. On 11 January 1992, the Arbitration Commission gave opinions considering each of these four applications.

The case of Slovenia was the least problematic. There had been no military action for many months, and the Government of Slovenia securely controlled its territory. The Arbitration Commission found that Slovenia fully satisfied the criteria for recognition. The Member States of the European Union extended recognition on 15 January 1992.[80]

As for Croatia, conflict continued on its territory with elements of the Yugoslav National Army (JNA) and local Serb militias. The Arbitration Commission was concerned that a constitutional amendment of 4 December 1991 did not fully reflect the necessary guarantees with respect to the protection of minorities. Following an undertaking by the Croatian President, the Member States recognized Croatia on 15 January 1992, although it did not control a significant part of its territory at that time. On 8 May 1992, the Constitution was further amended, and in Observations dated 4 July 1992, the Arbitration Commission concluded that:

> even if the Constitutional Law in question does sometimes fall short of the obligations assumed by Croatia when it accepted the Draft Convention of 4 November 1991, it

[80] See Conference on Yugoslavia, Arbitration Commission, Opinion No 7, 11 January 1992: 92 ILR 188.

nonetheless satisfies the requirements of general international law regarding the protection of minorities. Article 6(e) in particular is consistent with the fundamental principle of international law whereby all human beings are entitled to recognition, in the national context, of their membership of the ethnic, religious or language group of their choice.[81]

Macedonia, like Slovenia, substantially controlled its territory by December 1991; the Arbitration Commission held that it satisfied each of the requirements in the Guidelines. Macedonia had adopted a constitutional amendment providing that it 'has no territorial claim on neighbouring States', and the Commission held that: 'the Republic of Macedonia has, moreover, renounced all territorial claims of any kind in unambiguous statements binding in international law; that the use of the name "Macedonia" cannot therefore imply any territorial claim against another State.'[82] Greece was, however, not prepared to agree to the recognition of Macedonia under that title, and recognition by Members of the European Union did not occur until 16 December 1993, well after Macedonia had been admitted to the United Nations under the title 'The Former Yugoslav Republic of Macedonia'.

Bosnia-Herzegovina was a still more difficult case, given the large Serbian minority and its strong military opposition to separation. At no stage did the Bosnian federal authorities control more than a fraction of the territory of the republic. Nonetheless 'sovereignty' was proclaimed on 15 October 1991. On 11 January 1992 the Arbitration Commission noted the disagreement between the various ethnic groups in the republic as to its future and concluded 'that the will of the peoples of Bosnia-Hercegovina to constitute the SRBH as a sovereign and independent State cannot be held to have been fully established.' On 29 February to 1 March 1992 a referendum was held, which was boycotted by the Bosnian Serb population but that resulted in a 63 per cent vote of the total electorate in favour of independence, which was declared on 3 March 1992. The Members of the European Community recognized the independence of Bosnia-Herzegovina on 6 April 1992.[83]

Serbia and Montenegro, under the name of the Federal Republic of Yugoslavia, adopted a new constitution on 27 April 1992, which maintained

[81] See Conference on Yugoslavia, Arbitration Commission, Opinion No 5, 11 January 1992: 92 ILR 188; Conference on Yugoslavia, Arbitration Commission, Observations on Croatian Constitutional Law, 4 July 1992: 92 ILR 209, 211.

[82] Conference on Yugoslavia, Arbitration Commission, Opinion No 6, 11 January 1992: 92 ILR 182, 187.

[83] See Conference on Yugoslavia, Arbitration Commission, Opinion No 4, 11 January 1992: 92 ILR 173, 178.

its claim to continuity with the Socialist Federal Republic but excluded from its scope the other four Republics. At the same time it announced that it was:

> disposée à respecter pleinement les droits et les intérêts des républiques yougoslaves qui ont déclaré leur indépendance. La reconnaissance des États nouvellement constitués interviendra une fois qu'auront été reglées les questions en suspens actuellement en cours de négociation dans le cadre de la Conférence sur la Yougoslavie.[84]

In the case of Bosnia-Herzegovina, recognition by the Federal Republic of Yugoslavia did not occur until signature of the Peace Agreement in December 1995.

None of the constituent republics was admitted to the United Nations prior to the adoption by Serbia-Montenegro of its new Constitution and to its declaration of 27 April 1992, which both clearly implied renunciation of any territorial claim to the territory of the other republics. Slovenia, Croatia and Bosnia-Herzegovina were admitted to the United Nations on 22 May 1992. Macedonia was admitted on 8 April 1993. The United Nations took the view that Serbia and Montenegro was not entitled to participate as a United Nations Member on the basis of continuity with the membership of the former Yugoslavia, and the matter of UN membership was not resolved until 2000.[85] In other words, the United Nations proceeded on the basis that the former Yugoslavia had been dismembered.[86]

The Arbitration Commission repeated this view in its Opinion No 8 of 4 July 1992. In that Opinion it said, *inter alia*:

> 2. The dissolution of a State means that it no longer has legal personality, something which has major repercussions in international law. It therefore calls for the greatest caution.
>
> The Commission finds that the existence of a federal State, which is made up of a number of separate entities, is seriously compromised when a majority of these entities, embracing a greater part of the territory and population, constitute themselves as sovereign States with the result that federal authority may no longer be effectively exercised.
>
> By the same token, while recognition of a State by other States has only declarative value, such recognition, along with membership of international organizations, bears witness to these States' conviction that the political entity so recognized is a reality and confers on it certain rights and obligations under international law.

After reviewing developments, including adoption of its new Constitution by Serbia-Montenegro on 27 April 1992 and the admission of three of the other

[84] UN Doc A/46/915, 7 May 1992.
[85] SC res 1326, 31 Oct 2000; GA res 55/12, 1 Nov 2000.
[86] SC res 757 (1992), 30 May 1992; SC res 777 (1992), 19 September 1992.

former Republics to the United Nations, it concluded that the process of dissolution of the Socialist Federal Republic of Yugoslavia 'is now complete and that the SFRY no longer exists'.[87]

A General Framework Agreement for Peace in Bosnia and Herzegovina was initialled at Dayton, Ohio on 21 November 1995, and came into force upon its signature by the parties in Paris on 14 December 1995. It established a new federal constitution for Bosnia and Herzegovina, and sought to guarantee the territorial integrity of Bosnia and Herzegovina, both as against the Federal Republic of Yugoslavia and in relation to the two constituent entities of Bosnia and Herzegovina (the Federation of Bosnia and Herzegovina and Republika Srpska).[88]

Questions of international status in relation to Yugoslavia since 1991 have focused on the constituent republics, which were treated from an early stage not as entities seceding from a functioning State but as the product of the dissolution of a State the majority of whose territories and people, faced with violent attempts to hold the State together by one of its ethnic groups, wished to separate. This emphasis on the constituent republics as such, at a time when the State was in a process of dissolution, had a series of important consequences. In particular, it meant that international recognition was limited to the four republics. There was no correlative acceptance that any groups within the constituent republics had any right to secede. Nor was such a right recognized to any other territorial entities within the former Yugoslavia, including for example the autonomous area of Kosovo.

The appropriateness of the international response to the Yugoslav crisis continues to be debated. In particular the early recognition of Croatia and Bosnia-Herzegovina by member States of the European Union remains controversial,[89] as too the unduly delayed recognition of Macedonia. The Arbitration Commission has been criticised for advocating, *inter alia*, notions about protection of minorities which go well beyond current international law, and for failing to take into account standard criteria for independence based on effective control of territory.[90]

[87] See Conference on Yugoslavia, Arbitration Commission, Opinion No 8, 4 July 1992: 92 ILR 199, 201, 202. For the issues of continuity and extinction of the SFRY/FRY see further Chapter 17.

[88] General Framework Agreement for Peace in Bosnia and Herzegovina, Paris, 14 December 1995 (entered into force), (1996) 35 ILM 75.

[89] See Grant, *Recognition*, 169–98; Hilpold (1993) 31 *AdV* 387; Zipfel (1996) 2 *Mezinárodni vztahy* 54; Hille, *Völkerrechtliche Probleme der Staatenanerkennung bei den ehemaligen jugoslawischen Teilrepubliken*; Crawford (1996) 48 *World Politics* 482; Kherad (1997) 101 *RGDIP* 663; Rauschning in Götz (ed), *Liber amicorum Günther Jaenicke*, 375; Zeitler, *Deutschlands Rolle bei der völkerrechtlichen Annerkennung der Republik Kroatien unter besonderer Berucksichtigung des deutschen Auβenministers Genscher*.

[90] Craven (1995) 66 *BY* 333, 335. But see Pellet (1992) 38 *AFDI* 220.

In assessing the relevance or otherwise of the Yugoslav case to whether there is a right of unilateral secession, a number of points must be borne in mind. First, the Arbitration Commission, which provided the underlying legal rationale for the positions taken by the Members of the European Community and eventually by most Members of the United Nations, proceeded on the basis that the 'process of breaking up' of the Yugoslav Federation was a matter of fact, and that the emergence to independence of the constituent republics was a *consequence* of that fact. Secondly, it did not articulate any prior right to independence on the part of the constituent republics (although the Yugoslav Constitution of 1974 did purport to guarantee such a right to the six 'nations' it treated as indigenous to Yugoslavia). In particular the Commission did not rely on any right of self-determination of the constituent republics, as distinct from the continued proper functioning of federal organs in which those republics should have been directly represented.[91] Thirdly, the situation was strongly affected by the following facts: (1) four of the six republics, containing a substantial majority of the population, were attempting to break away; (2) the constitutional order under which the constituent republics themselves 'participate[d] in the exercise of political power within the framework of institutions common to the Federation'[92] had completely broken down, and (3) Yugoslavia was undergoing large-scale and unrelenting ethnic conflict involving war crimes and crimes against humanity, in which, it was believed, the then leadership of the FRY was complicit.

In each of these respects, the way in which the Yugoslavian situation was handled provides no precedent for the extension of any international legal right to secede in the case of the constituent units of federal States. Early recognition of the successor States was based on the conclusion that as a matter of political fact the former Yugoslavia was dissolving, that this process was irreversible and that the so-called 'federal authorities' were in fact an emanation of Serbia-Montenegro and had no title to represent the former Yugoslavia as a whole. Even then, the successor States were not admitted to the United Nations until after Yugoslavia (Serbia/Montenegro) had reconstituted itself as a new entity under a constitution which excluded the other four former republics and had announced its preparedness in principle to recognise them.[93]

[91] Craven (1995) 66 *BY* 333, 389–90.

[92] Conference on Yugoslavia, Arbitration Commission, Opinion No 1, 29 November 1991: 92 ILR 162, 163.

[93] This is not to say that the principle of self-determination had no consequences internally, for example in terms of the recognition of the identity of ethnic, religious and linguistic communities within the State (Conference on Yugoslavia, Arbitration Commission, Opinion No 2, 11 January 1992: 92 ILR 167, 168–9; Observations on Croatian Constitutional Law, 4 July 1992, 92 ILR 209, 211).

**(g) Czechoslovakia**

The separation of the Czech Republic and Slovakia was a straightforwardly consensual process at the level of the governments and parliaments concerned. The two constituent republics became separate States after an agreement between them dissolving the Czechoslovak Federation. Dissolution was achieved by parliamentary action under a Constitutional Act of 1992, rather than by a secession referendum as provided for in the Constitutional Act of 1991. By the time agreed upon as the date for independence (1 January 1993), most of the arrangements for the dissolution of the Federation had been worked out by agreement between the two governments and ratified by the Federal Assembly, although certain other changes (including minor exchanges of territory) were subsequently agreed to. On 31 December 1992, the State of Czechoslovakia ceased to exist. The two new States were subsequently admitted unopposed to the United Nations.[94]

**(h) Eritrea**

Eritrea was an Italian colony administered by Great Britain after 1941, initially as a belligerent occupant, subsequently pursuant to the provisions of the Italian Peace Treaty of 1947. It was federated with Ethiopia under UN auspices in 1952. In 1962 the federal arrangement was abolished unilaterally by Ethiopia, without reaction from the United Nations. The Eritrean Peoples Liberation Front (EPLF) fought for many years to gain independence without achieving any international recognition. In 1991 that movement assisted an Ethiopian movement (EPRDF) in defeating the forces of the military regime under Menghistu Haile Mariam, who later fled to Zimbabwe. The Transitional Government of Ethiopia, which emerged after this military victory, accepted that the people of Eritrea had a right of self-determination. A plebiscite was held under UN auspices in April 1993, resulting in a 99.8 per cent vote for independence. General Assembly resolution 47/114 of 16 December 1992 had established an observer mission for that purpose, on the basis that 'the authorities directly concerned have registered their commitment to respect the results of the referendum in Eritrea.' Eritrea was admitted to the United Nations with the support of the Transitional Government of Ethiopia, and without opposition.[95] None of the United Nations resolutions concerning

[94] See: Czech and Slovak Federal Republic, Constitutional Act No 541/1992 on the Division of Property, 13 November 1992; Czech and Slovak Federal Republic, Constitutional Act No 542/1992 on the Extinction of the Czech and Slovak Federal Republic, 25 November 1992. See further Malenovsky, (1993) 39 *AFDI* 305. For an account of the political background see Young, *The Breakup of Czechoslovakia* (1994).

[95] SC res 828, 26 May 1993; GA res 47/230, 28 May 1993.

Eritrea since 1952 referred to self-determination, though the agreement between the Transitional Government and the EPLF described the situation as involving self-determination.[96]

### *(ii) Unsuccessful attempts at secession*

Since 1945 there have been numerous attempts unilaterally to secede by groups or territories within independent States. The cases include, for example:

- Tibet (China);
- Katanga (Congo);
- Biafra (Nigeria);
- Kashmir (India);
- East Punjab (India);
- The Karen and Shan States (Burma);
- Turkish Federated State of Cyprus (Cyprus);
- Tamil Elam (Sri Lanka);
- South Sudan (Sudan);
- Somaliland (Somalia);
- Bougainville (Papua New Guinea);
- Kurdistan (Iraq/Turkey);
- Republika Srpska (Bosnia/Herzegovina);
- Chechnya (Russian Federation);
- Kosovo (Serbia-Montenegro);
- Abkhazia (Georgia);
- South Ossetia (Georgia);
- Anjouan (the Islamic Republic of the Comoros);
- Gaugauzia (Moldova);
- Nagorny-Kharabakh (Azerbaijan);
- Democratic Republic of Yemen (Yemen).

In many other cases support for secession has existed in a territory but has not risen to the level of a unilateral declaration of independence. Where the government of the State in question has maintained its opposition to the secession, such attempts have gained virtually no international support or recognition, and this has been true even when other humanitarian aspects of the situations have triggered widespread concern and action. For example, the situation of the Kurds in Northern Iraq was a matter of international concern and triggered action by the Security Council under Chapter VII of the Charter

[96] See further Yohannes (1987) 25 *J Mod Af St* 643; Gayim, *The Eritrean Question*; Goy (1993) 39 *AFDI* 337; Haile (1994) 8 *Emory ILR* 479; Iyob, *The Eritrean Struggle for Independence* (1995).

and by individual States by way of humanitarian intervention, both military and civil. But the operations in Northern Iraq, including the 'no-fly' zones policed by some western States, were explicitly carried out on the basis of the territorial integrity of Iraq, and this despite continued Iraqi repression of the Kurds and the stringent United Nations response to most other aspects of Iraqi policy.[97]

It is sufficient to refer only to a few of the cases of attempted unilateral secession by groups or territories within independent States.

**(a) The Faroes**

The Faroes are a Danish territory under Home Rule. Unlike Greenland they were never treated as a colonial territory after 1945.[98] But in a referendum on 14 September 1946 the electorate by a very narrow majority of valid votes cast favoured secession over autonomy, and this was followed by a parliamentary vote on 18 September 1946 in favour of secession. The Danish Government rejected unilateralism, and on 24 September 1946 the King, acting on the advice of the Danish Government, intervened, dissolving the Parliament and calling a general election (which was won by the Home Rule party). Following negotiations a new arrangement for Home Rule was ratified by the Danish Parliament and took effect on 1 April 1948. The Home Rule arrangements have evolved since but have remained stable. There was at no stage any international recognition of the Faroes as independent nor any international reaction to the unprecedented intervention by the King on 24 September 1946.[99]

**(b) Katanga**

The situation in the former Belgian Congo at independence in 1960 was discussed in Chapter 2. A secessionist regime in the province of Katanga, under the leadership of Moise Tshombe and with a considerable degree of external support, declared its independence eleven days after the Congo itself became independent. The secession was not ended until 21 January 1963: during that time the Katangan Government was considerably more stable than the central government of the Congo, though that stability was somewhat factitious, given substantial external involvement, and the revenues of the *Union Miniére*.[100]

[97] See SC resns 686, 2 March 1991; 687, 3 April 1991; 688, 5 April 1991; 949, 15 October 1994. Each of these resolutions explicitly affirmed Iraq's territorial integrity. The same is true of SC resolutions following the 2003 military intervention by the United States and certain allies: SC resns 1483, 22 May 2003; 1490, 3 July 2003; 1500, 14 August 2003; 1511, 16 October 2003; 1546, 8 June 2004; 1557, 12 August 2004.

[98] For Greenland see Foighel, in Dinstein (ed), *Models of Autonomy*, 31.

[99] See Olafsson (1982) 51 *Nordic JIL* 29; Patursson (1985) 54 *Nordic JIL* 52; Harhoff (1995) 2 *Enc PIL* 357.

[100] For details see McNemar in Falk, *The International Law of Civil War*, 244; Leclercq, *L'ONU et l'affaire du Congo*; Hoskyns, *The Congo since Independence*.

Despite its claim to self-determination, Katanga was recognized by no State.[101] Although the United Nations Force in the Congo was formally impartial as to the outcome of internal conflicts, its mandate included the promotion of the territorial integrity of the entire Congo,[102] and in fact it was instrumental in ending the secession.[103]

The status of the Katangan regime was indirectly an issue in the *Certain Expenses* Opinion. The Court was asked to determine whether the costs of ONUC were 'expenses of the Organization' within Article 17(2) of the Charter. The Court stated that, in order to answer the request, it was not necessary to determine the validity of the specific resolutions authorizing the Congo (or Middle East) operations. However, the Court went on to hold the operations *intra vires* on the ground that, not constituting 'enforcement measures' under Chapter VII, their direction was not within the exclusive preserve of the Security Council under the Charter, nor did they require a finding under Article 39 of a threat to or breach of the peace or act of aggression. The Court stated:

> It is not necessary . . . to express an opinion as to which article or articles of the Charter were the basis for the resolutions of the Security Council, but it can be said that the operations of ONUC did not include a use of armed force against a State which the Security Council, under Article 39, determined to have committed an act of aggression or to have breached the peace. The armed forces which were utilized in the Congo were not authorized to take military action against any State. The operation did not involve 'preventive or enforcement measures' against any State under Chapter VII and therefore did not constitute 'action' as that term is used in Article 11.[104]

Thus Katanga was at no time a 'State' for the purposes of the Charter.[105]

[101] Cf Lemarchand (1962) *56 Am Pol Sc R* 404. SC res 169, 24 Nov 1961 (9–0:2), *inter alia*, deplored 'all armed action in opposition to the authority of the Government of the Republic of the Congo, specifically secessionist activities and armed action now being carried on by the Provincial Administration of Katanga with the aid of external resources and foreign mercenaries, and *completely reject*[*ed*] the claim that Katanga is a "sovereign independent nation".'

[102] Cf Simmonds, *Legal Problems arising from the United Nations Military Operations in the Congo* 289–92; Bowett, *United Nations Forces*, 153–254.

[103] O'Brien, *To Katanga and Back*, 261–7.

[104] ICJ Rep 1962 p 151, 177. Judges Spiropoulos (ibid, 180), Spender (ibid, 182), and Morelli (ibid, 224–5) expressed no opinion. Judge Koretsky, dissenting (ibid, 267–72), was more equivocal. Only Judge Moreno Quintana expressly disagreed: he regarded the Katangan regime as 'a belligerent community recognized under international law as possessing a legal personality' (ibid, 246). Judge Bustamante, dissenting (ibid, 297 ff) thought that, although 'the new tutelary functions of the United Nations in respect of new States' might well be *intra vires*, they were not contemplated by the Charter as expenses.

[105] In the pleadings in the *Expenses Case*, only a few governments even indirectly adverted to the problem. Upper Volta was critical of what it regarded as a denial of self-determination *(Pleadings*, 123).

### (c) Biafra

In the Biafran situation the same conclusion must be reached. The secession of Biafra was declared on 30 May 1967[106] and terminated on 12 January 1970.[107] Biafra received less substantial external support than Katanga: it was an indigenous secession with some claims to self-determination in the political sense.[108] Again unlike the Katangan case there was no substantial United Nations involvement, although the OAU was a strong supporter of the central government.[109] Five States recognized Biafra unconditionally, although none of these established diplomatic relations with it.[110] The vast majority of States adjudged that Biafra did not qualify for recognition as a State: indeed, there was no case even of belligerent recognition in the civil war.[111] Once again it must be the case that Biafra was not a State.[112]

### (d) Republika Srpska

As noted earlier, no international acceptance or recognition was forthcoming for various seceding entities within the constituent republics of the former Yugoslavia. For example, by January 1992 the Serbian population in Bosnia-Herzegovina (which made up about thirty-five per cent of the population of the Republic) had constituted their own parliament, conducted a plebiscite, and on 9 January 1992 proclaimed the Republika Srpska. The EU Arbitration Commission was specifically asked whether the Serbian population in Croatia and Bosnia-Herzegovina had the right of self-determination. It said, *inter alia*:

1. The Commission considers that international law as it currently stands does not spell out all the implications of the right to self-determination. However, it is well

South Africa regarded ONUC as an intervention in the domestic jurisdiction of the Congo, and an uncontemplated maintenance of the artificial unity of a State (ibid, 265–6; cf Evensen's reply, ibid, 358). Denmark referred to 'the local regime in Katanga' as 'revolting provincial authorities' (ibid, 160).

106 6 ILM 665.

107 See Nwankwo and Ifejika, *The Making of a Nation: Biafra*; Kirk-Greene, *Crisis and Conflict in Nigeria*; Cronje, *The World and Nigeria*.

108 E.g., Statement of French Council of Ministers, 31 July 1968: Kirk-Greene, *Crisis and Conflict in Nigeria*, vol II, 245–6, 329–31; Cronje, *The World and Nigeria*, 194–6. See also Post (1968) *44 Int Aff* 26; Calogeropoulos-Stratis, *Le Droit des peuples à disposer d'eux-mêmes* 342–8; Nayar (1975) 10 *Texas ILJ* 321.

109 Kirk-Greene, *Crisis and Conflict in Nigeria*, vol II, 172–3, 244–5, 328; Tiewul (1975) 16 *Harv ILJ* 259.

110 The most significant of these recognitions (Tanzania) was extended for moral and humanitarian reasons rather than in the conviction that Biafra was a State: Grant (2000) 36 *Stan JIL* 221, 245–6; Kirk-Greene, *Crisis and Conflict in Nigeria*, vol II, 202–11; and Nyerere's remarkable 'Memorandum on Biafra's Case', 4 Sept 1969: ibid, 429–39. The others were Zambia, Ivory Coast, Gabon and Haiti: Stremlau, *The International Politics of the Nigerian Civil War, 1967–1970*, 127, 141.

111 Criticized by Higgins, in Luard, (ed) *The International Regulation of Civil Wars*, 169, 175.

112 See also Panter-Brick (1968) *44 Int Aff* 254; Adaramola (1970) *4 Nigerian LJ* 76; Ijalaye, (1971) 65 *AJ* 551; Elias (1971) 5 *Nigerian LJ* 1; but see Nwogugu (1974) 14 *Indian JIL* 13; Okeke, *Controversial Subjects of Contemporary International Law*, 165.

established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise.

2. Where there are one or more groups within a State constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law. As the Commission emphasized in its *Opinion No. 1* . . . the—now peremptory—norms of international law require States to ensure respect for the rights of minorities. This requirement applies to all the Republics vis-à-vis the minorities on their territory. The Serbian population in Bosnia-Hercegovina and Croatia must therefore be afforded every right accorded to minorities under international conventions as well as national and international guarantees consistent with the principles of international law and the provisions of Chapter II of the Draft Convention of 4 November 1991, which has been accepted by these Republics.

3. Article 1 of the two 1966 International Covenants on Human Rights establishes that the principle of the right to self-determination serves to safeguard human rights. By virtue of that right every individual may choose to belong to whatever ethnic, religious or language community he or she wishes. In the Commission's view one possible consequence of this principle might be for the members of the Serbian population in Bosnia-Hercegovina and Croatia to be recognized under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entails with respect to the States concerned.[113]

The Commission treated the Serbian population as a 'minority' and denied that they had any right to form an independent State. On the other hand, it did not deny the right of self-determination at the internal level, with the consequence, first, that 'every individual may choose to belong to whatever ethnic, religious or language community he or she wishes', and, secondly, that they might possibly have the right to adopt the nationality of their choice, under agreements to be concluded between the various republics. In the result, external self-determination was denied to Republika Srpska, a position expressly confirmed in the Dayton Agreement.[114]

**(e) Kosovo**

So too has it been denied to the lesser territorial units that had held a special constitutional status within the former SFRY—in particular the autonomous

[113] Conference on Yugoslavia, Arbitration Commission, Opinion No 2, 11 January 1992: 92 ILR 167, 168–9.

[114] Bosnia and Herzegovina–Croatia–Yugoslavia, General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Paris, 14 December 1995 (entered into force), (1996) 35 ILM 75. The Agreement and its annexes sought to guarantee the territorial integrity of Bosnia and Herzegovina against secession or dismemberment.

region of Kosovo. Kosovo (like the Vojvodina) was an autonomous region within the Republic of Serbia; it had nearly 2 million inhabitants of whom nearly ninety per cent were ethnic Albanians. Its substantial autonomy was unilaterally terminated by the Serbian Government in 1990, and there followed a substantial measure of repression. The Albanian leadership of Kosovo declared its independence in October 1991, but this was recognized only by Albania. More than one sixth of the population of Kosovo fled abroad, and a worsening of the humanitarian situation and of human rights abuses led in 1999 to increased international concern. Armed intervention by NATO Member States resulted in the withdrawal of Serbian authorities, and in June 1999 the Security Council authorized an international civil administration in the territory.[115] However, Kosovo's legal position remains that of an autonomous area under international administration: the territorial integrity of Serbia and Montenegro has so far been preserved and Kosovo is not (or not yet) a State.[116]

**(f) Chechnya**

Before 1990 the Chechen and Ingush peoples were united in the autonomous republic of Chechen-Ingushetia, a constituent republic of the Russian Soviet Federated Socialist Republic. On 2 November 1991, Chechnya purportedly declared its independence from the Russian Federation, the USSR and also Ingushetia, the other region constituting the former autonomous republic of Chechen-Ingushetia.[117] After a brief skirmish with Russian troops, Chechnya was largely left to its own devices; its government maintained effective control over the republic.[118] In December 1994, the Russian Army made a large-scale attempt to suppress the separatist movement, which was unsuccessful.[119] A cease-fire was agreed on 27 May 1996 between the Russian Federation and the Chechen Republic; a Joint Declaration, signed on 25 August 1996 at Khasavyurt, referred

[115] SC res 1244, 10 June 1999, para 10.

[116] See SC res 1244, preamble, 'Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia'; annex 2, para 8, calling for 'a political process towards establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of . . . the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia.'

[117] The declaration was not put to a referendum. On 6 June 1992, activists also declared Ingushetia a sovereign repubic. This was unceremoniously crushed by troops of the Russian Interior Ministry in November and Ingushetia was placed under direct rule from Moscow. On 10 December 1992, Ingushetia was made a republic of the Russian Federation. See Yakemtchouk (1993) 39 *AFDI* 393, 424–6.

[118] Ibid, 426.

[119] See Dunlop, *Russia Confronts Chechnya: Roots of a Separatist Conflict*; Grant (1998) 9 *Finn Ybk* 145; Leivan, *Chechnya: Tombstone of Russian Power*. See also Tappe (1995) 34 *Col JTL* 255; Gazzini (1996) 17 *HRLJ* 93; Gall and de Waal, *Chechnya: A Small Victorious War*; Ahrens (2004) 42 *Col JTL* 575.

to 'the universally recognised right of nations to self-determination' and provided for an agreement on mutual relations 'according to the universally accepted principles and norms of international law' to be reached by 31 December 2001.[120] Meanwhile Chechen forces re-captured Grozny, the territorial capital. Elections conducted in January 1997 were judged free and fair by OSCE and Council of Europe observers, and a new Chechen government took office in February 1997.[121] But despite Russian military defeat and withdrawal and the instatement of a representative local administration, there was no international recognition of the independence of Chechnya.[122] Following serious lapses in public order in Chechnya and incursions by Chechen groups into Daghestan (a neighbouring constituent republic of the Russian Federation), Russian forces in autumn 1999 started a second major operation against the Chechen separatists. This resulted in the capture of Grozny and, at length, the subjection of most of the territory of Chechnya to Russian Army control, though still contested by Chechen guerrillas who continued to oppose by violence an indigenous administration supported by Russia. There was much criticism of Russian conduct in Chechnya on grounds of the use of disproportionate force, violations of international humanitarian law and breach of arms control agreements.[123] But it has been accepted that the conflict in Chechnya is an internal armed conflict, and that the principle of territorial integrity applies. For example, the French Foreign Minister said on 9 January 1995:

La Tchétchénie fait partie de la Fédération de Russie. Le respect du principe de souveraineté et d'intégrité territoriale est une des règles de base de la vie internationale. Mais les Etats membres de la OSCE ont pris des engagements et sont reconnus un droit de regard mutuel sur ce qui se passe à l'intérieur de leurs propres territoires nationaux.[124]

The British Government stated that:

the exercise of the right [of self-determination] must also take into account questions such as what constitutes a separate people and respect for the principle [of] territorial

[120] Joint Declaration and Principles for Determining the Fundamentals for Mutual Relations between the Russian Federation and the Chechen Republic, 31 August 1996: reprinted in Curran, Hill and Kostritsyna, *The Search for Peace in Chechnya*, 208.

[121] *Annual Report 1997 on OSCE Activities*, sec 2.2.2, Doc 1/97, 18 Dec 1997. For EU reaction, see EU Doc 97/035, Presidency: The Netherlands, 31 January 1997.

[122] Apart from statements by governmental authorities themselves of uncertain status, e.g., the Taliban government in Afghanistan: Grant (2000) 15 *Am UILR* 869.

[123] In particular the Treaty on Conventional Armed Forces in Europe, Paris, 19 Nov 1990, 30 ILM 1, Art V: see, e.g., NATO Parliamentary Assembly, res 292, Political Committee, 15 Nov 1999, para 10(e). See also E/CN.4/1995/176, para 594, E/CN.4/1996/177, para 371; E/CN.4/1996/13.

[124] (1995) 41 *AFDI* 911.

integrity of the unitary state. In the case of Chechnya no country has recognised President Dudayev's unilateral declaration of independence, but we have repeatedly called on the Russians to work for a political solution which would allow the Chechen people to express their identity within the framework of the Russian Federation.[125]

The United States Government said that:

We support the sovereignty and territorial integrity of the Russian Federation . . . We oppose attempts to alter international boundaries by force, whether in the form of aggression by one state against another or in the form of armed secessionist movements such as the one led by Dzhokhar Dudayev. That is why we have said that we regard Chechnya as a matter which the Russian Government and the people of Chechnya will have to resolve together peacefully by political means . . . [A]lthough Chechnya is an integral part of the Russian Federation, Moscow should limit any use of force to a minimum, and respect human rights . . .[126]

The international organizations seized of humanitarian issues in Chechnya took similar positions. For example, the UN Committee on the Elimination of Racial Discrimination indicated that 'international law has not recognized a general right of peoples to unilaterally declare secession from a State' and that 'fragmentation of States may be detrimental to the protection of human rights as well as to the preservation of peace and security.'[127]

Thus even though other governments qualified the Chechens as a 'people', and even though this people was subject to violations of human rights and humanitarian law on a large scale, the principle of territorial integrity has been respected and reaffirmed.[128]

[125] 563 *HL Deb* col 476, 18 April 1955; in (1995) 66 *BY* 621.

[126] Deputy Secretary of State Talbott (1995) 6 *US Department of State Dispatch* 119, 120.

[127] CERD, General Recommendation XXI on self-determination, CERD/48/Misc.7/Rev.3 (1996), para 6.

[128] Equally the attempted secessions of Abkhazia and Anjouan were rejected as derogating from the territorial integrity of the States of which they form part. On Abkhazia, see the UK position, S/3488, 5–6 (1995); and SC res 971, 12 January 1995, para 4 and earlier resolutions (SC resns 937, 21 July 1994; 934, 30 June 1994; 906, 25 March 1994; 896, 31 January 1994; 892, 22 December 1993; 881, 4 November 1993; 876, 19 October 1993; 858, 24 August 1993; 854, 6 August 1993; 849, 9 July 1993): calling for a political settlement 'respecting fully the sovereignty and territorial integrity of the Republic of Georgia'. Respecting Anjouan, the Council of Ministers of the OAU 'urged the leaders of the countries of the region . . . to take all necessary measures so as to ensure . . . that the unity, sovereignty and territorial integrity of the Republic of the Comoros would be safeguarded': CM/Dec. 405 (LXVIII), para 6 (4–7 June 1998, Ouagadougu Council of Ministers Session). See also Statement of Hamada Madi Bolero (Comoros), Framework Agreement signed at Fomboni, 17 February 2001, drafted 'with respect for national unity and territorial integrity,' 8 May 2002, *GAOR*, A/S-27/PV.2, pp 7–8.

### (g) Quebec

Quebec was a French colony which was ceded to Great Britain in 1763.[129] It became one of the four initial provinces of Canada at confederation in 1863, but thereafter (and despite a major contribution to Canadian public life) many French-speaking Quebeckers were concerned at the risk of being submerged by English Canada. Since its formation in 1968, the *Parti quebecois* has had independence from Canada as its main aim, and for much of that time it has been in government in Quebec. Independence referenda were conducted by the Province in 1980 and 1995. The defeat of the 1995 referendum by a few thousand votes raised concern in Canada as a whole as to the impact and consequences for the nation of an eventual 'yes' vote. Accordingly the federal Government in 1966 asked the Supreme Court of Canada for an advisory opinion on three questions relating to the 'unilateral secession' of Quebec. The second question concerned international law issues. The Court was asked:

> Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

The Court summarized its answer in the following terms:

> We have also considered whether a positive legal entitlement to secession exists under international law in the factual circumstances contemplated by Question 1, i.e., a clear democratic expression of support on a clear question for Quebec secession. Some of those who supported an affirmative answer to this question did so on the basis of the recognized right to self-determination that belongs to all 'peoples'. Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the 'people' issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of peoples at international law where 'a people' is governed as part of a colonial empire; where 'a people' is subject to alien subjugation, domination or exploitation; and possibly where 'a people' is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal

[129] Definitive Treaty of Peace Between France, Great Britain, and Spain, Paris, 10 February 1763, 42 CTS 279, about which see Hogg, *Constitutional Law of Canada* (5th edn), 35–8.

arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.[130]

The astute balance achieved by the Court in its unanimous opinion—no right of unilateral secession either under constitutional or international law, but a constitutional right to negotiate independence in the event of a clear affirmative answer to a clear question about secession—did much to clarify the situation and to reduce tension.[131] The constitutional right to negotiate terms of separation has seemed to reduce the likelihood of separation altogether.[132]

Indeed the Parliament of Canada sought to take matters further. In 2000 it adopted an Act to clarify the terms of the right to negotiate.[133] The Clarity Act, so called, provides that the House of Commons shall consider the text of any future referendum question 'relating to the proposed secession of [a] province', in order to determine 'whether the question is clear' (s 1(1)) and 'shall take into account' the size of the majority in the referendum, percentage of voter participation, and 'any other matters or circumstances it considers to be relevant' (s 2(2)).[134] Whether this attempt to make clarity doubly clear was worthwhile remains to be seen.

**(h) Somaliland**[135]

Somaliland was a British protectorate that became independent on 26 June 1960 and 4 days later joined the former Trust Territory of Italian Somaliland

[130] *Reference re Secession of Quebec*, 1998 SCJ No 61, para 154, 115 ILR 537, 594–5.

[131] For comment see Rayfuse (1998) 21 *UNSWLJ* 834; Haljan (1999) 48 *ICLQ* 447; Whites (1999) 19 *NYLSJICLJ* 323; Choudry and Howse (2000) 13 *Can JL & Jur* 143.

[132] The history and politics of the matter have been addressed in an extensive literature: see, e.g., Jacobs, *Quebec and the Struggle over Sovereignty*; Williams, *International Legal Effects of Secession by Quebec*; Côte and Johnston, *If Québec Goes… The Real Cost of Separation*; Freeman and Grady, *Dividing the House: Planning for a Canada Without Quebec*; Young, *The Secession of Quebec and the Future of Canada*.

[133] Act to Give Effect to the Requirement for Clarity as Set Out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference, Statutes of Canada 2000, c 26.

[134] The Act has been criticized: e.g., Turp in Dahlitz (ed), *Secession and International Law*, 167, 172–5; and prompted the Quebec legislature to adopt its own version, an Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State, Statutes of Québec, 2000, c 46.

[135] See Kreijen, *State failure*, 66–73; Carroll & Rajagopal (1992) 8 *Am UJILP* 653; Kibble (2001) 15 *Int Rel* 5; Reno, *Somalia and Survival in the Shadow of the Global Economy* (Queen Elizabeth House Working Papers 100, 2003).

under an Act of Union. The different colonial traditions combined with tribal differences, and the Act of Union of 1960 proved difficult to implement. The English common law and the Indian Penal Code were in force in Somaliland; the Italian Code continued in the south. Economic differences also existed and were exacerbated by a lack of infrastructure connecting the regions.[136] Though measures were taken to address these problems, including a UN Consultative Commission for Integration, distinctions between the parts of the country remained.[137] The appearance of hundreds of thousands of refugees in the north after the war of 1977 to 1978 with Ethiopia over the Ogaden worsened north–south relations, and the eventual decision by the Government to seize Issaq lands and transfer these to refugees triggered a northern resistance, the Somali National Movement (SNM).[138] Some 50,000 Issaq civilians were estimated to have been killed during the civil war.[139] A much larger number fled to Ethiopia or were internally displaced.[140]

Said Barre, the president of the last Government to control the country as a whole, fled the capital, Mogadishu, in early 1991. The factions that had opposed the Government and driven it to collapse were unable to replace it.[141] Following an assembly of northern Somali clans, the 'Republic of Somaliland' was declared independent on 17 May 1991.[142] A provisional constitution was adopted in February 1997 and, following a referendum, a definitive constitution on 31 May 2001,[143] Article 1 of which provides as follows:

1. The country which gained its independence from the United Kingdom of Great Britain and Northern Ireland on 26th June 1960 and was known as the Somaliland Protectorate and which joined Somalia on 1st July 1960 so as to form the Somali Republic and then regained its independence by the Declaration of the Conference of

[136] Lewis, *The Modern History of Somaliland: From Nation to State*, 161–78. See also Cabdisalaam, *The Collapse of the Somali State* (rev edn).

[137] Metz (ed), *Somalia: A Country Study*, 26–8. These included separate Supreme Court chambers to deal with matters arising from the former Italian and British territories.

[138] Lewis, *Blood and Bone: The Call of Kinship in Somali Society*, 179; Hashim, *The Fallen State: Dissonance, Dictatorship and Death in Somalia*, 110.

[139] Bradbury, *Somaliland*, 11; Teutsch, *Collapsing Expectation: National Identity and the Disintegration of the State of Somalia*, 51–3; Hashim, *The Fallen State*, 113–15.

[140] Besteman, *Unraveling Somalia: Race, Violence, and the Legacy of Slavery*, 16–17 with citations.

[141] The facts are recited in *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA* [1993] QB 54, 56–7 (Hobhouse J). See also letter of 19 March 2004 of German Foreign Ministry (Bürgerservice, Gz: 040–209 06/2), indicating that legal documents originating in Somalia cannot be recognized in Germany because of 'collapsed State structures'; and judgment of 5 January 2004, 4 UE 1308/99.A (Hesse Administrative Court, Frankfurt), indicating that there exists no 'State or State-like power' in central or southern Somalia.

[142] Metz, *Somalia: A Country Study*, 169–70; Bradbury, *Somaliland*, 19.

[143] See S/2001/963, 11 October 2001; Gordon, (1999) 1 *U Penn JCL* 528, 575–83. See also www.somalilandforum.com/somaliland/constitution/revised_constitution.htm.

the Somaliland communities held in Burao between 27th April 1991 and 15th May 1991 shall hereby and in accordance with this Constitution become a sovereign and independent country known as 'The Republic of Somaliland'.

The territory of the Republic is defined as 'the same area as that of the former Somaliland Protectorate'.[144]

It is said that from 1993 onward, a Somaliland government has functioned effectively in the territory, restoring and maintaining public services and infrastructure.[145] The port of Berbera in Somaliland became the chief entry point for international aid to Ethiopia, as well as local aid.[146] The UN Secretary-General has described conditions in Somaliland, by and large, as 'calm', in contrast to conditions elsewhere in Somalia, which 'can be described as anarchic'.[147] A German court conveniently determined in 2003 that the Republic of Somaliland is a 'State' for purposes of asylum law.[148] But the stability of Somaliland is fragile. An Australian court, in an asylum appeal in 1999, considered the stability of Somaliland:

[T]he Tribunal did not consider whether the fluid situation it described (even if relatively stable by Somali standards), might change so as to expose Ms Jama to a real chance that she would suffer serious harm by reason of her clan membership . . . [T]he Republic of Somaliland in 1997 had rejected the so-called Sodere agreement which called for the reunification of Somalia. It was under pressure from other Somali factions to renounce its bid for secession. In these circumstances, bearing in mind that the relative stability in north-west Somalia involved 'continuing skirmishes' between clan fighters, it might have been thought that the prevailing conditions were not guaranteed to continue unchanged.[149]

[144] www.somalilandgov.com.

[145] *Hagi-Salad v Ashcroft*, 359 F 3d 1044, 1046 (8th Cir 2004, Loken CJ). The establishment and maintenance of regular public institutions is noted in detail in the judgment of 30 October 2003, 4 UE 4952/96.A (Hesse Administrative Court, Kassel). But compare the position taken by the Federal Administrative Court (Germany) that Somaliland did not meet the threshold for effective control necessary to impute responsibility to the Somaliland government: 'differences between the clans supporting the "government" in the West and the clans, predominant in the East rejecting the authority of the government, means that there is no police and administration, which can provide a valid State monopoly on violence in the entire region of the Republic of Somaliland.' Decision of 15 April 1997, 9 C 15.97, 104 BverwGE 254, 258 (1997).

[146] See, e.g., S/2002/189, 21 February 2002, para 29 (Somaliland safe for UN relief programmes); S/2005/89, 18 February 2005, paras 48, 57.

[147] S/2000/1211, 19 December 2000, para 34. See also S/2001/1201, 25 October 2002, para 55.

[148] Judgment of 30 October 2003, 4 UE 4952/96.A (Hesse Administrative Court, Kassel). The Court indicated that the continuing border dispute between Somaliland and Puntland did not qualify the status of Somaliland.

[149] *Ministry of Immigration & Multicultural Affairs v Jama* [1999] FCA 1680 (para 29). To similar effect *Ministry of Immigration & Multicultural Affairs v Haji Ibrahim* [2000] HCA 55, 204 CLR 1, 36 (Gleeson CJ).

Throughout the period since the declaration of independence, Somaliland officials have made clear their position that the territory is not part of Somalia and have rejected proposals for a single government over the entire territory of Somalia.[150] According to the UN Secretary-General, Somaliland 'has maintained a high degree of autonomy' at least since 1996.[151] But no third State has recognized the independence of Somaliland, despite a wide range of contacts and visits. The Court of Auditors of the European Communities assessed a decision by the Commission to appropriate aid to restore customs and tariff institutions at the port of Berbera in Somaliland in the following terms: 'The Commission should have been more cautious before committing itself to revenue-generating projects under the present conditions as Somaliland, where the port is located, has not been internationally recognised as an autonomous State.'[152] While expressing no view on the Somaliland claim to independence, the UN Secretary-General has indicated the need for an 'expanded United Nations role' in 'assisting in the effort to address the issue of Somaliland.'[153]

### *(iii) Summary of post-1945 practice*

To summarize, outside the colonial context, the principle of self-determination is not recognized as giving rise to unilateral rights of secession by parts of independent States. Self-determination outside the colonial context is primarily a process by which the peoples of the various States determine their future through constitutional processes without external interference. Faced with an expressed desire of part of its people to secede, it is for the government of the State to decide how to respond, for example by insisting that any change be carried out in accordance with constitutional processes. In fact no new State formed since 1945 outside the colonial context has been admitted to the United Nations over the opposition of the predecessor State.

State practice since 1945 shows the extreme reluctance of States to recognize or accept unilateral secession outside the colonial context. That practice has not changed since 1989, despite the emergence during that period of twenty-three new States. On the contrary, the practice has been powerfully reinforced. Of the new States which have emerged since 1945 outside the context of decolonization, only one case may be classified as a successful secession in the sense described above, viz Bangladesh. The indications are that the United Nations did not treat the emergence of Bangladesh as a case of self-determination despite good grounds for doing so, but rather as a *fait accompli* achieved as a

[150] S/2004/804, 8 October 2004, para 13.
[151] S/2002/198, 21 February 2002, para 28.
[152] Special Report no 4/2000, (2000) OJ C 113/1, para 83.
[153] S/2005/89, 18 February 2005, para 82.

result of foreign military assistance in special circumstances. The violence and repression engaged in by the Pakistan military made reunification unthinkable, and in effect legitimized the creation of the new State. In all other cases which might otherwise be classified as unilateral secession (Senegal, Singapore, the Baltic States and Eritrea) the consent of the relevant parties was given before independence was externally recognized as accomplished, and the process was accordingly not unilateral.[154] The key feature in the cases of Senegal, Singapore and Eritrea was that separation was expressly agreed to by the parties directly concerned. With the Baltic States, the essential rationale was the recovery of independence forcibly suppressed,[155] but even so, considerable importance was attached to the indication of consent given by the State Council of the Soviet Union.

A second group of cases involved States in Eastern and Central Europe immediately after the collapse of communism (Soviet Union, Yugoslavia, Czechoslovakia).[156] With the exception of Yugoslavia, the emergence of the constituent units of these States took place on a basis of agreement by those concerned, and international recognition followed upon that agreement. The position of Yugoslavia was different, but the articulated basis for the European and international response to the outbreak of violence and armed conflict in Yugoslavia was that this was inevitably producing the dissolution of Yugoslavia as a matter of fact. Neither the European Union nor the United Nations proclaimed that the peoples of Yugoslavia had a prior right to secede by virtue of the principle of self-determination. On the contrary the emergence of the constituent republics was treated as a consequence of the dissolution of Yugoslavia, and early international recognition was seen (rightly or wrongly) as a way of containing the violence and limiting the issues to be resolved.

By contrast, attempts at unilateral secession continue to occur. Where the government of the State has maintained its opposition to the unilateral secession such attempts have gained virtually no international support or

[154] In each of these cases the territory concerned had been either an independent State or a separate colonial territory to which the principle of self-determination had expressly applied. In each case the exercise of self-determination had either misfired (Senegal, Singapore) or been suppressed (Baltic States, Eritrea). But the pattern is incomplete and selective: the separate colonial territory of Somaliland has not been treated in the same way.

[155] This is one of the only cases since 1989 in which the rationale for admission to the United Nations was expressly spelled out by the Security Council at the time it recommended admission to the United Nations. The President of the Council stated, 'The independence of the [Baltic States] was restored peacefully, by means of dialogue, with the consent of the parties concerned, and in accordance with the wishes and aspirations of the three peoples': *SCOR*, S/PV/3007, 12 September 1991 (Mr Merimée (Fr); S/23021, 11 September 1991. In nearly all other cases the recommendation for admission was made in purely formal terms.

[156] Cf Wildhaber (1995) 33 *Can YBIL* 1, 12–13.

recognition, and this has been true even when other humanitarian aspects of the situation have triggered widespread concern and action. The strongest example of this is Somaliland, which has maintained its *de facto* independence for a considerable period in face of opposition and eventual disintegration of the central authorities. In a sense the absence of a recognizable government at national level has hindered the authorities in Somaliland in their quest for independence. There has been no effective government in Mogadishu to deal with on the subject of, or even to acquiesce in, the independence of Somaliland, and third States have not taken any initiative to press the matter to a conclusion, as was done in the former Yugoslavia. The notion of a *de facto* regime has been pressed to its ultimate—and Somaliland is not yet a State.

Thus there is a common pattern of international responses to unilateral secession and threats of such secession in the non-colonial context, a pattern which has normative significance. This may be summarized as follows:

(1) There is strong international reluctance to support unilateral secession or separation, and there is no recognition of a unilateral right to secede based merely on a majority vote of the population of a given sub-division or territory. In principle, self-determination for peoples or groups within the State is to be achieved by participation in its constitutional system, and on the basis of respect for its territorial integrity.

(2) In many cases referenda conducted in territories wishing to secede have returned very substantial majorities in favour (in the range of 65–99%). But even in cases where there is a strong and continued call for independence, it is a matter for the government of the State concerned to consider how to respond.

(3) Even in the context of separate colonial territories, unilateral secession was the exception. Self-determination was in the first instance a matter for the colonial authority to implement; only if it was blocked by the colonial authority did the United Nations support unilateral secession. Outside the colonial context, the United Nations is extremely reluctant to admit a seceding entity to membership against the wishes of the government of the State from which it has purported to secede. There is no case since 1945 where it has done so. Where the parent State agrees to allow a territory to separate and become independent, the terms on which separation is agreed between the parties concerned will be respected, whether it involves continued association with that State (Faroes) or emergence to independence (Eritrea). If independence is achieved under such an agreement, rapid admission to the United Nations will follow. But where the government of the State concerned has maintained its opposition to an attempted unilateral secession, such secession has in modern practice attracted virtually no international support or recognition.

(4) This pattern is reflected in the so-called 'safeguard' clause to the Friendly Relations Declaration of 1970, as restated by the 1993 Declaration of the Vienna World Conference on Human Rights (set out in Chapter 3). In accordance with this formula, a State whose government represents the whole people of its territory on a basis of equality complies with the principle of self-determination in respect of all of its people and is entitled to the protection of its territorial integrity. The people of such a State exercise the right of self-determination through their participation in the governmental system of the State on a basis of equality. The correlative is that a State which is governed democratically and respects the human rights of all its people is entitled to respect for its territorial integrity.

(5) These propositions apply to secession movements within independent States, even in cases where the State itself may be in the process of dissolution. However, there is a distinction between cases of unilateral secession and dissolution. If it becomes clear that the process of dissolution of the State as a whole is irreversible, the consent of the government of the predecessor State may cease to be required for the separation of its constituent parts. In such a case that government will itself be in the process of dissolution, and may have ceased to represent the former State. But there is a strong presumption against dissolution, and the only case of successful separation under these circumstances is that of the constituent republics of the former Yugoslavia.[157]

(6) There is a distinct issue of internal self-determination, in the sense of the recognition of cultural identity and internal self-government for different groups or peoples within the State. But these developments do not affect the established rules and practices with respect to self-determination and the territorial integrity of States. They lend no support to the view that peoples within independent States have a unilateral right to secede.

## 9.4 Certain incidents of secession in international law

Certain incidents of secession in modern international law also require at least brief consideration.

### (1) Belligerency and insurgency in secession struggles

The role of the institution of belligerent recognition in nineteenth-century civil wars has been briefly discussed earlier in this chapter. It was an

[157] Apart from Somaliland, contrast the unsuccessful claims by constituent islands of the Comorian Republic to have formed new States in circumstances of substantial breakdown of the federal government: (1997) 101 *RGDIP* 1029; *Report of the Secretary-General: Emergency economic assistance to the Comoros*, 21 June 2000, A/55/92, paras 7–12. See also Chapter 14.

intermediate legal status, involving some legal capacity, but not equivalent to statehood. Other legal incidents of civil wars—the laws of war, intervention and the like—were at least notionally attached to recognition of belligerency, which was thus in theory a relatively monolithic and identifiable form of regulation. But this is no longer true, if it ever was. Recognition of belligerency assumed the existence of relatively stable territorial units contesting the war. Most civil wars in the modern period have been conducted as less centralized, less territorial guerrilla wars.[158] Even when civil war has been conducted from a more or less coherent territorial base, the unwillingness of metropolitan or central governments to accord insurgents any form of status, and the political delicacy of third State recognition of belligerency, have operated to internalize even prolonged civil wars.[159] There was no clear twentieth century case of recognition of belligerency: the result, it has been persuasively argued, has been the desuetude of recognition of belligerency.[160] Other candidates such as 'recognition of insurgency' have failed to establish themselves in practice or doctrine.[161] Instead, recognition of insurgents as the government (as in Spain) or as a new State (as in Biafra) has effectively replaced belligerent recognition—despite the prematurity of recognition in most cases.[162] Intervention on behalf of both parties—whether or not under the cover of recognition—has become a common phenomenon in civil wars of all types.[163]

If international law is effectively to regulate civil conflict, it must do so by regulating specific problems rather than through the medium of some more general legal status such as belligerency. Fortunately these problems are to a large extent outside the scope of this study, but some brief reference to the more important issues follows.

[158] Cf Higgins in Luard (ed), *International Regulation*, 172.

[159] Falk, *Legal Order in a Violent World*, 121.

[160] Oglesby, *Internal War and the search for Normative Order*; Falk, *Legal Order in a Violent World*, 124–5; Higgins in Luard (ed), *International Regulation*, 171.

[161] Cf, however, Castrén (1965) 5 *Indian JIL* 443; Lauterpacht, *Recognition*, 270–8; Chen, *Recognition*, 398–407; Verhoeven, *Reconnaissance*, 100–40.

[162] Recognition of insurgents as a government of a new State occurred for example in the Algerian, Indonesian and Guinea-Bissau conflicts. Other forms of recognition of groups (National Liberation Movements and the like) attempting to seize control of particular territory have evolved in practice. On national liberation movements see Klein (1976) 36 *ZfV* 618; Verhoeven, *Reconnaissance*, 140–67, Ronzitti, *Le guerre di liberazione nazionale e il diritto internazionale*; Bennouna, *Le consentement*, 159–70; Fisher (1975) 3 *Syracuse JILC* 221; Lazarus [1974] *AFDI* 173; Shaw (1983) 5 *Liverpool LR* 19; Cassese, *International Law in a Divided World*, 90–9; Wilson, *International Law and the Use of Force by National Liberation Movements*, 117–23, 138–46; Roth, *Governmental Illegitimacy in International Law*, 227–34.

[163] Kaplan in Rosenau (ed), *International Aspects of Civil Strife*, 92–121.

## (2) Application of international humanitarian law in internal conflicts

Under the old law of belligerent status, the laws of war applied to civil conflict when belligerency was recognized; before that point, the treatment of rebel forces in accordance with those rules, if it occurred, was a concession of the central government. With the decline of belligerency the problem of the application of general standards of conduct of war to civil wars has proved troublesome. Common Article 3 of the 1949 Geneva Conventions of the Laws of War provides for the application of certain minimum standards 'in the case of armed conflict not of an international character'.[164] Since secessionist regimes are *ex hypothesi* not signatories to the convention, the application of Article 3 has met with difficulties in practice:[165] moreover, its operation is limited to persons taking no active part in the hostilities. The status of combatants in a civil war is thus left to the limited mercy of the customary law and the discretion of the metropolitan government.[166] However, attempts have been made to extend the international laws of war (as distinct from the minimum protection of Common Article 3) to civil conflict. Article I(4) of Protocol I additional to the Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts (1977), extends the notion of international armed conflict to include 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.'[167] International criminal tribunals have also extended the scope of application of international humanitarian law in civil conflict—without reference to Article I(4) of Protocol I.[168] In the *Wall* Advisory Opinion, the International Court confirmed that international humanitarian law is applicable to the Israel–Palestine conflict, but did so on grounds relating to the participation of Egypt and Jordan in the 1967 War,

[164] 75 UNTS 32.

[165] Greenspan, *The Modern Law of Land Warfare*, 619–27; Umozurike (1971) 11 *Indian JIL* 205; Rubin (1972) 21 *ICLQ* 472; Zorgbibe, *La guerre civile*, 178–201; Moir, *The Law of Internal Armed Conflict*, 67–88; Zegveld, *The Accountability of Armed Opposition Groups in International Law*, 9–18.

[166] See also Nurick and Barrett (1946) 40 *AJ* 563; Baxter (1951) 28 *BY* 323, 333–8; Bierzanek 'Le statut juridique' in Ibler (ed), *Mélanges Andrassy*, 54; Abi-Saab (1972) 3 *Annales d'Études Internationales* 93; Lopez (1994) 69 *NYULR* 916, 933–5; Berman (2004) 43 *Col JTL* 1, 20.

[167] 1125 UNTS 3 (8 June 1977). See Forsythe (1975) 69 *AJ* 77; Sandoz, Swinarski, Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 1949*, 71–3; Green (1997) 3 *ILSAJICL* 493; Greenwood in Durham and McCormack (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law*; Berman (2004) 43 *Col JTL* 1, 21–2; Cullen (2005) 183 *Military LR* 66.

[168] See Greenwood (1996) 7 *EJIL* 265; Moir, *The Law of Internal Armed Conflict*, 135–60.

which resulted in the occupation by Israel of Gaza, the West Bank and the Old City of Jerusalem.[169]

### (3) Military and civil aid to seceding regimes

The question of legality of intervention in aid or opposition to a revolutionary or secessionary force is highly controversial. There is little agreement on a satisfactory and comprehensive regulation of intervention, but once again the matter is largely outside the scope of this study. The argument that, exceptionally, aid or intervention is permissible to liberation movements in self-determination territories has been referred to already. In all sorts of conflicts the lawfulness of providing food aid is coming to be recognized, even though this may involve dealing with breakaway regimes.[170]

### (4) Problems of continuity and commencement

In a situation of secession, an effective territorial entity can subsist for a lengthy period of time without any or with only a provisional legal status. If the entity subsequently establishes itself as a State, questions of commencement, continuity and responsibility arise. These issues are discussed in Chapter 15.

## 9.5 The former Palestine Mandate: Israel and Palestine

### (1) Historical introduction

The creation of the State of Israel in 1948 to 1949 presents a perplexing and important instance of international legal arguments adduced for and against the existence of States, initially Israel, subsequently Palestine. On the whole, neither side in the controversy has taken the position that the creation of the State of Israel was merely a question of fact,[171] and the State of Palestine has not yet become a fact as distinct from an aspiration. Complex legal arguments have been presented for a variety of positions, and these arguments retain their relevance in the more recent literature on the Middle East conflict.[172]

[169] ICJ Rep 2004 p 136, 171–7 (paras 86–116).

[170] See 'Guiding Principles on the Right to Humanitarian Assistance' (1993) 33 *IRRC* 519; and Additional Protocol I, Art 40, discussed in Sandoz, Swinarski and Zimmermann (eds), *Commentary on the Additional Protocols*, 816–29.

[171] But Abba Eban did so, arguing against a request for an advisory opinion of the International Court on the status of Palestine: *SCOR*, 340th mtg, 27 July 1948, 29–30.

[172] See, e.g., Alexander (1951) 4 *ICLQ* 423; Cattan, *Palestine, The Arabs and Israel*; Feinberg, *Arab Jurist's Approach*; Cattan, *Palestine and International Law*; Martin, *Le Conflit Israëlo-Arab*; Moore (ed), *The Arab-Israeli Conflict*. See also Kassim (1980) 9 *Denver JILP* 1; Collins (1980) 12 *Case Western*

Palestine was in 1914 an undivided part of the Ottoman Empire without separate status. It was occupied by British troops in 1917 and came to be disposed of as part of the post-war settlement. The difficulty in achieving such a settlement was that, by 1917, Britain had incurred conflicting obligations with respect to Palestine. In an exchange of notes with France in 1916 (referred to as the Sykes–Picot Agreement) it had been agreed that Britain and France would recognize an independent Arab State or confederation in the area, and arrangements had been made for division of influence and protection.[173] On the other hand, in a letter of 2 November 1917 Lord Balfour had stated, on behalf of the British War Cabinet, that:

> His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.[174]

In the event the latter, a somewhat ambiguous domestic political statement,[175] took priority over the former, and the Balfour Declaration was eventually incorporated in the Mandate for Palestine.

### *(i) The Mandate for Palestine*

Article 22 of the Covenant of the League of Nations of 1919 provided that 'certain territories detached from Turkey' could be 'provisionally recognized' as 'independent nations . . . subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone . . .'. By Article 95 of the Treaty of Sèvres, Turkey and the Allied and Associated Powers agreed:

> to entrust, by application of the provisions of Article 22, the administration of Palestine, within such boundaries as may be determined by the Principal Allied Powers, to a Mandatory to be selected by the said Powers. The Mandatory will be responsible for putting into effect the declaration originally made on the 2nd November 1917, by

*Reserve JIL* 137; Mallison and Mallison (1984) 1 *Palestinian YBIL* 36; Curtis (1991) 32 *Harv ILJ* 457; Falk and Weston (1992) 33 *Harv ILJ* 191. Dajani (1997) 26 *Denver JILP* 27; Imseis (2003) 44 *Harv JIL* 65; Grossman (2001) 50 *ICLQ* 849; Weiner (1999) 23 *Fordham ILJ* 230; Klieman, *Compromising Palestine*.

[173] 221 CTS 323. See also the MacMahon agreement of 24 October 1915: Cmd 5957 (1939).

[174] Cmd 5479 (1937) 22, and see generally Stein, *The Balfour Declaration*.

[175] Feinberg, *Arab Jurist's Approach*, 22–5 (but cf his earlier view in Moore *Digest*, vol I, 68–9 (1948)); Cattan, *Palestine and International Law*, 11–21 (who nevertheless argues for the invalidity of the Declaration); Rosenne (1968) 33 *Law & Contemporary Problems* 44.

the British Government, and adopted by the other Allied Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.[176]

Due to the revolution in Turkey, the Treaty of Sèvres was never ratified. Nonetheless the League Council proceeded to approve the terms of the British mandate on 24 July 1922.[177] The Mandate came into force on 29 September 1923, after signature but before ratification by Turkey of the Treaty of Lausanne, Article 16 of which merely provided that:

> La Turquie déclare renoncer à tous droits et titres, de quelque nature que ce soit, sur ou concernant les territoires situés au dela des frontières prévues par le présent Traité et sur les îles autres que celles sur lesquelles la souveraineté lui est reconnue par ledit Traité, le sort de ces territoires et îles étant réglé ou à régler par les intéressés . . . [178]

The Treaty of Lausanne made no reference either to Article 22 of the Covenant or to the Balfour Declaration.

The Mandate made special provision for the division of Palestine. By an amendment to the Mandate approved in November 1922, Britain was authorized to divide the territory into two, and to limit the application of the Balfour Declaration to the area to the west, excluding what was then referred to as Transjordan.[179] As described in the Palestine Order-in-Council of 1 September 1922, Transjordan consisted of 'all territory lying to the east of a line drawn from a point two miles west of the town of Aqaba on the Gulf of that name up the centre of the Wadi Araba, Dead Sea and River Jordan to its junction with the Yarmuk: hence up the centre of that river to the Syrian frontier.' Self-determination for the residents of Transjordan was achieved in stages, beginning with a Treaty between Great Britain and the Emir Abdullah of 20 February 1928,[180] and culminating in a Treaty of Alliance of 22 March 1946

[176] 113 BFSP 652 (10 August 1920). Article 96 further provided that 'The terms of the mandates in respect of the above territories will be formulated by the Principal Allied Powers and submitted to the Council of the League of Nations for approval.' By Article 97 Turkey agreed to accept such decisions.

[177] See LNOJ vol 3, No 8 Pt II (August 1922) 798–802, 817–25. The only dispute related to Art 14 (the Holy Places): there was also some discussion of procedure. For the text of the Mandate see ibid, 1007.

[178] 117 BFSP 543.

[179] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep 2004 p 136, 165 (para 70).

[180] Agreement between the United Kingdom and Transjordan respecting the Administration of the Latter, Jerusalem, 20 Feb 1928, 128 BFSP 273; UKTS No 7 (1930).

that marked the full independence of Jordan.[181] Although various links existed between Jordan and the Occupied Territories (not limited to the period 1949 to 1967 when Jordan administered the West Bank), the effect of the separation was that issues of self-determination in respect of Palestine properly so called, that is, the area west of the 1922 line, had thereafter to be separately resolved. The 1994 Peace Treaty between Israel and Jordan confirms that the western boundary of Jordan is the line laid down in 1922, but left other issues to be resolved as part of the Permanent Status Negotiations.[182]

### *(ii) The abandonment of the Mandate and its aftermath*

On 18 February 1947 the British Foreign Secretary announced that Britain was referring the question of Palestine to the United Nations, and that Britain would withdraw its administration by 1 August 1948.[183] On 29 November 1947, the General Assembly, by a vote of thirty-three (France, USA, USSR) to thirteen (including all the Arab States) with ten abstentions (China, UK, Yugoslavia), adopted resolution 181(II), incorporating a plan for the partition of Palestine into two States (Arab and Jewish), economic union between them and the internationalization of Jerusalem.[184] The Mandate was to terminate upon British withdrawal, and in any case not later than 1 August 1948.[185] The Zionist League declared its acceptance of the partition plan, but it was rejected by the Arab States and organizations. The Security Council failed to take the enforcement measures requested by the Assembly in resolution 181 (II),[186] and various alternative plans were mooted.[187] On 14 May 1948 the Assembly at its Second Special Session appointed a United Nations Mediator in Palestine, *inter alia*, to 'promote a peaceful adjustment of the future situation of Palestine', and relieved the Special Commission for Palestine—which, under resolution 181 (II) had been intended to take over the administration of Palestine prior to the establishment of the two partition States—of its

[181] Treaty of Alliance between the United Kingdom and Transjordan, with Annex and Exchange of Notes, London, 22 Mar 1946, 146 BFSP 461; UKTS No 32 (1946).

[182] Israel–Jordan Treaty of Peace, Arava/Araba Crossing Point, 26 Oct 1994, 34 ILM 43 (1995). See Al Madfai, *Jordan, The United States and the Middle East Peace Process 1974–1991*; Lukacs, *Israel, Jordan and the Peace Process*; Weiner (1999) 23 *Fordham ILJ* 230; Klein (2002) 9 *ILSA JICL* 211.

[183] 433 *HC Deb* (18 February 1947) cols 987–8; *GAOR*, 1st Sp Sess (2 April 1947) 193; UN Doc A/286 (1947). The relinquishment of the Mandate was authorized by the Palestine Act 1948 (UK) s 1.

[184] About which see *Wall Advisory Opinion*, ICJ Rep 2004 p 136, 165–6 (para 71).

[185] Plan of Partition with Economic Union, Part IA, Art 1.

[186] *SCOR* 263rd mtg, 5 March 1948, 38–44; S/691.

[187] E.g., the United States argued for a time in favour of a temporary UN Trusteeship over Palestine: ibid, 166–7 (271st mtg, 19 March 1948), a proposal described by the Jewish Agency as an 'amazing reversal': ibid, 169.

responsibilities.[188] On the same day a 'Provisional State Council' proclaimed the independence of Israel.[189] Ten minutes later the United States accorded it unqualified recognition.[190] The Mandate terminated at midnight with the formal British withdrawal. On 15 May 1948 the armed forces of surrounding Arab States invaded Palestine. Ceasefire agreements were signed in 1949 between the various belligerents,[191] and Israel was shortly thereafter admitted to the United Nations.[192] The territory under Israeli control at the ceasefire was considerably more extensive than its proposed territory under the partition resolution. The remaining territory of pre-1948 Palestine was occupied by Jordan (the West Bank, East Jerusalem) and Egypt (the Gaza Strip). This occupation lasted until 1967, when, as a result of the Six Day War, Israel occupied those territories.[193]

In terms of these events, questions arise both with respect to the State of Israel and an existing or putative Palestinian State. The two require separate treatment and will be discussed in turn.

## (2) The creation of the State of Israel

As to Israel, many different legal positions have been taken. First, it is arguable that the Mandate for Palestine was null and void because of its inconsistency with Article 22 of the Covenant. But proponents of this view[194] have not been very clear as to the consequences of the nullity of the Mandate, and some indeed have tended to argue as if its nullity made no legal difference to the events of 1947 to 1949.[195] But the existence of Jews as a separate group in Palestine had its basis in the Mandate, which incorporated the Balfour

[188] GA res 186 (S-2), 14 May 1948 (adopted 31–7:16). The only reference to GA res 181(II) was in Part III, effectively terminating the Palestine Commission's responsibilities under that resolution.

[189] Proclamation of Independence of the State of Israel, 14 May 1948: *Laws of the State of Israel I*, 3; Bentwich, *Israel*, 206–8. The Provisional Government regarded itself as acting 'by virtue of the natural and historic right of the Jewish people and of the Resolution of the General Assembly of the United Nations'.

[190] Whiteman, 2 *Digest* 167–9.

[191] Armistice Agreements were signed with Egypt, 24 February 1949, 49 UNTS 252; Lebanon, 23 March 1949, 49 UNTS 288; Jordan, 3 April 1949, 49 UNTS 304, and Syria, 20 July 1949, 49 UNTS 328. See Rosenne, *Israel's Armistice Agreements with the Arab States*; Bar-Yaacov, *The Israel-Syrian Armistice*.

[192] SC res 70 (1949), 4 March 1949 (9–1 (Egypt):1 (UK)), GA res 273(III), 11 May 1949 (37–12:9 (UK)).

[193] See especially Playfair (ed), *International Law and the Administration of Occupied Territories*, and for a range of other views on the status of the occupied territories, Blum (1968) 3 Israel LR 279; Lauterpacht (1952) 6 *ICLQ* 513; Cattan, *Palestine and International Law*, 78–82; Roberts (1990) 84 *AJ* 44. Israel regards itself as belligerent occupant of territories captured since 1949, apart from Jerusalem: *Military Prosecutor v Bakhis* (1968) 47 ILR 484, a position confirmed by the International Court in the *Wall Advisory Opinion*: ICJ Rep 2004 p 136, 166–67 (paras 74–8).

[194] Cattan, *Palestine and International Law*, 25–33, 74.

[195] Elaraby (1968) 33 *Law & Contemporary Problems* 97, 98–9.

Declaration and authorized the Mandatory to establish a Jewish National Home in Palestine. If the Mandate was invalid, then the notion of a Jewish 'nation' in Palestine was illegitimate, and that the principle of self-determination, applied to the Mandates by Article 22, would only have concerned the Arab majority resident in the territory. On this basis the creation of Israel would have been an outright violation of self-determination, quite apart from the legitimacy of the terms of partition themselves.[196] A further consequence would presumably be the invalidity of resolution 181 (II).

Assuming that the Mandate was valid, a second possible view is that British abandonment of Palestine and the termination of the Mandate left Palestine as *terra nullius* open to occupation by any State, existing or to be created. This was one justification given for the Arab invasion after 15 May 1948.[197]

But thirdly, assuming the territory was not *terra nullius*, it is arguable that the General Assembly resolution constituted a binding arrangement for the future of the territory. This view was taken by the Soviet Union[198] and by the United Nations Secretary-General.[199] A consequence of this argument, presumably, would be that Israel was only legitimately created with respect to its partition territory but that, on the other hand, immediate recognition of Israel was justified.

Fourthly, it is arguable that, although the partition resolution was not binding it constituted a valid legal authorization to the parties concerned to take steps to achieve the purposes of the resolution; that in establishing Israel the Provisional Government acted on that authorization and that Israel was accordingly legitimately created, at least with respect to its partition territory.[200]

[196] 1967 Seminar of Arab Jurists; Moore, 304–7, Cattan *Palestine and International Law*, 25–33: *contra* Feinberg *Arab Jurist's Approach*, 66–9.

[197] The Arab States referred to the 'vacuum created by the termination of the mandate and the failure to replace it by any legally constituted authority': S/745 (1948). Cf *The Fjeld* (Alexandria Prize Court, 1950) 17 ILR 345, 347; Martin, *Le Conflit israelo-arabe*, 41–4.

[198] See for example the USSR view as enunciated during the admission debates: 'The State of Israel has been created and exists in accordance with a resolution passed in the General Assembly on 29 November 1947. It is therefore incorrect to assert that its territory is not defined. Its territory is clearly defined by an international decision of the United Nations . . .' *SCOR*, 3rd yr, 383rd mtg (2 December 1948) 22; reaffirmed, 384th mtg (15 December 1948) 20–1. Israel also described the resolution as 'the only internationally valid adjudication on the question of the future government of Palestine': *GAOR* 3rd yr, supp 11, Annex I, 24; A/648 (1948). Cf the reference to the resolution as a 'document having validity under international law' in *AG of Israel v El-Turani* (Haifa D Ct, 1951; aff'd S Ct, 1952) 18 ILR 164, 167: 'The State of Israel . . . includes at least the territories allocated to it under the UN decision . . .'

[199] Cordier and Foote (eds), *Public Papers of the Secretaries-General of the United Nations I*, 106–15.

[200] Alexander (1951) 4 *ILQ* 423, 427–8 describes the resolution as an 'assignment of the territory by the UN, though the procedure prescribed was disregarded.' Cf the more guarded position of Lauterpacht, *Jerusalem and the Holy Places*, 16. The Jewish Agency argued that, although the resolution was originally only a recommendation, steps taken to implement it had converted it into a binding arrangement, citing the case of Trieste: *SCOR* 262nd mtg, 5 March 1948, 11–12.

Fifthly, it is arguable that the Partition Resolution, although it was not otherwise complied with, effectively partitioned Palestine into two self-determination units, one for each of the peoples, Israeli and Palestinian; so that the independence of Israel with respect to its partition territory was an expression of its separate self-determination as to the area allocated to it in the resolution. The consequence of this argument would presumably be to legitimize the immediate recognition of Israel, despite doubts as to its effectiveness or stability at that time.

Sixthly, assuming that Palestine in 1948 remained a single undivided self-determination unit, it is arguable that the creation of Israel occurred through secession from 'Palestine' as a whole. But even so, it may be that the secession of Israel was not a violation of self-determination, because of the provisions of the Mandate recognising the 'Jewish national home', and the relative population of Jews and Arabs in Palestine at the time.[201] On that view, the criterion for statehood would be the normal rules of effectiveness and stability. Arguably the immediate recognition of Israel was premature, but the prematurity would have been cured by subsequent events, and in particular by the effective establishment of the State of Israel within its ceasefire territory. But another view is that the secession was a violation of self-determination by a minority of the whole population of Palestine. In such a case, either rigorous criteria of permanence and stability should have been applied, or it might even have been the case that the rule precluding recognition of States brought into existence in violation of self-determination applied, so that Israel was not a State at all, and was accordingly illegally recognized and improperly admitted to the United Nations.[202]

It must first of all be noted that some of the arguments outlined above assume the existence of rules which have only been established in international law since 1948. The principle of the intertemporal law requires that events occurring at a particular period be judged by the law applicable at that time. Arguments which rely on legal developments not accepted at the time—for example, the principle that self-determination is an overriding criterion of statehood, permitting early recognition of self-determination movements, and precluding the statehood of any entity created in violation of self-determination—may therefore be misplaced. Nonetheless there is value in assessing the case of

[201] On 1 May 1948, Jews constituted about 42% of the population of Palestine: they were allocated 56% of its area, including the barren area of the Negev: Elaraby (1968) *Law and Contemporary Problems* 102.

[202] Cattan, *Palestine and International Law*; Seminar of Arab Jurists (1967) in Moore, 383; El-Farra (1968) 33 *Law and Contemporary Problems* 68–70; *contra* Feinberg, *Arab Jurist's Approach*, in Moore, 436.

Israel in accordance with the present rules relating to the acquisition of statehood and territorial status, since in 1948 those rules were already emerging, and since the definitive formulation of a particular rule may well await a situation requiring its application.

A second preliminary observation is that the principle of self-determination, in its application to Palestine, is not one of these doubtful or later-developed rules. It has been argued that since self-determination was not a general rule or principle of international law in 1920 or in 1948, it can have had no application to Palestine at either period.[203] But the Covenant and (subject to one point) the Mandate specifically applied the principle of self-determination to the territory of Palestine. This position was, at least by implication, reaffirmed by Article 80 of the Charter.[204] Palestine in 1948 constituted a self-determination unit in international law.

### *(i) The validity of the Mandate for Palestine*

The validity of the Palestine Mandate has been challenged on three distinct grounds: as a violation of the right to self-determination or of the 'sovereignty' of the existing inhabitants of Palestine; as a violation of the sovereignty of Turkey and as a violation of Article 22 of the Covenant. The underlying difficulty with each of these arguments is the explicit recognition of the Jewish people's right to form a homeland in Palestine pursuant to the Balfour Declaration, a statement never consented to by the Ottoman Empire but nonetheless incorporated into the Mandate. In effect the Mandate constituted a trust over the same territory, the beneficiaries of which were two distinct and predictably antagonistic peoples.

If this constituted a violation of the rights of the existing (overwhelmingly Arab) population of Palestine,[205] the difficulty is that the people of Palestine were not then 'sovereign' with respect to their territory;[206] nor were they, prior to the Mandate, a subject of international law. There was in 1920 no general right of self-determination in international law. At the Versailles Conference,

[203] Martin, *Le Conflit israelo-arabe*, 49–50; Feinberg, *Arab Jurist's Approach*, 13–14 and in Moore, 424–30. cf Lauterpacht, *Jerusalenm and the Holy Places,* 17–18.

[204] Article 80, the so-called 'conservatory clause' was 'laboriously negotiated' at the San Francisco Conference: see 17 *UNCIO* 312. Various Egyptian and Syrian proposals, though expressed in general terms, related to the Palestine situation. A Syrian amendment limited the rights of 'peoples' under Art 80 to peoples in the territories concerned; this was criticized as seriously weakening 'certain rights' and defeated (5–26): 10 *UNCIO* 487, 610–11.

[205] Cf Bassiouni and Fisher in Moore, 646–7.

[206] Feinberg, *Arab Jurist's Approach*, 10–14, 18–21; *contra* Cattan, *Palestine and International Law*, 64–73.

that principle was applied by way of exception to mandated territories[207] but it did not apply independently of Article 22 of the Covenant.

If it is argued that because Turkey failed to ratify the Treaty of Sèvres, which incorporated both the Covenant and the Balfour Declaration, but instead merely relinquished title in general terms, the application of the Balfour Declaration to Palestine was in some way unlawful,[208] the response is that Article 16 of the Treaty of Lausanne implied Turkish recognition of the Palestine Mandate, which had already been publicly approved by the Council.

A third ground of objection is more substantial. Article 22 of the Covenant expressly provided, as a basic principle, that 'the well-being and development of such peoples [i.e. the inhabitants of the territories concerned] form[ed] a sacred trust of civilization . . .', and it is clear that this language referred to the actual inhabitants of mandated territories. This was especially so in the case of 'certain communities formerly belonging to the Turkish Empire': only the Arab inhabitants of Palestine fitted this description.[209] The provision for an entirely distinct introduced population of Palestine, contrary to the interests and the wishes of its existing inhabitants, thus contradicted Article 22,[210] however imprecise the language of that Article.

But if the incorporation of the Balfour Declaration in the Mandate contradicted both the political rights of the inhabitants and the terms of Article 22 itself, it is also clear that the League, confronted with this position, approved the Mandate and affirmed its validity throughout, and this position was affirmed in turn by Article 80 of the Charter.[211] This is an insuperable barrier to arguing that the Mandate was invalid as a matter of international law. Indeed, by analogy with termination of mandate and trusteeship agreements, it is probably the case that the approval of the Mandate by the appropriate body had 'definitive legal effect', so that no other body could question its validity.[212] Certainly the Permanent Court in the *Mavrommatis* case showed no inclination to do so, although the Mandate was the basis for its jurisdiction in the case,[213]

[207] Calogeropoulos Stratis, *Le Droit des Peuples à disposer d'Eux-mêmes*, 86–8, and see Chapter 12.

[208] Cattan, *Arab Jurist's Approach*, 66–7; cf Feinberg, *Palestine and International Law*, 15–16.

[209] Feinberg argues unconvincingly from the term 'certain communities' in Art 22 that Palestine was not necessarily contemplated as an A Mandate: Moore, *Digest*, vol I, 420–1.

[210] Wright, *Mandates under the League*, 62, 232; but cf Bentwich, *The Mandates System*, 42–7 esp 43: 'The Insertion of the provisions regarding the national home in Palestine merely widens the scope of the [Mandate] and does not affect the fundamental principles of the system as a whole . . .' See also Rigo Sureda, *The Evolution of the Right of Self-Determination*, 126–8.

[211] Thus petitions from Palestinian Arabs protesting the conflict between the Mandate and Art 22 were declared inadmissible: Wright, *Mandates under the League of Nations*, 119.

[212] Cf *Northern Cameroons Case*, ICJ Rep 1963 p 15, analysed in Chapter 12.

[213] *Mavrommatis Palestine Concessions*, PCIJ ser A no 2 (1924).

and even though it is settled that the Court should raise and consider, independently of the parties, any relevant objections to its jurisdiction.[214] Thus despite its inconsistency with Article 22, the Mandate for Palestine was valid; at any rate it was validated by the general practice of the members of the League, acquiesced in by those other States who were 'interested' in terms of Article 16 of the Treaty of Lausanne.[215]

### *(ii) Validity and legal effects of the Partition Resolution*

Three views of the validity and legal effects of GA resolution 181(II) are possible. It might have been *ultra vires*; it might have been only a recommendation or it might have constituted a valid and effective disposition of Palestine, at least to the extent of authorizing those concerned to implement it.

The view that the resolution was *ultra vires*[216] derives from a general implication as to the dispositive powers of the General Assembly. However, even earlier practice suggested that United Nations organs can make binding dispositions of territory in appropriate circumstances, pursuant to a delegation of power from States concerned or otherwise. This view has been twice reaffirmed, in the context of the Mandate system, by the International Court in the *Status* Opinion[217] and the *Namibia* Opinion.[218] There is no basis for treating the resolution as *ultra vires*.[219]

Indeed, in one respect at least it is clear that the resolution had definitive legal effect. A Mandatory could not by its own unilateral act resile from its responsibilities. Since the demise of the League any alteration in the basis for administration of a mandate has been held to require the approval of the General Assembly.[220] Britain relinquished the Mandate at midnight on 14–15

[214] Cf *Eastern Carelia Opinion*, PCIJ ser B no 5 (1923); *South West Africa Cases (Second Phase)*, ICJ Rep 1966 p 6. In the *Mavrommatis Case*, Judge Moore, dissenting, described a mandate as 'in a sense a legislative act of the Council': PCIJ ser A no 2, 69.

[215] Cf Wright, *Mandates under the League of Nations*, 12: 'However justified the Arab protest against the Balfour Declaration and the British Mandate may have been in 1919, the issues had become moot before 1947 because the legality of the conditions they established had been recognized by most states including the Arab states, for many years and had been confirmed in the . . . Charter (Article 80)'. See also Rosenne (1968) 48–9. In 1946 the Arab League seems to have accepted both the position of Britain as Mandatory and the propriety of reference of the problem to the UN: see USFR 1946/VII, 635–6.

[216] Brownlie, *Principles* (6th edn) 163–4; Cattan, *Palestine and International Law*, 42–56.

[217] ICJ Rep 1950 p 128. [218] ICJ Rep 1971 p 16.

[219] Kelsen, *The Law of the United Nations*, 195–7; Martin *Le Conflict israelo-arabe*, 50–1; Feinberg, *Arab Jurist's Approach*, 25–7 and in Moore, 434–50. Cf Wright, *Mandates under the League of Nations*, 15: 'In view of the Arab acceptance of the original partition proposal, of the general recognition of Israel as a State, and of its membership in the UN since May 1949, an objection to partition as such is probably not legally valid in 1968.'

[220] *Status of South West Africa Opinion*, ICJ Rep 1950 p 128.

May 1948; its action was legally effective by virtue of the Assembly's approval in resolution 181(II).

The vexed question is, however, the status of the substantive provisions of that Resolution, in particular the partition plan. It was responsibly argued at the time that the resolution was binding by virtue of the Assembly's own authority with respect to Mandates and of the referral of the Mandatory. Certainly, if the Mandatory and the Assembly had together determined upon the future disposition of the territory, that determination would have been legally effective (at least if it did not manifestly violate the essential conditions of the Mandate). Alternatively, the Assembly might have acquired sole dispositive authority over the Mandate, for example in the event of a valid revocation for material breach.[221]

But it is clear that neither of these conditions was fulfilled. In the first place, although Britain's unilateral abandonment of the Mandate might, in other circumstances, have constituted a material breach, it was necessary also that the Assembly act upon that breach by revoking the Mandate. This it did not do; on the contrary it affirmed the British decision to withdraw. But there was no concurrence between the Mandatory and the Assembly as to the future disposition of the territory,[222] nor was there any agreed intent to adopt the partition plan as anything else than a recommendation to the parties concerned.[223] The conclusion must be that the partition plan, though valid, was intended as no more than a recommendation.[224]

This conclusion is reinforced by the history of the resolution after 29 November 1947. Both the Security Council[225] and the United Kingdom[226] refused to enforce the partition plan, and various alternative schemes were

[221] As was held to be the case with the Mandate for South West Africa: *Namibia Opinion*, ICJ Rep 1971 p 16.

[222] Prior to 14 May 1948 the UK position was somewhat equivocal. On 12 December 1947, Foreign Minister Bevin referred to the impending 'transfer of power to the UN' (i.e. on 15 May): 445 *HC Deb* col 1389; and to the 'UN decision' on partition: ibid, col 1396. On 18 February 1948 he referred to the question of the Holy Places as being 'in the hands of the UN': 447 *HC Deb* col 1150. But on 10 June 1948 the Under-Secretary of State (Mayhew) stated that the argument that Resolution 181 was binding could not 'possibly be maintained': 451 *HC Deb* col 2667.

[223] Martin, *Le Conflict israelo-arabe*, 52–3.

[224] Eagleton (1948) 42 *AJIL* 397; Elaraby, *Law and Contemporary Problems*, 102–3; Wright, *Mandates under the League*, 14–15; Lauterpacht, *Jerusalem and the Holy Place*s, 20–1; Martin, *Le Conflict israelo-arabe*, 52–5. This view was also, it seems, that of the Arab States: *GAOR*, 2nd Sp Sess, 1st Comm, 22–3 (1948), cited by Halderman (1968) 53 *Law & Contemporary Problems* 78, 86.

[225] Cf Kahng, *Law, Politics and the Security Council*, 78–80; Halderman (1968) 53 *Law & Contemporary Problems* 78.

[226] Cf Bevin, 445 *HC Deb* col 1396 (12 December 1947): 'HMG are not going to oppose the UN decision. The decision has been taken . . . We have no intention of opposing that decision, but we cannot ourselves undertake, either individually or collectively in association with others, to impose that decision by force . . .'.

mooted. By 14 May 1948 it was clear that resolution 181 (II) could not be implemented, and resolution 186 (S-2) terminated the functions of the United Nations Commission on Palestine, appointing instead Folke Bernadotte as Mediator. The latter took the view that his function was not simply to implement the Partition Resolution but to attempt to find a proper and acceptable solution to the conflict, whether or not consistent with the resolution.[227] By 14 May 1948 the Assembly itself had, in effect, abandoned the partition plan as a whole.[228]

### *(iii) The creation of Israel (1948–9)*

It follows that, although the Israeli Declaration of Independence partly relied upon resolution 181 (II), Israel was not created either pursuant to an authoritative disposition of the territory, or to a valid and subsisting authorization.[229] But even if resolution 181 (II) had constituted such a disposition or authorization, it would have been difficult to argue that the creation of Israel occurred in compliance with it. At the time of the ceasefire Israel extended over substantially greater territory than that accorded it by the Partition Resolution. It was not created in the manner there laid down, and it did not comply with the prescribed conditions for protection of minorities, etc. Neither the Arab States (which attacked Israel) nor the Arab inhabitants of Palestine attempted to implement the resolution. No Arab State was created, nor was any effective regime for Jerusalem established. Israel was created without the consent of any previous sovereign and without complying with any valid act of disposition.

If Palestine in 1948 had become *terra nullius*, the creation of Israel would have been a case of original occupation. However, it is clear that this was not so. The category *terra nullius* applies only in limited circumstances, and does not apply to any territory inhabited by an organized population.[230] If Palestine had become *terra nullius* on 15 May, the invasion by the surrounding Arab States

[227] Cattan, *Palestine and International Law*, 75–6. This view was also tacitly accepted by the Security Council, which relieved the then Acting Mediator of any further responsibilities under Council resolutions upon the conclusion of the Armistice Agreements: SC res 73 (1949), 11 August 1949 (9–0:2 Ukraine, USSR).

[228] More recently, it has been inferred that res 181(II) might still have some continuing effect. Thus GA res 43/177 of 15 December 1988 recalled the resolution and noted 'the proclamation of the State of Palestine by the Palestine National Council in line with General Assembly resolution 181 (II) and in exercise of the inalienable rights of the Palestinian people.' GA res 48/158D, 20 December 1993, para 5 (c) stipulated that the permanent status negotiations should guarantee 'arrangements for peace and security of all States in the region, including those named in resolution 181 (II) of 29 November 1947, within secure and internationally recognized boundaries.' Thus the resolution continues to wield a certain influence.

[229] To the same effect Lauterpacht, *Jerusalem and the Holy Places*, 19; Elaraby, *Law and contemporary Problems*, 103–4; Feinberg, *Arab Jurist's Approach*, 36–8.

[230] *Western Sahara Advisory Opinion*, ICJ Rep 1975 p 12, 31–2, and see Chapter 6.

might arguably have been justified, but this view was not shared by the Security Council[231] or by commentators.[232]

Secession would thus appear to be the appropriate mode, and the question then becomes at what time Israel qualified as a seceding State in accordance with the criteria for secessionary independence discussed in this chapter. In applying these criteria Palestine should be regarded as a single self-determination unit. Resolution 181(II) did not purport to divide Palestine into distinct self-determination units, and even had it done so, Israel was not created within such a unit but on more extensive territory. The partition resolution merely recommended what was considered to be a legitimate mode of self-determination for Palestine as a whole.

The criterion for secessionary independence is thus not the 'qualified effectiveness' test applied to secession of a self-determination unit, but rather the stricter test of stable and effective government of territory. Israel must be considered to have met that standard by 24 February 1949, when the Egyptian-Israeli Armistice Agreement was signed. It is clear that this stricter criterion was applied by individual States[233] and by the United Nations in admitting Israel to membership.[234] United States recognition was correspondingly premature.[235]

[231] The Security Council repeatedly called upon the parties to accept a ceasefire and withdraw to their pre-war positions, a view inconsistent with the proposition that Palestine was then *terra nullius*.

[232] Martin, *Le Conflict israelo-arabe*, 55–9; Alexander (1951) 4 *ILQ* 423, 426; cf Cattan, *Palestine and International Law*, 77.

[233] Cf Bevin, 451 *HC Deb* col 2144 (9 June 1948): 'HMG do not consider that the recommendations voted by the General Assembly on 29 Nov 1947, can be invoked as imposing a legal obligation to recognize the Jewish State set up on 14 May. The resolution of 29 November instructed the UN Commission from the further exercise of its responsibilities. In these circumstances HMG will judge the Jewish State's case for recognition on its own merits according to the normal criterion of international law.' Cf ibid, col 2667 (10 June 1948).

[234] The various positions were reflected in the Council debates on Israel's application for admission. At its meeting on 2 December 1948, Jessup emphasized the *de facto* considerations: *SCOR* 3rd yr 383rd mtg (2 December 1948) 10–22. Malik repeated the Soviet view of the binding nature of res 181. On 15 December 1948 the British delegate referred to 'the obvious fact that the Jewish State is now in process of formation, and that it will continue to exist. At the same time, it must be admitted that the frontiers of the Jewish State are at present quite unsettled . . . in large and important areas . . .': ibid, 384th mtg, 14–15. The French approach was similar, although the doubt related to timing rather than substance: 'the existence of the State of Israel can now no longer be seriously challenged. As a result of the *de facto* situation . . . some time or other—and perhaps very soon—the State of Israel will have to be admitted to the UN': ibid, 385th/386th mtgs (17 December 1948) 16. The Canadian delegate agreed: ibid, 24–5. A French proposal for deferral for a month was rejected (6–0:5): ibid, 35, as also a British proposal for deferral *sine die* (4–0:7): ibid, 34, and a Belgian proposal for referral to the International Court (2–0:9): ibid, 36–7. The draft resolution recommending admission was rejected: 5–1:5. At a later meeting, however, the British delegate referred only to issues relating to Israeli compliance with UN resolutions: 4th yr, 414th mtg (4 March 1949) 2–3. The French position was also much clearer: 'now that the State of Israel is in existence, it feels that that State fulfils the obligations of the Charter and shows every sign of being a peace-loving State': 413th mtg (3 March 1949) 8. The Council recommended admission 9–1 (Egypt):1 (UK).

[235] In deciding upon immediate recognition, President Truman overrode State Department advice based on a legal opinion of 13 May 1948 by the legal adviser, EA Gross, which stated that, prior to the

This conclusion assumes that the principle of self-determination was not an obstacle to the statehood of Israel. If its creation had involved a violation of self-determination, it is arguable, applying the Rhodesian precedent *ex post facto*, that Israel should not have been recognized as a State at all. But at that time self-determination was not sufficiently well established as a principle of general international law to constitute a criterion for statehood, especially an overriding or peremptory criterion. And in any event, given the social and political situation in Palestine by that time, it was arguable that partition and the creation of two States was consistent with the principle of self-determination as applied to Palestine as a whole.[236] Certainly the General Assembly proceeded on that basis in adopting the Partition Resolution.

It must be concluded that Israel was effectively and lawfully established as a State by secession from Palestine in the period 1948 to 1949.[237] Its original territory was its armistice territory, not the partition territory.

### (3) The creation of the State of Palestine (1988–)[238]

If what has been said about the events of 1948 to 1949 is accepted, then Israel seceded from the mandated territory of Palestine, leaving its remaining territory subject still to the principles of the mandate. The mandate was certainly

establishment of a stable and effective government, recognition constituted 'an unwarranted interference in the affairs of the previously existing state': cited by Snetsinger, *Truman, the Jewish Vote and the Creation of Israel*, 108–9, 181. Cf Brown (1948) 42 *AJ* 620. Soviet recognition was extended on 17 May 1948.

[236] Martin, *Le Conflict israelo-arabe*, 50; Lauterpacht, *Jerusalem and the Holy places*, 17–18; cf Halderman (1968) 53 *Law & Contemporary Problems*, 88–9.

[237] The UN Mediator, Bernadotte, thought that Israel was securely established in September 1948: see Carnegie Endowment for International Peace, *Israel and the United Nations*, 88. In two cases, the Prize Court of Alexandria held Egyptian seizure of cargoes shortly after the termination of the Mandate justified by the belligerency existing between Egypt and Israel despite Egypt's non-recognition of Israel: *The Fjeld* (1950) 17 ILR 345; *The Flying Trader* (1950) 17 ILR 440. Israeli courts were, of course, bound by the Declaration of Independence to regard 15 May 1948 as the beginning of the existence of Israel: *Ziv v Gubernik* (S Ct, 1948), aff'd *el Kharbutli v Minister of Defence* (S Ct, 1949) 15 ILR 7. See also *AB v MB* (Tel Aviv DCt, 1951); *Oseri v Oseri* (Tel Aviv DCt, 1952) 17 ILR 110 (nationality).

[238] See the overview in *Efrat Ungar v Palestine Liberation Organization*, 402 F 3d 274, 284–9 (2005); and see also Boyle (1987–8) 4 *Pal Ybk* 15; Salmon (1988) 34 *AFDI* 37; Flory (1989) 93 *RGDIP* 385; Geesteranus (1989) 2 *Leiden JIL* 79; Prince (1989) 25 *Stanford JIL* 681; Salmon (1989) 5 *Pal Ybk* 48; Gowlland-Debbas (1990) 61 *BY* 135; Howley (1990) 8 *Dick JIL* 348; Lapidoth and Calvo-Goller (1992) 96 *RGDIP* 777; Bockel, (1994) 40 *AFDI* 261; Guarino, *La questione della Palestina nel diritto internationale*; McDowall, *The Palestinians: The Road to Nationhood*; Bockel (1995) 41 *AFDI* 32; Calvo-Goller (1995) 41 *AFDI* 53; Mouton (1996) 100 *RGDIP* 951; Dajani (1997) 26 *Denver JIL & Pol* 27; Bishara (1999) 28 *J Pal Stud* 5; Crawford in Goodwin-Gill (ed), *The Reality of International Law*, 95.

not terminated by the dissolution of the League of Nations.[239] Probably it was not terminated either by Britain's withdrawal in May 1948 or by the secession of Israel. The Partition Resolution only approved its termination on the assumption that the whole of Palestine (apart from Jerusalem) would become part of the envisaged Arab and Jewish States, but this did not happen. The Balfour Declaration had been accepted as incorporated in the Mandate, and the Jewish people accordingly had a right of self-determination in respect of post-1922 Palestine as a whole. But so too did the Palestinian people. Israel could be regarded as an expression of the principle of self-determination for the Jewish people of Palestine as at 1948, even though the Partition Resolution had not been implemented. But there was no equivalent expression for the Palestinian population. The implementation of their right to self-determination has been, from a legal as well as a political point of view, the key element in the conflict since then.

Self-determination, while it may and often does lead to statehood, is not the same thing as statehood. Yet it has been argued that the strong correlation between the two concepts, the evident desire of the Palestinians of the Occupied Territories for their own State, and the recalcitrance of Israel in recognizing their right of self-determination (a refusal associated with a policy of 'creeping expropriation' through the creation of further settlements in the Occupied Territories) taken together justify a form of 'prefiguring' of Palestinian statehood. If statehood is not just a question of fact, and if the rights of the Palestinian people are denied, why should not international law treat them as having that which they are entitled to have, their own State? Such thinking underlay the 'declaration of independence' made by the Palestinian National Council in 1988, on the basis of which the independence of Palestine was recognised by a numerical majority of United Nations Members. It underlies claims made now that the agreements between Israel and Palestine since 1993 have in effect acknowledged the international existence of Palestine, which could be nothing but a State.

### *(i) Palestine prior to the Oslo Accords: the 1988 Declaration*

In November 1988, the Palestinian National Council in response to the uprising in the occupied territories known as the *intifada* proclaimed 'the establishment of the State of Palestine on our Palestinian territory with its capital Holy Jerusalem'.[240] This Declaration was quite widely recognized by States although often in equivocal terms. In turn the General Assembly by resolution 43/177 of 15 December 1988 (adopted by 104-2 (Israel, USA) with 36 abstentions)

[239] *Status of South West Africa*, ICJ Rep 1950 p 128; *Namibia Advisory Opinion*, ICJ Rep 1971 p 16.

[240] Palestinian Declaration of Independence, 15 November 1988, A/43/827 (1988), para 10.

'acknowledge[d] the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988', described that Declaration as being 'in line with General Assembly resolution 181(II) and in exercise of the inalienable rights of the Palestinian people', and affirmed 'the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967'. In addition it decided that:

> the designation 'Palestine' should be used in place of the designation 'Palestine Liberation Organization' in the United Nations system, without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system, in conformity with relevant United Nations resolutions and practice . . .

No attempt was made, however, to recommend United Nations membership for Palestine.

According to its proponents,[241] Palestinian statehood in the period after 1988 is based on three propositions. First, having regard to the classical 'four elements constituent of a State', Palestine, under the provisional government of the Palestine Liberation Organization (PLO), is already a State in international law: 'all four characteristics have been satisfied by the newly proclaimed independent state of Palestine'.[242] Secondly, the General Assembly, whether as the successor to the League of Nations with respect to the mandate system or by virtue of the authority it exercised under the Partition resolution, had the authority to recognize the new State, and in its resolution 43/177 has 'essentially' done so, such recognition 'being constitutive, definitive, and universally determinative'.[243] Thirdly, other States, and in particular Israel and the United States, are bound to accept the new State, either because the international status of the Palestinian people had already been 'provisionally recognized' in Article 22 of the League of Nations Covenant, a position preserved by Article 80 of the Charter, or in the case of Israel because its acceptance of the Partition Resolution was a 'condition for its admission' to the United Nations.[244] These arguments call for a number of observations.

### *(ii) Alternative conceptions of statehood: Montevideo and other criteria*

First and foremost is the misconceived reliance on the Montevideo Convention formula as criteria for statehood. It is odd to see the Montevideo

[241] See, e.g., Boyle (1988) 7 *Scandinavian Journal of Development Alternatives* 25; Boyle (1990) 1 *EJIL* 301; and the response by Crawford (1990) 1 *EJIL* 307. See also Lapidoth and Colvo-Goller (1992) 96 *RGDIP* 777. [242] Boyle (1990) 1 *EJIL* 301.

[243] Ibid, 303. Boyle has, however, already stated that the Palestine National Council's Declaration of Independence was 'definitive, determinative and irreversible': ibid, 303. [244] Ibid, 304.

definition, which looks to the ostensibly separate elements of territory, permanent population, government and the capacity to enter into relations with other States, minutely examined in order to argue that a particular entity fits within those criteria when it self-evidently does not. Applying the Montevideo Convention in accordance with its terms, Palestine before 1993 could not possibly have constituted a State. Its whole territory was occupied by Israel which functioned as a government there and claimed the right to do so until further agreement. The PLO had never functioned as a government there and lacked the means to do so, given strong Israeli opposition. It is true that the Palestine National Council commands the allegiance of the overwhelming majority of the Palestinian residents of the occupied territories. But the Montevideo Convention treats statehood essentially as an existing state of affairs, as a matter of fact. As a matter of fact, despite the allegiance of the people, neither the PLO nor the Palestine National Council have been in a position to exercise governmental powers within the Occupied Territories. That they may have a right to do so—or, more accurately, that the Palestinian people may have a right that they do so—is beside the point. No doubt the Montevideo formula was drawn up at a time when the principle of self-determination was not generally recognised in international law, and when the implications of the nascent rule prohibiting the use of force between States had not been worked out. That makes it even odder to debate the statehood of entities such as Palestine in terms of the Convention's hackneyed formula.

Rather—as argued in Chapters 2 and 3 above—it is preferable to focus on the notion of State independence as a prerequisite for statehood. Essentially that notion embodies two elements: the existence of an organized community on a particular territory, exclusively or substantially exercising self-governing power, and the absence of the exercise by another State, and of the right of another State to exercise, self-governing powers over that territory.[245] From this perspective, the proposition that the absence of clearly delimited boundaries is not a prerequisite to statehood is axiomatic. Boundaries are the *consequence* of territory. But territory, in the context of statehood, is not 'something owned': it is the basis in space for the organized community which is the State. No doubt before 1993 the PLO directly and indirectly exercised great influence within the occupied territories, and commanded the general allegiance of its population. But this fell far short of what is required in terms of the first criterion, the existence of an organized self-governing community. It is true that Israel's governmental power and

[245] See also Grant (1999) 37 *Col JTL* 403.

authority over the Occupied Territories did not amount, for the most part, to a claim of sovereignty. According to relevant Security Council resolutions, moreover, such a claim of sovereignty must not be recognised. There is a substantial international consensus that the Palestinian people are entitled to form a State (subject to guarantees as to the security of the other States in the region). But none of this affects the point that, at least before 1993, they did not actually do so, under the generally accepted criterion of State independence.[246]

There are other conceptions of statehood under which different results might be reached. The most obvious alternative is the constitutive theory of recognition. According to this view an entity is a State if it is recognized as such by 'other States'. But as demonstrated in Chapter 1, the difficulty is that the constitutive theory leads to extreme subjectivity in the notion of the State, effectively destroying that which it seeks to define. There is no rule that majority recognition (outside the framework of admission to the United Nations) is binding on third States. Before 1993, Palestine was recognized as a State by over a hundred States, but it has never commanded anything like the level of quasi-unanimous support that would be required to establish a particular rule of international law to the effect that Palestine is a State.[247] In the absence of such a 'particular' rule, the constitutive theory leads inevitably to the proposition that another State is not bound to treat an entity as a State if it has not recognized it. Since the crucial actors here are the United States and Israel, which did not and still do not recognize Palestine as a State, the theory leads nowhere. In any event, there are compelling reasons for rejecting the constitutive theory, as seen in Chapter 1.

The second alternative would be to seek to take advantage of developments in international law—reviewed in Chapter 3—which have modified the conception of statehood from that implied by the Montevideo formula. Under these developments, the notion of entitlement or disentitlement to be regarded as a State have been influential, at least in cases where the rules invoked are regarded as peremptory norms. Entities which would have otherwise qualified as a State may not do so because their creation is substantially illegitimate. Palestine involves the converse problem, that of an entity which is not sufficiently effective to be regarded as independent, but whose people is entitled to self-determination, i.e. to elect to form their own

[246] As a US court held: *Klinghoffer v Achille Lauro*, 937 F 2d 44 (CA2, 1991). That case did not relate to acts performed in right of the territory of Palestine.

[247] Cf the International Court's reference in *Reparations* to 'the vast majority of the members of the international community': ICJ Rep 1949 p 174, 185.

State.[248] In such cases, should international law treat as having been done that which ought to be done?

It should be stressed that we are not dealing with the situation of the suppression of States which were once incontestably established as such (the Baltic States between 1941 and 1990; Kuwait during Iraqi occupation in 1990). The question is rather the establishment of a new State on territory over which other States have claims of one kind or another. On this issue the practice is limited. In the case of some former Portuguese territories in Africa (Guinea-Bissau is the best example) the view was taken that the National Liberation Organisation's extensive *de facto* control over large parts of the relevant territory, and the apparent inevitability of its success, combined with the principle of self-determination, meant that the entity became a State in circumstances in which recognition would otherwise have been premature. Although the legal arguments in favour of premature statehood were often not set out or were poorly articulated, the importance of the principle of self-determination in such cases seems to have been that it disentitled the former sovereign to rely on its authority over the territory. On the other hand it is significant that in each of these cases the liberation organisation did have a significant degree of control in the territory, such that its victory could reasonably be said to be imminent. Moreover, the issue presented was one of a simple yes/no kind—independence for the territory in question or the continuation of colonial rule. There was no question of any subsisting claim by the colonial power, or by any other State, to significant parts of the territory in question.

The situation in Namibia provides an instructive contrast. There, notwithstanding the undoubted entitlement of the people of Namibia to self-determination, as declared by the International Court in the *Namibia* Opinion,[249] and despite the fact that the relevant liberation organization, SWAPO, had a high degree of allegiance and a fluctuating degree of control, there was no attempt to treat Namibia as already a State. Instead action was taken to bring about its independence, and in the meantime to seek to protect the rights of the people through other means (e.g., the resolution of the United Nations Committee for Namibia on Permanent Sovereignty over its Natural Resources). In this situation the

[248] Self-determination may involve other outcomes than independence: see GA res 1541 (XV), Principle V. But in the case of Palestine such options are excluded. For example earlier ideas of 'confederation' with Jordan were set aside: see King Hussein's speech of 31 July 1988, in Institute for Palestinian Studies, *The Palestinian–Israeli Peace Agreement: A Documentary Record*, 262.

[249] ICJ Rep 1971 p 16.

modalities of achieving independence were of great importance, and were arduously negotiated.[250]

Thus although a majority of States seems to have taken the view, however inarticulately, that a further step beyond the Guinea-Bissau situation could be taken in the case of Palestine, a significant minority of States opposed that step. The continuing reservations held about the status of Palestine were reflected in the practice of international organizations and in the actions of individual States. For example, on 12 May 1989 the 42nd World Health Assembly deferred consideration of the application of Palestine for admission as a member of the World Health Organization.[251] Similarly the Executive Board of UNESCO deferred consideration of a Palestinian application for membership of UNESCO, while adopting measures to ensure that Palestine had the fullest possible opportunity (short of membership) of participation in the work of UNESCO.[252]

Another expression of doubt as to the status of Palestine is contained in the Note of Information that Switzerland, as the depository of the 1949 Geneva Conventions on the Laws of War and the 1977 Protocols, addressed to States parties. In that Note Switzerland reported that it had declined to accept a 'communication' from the permanent observer of Palestine to the United Nations Office in Geneva, acceding to the Conventions and Protocols, on the grounds that:

> Due to the uncertainty within the international community as to the existence or the non-existence of a State of Palestine and as long as the issue has not been settled in an appropriate framework, the Swiss Government, in its capacity as depositary . . . is not in a position to decide whether this communication can be considered as an instrument of accession in the sense of the relevant provisions of the Conventions and their additional Protocols . . . The unilateral declaration of application of the four Geneva Conventions and of the additional Protocol I made on 7 June 1982 by the Palestine Liberation Organization remains valid.[253]

### *(iii) The authority of the General Assembly*

Supporters of Palestinian statehood on the basis of the 1988 Declaration place particular stress on General Assembly resolution 43/177. The authority of the

[250] Schmidt-Jortzig (1991) 34 *German YBIL* 413; Sinjela (1993) 1 *African YBIL* 13, and see further Chapter 12.

[251] For the controversy see Kirgis (1990) 84 *AJIL* 218.

[252] See UNESCO 132 EX/31, 29 September 1989, and the associated *Consultation* by Pellet, 7 September 1989.

[253] Embassy of Switzerland, Note of Information sent to States Parties to the Convention and Protocol, 13 September 1989.

General Assembly is invoked in support of the statehood of Palestine,[254] and this on three distinct grounds.

The first is based on the 'provisional recognition' given to the sovereignty of the nations subject to 'A' class mandates under Article 22 of the Covenant. That provisional recognition would be a right of peoples saved or reserved by Article 80 of the United Nations Charter. But the fact is that, with the exception of Iraq, the 'provisional recognition' given by Article 22 did not amount to much. In practice 'A' Class mandates were subject to the normal mandatory regime, and it was not argued that the status of the territories concerned was that of independent States. In this context the distinction between 'State' and 'nation' is crucial: certain 'peoples' or 'nations' were recognized by Article 22 as having rights of a relatively immediate kind, but these did not as yet amount to statehood.

The second element supporting General Assembly authority is said to arise from the General Assembly's position as the successor to the League of Nations with respect to the mandate system.[255] But there was no direct succession between the League of Nations and the United Nations in this or in other respects, and this lack of succession was deliberate. Thus the International Court in 1950[256] and again in 1971[257] supported the exercise by the United Nations of authority with respect to mandates on the basis of arguments that did not depend on a rule of succession. Moreover, although the General Assembly acquired power through these means to revoke the mandate for South West Africa, that power was not of a general discretionary or governing kind; it was more in the nature of a declaratory power exercised on behalf of the international community in a situation where no State had sovereignty over the territory concerned.[258] The legal consequences for States as set out in the *Namibia* Opinion were in a substantial part due to the operation of Security Council resolutions pursuant to Article 25 of the Charter. No doubt there are important implications for the status of Palestine in these arguments. But they stop far short of the proposition that the General Assembly can recognise Palestine as a State, with an effect that is 'constitutive, definitive, and universally determinative'.[259]

[254] Boyle (1990) 1 *EJIL* 302–3. Earlier resolutions had been expressed in terms of 'the right to national independence' as a consequence of self-determination. See, e.g., GA res 3236 (XXIV), 22 November 1974 (adopted by 89–8: 37) reaffirming 'the inalienable rights of the Palestinian people in Palestine, including: (a) The right to self-determination without external interference; (b) The right to national independence and sovereignty'.

[255] Boyle (1990) 1 *EJIL* 301–2.

[256] *Status of South West Africa Opinion*, ICJ Rep 1950 p 128.

[257] *Namibia Opinion*, ICJ Rep 1971 p 16.

[258] As noted by Brownlie, *Principles* (6th edn) 164–5. See further Chapter 12.

[259] Boyle (1990) 1 *EJIL* 303.

### *(iv) The position of dissenting or opposing States*

Finally, it is said that both the United States and Israel are bound to accept the status of Palestine as a new State. So far as the United States is concerned, the principal ground for the argument is based upon the 'provisional recognition' by Article 22 of the League of Nations Covenant of the status of the nations under A class Mandates, a position preserved in Article 80 of the Charter.[260] Of course the United States was not a party to the Covenant, and it is an interesting question whether Article 80 can have had the effect of preserving treaty rights as against States not parties to the relevant treaties. But the better view is, anyway, that Article 80 simply did not address this issue. It was concerned with preserving the existing rights of 'peoples' and the 'provisional recognition' of the peoples under A class mandates before 1945 was not sufficient already to constitute them as States, however significant a pointer it may have been as to their future.

So far as Israel is concerned, the argument that it is bound is principally based, it seems, upon the proposition that Israel's acceptance of the partition resolution was 'a condition for its admission' to the United Nations.[261] But as we have seen, although the relevant Jewish organizations did accept the Partition Resolution when it was first adopted, the Resolution was not accepted by the Arab League, and faced with this situation it was not insisted on by the competent organs of the United Nations. Instead war broke out, leading to a ceasefire within quite different boundaries. Israel was not admitted to the United Nations on the basis of a division of territory which reflected the Partition Resolution. But even if it had been, that would not have entailed the existence of a Palestinian State on the remaining territory, in the absence of any actual administration on behalf of the Palestinian population with claims to independence.

### *(v) The road to Palestinian statehood since 1993*[262]

The question is whether any different conclusion follows in respect of the period since 1993, when there has been some transfer of territorial control by Israel to an Interim Administration, pursuant to agreements between Israel and the PLO. That process is far from complete and it continues to meet

[260] Boyle (1990) 1 *EJIL* 302–3. [261] Ibid, 304.

[262] On the status of Palestine in the post-1993 period are Dajani (1997) 26 *Denver JILP* 27; Shehadeh, *From Occupation to Interim Accords*. See also Cassese, *Self-determination of Peoples*, 230–48; Cassese (1993) 4 *EJIL* 564; Bockel (1994) 40 *AFDI* 261; Colvo-Goller (1995) 41 *AFDI* 53; Sayigh (1995) 24 *J Pal Stvd* 5; Mackinney (1994) 18 *Seattle ULR* 93; Schulman (1993) 7 *Emory ILR* 793; Ben Achour (1994) 98 *RGDIP* 337: Lustick (1997) 30 *Cornell ILJ* 741; Silverburg (1998) 6 *Tulsa JCIL* 21; Beres (1999) 17 *Dickinson JIL* 229; Weiner (1999) 23 *Fordham ILJ* 230; Husseini (2003) 26 *Fordham ILJ* 500.

obstacles from both sides. However, it has been said to be a sufficient basis for supporting the existence of a Palestinian State, either immediately[263] or pursuant to a further declaration of independence.[264]

It is unnecessary for present purposes to describe in detail the framework resulting from agreements that constitute the 'Oslo process'. Apart from anything else, the agreements are remarkably unforthcoming on issues of status, no doubt because of fundamental disagreements between the parties. The principal agreements so far concluded are as follows:

- Exchange of correspondence (Arafat–Rabin), 9 September 1993.[265]
- Israel–Palestine Liberation Organization, Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993.[266]
- Israel–Palestine Liberation Organization, Agreement on the Gaza Strip and the Jericho Area, 4 May 1994.[267]
- Israel–Palestine Liberation Organization, Agreement on Preparatory Powers and Responsibilities, 29 August 1994.[268]
- Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995.[269]
- Note for the Record (Ross–Netanyahu–Arafat), 17 January 1997.[270]
- Israel–Palestine Liberation Organization, Protocol concerning the Redeployment in Hebron, Jerusalem, 17 January 1997.[271]
- Israel–Palestine Liberation Organization, Wye River Memorandum, 23 October 1998.[272]

The sequence began with a real step forward. In an exchange of letters, the PLO recognized Israel's right to exist, and committed itself to a negotiated settlement of 'all outstanding issues relating to permanent status'; in return, Israel recognized the PLO 'as the representative of the Palestinian people' and therefore as the principal interlocutor in that process. The subsequent partial withdrawals of Israel from civil administration of the Palestinian population of the occupied territory is also significant. But the limited character of that withdrawal can be seen, for example, from the jurisdiction of the Palestinian Interim Self-Government Authority, which covers: 'West Bank and Gaza Strip territory, except for issues that will be negotiated in the permanent status

[263] Quigley (1997) 30 *Cornell ILJ* 717, 724 .

[264] For example, such a declaration was foreshadowed for 4 May 1999, the end of the five-year transitional period defined in Article V of the 1993 Declaration of Principles on Interim Self-Government Arrangements.

[265] Text in (1992–4) 7 *Palestine YBIL* 230.

[266] (1993) 32 ILM 1525.

[267] (1994) 33 ILM 622.

[268] (1995) 34 ILM 455.

[269] (1997) 36 ILM 551.

[270] (1997) 36 ILM 665.

[271] (1997) 36 ILM 650.

[272] (1998) 37 ILM 1251. For documents relating to the earlier negotiations see Institute for Palestinian Studies (1994) 3–115.

negotiations: Jerusalem, settlements, military locations, and Israelis.'[273] Thus a jurisdiction defined apparently in normal territorial terms is for practical purposes redefined as a jurisdiction over Palestinians (and visitors). In this way the agenda of the permanent status negotiations becomes a series of exclusions from Palestinian self-government in the interim period. Apart from Jerusalem itself, the exclusion of substantive powers in the field of foreign relations is particularly important.[274] There are also repeated commitments by both sides not to 'initiate or take any step that will change the status of the West Bank and the Gaza Strip in accordance with the Interim Agreement.'[275]

This is unpromising in terms of providing a substantial base of autonomous local self-government on which to found a claim to Palestinian statehood. The PLO of course is a national liberation organization, widely recognized as such, and is the external representative of the Palestinian people.[276] The people of Palestine (i.e. of the remaining territories of the Mandate for Palestine) have a right of self-determination, a position noted by the International Court in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[277] There is thus a non-State legal entity recognized as represented by a national liberation movement. This explains the 'capacity' of the PLO to perform various acts, to enter into treaties, to bear rights and assume obligations. But these are not things which in modern international law only States can do. On the other hand the Palestinian Authority is an interim local government body with restricted powers; it is not identical with the PLO, even though there is an overlapping composition, and Israel has carefully reserved to itself 'the powers and responsibilities not transferred to the Council'.[278] Thus, according to one analysis:

Under the interim arrangements . . . Palestine may best be described as a transitional association between the PA and the PLO. The PLO, which has been recognized to

[273] Agreed Minutes to the Declaration of Principles on Interim Self-Government Arrangements, B, Art IV: (1993) 32 ILM 1542; repeated with further elaboration in Art XVII of the Art 17 of the Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995, which states that '[i]n accordance with the Declaration of Principles, the jurisdiction of the Council will cover West Bank and Gaza Strip territory as a single territorial unit, except for: (a) issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis.'

[274] See the excellent analysis of the Agreements by Dajani (1997) 26 *Denver JILP* 27, 61–74.

[275] Wye River Memorandum, Art V.

[276] On the status of national liberation movements see, e.g., Wilson, *International Law and the Use of Force by National Liberation Movements*.

[277] 'As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a "Palestinian people" is no longer in issue': *Wall Advisory Opinion*, ICJ Rep 2004 p 136, 182–3 (para 118).

[278] Declaration of Principles, 1993, Agreed Minutes, B, Art VII(5), (1993) 32 ILM at 1542; see also Annex II.

possess an independent international personality as representative of the Palestinian people, has been delegated the power to act on behalf of the PA in the international arena with regard to specific substantive areas. Nevertheless, the PA's constituent organs . . . form a local government with largely municipal functions and, with regard to those functions, they are independent of the PLO . . . Moreover, the powers withheld from the PLO by the DOP—i.e. the authority to conclude international agreements (with parties other than Israel) that affect the status or security of the OPT—are held by Israel, not by the PA. The PA is consequently in a position of subordination to both the PLO and Israel. Further, the current arrangements have elicited the support of the Palestinian population only insofar as they are transitional.[279]

There is a further issue, which is that of reversionary authority over the territories. In acting on behalf of the Palestinian people the PLO is not exercising authority that is legally dependent on that of another State, still less acting as agent of a belligerent occupant. But the Palestinian Authority is in a different position, since its powers derive from arrangements between Israel and the PLO which neither the Authority nor its people can alter, and which the PLO itself is committed not to alter unilaterally in the interim period. There is, in addition, the threat of unilateral Israeli measures in the event of a perceived breach of any of the agreements. In its decision on the Wye River Memorandum, the Israeli Government declared that:

a unilateral declaration by the Palestinian Authority on the establishment of a Palestinian state, prior to the achievement of a Final Status Agreement, would constitute a substantive and fundamental violation of the Interim Agreement. In the event of such a violation, the Government would consider itself entitled to take all necessary steps, including the application of Israeli rule, law and administration to settlement areas and security areas in Judea, Samaria and Gaza, as it sees fit. Israel reiterates its position, in accordance with the agreement of the PA, that the Final Status must be the result of free negotiations between the parties without the implementation of unilateral steps which will change the status of the area.[280]

This characteristically emphatic statement is not without its own internal uncertainties. One party to an agreement has no unilateral right to decide, definitively, that the other is in 'substantive and fundamental violation'—although it may be clear that that is so. And is there a suggestion, in the final sentence, that it lies in the hands of the Palestinian Authority, which controls (some of) the territory of a self-determination unit, to implement 'unilateral steps which *will* change the status of the area'?

[279] Dajani (1997) *Denver JILP* 27, 90–1.

[280] Government Decision on the Wye River Memorandum, 11 November 1998, para 8.

However that may be, such a unilateral step has not been taken since 1993. But is it even necessary? The case for Palestinian statehood is made by Quigley in the following terms:

> the control requirement has been relaxed in international practice when the putative state was seen to have a right to statehood and where there was not a competing entity seeking statehood in the same territory . . . An entity does not lack the quality of statehood . . . if it agrees to let another state handle its external relations . . . [Moreover, the] PLO did not cede all foreign relations to Israel . . . Whether or not Palestine is a state is not a question for Israel to decide. That determination turns on objective criteria, with recognition by states providing significant evidence as to whether these criteria are met . . . Applying these criteria, Palestine has a plausible claim to statehood because it controls territory and has the capacity to engage in international relations.[281]

The argument is unsatisfactory. If a new unilateral declaration is thought necessary by some within the PLO, on what basis was that of 1988 insufficient? It is inaccurate to say that the PLO 'ceded' foreign relations power to Israel, but its representative capacity did not and still does not depend on the Palestinian Authority's control over Palestine. To say that 'Palestine . . . controls territory and has the capacity to engage in international relations' is a complete elision; the use of the term 'Palestine' implies a refusal to face the existing situation as expressed in the agreements themselves.

The essential point is that a process of negotiation towards identified and acceptable ends is still, however precariously, in place. That being so, it misrepresents the reality of the situation to claim that one party already has that for which it is striving. It may also be counterproductive. Analysing the structure of the agreements suggests why the position of the PLO has been separated from that of the Palestinian Authority, and why the agenda of the future negotiations is precisely mirrored in a reservation of the authority of the existing entities. If freedom once conferred cannot be revoked, that is a reason not to confer it, or to do so in as disaggregated and fragile a way as possible. Thus the agreements bear the signs of the underlying structural difficulty, which—for the time being at least—unilateral action can only exacerbate.

### *(vi) Conclusion*

Thus far international law has distinguished between the right to self-determination and the actual achievement of statehood, and for good reason. Even the exercise of external self-determination need not result in independence; there are other options. Moreover, it is one thing for a people, acting

[281] Quigley (1997) 30 *Cornell ILJ* 717, 724–6.

through the appropriate procedures, to choose independence, and another for the representatives of the people actually to assume responsibility for the international relations of the territory as well as for its internal government. In cases where it is clear that an entity will achieve independence within a very short time, it may be convenient to deal with the new authorities on the footing that they are virtually independent, i.e. on the basis of the maxim *nasciturus pro jam natus habetur* (see Chapter 15). But even when it is quite clear that a new State will come into existence on a particular day—as it was, for example, with the dissolution of Czechoslovakia and its replacement by the Czech Republic and Slovakia at the end of 1992—nonetheless the old State continues to exist until the appointed hour, and the international law of State succession proceeds on the assumption of an orderly transfer of authority and not its piecemeal anticipation.[282]

Whatever the case when the new State is only a few days or weeks away, and where no obstacle to the event can be conceived, the position is different when there are many uncertainties about the outcome, and when the agreement (and above all, the action) of involved participants, States and non-States, is necessary. Thus provisions in multilateral treaties prescribing that new entities be created—for example, the principality of Albania between 1913 and 1919, the Free City of Fiume in 1919 or the Free City of Trieste between 1947 and 1954—have not been regarded as self-executing. Those treaties may have contained authorizations and even requirements as to action to be taken, and they were not more: they did not actually constitute the entities whose existence they prescribed.

It can be argued that the position is different when the requirement in favour of the statehood of a given territory is imposed by general international law, and in particular by a peremptory norm such as the right to self-determination. But in the situation where State structures have not yet been created in fact, and where serious issues remain to be resolved about the constitution and boundaries of the putative State, its obligations towards minorities on its territory and the question of commitments to respect the rights of neighbouring States, statehood should not be regarded as existing already, as it were, by operation of law.

Nonetheless this may not be the whole story. There may come a point where international law may be justified in regarding as done that which ought to have been done, if the reason it has not been done is the serious default of one party and if the consequence of its not being done is serious prejudice to

[282] There was in fact very little anticipation of the separation in the case of Czechoslovakia: even a month before, everyone was proceeding on the basis of the 'diplomatic unity' of Czechoslovakia. Cf *Case concerning the Gabčíkovo-Nagymaros Project*, ICJ Rep 1997 p 3.

another. The principle that a State cannot rely on its own wrongful conduct to avoid the consequences of its international obligations is capable of novel applications, and circumstances can be imagined where the international community would be entitled to treat a new State as existing on a given territory, notwithstanding the facts.

However, it seems clear that this possibility does not yet apply in the case of Palestine. In agreements welcomed by the General Assembly, the PLO has expressly accepted that an important agenda of issues remains to be resolved through permanent status negotiations. For its part, the General Assembly has stated that it has 'a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy.'[283] Both parties have agreed that unilateral action must not be taken in the meantime to change the status quo;[284] this is equally the position reached by the International Court in the *Wall* Advisory Opinion.[285] But the point is to change the status quo in favour of a comprehensive settlement accepted by all parties concerned—a situation that seems as remote as ever.[286]

[283] GA res 57/107, 3 December 2002.

[284] Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli–Palestinian Conflict: S/2003/509, endorsed by SC res 1515, 19 November 2003.

[285] ICJ Rep 2004 p 136, 200–1 (para 162).

[286] In September 2005, pursuant to a Revised Disengagement Plan of 6 June 2004 (available at http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June-2004.htm), Israel evacuated its military forces and settlers from the Gaza Strip. The evacuation did not end all incidents of occupation in Gaza, as Israel retains control over the frontiers, airspace, and maritime zone. Under international humanitarian law, occupation of territory is a temporary phenomenon and, as a general matter, an occupant can withdraw from territory including by way of partial withdrawal. However Israel's obligations with respect to the Occupied Palestinian Territory do not arise exclusively under the law of occupation but under specific agreements as well as under general international law. Moreover it is not for Israel to declare, expressly or by inference, the independence of Palestine on part only of its territory, and *a fortiori* where substantial control continues to be exercised over that territory. In accordance with the arguments set out above, the Occupied Palestinian Territory constitutes a single self-determination unit, not to be divided without the consent of the inhabitants: see *Wall Case*, Written Statement, Jordan (30 January 2004) 89–90, para 5.134; Written Statement, Malaysia, 42–43, para 115. Thus the better view is that the partial withdrawal has no legal significance and that the status of the Occupied Palestinian Territory remains unchanged pending a comprehensive settlement.

# Chapter 10

# DIVIDED STATES AND REUNIFICATION


| | | |
|---|---|---|
| **10.1** | **The category of 'divided States'** | 449 |
| **10.2** | **The two Germanies** | 452 |
| | (1) The quadripartite government of Germany | 452 |
| | (2) The creation of the Federal Republic of Germany | 454 |
| | (3) The creation of the German Democratic Republic | 455 |
| | (4) Residual quadripartite authority over 'Germany as a whole' | 458 |
| | (5) The status of Berlin | 459 |
| | (6) Conclusions | 465 |
| **10.3** | **Other cases of 'divided States'** | 466 |
| | (1) Korea after 1947 | 466 |
| | (2) Vietnam after 1945 | 472 |
| | (3) China after 1948 | 477 |
| **10.4** | **Conclusions** | 477 |


## 10.1 The category of 'divided States'

The consciousness of a 'people' or 'nation' that they constitute a separate entity has always been a factor in international relations: its importance increased substantially in the nineteenth and early twentieth century, and it has come to have certain juridical or quasi-juridical consequences. The translation of ethnic or cultural affinity into territorial organization is, however, not an easy one—especially since it tends to invade the claims for unity of other 'peoples' or 'nations'. Nevertheless much of the pressure behind certain political situations derives from such a sense of national identity: for example, the claims that there is 'one China', 'one Korea', or for that matter 'one Ireland'.

In the decade after World War II, certain territorial entities that had previously been either States (Germany, China) or at least distinct territories

(Vietnam, Korea) found themselves divided into two or more separate units of administration.[1] It has been argued that this phenomenon of the 'divided State' gave rise to a special juridical category of State, requiring separate treatment.[2] Caty, for example, argued that: 'il y a État divisé lorsque la ligne partageant l'État ne peut être considérée comme une frontière au sens juridique du terme.'[3] But the question whether a particular administrative line can be considered a frontier 'au sens juridique du terme' assumes a unique sense of the term 'frontier', whereas a demarcation line within a State may be a frontier for certain purposes but not others. For example the Friendly Relations Declaration of 1970 states in part:

> Every State . . . has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special regimes or as affecting their temporary character.[4]

There are then several distinct questions—the juridical status of a particular frontier for a given purpose and the question whether a particular frontier is the frontier between two States. The latter carries certain implications for the former. For example an inter-State boundary is a limit for the purposes of the use of force, but, as resolution 2625 (XXV) recognizes, there can be other such boundaries. Questions such as these are relevant to the various divided States but they are equally relevant elsewhere. Territorial entities can vary substantially in status and the juridical status of boundaries can similarly vary.

In short, treating divided States as a separate juridical category overlooks differences as between different 'divided States' and blurs the similarity with cases not so categorized: in the field of territorial status, legal categories should not be uselessly multiplied. There is a further disadvantage in that for many commentators Germany is seen as the prototype of the 'divided State'.[5] For

[1] Other cases were the division of Austria after 1945, and the Anglo-Egyptian Sudan 1899–1956: Whiteman, 1 *Digest* 280–1, 2 *Digest* 217–18, 14 *Digest* 487–90; Baddour, *Sudanese-Egyptian Relations*; Coret, *Le Condominium*, 165–76. More recently, ethnic or other conflicts within States have tended to cause territorial polarization not unlike the 'divided State' situations discussed in this chapter: e.g., Cyprus, as to which see Chapter 5.

[2] Caty, *Le Statut juridique des états divisés*; Martinez-Agullo (1964) 91 *JDI* 265; Whiteman, 1 *Digest* 320–38; but cf the more summary treatment by Verzijl, *International Law,* vol II, 307. See also Mendelson, 'Acquisition of Membership' 171–203; Verhoeven, *Reconnaissance*, 36–52.

[3] Caty, *Le Statut*, 15.

[4] GA res 2625 (XXV), Annex. For the *travaux* see, e.g., A/7326 (1968), 28–30; A/7619 (1969), 27–8, 38; A/8018 (1970), 33, 65, 90, 120.

[5] Cf Caty, *La Statut*, 17, 74.

example, in Caty's view '[d]ans les deux cas du Vietnam et de la Corée, seul un traité de paix peut . . . écarter l'hypothèse d'un État global. Il en est de même en Allemagne.'[6] But the cases were quite different. If 'Germany' continued to exist, it was because there were subsisting legal reasons for its existence. The same could not be said of 'Vietnam' before 1975 or of 'Korea' now. Indeed, it is doubtful if it ever was true of 'Vietnam'. An intention for eventual unification and the reaffirmation that ceasefire lines are 'temporary', are not enough, since they may be as consistent with two States as with one.[7] Again, the point is not whether two entities are bound to work towards the reunification of the nation and their reabsorption into a single State; but whether they do actually constitute parts of a single State. Whether they do depends on general criteria for statehood—not on some postulated category of 'divided States' into which a variety of cases are supposed to fit.

This is not to say that the various cases of divided States which occurred shortly after World War II did not have important similarities. Like the 'colonial frontier' of an earlier period, they marked the front line of the 'Cold War'. They were created, on the whole, at the same time and for much the same reasons. With the partial exception of China, relatively stable settlements were achieved at the same time, in the period 1970–75, and for much the same reasons. That China, despite resolution of the question of United Nations representation, is an exception to this generalization is no doubt due to the fact that the China problem appears to be incapable of a compromise settlement.

Although there is no separate category of 'divided States', they are nonetheless worth separate consideration, individually because of their interest and importance; together as demonstrating the tendency towards consolidation of status of existing political and administrative entities, despite political and legal impediments tending to prevent consolidation. The mistake is to treat the 'divided States' as a special juridical category, the subject of legal rules different in kind from those applying to States in general.[8]

[6] Ibid, 57. [7] See also ibid, 52, 56; but cf 80.

[8] Cf Waldock, 1972/II *ILC Ybk* 43: '[D]o the categories of succession include, as a special case, the mere division of a State into two or more States? And in that event is the international personality of the former State to be considered as extinguished and the State replaced by two or more new States, or as continuing in a divided form in the international personalities of the States resulting from the division? Practice does not throw much useful light on this question, despite the fact that among the major political problems of the post-war world have been what are sometimes called the two Germanies, the two Koreas and the two Viet-Nams. The circumstances of each of these so called divided States are, however, altogether too special for them to provide guidance in regard to questions of succession. In all three cases the problem of succession is complicated by the fact that one of the two Governments claims to represent the whole State. Further complications are the effect of the Second World War on

## 10.2 The two Germanies[9]

On 3 October 1990, the territories comprising the German Democratic Republic and Berlin were duly incorporated into the Federal Republic of Germany and the issue of the 'final status of Germany' was thereby resolved. But the transactions affecting Germany between 1945 and 1990 still deserve analysis. Of particular interest are the establishment of quadripartite control over Germany; the eventual acceptance of two independent German States on part of the territory; the status of Berlin and the question of continuity with pre-1945 Germany in light of the final settlement actually achieved. In this chapter the status of Germany as a whole, the two German States and Berlin will be discussed; in Chapter 12, the extent of quadripartite authority over final status issues and in Chapter 16 the consequential issues of identity and continuity after 1990.

### (1) The quadripartite government of Germany

By the middle of 1944 the ultimate result of the war in Europe was not in doubt and the Allies began to make arrangements for the treatment of Germany after its surrender. It was agreed that Germany, within its 1937 frontiers, was to be divided 'for the purpose of occupation' into three Zones 'and a special Berlin area, which will be under joint occupation by the three Powers'.[10] An Inter-Allied Governing Authority was to be responsible for the administration of Berlin. The Agreement was to come into force on Germany's unconditional surrender. By a subsequent Protocol France was included in the arrangements and given its own Zone of Occupation out of the UK and US allocations, as well as a place in the administration of Berlin.[11]

the treaties previously affecting the territories in question, and in the cases of Korea and Vietnam their very recent emergence to independence when the division of their territories occurred. These various complications are, no doubt, responsible for the extreme paucity of information regarding succession by one part of these States to the treaties of the previously undivided State or territory.'

[9] The literature is vast. See Caty, *Le Statut*, 31–41, 47–51, 57–73; Bathurst and Simpson, *Germany and the North Atlantic Community*; Bishop (1955) 49 *AJ* 125; van Laun (1951) 45 *AJ* 267; Münch (1962) 89 *JDI* 5; Wright (1952) 46 *AJ* 299; Mann, *Studies in International Law*, 634, 660; Pinto (1959) 86 *JDI* 313; Tsoutsos, *Politique et Droit dans les Relations Internationales*, 19–85, Piotrowicz (1989) 38 *ICLQ* 609; Piotrowicz and Blay, *The Unification of Germany in International and Domestic Law* and the works cited below.

[10] Protocol on Zones of Occupation in Germany, London, 12 September 1944: 227 UNTS 279, Art 1.

[11] USA–USSR–UK–France, Agreement regarding amendments to the Protocol of 12 September 1944 on the zones of occupation in Germany and the administration of 'Greater Berlin', London, 26 July 1946, 227 UNTS 298.

With the collapse of German resistance there was by 5 June 1945 no longer an effective or recognized government of Germany.[12] The Allied Powers assumed 'supreme authority with respect to Germany', which, in accordance with these arrangements was divided into four Zones of Occupation with a 'special Berlin area' under quadripartite control.[13] In the absence of a reformed German government this could have led to the extinction of Germany by *debellatio*, as Kelsen pointed out.[14] However, the Berlin Declaration was stated not to effect the annexation of Germany, and the Allied Control Council subsequently achieved recognition as 'the Government of Germany'.[15] Thus, it was said, 'Germany continued to exist as a State, and German nationality as a nationality.'[16] This remarkable arrangement—'government in commission', as it has been called[17]—was taken both in practice and in the doctrine to involve the legal continuity of pre-1945 Germany; although it is difficult to see how this would have been so absent the Allied Control Council's claim to act as the government of Germany. The distinction between the post-war situation in Germany and regimes of belligerent occupation under the Hague Regulations of 1907 was clear enough.[18]

In practice the government of Germany was entrusted to the respective Commanders-in-Chief of the Four Powers, who acted jointly with respect to Germany as a whole and separately in each Zone of Occupation, acting on behalf of the Four Powers though instructed by their own governments.[19] On

[12] Cf Berlin Declaration, 5 June 1945, 145 BFSP 796, stating that there was 'no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers.'

[13] Statement on Control Machinery in Germany, 5 June 1945, 145 BFSP 803; affirmed at Potsdam, ibid, 852. For details see Sharp, *The Wartime Alliance and the Zonal Division of Germany*.

[14] (1945) 39 *AJ* 518, 519. On the 'survival' of Germany, notwithstanding factors consistent with *debellatio* see Blumenwitz (1985) 23 *AdV* 1, 15–16.

[15] E.g., Exchange of Notes with Spain concerning German Enemy Assets, Madrid, 28 Oct 1946: 147 BFSP 1058: 'the Allied Control Council for Germany will assume, after its recognition by Spain as the Government of Germany, the rights and obligations incident to its status as a government.' The French military authorities in Germany under the occupation régime were 'a foreign authority . . . outside any French supervisory jurisdiction': *Clement v Agent Judiciaire du Trésor Public* (Paris CA, 1961) 41 ILR 478, 480. Cf Schröder, in *Recht, Wirtschaft, Politik im geteilten Deutschland. Festschrift für Siegfried Mampel*, 71; Schröder (1985) 23 *AdV* 42. By contrast the Polish position was that the German State disappeared in 1945: Piotrowicz (1991) 40 *ICLQ* 635, 639.

[16] As stated in the Foreign Office certificate presented in *R v Bottrill, ex parte Kuechenmeister* [1947] 1 KB 41.

[17] Jennings (1946) 23 *BY* 112.

[18] Hendry and Wood, *Legal Status of Berlin*, 35. The assumption of governmental authority over Germany probably involved the termination of the war as a matter of international law as well as common sense, since States cannot be at war with themselves: Bathurst and Simpson, *Germany and the North Atlantic Community*, 45–6. For termination in internal law see Ottensooser (1952) 29 *BY* 435; Kunz (1952) 46 *AJ* 114.

[19] Kunz (1952) 46 *AJ* 114, 115–17; Bathurst and Simpson, *Germany and the North Atlantic Community*, 33–41; Mann, *Studies in International law*, 652–8.

this view, Germany was not a condominium,[20] but the government of Germany was carried on by the Four Powers according to the instruments establishing the occupation regime.[21] But the provisions of the Potsdam Agreement regarding reunification and the economic unity of Germany could not be implemented. Instead two separate governmental units evolved in the Soviet and Western Zones of Germany, both eventually claiming separate statehood.

## (2) The creation of the Federal Republic of Germany

On 23 May 1949, shortly after the breakdown of the Allied Control Council, the three Western Allies established a subordinate government in their zones—the Federal Republic of Germany (FRG). In the circumstances unilateral creation of such subordinate entities was not unlawful: each occupying Power was '*de jure* entitled to exercise governing authority in respect of [its] zone of occupation in Germany and might therefore establish subordinate organizations to act on its behalf.'[22] Nevertheless, the Western Allies were already taking the view that the Federal Republic was entitled to some special status and that it was not merely a delegate. A Declaration of 19 December 1950, for example, stated that: 'The Three Governments consider that the Government of the Federal Republic is the only German Government freely and legitimately constituted and therefore entitled to speak for the German people in international affairs.'[23] The authority of the Federal Republic was further enlarged by a Tripartite Convention on Relations of 26 May 1952.[24] Under that Convention as amended, the 'Occupation regime' in the Federal Republic was purportedly terminated: Article 1(2) provided that: 'The Federal Republic shall have accordingly the full authority of a sovereign State over its internal and external affairs.'[25] However, that authority was not unlimited. Article 2 provided that:

In view of the international situation, which has so far prevented the unification of Germany and the conclusion of a peace settlement the Three Powers retain the rights

[20] Bathurst and Simpson, *Germany and the North Atlantic Community*, 41–5.

[21] Questions of the status of the zones of occupation in the law of the States concerned raised difficult questions, which were resolved by interpretation rather than by reference to the formal status of Germany after 1945: cf *Brehm v Acheson*, 90 F Supp 662, 17 ILR 208 (DC Tex 1950); *Recidivism (Soviet Zone of Germany) Case* (Fed Sup Ct GDR 1954), 21 ILR 42. This is also the better interpretation of *In re Kraussman*, 130 F Supp 926, 22 ILR 987 (DC Conn 1955).

[22] 735 *HC Deb* WA col 204, 7 Nov 1966. Cf Coret, *Le Condominium*, 215–27.

[23] [1964] *BPIL* 276. Cf the Declaration of 3 October 1954, cited by Baade in Stanger (ed) *West Berlin: The Legal Context*, 53, 67. The Protocol relating to the incorporation of Germany into the European Community of Nations, Bonn, 22 November 1949, 185 UNTS 308 treated the Federal Republic as equivalent to 'Germany'.

[24] The amended text is in 331 UNTS 327.

[25] For events leading to the Convention see Klein (1980) 31 *Außenpolitik* 394, 395–7; Piotrowicz and Blay, *Unification of Germany*, 14–15.

and responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement . . .

The Convention was to remain in force only 'until Germany is re-united' (Article 10). It is clear that the three Allies had no competence to relinquish quadripartite authority, even with respect to the western zones, without Soviet consent; but consent was granted by Soviet recognition of the FRG on 13 September 1955, retrospective to 1949.[26] This, in Mann's view, 'involved the ratification and validation of the action taken in 1949 by the Western Allies in creating the Federal Republic. Accordingly, the question of the original legality or illegality of this action is no longer useful.'[27] But the former proposition did not entail the latter: the hypothetical question of the status of the Federal Republic if Soviet recognition had not been forthcoming found a direct parallel in the question of the status of the German Democratic Republic (GDR) after 1955.

## (3) The creation of the German Democratic Republic

In much the same way as the three western Powers had created the Federal Republic, so the Soviet Union on 7 October 1949 created the GDR. A treaty of 20 September 1955 accorded it general freedom of action with respect to its 'domestic and foreign policy', but express reservation was made of the 'obligations of the Soviet Union and of the GDR under existing international agreements relating to Germany as a whole'.[28] Nonetheless western recognition of this purported transfer of power was withheld: the various western governments denied that the GDR was a separate State.[29] Four different arguments were proposed in the period 1955 to 1970 to explain this view.

[26] Letter from Prime Minister Bulganin to FRG delegation, 13 September 1955, quoted in FRG Memorandum to the Soviet Union, Bonn, 2 September 1956: 162 BFSP 623.

[27] Mann, *Studies in International Law*, 671.

[28] Treaty concerning relations between the USSR and the GDR, Moscow, 20 September 1955, 226 UNTS 201, preamble. Cf the Agreement of 1964 in which the GDR and the USSR affirmed 'the existence of two sovereign German States', stated that unification could be achieved only by agreement between them, but reserved 'the rights or obligations of the Parties under bilateral or other international agreements at present in force, including the Potsdam Agreement': USSR–GDR Treaty of Friendship, Mutual Assistance and Co-operation, Moscow, 12 June 1964, 553 UNTS 249, Arts 7, 9.

[29] Cf the Foreign Office certificate in *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] AC 853; 43 ILR 23. In a 1968 debate on Rhodesia, a telegram from the GDR was circulated not under Rule 6 but unofficially. Answering a Soviet complaint, the UK stated that the telegram was 'not a communication from a State': *SCOR* 1445th mtg, 24 Aug 1968, 3. The US and Canada agreed. A proposal to invite the GDR to participate was rejected: ibid, 17 (2–9:4). Cf [1966] *BPIL* 160. On West German policy toward the question, see generally Gray, *Germany's Cold War: The Global Campaign to Isolate East Germany, 1949–1969* and on the 'Hallstein doctrine', ibid, 81–7. See also Grant (2000) 36 *Stanford JIL* 221, 223–30.

First and simplest was the contention that, in the absence of general recognition, the GDR could not be considered a State, whatever its actual authority or independence.[30] As we have seen, however, non-recognition is not supportable as a basis for denying statehood; though it might be regarded as a summary of other, more particular reasons.

Secondly, it was arguable that the creation of a new State in the Soviet Zone without quadripartite consent was legally impossible, that no such entity could be more than a local or subordinate government.[31] But western statements concerning the status of the GDR did not take that position: rather it was argued that in the circumstances the Republic did not qualify for statehood. Thus reference was made to 'democratic standards',[32] to the absence of 'free elections'[33] and to the continued 'effective control of the Soviet Union'.[34] The implication seems to be that an entity with real independence, created in accordance with 'democratic standards' (i.e. with the actual support of the population) might have constituted a new State without quadripartite consent. And this view is surely correct. It cannot be contended that the FRG would not have acquired statehood over a period of time, even if Soviet recognition had not been forthcoming, and the same must apply to the GDR.[35] Although the principle of effectiveness is not the sole criterion of statehood, it remains sufficiently important to preclude most attempts to legislate against the creation of new States, and (despite Article 107 of the Charter) there is no reason to treat the quadripartite arrangements as peremptory.

[30] E.g. *International Registration of Trade Mark (Germany) Case* (1959) 28 ILR 82.

[31] Cf again the *Carl Zeiss* case, criticized by Mann, *Studies in International law*, 549–50, 675–9. The House of Lords was compelled to that view by the FO certificate before it: either the GDR was a subordinate government or it was nothing.

[32] Sec of State, 12 Oct 1949, in Ruhm von Oppen (ed), *Documents on Germany Under Occupation 1945–1954*, 424 as cited in Baade in Stranger (ed), *West Berlin: The Legal Contest*, 69.

[33] Statement of the Allied High Commission, 1954, in Von der Gablentz (ed), *Documents on the Status of Berlin 1944–59*, 160, 161, as cited in Baade, in Stranger (ed), *West Berlin*, 67. The three Western Allies took the view in response to an application for UN membership by the GDR in 1966 that 'the Government of the Federal Republic is the only German Government freely and legitimately constituted and therefore entitled to speak on behalf of the German people in international affairs. It is, furthermore, the only authority in Germany resulting from free elections. The great majority of the world community has refused recognition of the so-called German Democratic Republic. No specialized agency of the United Nations has admitted it to any form of active participation whatever. It cannot be eligible for membership in the United Nations, which, according to Article 4 of the Charter, is open only to States.' [1964] *BPIL* 276. Cf the Declaration of 3 October 1954, cited by Baade, in Stranger (ed), *West Berlin*, 67. The 1949 Protocol relating to the incorporation of Germany into the European Community of Nations treats the Federal Republic as equivalent to 'Germany': 22 Nov 1949, 185 UNTS 307.

[34] Dept of State, 23 May 1962, in Bilder *et al* (1963) 57 *AJ* 403, 410, as cited in Baade, in Stranger (ed), *West Berlin*, 68.

[35] Cf Wright (1961) 56 *AJ* 959.

A third persistent argument against the statehood of the GDR was its lack of independence from the USSR. It is true that the government of the GDR appeared to be, and on many issues was, subservient to the Soviet Union, and that it may be easier for a State to maintain its independence with three masters to serve rather than one. But even if the treaty violations associated with its creation required a stricter application of the 'effective independence' test, the GDR's continuance over a long period, despite initial international disapproval, must be regarded as having consolidated its separate statehood.[36]

Finally, it was argued that the creation of the GDR was a violation of the principle of self-determination as applied to 'Germany as a whole' by the Potsdam Agreement. The relation between the principles of effectiveness and self-determination has been discussed in Chapter 3: it has been seen that the latter is capable of modifying or controlling the operation of the former. Nevertheless the view that the GDR was not a State because of its having been created in violation of the principle of self-determination must be rejected for several reasons. In particular the application of the principle of self-determination to Germany 'as a whole' as a result of the agreements of 1945 was heavily qualified by reference to strategic considerations and coexisted with extensive powers of the victorious Allies with respect to Germany and a peace settlement—powers which extended even to the contemplated dismemberment of Germany.[37]

The mode of the creation of the GDR—assuming then its existence as a State between 1955 and 1990—bears examination. The obvious parallel is secession—the seizure of power without consent of the previous sovereign, in this case the quadripartite government of 'Germany as a whole'.[38] To be sure, it could not have been argued that the quadripartite agreements made independence legally impossible: secession from international authority is presumably possible in the same way as secession from national authority, absent any violation of a peremptory norm. But there are significant differences between the case of the GDR and secession as defined in the previous chapter. In the first place, Soviet authority within its zone was considerable so the capacity to sub-delegate and the legality of the exercise of most governmental powers by the GDR could not be disputed. Moreover, in the normal case secession is internationally a legally neutral or even a legally permissible

[36] Wright (1961) 56 *AJ* 959, 960; but see Grewe (1962) 56 *AJ* 510.

[37] Cf the terms of the Berlin Declaration: 'The Governments . . . will hereafter determine the status of Germany or of any area at present being part of German territory': 145 BFSP 796. For the Morgenthau plan and the proposed dismemberment of Germany see Wheeler-Bennett and Nicholls, *The Semblance of Peace*, 131–3, 172.

[38] Mann in 1967 referred to the GDR as an 'insurgent régime'. Mann, *Studies in International law*, 693–4.

act, whereas in the case of the GDR the grant of independence was a breach of applicable treaties. Even if the new entity was not a party to those treaties, it claimed through a State that was. But again, short of fundamental illegality, it must be possible for established situations to become consolidated over time and by agreement, and in the event the continued existence of an East German State was accepted, not least by the FRG itself, as being 'in conformity with international order'.[39]

Explicit quadripartite recognition of the division of Germany was achieved in a series of transactions in the period 1970 to 1973. A Non-Aggression Treaty between the Federal Republic and the Soviet Union of 12 August 1970 stated that 'the frontier between the Federal Republic of Germany and the German Democratic Republic' was inviolable.[40] On 21 December 1972, a Treaty on the Basis of Intra-German Relations was concluded between the two German States. Article 4 provided that 'The Federal Republic of Germany and the German Democratic Republic proceed on the assumption that neither of the two States can represent the other in the international sphere or act on its behalf.'[41] Meanwhile the Four Powers had declared their acceptance of separate United Nations membership for the two Germanies.[42] Membership was stated not to affect 'the rights and responsibilities of the Four Powers and the corresponding related Quadripartite agreements, decisions and practices.' The two German Republics were admitted to the United Nations, without opposition, on 18 September 1973.[43]

### (4) Residual quadripartite authority over 'Germany as a whole'

Thus the Federal Republic of Germany (FRG) and the GDR must be taken to have established themselves, by processes analogous to devolution and

[39] Oppenheim (8th edn), vol 1 576; cf (9th edn) vol 1 706. See Ress, *Die Rechtslage Deutschlands nach dem Grundlagenvertrag vom 21*, 26–51, 214–16.

[40] Non-Aggression Treaty, Moscow, 12 August 1970, 1972 UNTS 315, 9 ILM 1026, Art 3.

[41] Treaty on the Basis of Intra-German Relations, East Berlin, 21 December 1972, 12 ILM 16. Article 3 reaffirmed the inviolability of the FRG-GDR frontier. Article 6 provided for compliance with 'the principle that the sovereign jurisdiction of each of the two States is confirmed to its own territory.' Diplomatic representation was to be established (Art 8). The Treaty was stated not to affect 'the bilateral and multilateral international treaties and agreements already concluded by [the signatories] or relating to them (Art 9). See also the Protocol on the Exchange of Permanent Missions, Bonn, 14 March 1974, 13 ILM 878.

[42] Declaration of 9 Nov 1972, Berlin, 12 ILM 217. Membership had previously been regarded by the Western Allies as contingent upon the establishment of 'a freely elected all-German Government': see, e.g., 738 *HC Deb* 738, WA 12, 12 Dec 1966. Cf Battati [1973] *AFDI* 211.

[43] SC res 344, 22 June 1973; GA res 3050 (XXVIII), 18 Sept 1973. On changing attitudes during this period cf *Kunstsammlungen zu Weimar v Elicofon*, 478 F 2d 231 (2nd Cir 1973), 678 F 2d 1150, 1156 (2nd Cir 1982), 61 ILR 143.

secession respectively, prior to the agreements of 1970 to 1973.[44] Thereafter the term 'Germany' in legal documents could have been interpreted as having a non-technical or even a non-specific meaning.[45] Although relations between the two German States continued to have certain special characteristics,[46] it seems that this was not attributable to any third overarching State of Germany of which they were part (in the way the dominions could be considered part of the British Empire before 1926). Rather the establishment of the two German States must have limited, if it did not extinguish entirely, quadripartite authority with respect to their affairs, at least to the extent that such authority was not reserved in the various instruments. It is true that certain authority was reserved, but this was expressed in rather vague terms, and it could hardly have been exercised (and in fact was not exercised) in such a way as to override the independence of the two Germanies.[47]

## (5) The status of Berlin[48]

A 'special Berlin area' under an Inter-Allied Governing Authority (*Kommandatura*) was established in 1945 'to direct jointly the administration of the "Greater Berlin" area'.[49] Like the Allied Control Council for Germany as a whole, the Governing Authority's effective operation did not continue beyond 1948.[50] In 1952, when the Western Allies were negotiating with the

[44] To the same effect, e.g., Wright (1961) 56 *AJ* 959; Pinto (1959) 86 *JDI* 312; Baade in Stranger (ed), *West Berlin*; but see Caty, *Le Statut*, 31–9, 52–64.

[45] E.g., *Re Delacher* (1962) 40 ILR 5; *Austrian Citizens (Entitlement to Compensation) Case* (1960) 32 ILR 153.

[46] *German Inter-Zonal Trade Case* (1965) 45 ILR 37; and cf the decision of 31 July 1973 on the constitutionality of the Treaty of Relations, 78 ILR 149, noted (1976) 70 *AJ* 147.

[47] E.g. 1952 Tripartite Convention, Art 2: 331 UNTS 327; 1955 Convention (USSR–GDR), Art 1, 226 UNTS 201; 1972 Treaty on the Basis of Intra-German Relations, East Berlin, 21 December 1973, 12 ILM 16, Art 9 ('bilateral and multilateral international treaties and agreements relating to them'). The role of the four Powers in the final settlement in 1990 is addressed in Chapter 12.

[48] In addition to the works cited already, see Simpson (1957) 6 *ICLQ* 83; Bathurst (1962) 38 *BY* 255; Green (1963) 10 *NILR* 113; Lush (1965) 14 *ICLQ* 742; Stanger, *West Berlin: The Legal Context*; Caty, *Le Statut*, 64–73; Zorgbibe, *La Question de Berlin*; Doeker, Melsheimer and Schröder (1973) 67 *AJ* 44; Feller (1977) 51 *ALJ* 272; Hendry and Wood, *The Legal Status of Berlin*; Wilms (1991) 51 *ZaöRV* 470.

[49] Protocol on the Zones of Occupation in Germany and the Administration of 'Greater Berlin', London, 12 September 1944, 227 UNTS 279, Art 5.

[50] Cf Agreement relating to the removal of restrictions on communication, transportation and trade between Berlin and the Eastern and Western Zones of Germany, New York, 4 May 1949, esp para 1, 138 UNTS 123. For details of the breakdown of the Kommandatura, see Rengel, *Berlin nach 1945: politisch-rechtliche Untersuchungen zur Lage der Stadt im geteilten Deutschland*, 268–76; Hendry and Wood, 56–9; Schricke (1990) 36 *AFDI* 47, 49–50, 53. After the breakdown of four-power administration, functional links remained in the areas of rail and public transit only: Mahnke in Jacobsen, Leptin, Scheuner and Schulz (eds), *Drei Jahrzehnte Außenpolitik der DDR*, 109, 118–19.

Government of the Federal Republic with a view to terminating the occupation régime in their zones, the eastern (Soviet) zone of Berlin was under the *de facto* control of the GDR and was administered separately from the rest of Berlin. There were, however, strong grounds for the Western view that Greater Berlin remained legally a separate part of Germany—an 'international enclave' in Jessup's phrase—that was not part either of the FRG or the GDR.[51]

The Quadripartite Declaration on Berlin of 26 May 1952[52] aimed at granting to 'the Berlin authorities the maximum liberty compatible with the special situation of Berlin.' Fairly extensive powers were accorded but the three Allies retained the 'right to take . . . such measures as may be required to fulfil their international obligations, to ensure public order and to maintain the status and security of Berlin.'[53] Berlin legislation, which usually enacted by reference the legislation of the Federal Republic, required Allied approval. Representation of Berlin was, pursuant to arrangements with the Federal Republic, delegated to the latter, subject again to an Allied veto. Under this arrangement, treaties concluded by the Federal Republic required separate application to Berlin.[54]

In 1955, then, no part of Berlin was transferred to the jurisdiction of the FRG. The position was as stated by the Court of Appeals of the Allied High Commission for Germany:

> It is clear that the Federal Republic of Germany has no governmental authority over Berlin and that the Allied Control Authority, the Allied Kommandatura and the City Council and Senate are the only governing bodies in Berlin. Accordingly, the fact that Yugoslavia has an embassy accredited to the Federal Republic . . . can have no bearing upon the functions and status of its military mission in Berlin which is accredited to *another independent governmental authority and territory*.[55]

Although the Court of Appeals did not use the term 'State', a State is an 'independent governmental authority and territory'. In other words, territory not part of another State on which there is an independent governmental

[51] Jessup (1949) 43 *AJ* 92. See also Schiedermair [1973] *AFDI* 171.

[52] 159 BFSP 206, replacing an earlier agreement on Principles Governing the relationship between the Allied *Kommandatura* and Greater Berlin of 14 May 1949, as amended, 158 BFSP 804.

[53] 1952 Agreement, Art II.

[54] See, e.g., 209 UNTS 334 (accession to WHO); 223 UNTS 245 (validation of dollar bonds of German issue). See also French note of 22 March 1983 respecting extension to West Berlin of the Convention on Antarctic Marine Living Resources: (1983) 54 *BY* 472–3.

[55] *Hartje v Yugoslav Military Mission* (1954) 21 ILR 116, 119 (emphasis added). To the same effect, *Etablissements Allart Rousseau et Cie v FRG* (Arbitral Comm on Property Rights and Interests in Germany, 2nd Chamber, 1959) 29 ILR 329, 336; *NY Hanseatic Corporation v FRG* (Arb Comm, 3rd Chamber) 34 ILR 270, 274–5. *In re Kraussman* (1955) 22 ILR 987, 130 F Supp 926 (DC Conn 1955), can only be explained on grounds of a presumption against extradition and the absence of relevant *de facto* control.

authority lawfully established[56] is itself a State. That was the situation of Berlin in 1955.

Berlin was not treated as a 'European territor[y] for whose external relations' the FRG was responsible under the European Communities treaties:[57] rather, these were extended to Berlin by special declaration.

This separate status of Berlin was on the whole confirmed by a Quadripartite Agreement and Associated Arrangements of 3 September 1971.[58] The Four Powers '[a]cting on the basis of their quadripartite rights and responsibilities, and on the corresponding wartime and postwar agreements and decisions of the Four Powers, which are not affected' agreed that there would be no use or threat of force 'in the area' and that the *de facto* situation would not be changed unilaterally.[59] West Berlin was declared 'not to be a constituent part of the Federal Republic of Germany and not to be governed by it';[60] nonetheless, the arrangement whereby the diplomatic representation of West Berlin was entrusted to the Federal Republic was reaffirmed.[61] The effect of the Agreement was summarized in a Note of the same date to the Chancellor of the Federal Republic: 'Our Governments will continue, as heretofore, to exercise supreme authority in the Western Section of Berlin, within the framework of the Four Power responsibility which we share for Berlin as a whole.'[62]

For much of this time the Soviet Union in its arrangements with the GDR also reserved quadripartite rights and responsibilities relating to Berlin.[63] But this eventually changed: an amendment in 1979 to the electoral law of the GDR replaced appointed representation in the *Volkskammer* for East Berlin with direct election. After the first election under the amended law, the western Powers protested in the following terms:

The new procedures which the GDR has introduced in the eastern sector of Berlin treat this sector as though it were part of the territory of the GDR. This is in

[56] As to the legality of the post-war arrangements for Berlin and Germany as a whole there can be no doubt: Art 107 of the Charter confirms this, if confirmation was needed. As to Art 107 see Ress in Simma, *The Charter of the United Nations* (2nd edn, 2002), vol II, 1330–40.

[57] EEC Treaty, Art 227(4), 298 UNTS 11.

[58] Quadripartite Agreement, Berlin, 3 September 1971, 10 ILM 895, 880 UNTS 123.

[59] Part I, paras (2), (4). [60] Part IIB; Annex II(I), 880 UNTS 231.

[61] Part II(D); Annex IV 880 UNTS 231.

[62] 10 ILM 901. See also the Final Quadripartite Protocol of 3 June 1972: 11 ILM 734, affirming that the agreements do 'not affect quadripartite agreements or decisions previously concluded or reached,': Art 1; and approving the various ancillary agreements; all of which came into force and remain in force together: Art 3. See also Hendry and Wood, *The Legal Status of Berlin*, 71–2.

[63] Cf Protocol on the zones of occupation in Germany and the Administration of 'Greater Berlin', 12 September 1944, 227 UNTS 279, Preamble; Art 9, Treaty of Friendship of 12 June 1964, Art 2; 553 UNTS 249.

contradiction with the wartime and post-war agreements defining the status of the special Berlin area and accordingly also in contradiction with the Quadripartite Agreement of 3 September 1971 which applies to the whole of Berlin.[64]

Various incidents occasioned similar protests: the western Powers made clear their view that neither the GDR nor the Soviet Union was competent to assimilate the Soviet sector of Berlin into the GDR.[65] A Three Power note circulated in August 1984 summarized the western position:

Any change in the status of Greater Berlin as reflected in these agreements and decisions would require the agreement of all Four Powers. No such agreement altering the status of Berlin or providing for a special status for any of its Sectors has ever been concluded. The fact that the seat of government of the German Democratic Republic is currently located in the Eastern Sector of the city cannot imply that the quadripartite rights and responsibilities relating to the Eastern Sector are in any way affected. In fact, the Four Powers continue to exercise their quadripartite rights and responsibilities in all four Sectors of the city.[66]

The Soviet Union and the GDR, for their part, routinely protested transactions that they characterized as violating the separate status of West Berlin. The Western Allies asserted in reply that the functional links fostered between the FRG and western sectors were consistent with the Quadripartite Agreement of 3 September 1971 and the special status of Berlin. For example, responding to a protest against inclusion of a resident of West Berlin in an FRG economic delegation, the United States stated:

[T]here is nothing in the Quadripartite Agreement which supports the contention that residents of the Western Sectors of Berlin may not be included in the delegations of the Federal Republic of Germany to international conferences; in fact Annex IV to the Quadripartite Agreement stipulates that, provided matters of security and status are not affected, the Federal Republic of Germany may represent the interests of the Western Sectors of Berlin in international organizations and at international conferences and that permanent residents of the Western Sectors of Berlin may participate jointly with participants from the Federal Republic of Germany in international exchanges.[67]

[64] Note of 14 June 1981, (1981) 52 *BY* 456. This reiterated protests made to the USSR on 9 July 1979 by the three Powers and the FRG following adoption of the amended rules in East Germany: ibid, 456. On the integration of East Berlin into the GDR, see Mahnke, in Jacobsen, Leptin, Scheuner and Schulz (eds), *Drei Jahrzehnte Außenpolitik der DDR*, 119–23.

[65] See, e.g., FCO statement, 27 May 1986, (1986) 57 *BY* 567; statement of Allied spokesman in Berlin, 7 Oct 1986, ibid, 568; letter from UK Mission, Vienna, 27 Apr 1987, to Chairman, 32nd Session of the Commission on Narcotic Drugs, (1987) 58 *BY* 587.

[66] Letter from the Permanent Representatives of the Three Powers to the Secretary General, 14 April 1975, A/10078; (1984) 55 *BY* 535.

[67] Letter, 5 Feb 1987 to Vice-Chairman, Working Group on Nitrogen Oxides, Economic Commission for Europe, from US Mission to International Organizations, Geneva (1987) 58 *BY*

The Western Allies also took the view that it was for the Four Powers to address matters relating to Berlin and that other States, including the GDR, lacked standing:

> [S]tates which are not parties to the Quadripartite Agreement of September 3, 1971, are not competent to comment authoritatively on its provisions. The Governments of France, the United Kingdom and the United States do not consider it necessary, nor do they intend, to respond to any further communications on this subject from states which are not parties to the Quadripartite Agreement.[68]

Thus Greater Berlin remained a separate entity under quadripartite authority, extraterritorial to both German States.[69] This was the case although *de facto* the FRG was closely linked to Berlin (West) and the GDR was the actual administering power in Berlin (East).[70] The Soviet position was that, while West Berlin was extraterritorial to the FRG, East Berlin was an integral part of the GDR and thus, presumably, exempt from quadripartite control or authority.[71] But given the insistence by the other three Powers on continuing quadripartite authority over the whole of Berlin and continuing manifestations of that authority (e.g., Spandau Prison, located in the British sector),[72] it is not clear how the GDR could have acquired sovereignty over East Berlin.[73]

586, 587. The inclusion of West Berlin residents in FRG delegations attracted Soviet protest on a number of occasions. See, e.g., (1983) 54 *BY* 476; (1984) 55 *BY* 526, (1985) 56 *BY* 477.

[68] Statement of the US to the Secretary-General of the United Nations, dated 25 January 1985, in response to GDR comment respecting ratification of the International Cocoa Agreement. 56 *BY* 479 (1985). See also the Three Power Note, 27 November 1985, responding to the Polish declaration on ratification of the Convention on Long-Range Transboundary Air Pollution of 1979: ibid.

[69] Cf the terms of GA res 510 (VI), 20 Dec 1951 (45–6:8), referring to 'the Federal Republic of Germany . . . Berlin, and . . . the Soviet Zone of Germany.'

[70] Certain minor transfers of territory between West Berlin and the German Democratic Republic were made by the *Senat* of Berlin rather than the Government of the Federal Republic: Arrangement between the GDR and the Senate on Settling the Question of the Enclaves by Exchange of Territory, Berlin, 17 December 1971, 11 ILM 14. The Treaty on the Basis of Inter-German Relations of 1972 was extended to West Berlin by Joint Statement: 12 ILM 19. It was agreed that the FRG would represent West Berlin interests in the GDR. For discussion, see Doeker, Melsheimer and Schröder (1973) 67 *AJ* 44.

[71] In a note of 19 June 1974 (A/9648), the USSR stated that there was no basis for 'asserting that the status of Berlin, the capital of the Sovereign State of the German Democratic Republic, and that of West Berlin, which was under the occupation of the three Powers, were identical.' But cf the studied ambiguity of Art 9 of the USSR–GDR Treaty of Friendship, Moscow, 12 June 1964: 553 UNTS 249. There was no reference to Berlin in the 1954 Treaty: 226 UNTS 208.

[72] On the arrangements for Spandau prison see Henry and Wood, *Legal Status of Berlin*, 63–4.

[73] In reply to the Soviet note, the three Western Powers reaffirmed their view that 'any change in the status of greater Berlin would require the agreement of all four Powers which continued to exercise their quadripartite rights . . . in all four sectors of the city.' A/10078 (1975), reaffirming A/9855 (1974) and cf the Soviet reply, A/10084 (1975). See further (1977) 81 *RGDIP* 494, 613–14, 772–4.

Even if territory can be acquired by the process of prescription,[74] yet the factors tending to acquisition of territory by prescription are less cogent than those tending to acquisition of statehood. In particular there is no analogy in the law relating to acquisition of territory to the secessionary creation of a new State. In the latter case, the considerations which eventually compel recognition—such as the need to treat with the *de facto* government and the need to recognize an effective nationality and the human allegiance corresponding to it—are more pressing, absent any violation of peremptory norms; they were certainly pressing in the case of Cold War Germany. Where the case involves merely acquisition of territory by an existing State, such considerations may be addressed in other ways, including recognition of *de facto* control. But there is no such thing as a *de facto* State. Thus the GDR and USSR never succeeded in securing the claim that East Berlin had been incorporated into the GDR as its capital.[75]

But if Berlin under quadripartite government continued to constitute territory of Germany which was extraterritorial to both German States, the issue is raised—which Germany was it the territory of? From a formal point of view there can be only one answer. It was the residual territory of pre-1945 Germany, the rest of German territory and governing authority in relation to that territory having been granted, one way or the other, to two German States whose existence was by now generally recognized. It is true that to postulate a third Germany, 'Germany as a whole', whose remaining manifestations were the territory of Greater Berlin and certain governmental authority concerning the final settlement, is something of a legal construction.[76] Greater Berlin may have remained formally the territory of pre-1945 Germany, but in view of its links with the two Germanies it might seem artificial to regard it as a distinct State. For most purposes it did not function as a territorial unit in any separate way, and certainly it was never a *new* State. On the other hand the territory of Berlin was undoubtedly part of the State of Germany under quadripartite government in 1948 or 1950, and once qualified as such it is difficult to detect any moment, prior to the final settlement, where its status could have definitively

[74] The International Court has never committed itself to the doctrine of prescription, despite opportunities to do so, e.g., *Namibia/Botswana*, ICJ Rep 1999 p 1045, 1105–6 (paras 96–9). It has also disapproved as a legal category the notion of consolidation as a mode of acquisition of territory (*Cameroon/Nigeria*, ICJ Rep 2002 p 275, 352 (para 65)). It seems that significant legal rights such as sovereignty and, by extension, dispositive powers analogous to sovereignty are not lost by the mere lapse of time but only by processes of consent, recognition or acquiescence, and that prescription (and *a fortiori* 'consolidation') are compendious ways of describing these rather than distinct juridical categories.

[75] See Wilms (1991) 51 *ZaöRV* 470, 486.

[76] Ress *Die Rechtslage Deutschlands*, 117–18; Tomuschat in Bathurst *et al*, *Legal Problems of an Enlarged European Community* 154, 160.

changed. All governmental authority in Berlin was referable to the quadripartite arrangements: the Allied Control Authority, the Allied Kommandatura, the City Council and the Senate were entities of Berlin, not the FRG; and the FRG's representation of Berlin and Berliners for various purposes in each case depended on a delegation from the four Powers or some of them.

## (6) Conclusions

It must be concluded that prior to 1990 there were not one but three German States. The quadripartite government of Germany retained functional and territorial authority with respect to 'Germany as a whole' and Berlin and in that capacity it was formally independent of both the FRG and the GDR.[77] It is to this authority, traceable directly to the assumption of supreme authority over Germany in 1945, that we must look in order to find a body of legal relations formally continuous with pre-1945 Germany.

In the period from 1945 to 1990, then, the term 'Germany as a whole' was equivalent to responsibility for the final settlement, and it included independent territorial authority over Berlin. Once the FRG and GDR had emerged as separate States, the various transactions by which the Powers had accepted the territorial and administrative status quo in Germany might seem to have approximated a 'final settlement' but they did not do so entirely. The political shifts of 1989 made possible a return to joint action by the Four Powers and to the final exercise of their rights and responsibilities (described in Chapter 12). That these retained some practical meaning was demonstrated in 1990 in the process leading to reunification.

Furthermore, the territory of Greater Berlin which was in 1949 part of an undivided Germany under quadripartite government did not become part of either German State between 1955 and 1990. It was not part of the FRG because of express reservation in the grant of authority to that State, reservations subsequently affirmed in terms binding the FRG. It had always been extra-territorial to the GDR and the USSR lacked the authority to transfer it to the GDR except with the consent of the other three Powers, which consent was never given. Pursuant to the agreements of 1971 to 1972 Berlin retained a separate status, even though it was administratively assimilated in part to the FRG and in part to the GDR. The Four Powers retained supreme authority with respect to Berlin, which they referred to as 'another independent governmental authority and territory'.

[77] Hendry and Wood, *Legel Status of Berlin*, 19 nn 7–9.

Thus pre-1945 Germany survived the creation of the two German States because the Four Powers, in their capacity as the Government of Germany, retained governmental and territorial authority over German territory which was not part of any other State and retained their independence with respect to that territory. In the events which happened, neither the GDR nor the FRG was identical with pre-1945 Germany; both were in some sense successor States.[78] Only Berlin remained exclusively and unequivocally the territory of the pre-1945 Germany.[79]

Similarly the British Government stated to the House of Commons Foreign Affairs Committee just before reunification:

> HMG recognises both the Federal Republic of Germany and the German Democratic Republic as having the full authority of sovereign States over their external and internal affairs, subject only to Allied rights and responsibilities. Germany as a whole continues to exist as a State in international law, and the special Berlin area remains subject to a special quadripartite status.[80]

## 10.3 Other cases of 'divided States'

### (1) Korea after 1947[81]

The Korean peninsula became a Japanese protectorate in 1905 and was annexed in 1910.[82] Korea was accordingly not a World War II belligerent. The Cairo Declaration stated that '[t]he aforesaid . . . powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent',[83] a determination that was reaffirmed in the Potsdam Proclamation and accepted by the Japanese Instrument of

[78] For an overview see Ress, *Die Rechtslage Deutschlands,* 199–228.

[79] Cf the equivocal conclusions of Schiedermair [1973] *AFDI* 171; see also Klein (1980) 31 *Außenpolitik* 394, 398–99; Piotrowicz and Blay, *Unification of Germany*, 7, 20: '[E]ven if there were two new German states, there was still an old one lurking in the background. Even if the USSR adopted the view that Germany no longer existed, the right to bring Germany's existence to an end was one held by the four Powers to be exercised jointly . . .'.

[80] FCO Memorandum to House of Commons Foreign Affairs Committee on the Status of the Two German States, March 1990, reprinted 61 *BY* 494 (1991).

[81] See Caty, *Le Statut*, 44–7, 52–7; Whiteman, 1 *Digest* 320–5, 2 *Digest* 172–82, 3 *Digest* 477–559; Gordenker, *The United Nations and the Peaceful Unification of Korea*; Potter (1950) 44 *AJ* 709; Goodrich, *Korea. A Study of United States Policy in the United Nations*; Green (1951) 4 *ILQ* 462–8; Jessup, *Birth of Nations*, 19–42; Pak, *Korea and the United Nations*; Dong (ed), *The Two Koreas and the United States*.

[82] Japan–Korea, Protectorate Agreement, 17 November 1905, 98 BFSP 1139; Japan–Korea, Treaty of Annexation, Seoul, 22 August 1910, 103 BFSP 992 (proclaimed 29 August 1910, 105 BFSP 683).

[83] (1944) 38 *AJ Supp* 8.

Surrender.[84] It was provided that Japanese forces north of the 38th parallel would surrender to Soviet forces; south of the 38th parallel, to United States forces. The territorial assignment between the two occupying powers was referred to at the time by the United States Acting Secretary of State as a 'purely *ad hoc* military decision . . . adopted for military purposes only . . . [I]t was not meant . . . to be a barrier cutting Korea into two sections.'[85] Nevertheless difficulties occurred in bringing about the projected unification of the whole of Korea, both before and after a Tripartite Agreement to facilitate that aim.[86] As a result on 17 September 1947 the United States referred the problem to the United Nations. General Assembly resolution 122(II) of 14 November 1947 established a Temporary Commission on Korea and recognized 'the urgent and rightful claims to independence of the people of Korea'. Machinery for the free election of representatives was established, but the refusal of the Soviet Union or the local North Korean administration to cooperate meant that implementation of the resolution was in effect confined to the south. As a result of the elections the General Assembly declared

> that there has been established a lawful government [the Government of the Republic of Korea] having effective control and jurisdiction over that part of Korea where the Temporary Commission was able to observe . . . and in which the great majority of the people of all Korea reside; that this Government is based on elections which were a valid expression of the free will of the electorate of that part of Korea . . . and that this is the only such Government in Korea.[87]

Nevertheless, as the same resolution conceded, 'the division of Korea persisted', a provisional government, the Korean People's Democratic Republic, being established in the North. In 1949 both governments applied for United Nations membership. The application of the Korean People's Democratic Republic was not considered;[88] that of the Republic of Korea (ROK) was vetoed by the Soviet Union.[89] The Assembly stated its opinion that 'the Republic of Korea is a peace-loving State within the meaning of Article 4 of the

[84] Whiteman, 3 *Digest* 486–7. [85] Ibid, 488–9.

[86] The Moscow Agreement Communiqué on the Moscow Conference of the three Foreign Ministers, Moscow, 27 December 1945; Report of the meeting of the Ministers of Foreign Affairs of the Union of Soviet Socialist Republics, the United States of America and the United Kingdom, 26 December 1945, 26 December 1945 (USA, UK, USSR), 20 UNTS 259. For Soviet violations see Whiteman, 3 *Digest* 506–7. An earlier wartime proposal to establish a trusteeship for Korea was not developed. Pak, *Korea and the United Nations*, 4–6. [87] GA res 195 (III), 12 Dec 1948 (46–6:1).

[88] A USSR draft resolution to refer the application to the Committee on Admissions was rejected. *SCOR*, 410th mtg, 16 Feb 1949 (2–8:1). See also *SCOR* 790th mtg, 9 Sept 1957 (S/3887) (1–9:1).

[89] *SCOR* 423rd mtg, 8 Apr 1949 (9–1:0). The Republic of Korea's application was repeatedly rejected: *SCOR*, 704th mtg, 13 Dec 1955 (9–1:1); *SCOR*, 790th mtg, 9 Sept 1957 (10–1:0).

Charter, is able and willing to carry out the obligations of the Charter, and should therefore be admitted to the United Nations.'[90]

On 25 June 1950 the military forces of the People's Republic attacked the Republic across the 38th parallel. The Security Council immediately authorized assistance to the South Korean Government, determining that a breach of the peace had been committed by 'the authorities of North Korea'.[91] A United Nations force of considerable size was engaged.[92] On 5 November 1950 the People's Republic of China officially intervened in Korea. On 27 July 1953 the parties signed a Military Armistice Agreement establishing, approximately at the 38th parallel, a ceasefire line and Demilitarized Zone.[93] Under Article 10, the 'civil and relief jurisdiction' of each side was accepted with respect to its own territory. The Republic of Korea was not, however, a signatory.

Meanwhile, by Article 2(a) of the Peace Treaty of 1951, Japan, 'recognizing the independence of Korea, renounce[d] all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.'[94]

What then was the status of the two Korean governments at this time? To some extent the establishment of the two local regimes in the two zones of occupation resembles the establishment in the zones of occupation in Germany of rival German governments. There were, however, significant differences between the two situations. In Germany the military occupation was effected by the Four Powers not as belligerent occupants but as the government of Germany. The unilateral establishment of 'States' in the zones of Germany may have been a breach of quadripartite agreements, but these breaches could be, and eventually were, cured by quadripartite recognition. In Korea, on the other hand, the position of the United States and the Soviet Union was precisely that of belligerent occupants pursuant to the surrender of Japan, the territorial sovereign. As belligerent occupants, the Allies had no dispositive authority with respect to Korea, apart from that to be exercised in the dispositions of the Japanese Peace Treaty. The establishment, under United Nations auspices, of an indigenous government in Korea, which claimed to be and was recognized as a State, was thus, in form at least, not an act of disposition by the belligerents but a secession under international auspices from Japan. Equally, in the north, the establishment of a *de facto* government was not authorized by the terms of

[90] GA res 296G (IV), 22 Nov 1949 (50–6:3); and also GA rsns 1017A (XI), 28 Feb 1957 (40–8:16); 1144A (XII), 25 Oct 1957 (51–9:21).

[91] SC res 82 (1950), 25 June 1950 (9–0:1 (Yugoslavia), 1 absent (USSR)). See Hoyt (1961) 55 *AJ* 45.

[92] For details, see Higgins, *UN Peacekeeping 1946–1967,* vol 2, 153–314.

[93] For text see [1953] *UNYB* 136. The Armistice ended the Korean war for the purposes of US military law: *US v Sanders* (1956) 22 ILR 896; *US v Shell* (1957) 24 ILR 929.

[94] 136 UNTS 45. Neither Korean government was a signatory to the Peace Treaty.

the occupation, and must also be regarded as a secession from Japan. The difference between the two cases, prior to 5 November 1950, was, firstly, that the government in the south had been established under international supervision in circumstances which lent support to its representative character; and, secondly, that it had been widely recognized. The Republic of Korea would thus seem to have qualified as a State prior to 1951, having established, in accordance with the principles discussed in the preceding Chapter, effective independence after secession.[95]

The situation of the Democratic People's Republic of Korea (DPRK) was much less clear. In the first place, its effective independence was in doubt, since it had been established by nomination of a single belligerent occupant without any form of international supervision. It had been recognized by very few States. In 1950 it was only a *de facto* regime attempting to secede from the territorial sovereign but which had not at that stage established effective independence. This situation did not change during the Korean War, a conflict related to the very existence of a divided Korea or its unification under one or other of the claimant governments.[96]

In 1951 Japan recognized the independence of 'Korea' and thereby renounced all rights to Korea as a whole. Various interpretations of Article 2(a) of the Japanese Peace Treaty are possible. It could be that as with China, Japan merely renounced its sovereignty over the territory in question, leaving at large the status of the various entities in the territory. On that view, the Democratic People's Republic of Korea could have become a State by occupation of *terra derelicta* in 1951, assuming that it had by that date established its separate independence from the former belligerent occupant. Alternatively, it could be

[95] The Japanese Supreme Court held (by majority) that Japanese subjects resident in Korea lost their Japanese nationality only on the signing of the Peace Treaty: *Kanda v State of Japan* (1961) 32 ILR 170. Judges Fujita and Okuno thought the relevant date the acceptance by Japan of the Potsdam Proclamation (August 1945): ibid, 179, 182. On the problem of the stateless Koreans see Crawford (1986) 27 *Seoul LJ* 34.

[96] In the period 1950–3 the Security Council consistently refused hearings to the DPRK under Art 32 of the Charter, although the ROK was invited to attend under the equivalent provisions of Art 39 of the Provisional Rules of the Council. *SCOR*, 473rd mtg, 25 June 1950, 4. A Yugoslav draft resolution to invite the DPRK to put its case (S/1500) was refused: ibid, 15 (1–6: 3 abstentions); also S/1509, *SCOR*, 474th mtg, 7 (1–7:2 abstentions). See also the USSR draft resolutions S/1668 (defeated 1–8:2); S/1751 (2–8:1). An alternative basis for refusal was that Council action under Chapter VII concerning a breach of the peace was not action concerning a 'dispute': Art 32 was therefore inapplicable. See *SCOR* 488th mtg, 15–16 (Norway); 494th mtg, 15–16 (India), 20 (France), 21 (UK), 21–2 (Ecuador). Notes from the DPRK to the UN were circulated by the Secretary-General 'for the convenience of Members' and not under Rule 6 of the Provisional Rules ('Communication from States'): citing GA res 195 (III), S/1477, 409th mtg, 12, 18, S/1256, 409th mtg, 14–15. See also *SCOR* 7th yr, 585th mtg, 1 July 1952, 6, 10.

that, in recognizing the independence of 'Korea' (which was taken to mean the Republic of Korea) and in simultaneously renouncing its claims to the whole of Korea, Japan transferred territorial sovereignty over the whole of the Korean peninsula to the Republic of Korea, so that, after 1951, the Democratic People's Republic of Korea continued its secession against a new territorial sovereign, the Republic of Korea. In view of the formal acceptance by all parties of the principle of the unity of Korea in 1951 and the general recognition of the Republic of Korea as entitled to represent internationally the whole of Korea,[97] this interpretation may be preferable. On the other hand the Republic of Korea did not in 1951 exercise effective jurisdiction over the whole of Korea (it has never done so), and Article 2(a) of the Japanese Peace Treaty does not readily lend itself to interpretation in terms of transfer, rather than renunciation, of sovereignty.

On this view, there were, in 1952 'not . . . two States but . . . two rival Governments of one and the same State established on the totality of the Korean Peninsula, irrespective of their names.'[98] This is not to say, however, that the DPRK had no status prior to 1953. It was an established *de facto* government, bound by international law, including the international laws of war.[99] But Security Council action taken against it was advanced specifically on grounds of a 'breach of the peace' rather than 'aggression': the 38th parallel was not, it seems, in 1950 either an international boundary or even a 'line of demarcation . . . which it [was] otherwise bound to respect.'[100] The same conclusion was reached by the UK Registrar of Patents in the *Harshaw Chemical Patent* case. That case concerned section 24 of the Patents Act 1949 (UK): the word 'State' in the section was construed to mean 'State' in the full international sense. The Registrar concluded that: 'the hostilities in Korea were more in the nature of a civil war rather than a war between two "states" . . . Up to [1954] at least, the Democratic People's Republic was considered to be no more than a belligerent power.'[101]

The United Nations after 1953 frequently reaffirmed 'that the objectives of the United Nations remain the achievement by peaceful means of a unified,

[97] The Republic was accorded observer status at the UN in 1948 and became a member of numerous specialized agencies. See Pak, *Korea and the United Nations*, 63–74 for details.

[98] *Go Man Ei v Municipality of Tokyo* (District Court of Tokyo, 14 May 1957) 32 ILR 185, 186 referring, however, to a later period.

[99] The DPRK agreed to observe the 1949 Geneva Conventions, at least insofar as they were declaratory of customary international law: Higgins, *UN Peacekeeping*, vol 2, 190–5. The Republic of Korea acceded to the Conventions on 16 August 1966.

[100] Cf GA res 2625(XXV) Annex.

[101] (1964) 41 ILR 15. But in 1970, Graham J held that North Korea was a State for the purposes of s 24(1), although at that time unrecognized by the UK: *In re Al-Fin Corporation's Patent* [1970] Ch 160, 52 ILR 68, overruling *Harshaw Chemical Co's Patent*. For further proceedings see [1970] RPC 70.

independent and democratic Korea under a representative form of government, and the full restoration of international peace and security in the area.'[102] However, the stalemate of the Korean War and the continuing existence of two Korean States eventually compelled the recognition of both. The boundary between them was consolidated into a full-scale juridical boundary for the purpose amongst other things, of the use of force. A Joint Communiqué on Basic Principles of National Unity, 4 July 1972 laid down, *inter alia*, that unification was to be effected by peaceful means and not the use of force:[103] this amounted to recognition by the parties of the situation created in 1953.[104] In 1973, after extensive debate, the DPRK was admitted to the WHO,[105] membership of which, by Article 3 of its Constitution, is open to 'all States'. It was given 'observer status' at the United Nations in June 1973.[106] The United States, following President Park of the ROK, accepted in principle a proposal that both Korean States be admitted to the United Nations,[107] and they eventually were in 1991.[108] At what point the DPRK became a separate State is, however, less clear. It seems to have been accepted at the time of the *Pueblo* incident in 1968 that the DPRK's 12 nm territorial sea was opposable to the

[102] GA res 811(IX), 11 Dec 1954 (50–5:4), para 2; see also res 2668(XXV), 7 Dec 1970 (67–28:22).

[103] 1972 *UN Ybk* 150; *Report of the Secretary-General on the Work of the Organization*, 29th sess, June 1974, A/9601, 30–1.

[104] Cf (1975) 79 *RGDIP* 468–9.

[105] For the verbatim record, see Twenty-Sixth World Health Assembly, Part II, p 230, s 3, item 1.13.2. WHA 26.28 of 17 May 1973, admitting the DPRK, was adopted by a divided Assembly (66–41:22). 1973 *UN Ybk* 917.

[106] The procedure leading to the grant was not precisely defined. A cable from the DPRK foreign minister to the Secretary-General received at headquarters on 26 June 1973 suggested that North Korea took the view that it had automatically become a permanent observer when it had been admitted to the WHO: 'Pleased with admission of Democratic People's Republic of Korea into World Health Organization and *resultant* satisfactory solution of question of establishing its office of Permanent Observer to United Nations Office at Geneva and Permanent Delegation to International Organizations at Geneva. I inform your excellency that Government of Democratic People's Republic of Korea has decided to establish its Office of Permanent Observer to United Nations Headquarters.' (Emphasis added.) In the press statement in which this communication was quoted, the press spokesman referred to admission to a specialized agency (such as the WHO) as a 'criterion for Observer status': OPI Daily Press Briefing, 27 June 1973. It would appear that it was a statement by the Secretary-General, in a cable to the DPRK foreign minister (29 June 1973), that formalized the arrangement, though whether this was merely a matter of housekeeping or a substantive decision on status is unclear. The press spokesman affirmed that the decision respecting establishment of a permanent observer mission was within the Secretary-General's prerogative: OPI Daily Press Statement, 29 June 1973. For a notable confusion between these transactions and the earlier WHO admission vote, see *Keesing's* 1973, 25963A; Osmanczyk, *Encyclopedia* (2nd edn), 491, about which see Choi (1991) 19 *Korean JCL* 135, 138–44.

[107] *Keesing's 1973*, 26148A. But on 7 August 1975 the Security Council refused to proceed with an application for membership by the ROK (7–6:2), while approving application of both Vietnamese States and the DPRK. All these applications were subsequently vetoed by the USA.

[108] SC res 702, 8 Aug 1991; GA res 46/1, 17 Sept 1991; Pak, 73–4.

United States.[109] The date of the Korean ceasefire (July 1953) may perhaps be taken as the date of the secession of the DPRK from the Republic of Korea. That date has the twin merit of being the point at which the boundary between the two entities became firmly established, and of marking the last substantial attempt at a settlement of the Korean problem by unilateral military force.

### (2) Vietnam after 1945[110]

The French protectorates of Tonkin and Annam and the colony of Cochin-China, which were part of French Indo-China, were invaded by Japanese forces in 1940. A Vichy-French administration continued to operate under Japanese auspices until March 1945, when it was replaced by a regime under Emperor Bao Dai. On 2 September 1945, after Japanese withdrawal, the Democratic Republic of Vietnam (DRVN) under Ho Chi Minh declared its independence:[111] this was not recognized either by France or the other allies. On 6 March 1946 a Franco-Vietnamese Preliminary Convention and Annex was signed, Article 1 of which read: 'The French Government recognizes the Republic of Vietnam as a free State having its own government, parliament, army and finances, and forming part of the Indochinese Federation and the French Union.'[112]

The Convention was stated to be preliminary to the opening of full negotiations on 'the diplomatic relations of Vietnam with foreign States . . . the future status of Indochina, and . . . the French economic and cultural interests in Vietnam.' In apparent violation of this Convention, the French Government proceeded by a Franco-Cochinese Convention of 3 June 1946 to establish a Provisional Government of the French Republic of Cochin-China.[113] The DRVN protested,[114] and on 14 September 1946 a *modus vivendi* purported to

[109] The ROK at that time claimed only three miles: the US argument thus accepted the Democratic Republic's capacity to extend its maritime frontier. The Ethiopian representative suggested that an invitation to North Korea to attend as a party to the dispute would be in order: *SCOR* 1389th mtg, 27 Jan 1968, 2. The meeting adjourned without reaching any decision. See Schumacher and Wilson, *Bridge of No Return; the Ordeal of the USS Pueblo*; Lerner, *The Pueblo Incident: A Spy Ship and the Failure of American Foreign Policy*; Armbrister, *A Matter of Accountability: The True Story of the Pueblo Affair*.

[110] See Cameron, *Vietnam Crisis*; Caty, *Le Statut*, 42–4, 52–6; Blanchet, *La Naissance de l'État associé du Vietnam*; Partan (1966) 46 *Boston ULR* 281; Thierry [1955] *AFDI* 168; Moore, *Law and the Indochina War*; Falk (ed), *The Vietnam War and International Law*; Murti (1967) 7 *Indian JIL* 369; Schick (1968), 17 *ICLQ* 953; Kamps, *The History of the Vietnam War*.

[111] Cameron, *Vietnam Crisis*, vol I, 52.

[112] 149 BFSP 657, in Cameron, *Vietnam Crisis*, vol I, 77–8.

[113] Cameron, *Vietnam Crisis*, vol I, 80–2. France, Direction de la Documentation, Notes Documentaires et Etudes, No 554 (February 22, 1947), 7–8.

[114] Cameron, *Vietnam Crisis*, vol I, 83–4.

regulate questions between it and France on a basis of equality.[115] Hostilities were not, however, prevented, and these continued from December 1946. In June 1948 a third party joined the conflict: France established a 'Provisional Government of Vietnam' by the Ha Long Bay Agreement, Article 1 of which provided:

> France solemnly recognizes the independence of Vietnam, to who falls hereafter the task of freely realizing its unity. On its part Vietnam proclaims its adherence to the French Union as a State associated to France. The independence of Vietnam has no other limits than those imposed upon it by its adherence to the French Union.[116]

The head of the Government so established was the Emperor Bao Dai. His Government was accorded, at least in theory, full powers of internal control, but diplomatic and military matters were reserved to the French Union.[117] This Government failed to establish the intended unity of Vietnam. Instead, the DRVN was recognized by the People's Republic of China on 18 January 1950 and by the Soviet Union on 30 January 1950.[118] On 7 February the United Kingdom decided to recognize 'the status of Vietnam, Laos and Cambodia as Associated States within the French Union',[119] and the United States on the same day accorded 'diplomatic recognition to the governments of the State of Vietnam, the Kingdom of Laos and the Kingdom of Cambodia.'[120] Thus there were in 1950 two Vietnamese governments each claiming and exercising a degree of control over the whole territory; each having been recognized by certain States. It seems that at this stage neither government qualified as the government of an independent State of Vietnam. The DRVN had not consolidated effective control over the whole territory. The Republic of Vietnam (RVN) lacked formal independence because of its association with the French Union, and it also lacked real or effective independence.

In 1952, both the RVN and the DRVN applied to join the United Nations. The application of the RVN was vetoed by the Soviet Union;[121] that of the DRVN was rejected, only the Soviet Union voting in favour.[122] The General Assembly thereupon resolved that: 'Vietnam is . . . a peace-loving State within

[115] Cameron, *Vietnam Crisis*, vol I, 85–9. Article 1 provided that 'Vietnamese nationals in France and French nationals in Vietnam should enjoy equal rights of domicile in the two countries.'

[116] 5 June 1948, 152 BFSP 414; Cameron, *Vietnam Crisis*, vol I, 117. Cf Whiteman, 1 *Digest* 284–91.

[117] See the Elysée Agreements of 8 March 1949: 155 BFSP 472, Cameron, *Vietnam Crisis*, vol I, 120–44.

[118] Cameron, *Vietnam Crisis*, vol I, 134–44.

[119] Cameron, *Vietnam Crisis*, vol I, 145–6.

[120] Cameron, *Vietnam Crisis*, vol I, 146–7. US recognition was deliberately reserved and ambiguous: see O'Brien and Goebel, 'U.S. Recognition Policy', 147–51.

[121] S/2758, 603rd mtg, 19 Sept 1952.

[122] Ibid; S/2773.

the meaning of Article 4 of the Charter, is able and willing to carry out the obligations of the Charter, and should therefore be admitted to membership in the United Nations.'[123] On 7 May 1954, the French base at Dien Bien Phu, in the north of Vietnam, was taken by DRVN forces. On 4 June 1954, a Treaty of Independence of the State of Vietnam and of Association between the new State and France was initialled, but it was never signed.[124] Meanwhile, Article 1 of the Agreement on the Cessation of Hostilities between the belligerent forces of France and the Democratic Republic, established 'a provisional military demarcation line [the 17th parallel] . . . on either side of which the forces of the two parties shall be regrouped after their withdrawal, the forces of the People's Army of Vietnam to the north of the line and the forces of the French Union to the South.'[125] Article 6 of the Final Declaration of the Geneva Conference 'recognize[d] . . . that the military demarcation line is provisional and should not in any way be interpreted as constituting a political or territorial boundary.'

Elections were to be held by July 1956 throughout Vietnam.[126] The Final Declaration was accepted expressly by France, Laos, the People's Republic of China, the United Kingdom, the Soviet Union, Cambodia and the DRVN. The Government of the RVN did not accept the Declaration, although in view of the arrangements for the conduct of its diplomatic relations, it was arguably bound by French acceptance. The United States undertook to 'refrain from the threat or use of force to disturb' the Agreements.[127] No consultations for elections were held under the Final Declaration, although requested by the DRVN.[128] The reasons for this failure need not be discussed here: what in fact occurred in the period after 1954 is clear—the provisional demarcation line between the two zones became a boundary between two States, north and south Vietnam.[129] That this is so appears for example from the provisions of the Paris Peace Agreement of 27 January 1973, which formally ended the war in Vietnam so far as the United States was concerned. The agreement read in part

1. The United States and all other countries respect the independent sovereignty, unity and territorial integrity of Vietnam as recognized by the 1954 Geneva Agreements . . .

2. The United States will stop all its military activities against the territory of the Democratic Republic of Vietnam . . .

[123] GA res 620 (VII), 21 Dec 1952 (40–5:12). Nevertheless, the Republic of Vietnam's application was again vetoed in 1955 and 1957. [124] 161 BFSP 649.

[125] 161 BFSP 818, Cameron, *Vietnam Crisis*, vol I, 268. [126] Final Declaration, Art 7.

[127] Cameron, *Vietnam Crisis*, 286, 306, 314. [128] Cameron, *Vietnam Crisis*, 373.

[129] The 'Republic of [South] Vietnam' was established on 28 October 1955, after a referendum and the deposition of Bao Dai. The US immediately recognized the new government.

4. The United States will not continue its military involvement or interfere in the internal affairs of South Vietnam . . .

9. The Government of the United States and the Government of the Democratic Republic of Vietnam undertake to respect the following principles for the exercise of the South Vietnamese people's right to self-determination . . .

15. The reunification of Vietnam will be carried out step by step through peaceful means on the basis of discussion and agreements between North and South Vietnam without coercion or annexation by either party, and without foreign interference. The time for reunification will be agreed upon by North and South Vietnam. Pending the reunification

(a) The military demarcation line between the two zones at the 17th parallel is only provisional and not a political or territorial boundary, as provided for in Paragraph 6 of the Final Declaration of the 1954 Peace Conference . . . [130]

The 1973 Agreement was not internally self-consistent. On the one hand it attributed territory to the DRVN, a right of self-determination and a domestic jurisdiction to the RVN, and a right of veto over unification to both parties. On the other hand it maintained that the boundary between them was not only 'provisional' (which, as we have seen, is consistent with the separate statehood of the two entities) but that it was not a 'political or territorial boundary'. But it is difficult to see what consequences were intended to flow from that denial, apart from a reaffirmation of the political goal of peaceful unification of Vietnam. Each entity was a unit for the purposes of the use of force, self-determination, foreign and internal affairs; and another name for such a unit is a State. The 1973 Agreement definitively, if not explicitly, recognized the existence of two Vietnamese States.[131]

The Vietnamese situation prior to 1975, while quite different from that in Germany, bore a certain resemblance to that in Korea. In both Korea and Vietnam there existed for a time rival *de facto* governments: in both cases there was eventually established a ceasefire line binding both parties after open conflict between them. The lines so established subsequently became, by a process of recognition and acquiescence, effectively the boundaries between two States. Although both had been united in pre-colonial times, in neither case had there been a unified, independent State prior to partition.

[130] Text in *Keesing's* 1973, 25781A. See also (1973) 22 *ICLQ* 379.

[131] Prior to 1973 the US position was somewhat equivocal. The Department of State Legal Memorandum of 1966, justifying US military involvement, based itself on the premise that South Vietnam was then 'a zone of a temporarily divided state' and made no express reference to the status of 'North Vietnam': (1966) 60 *AJ* 656, 570, 584. However, 'North Vietnam' was referred to as the instigator of an 'armed attack' for the purposes of Art 51 of the Charter.

Nevertheless the Vietnamese situation had certain special features. In particular, the early and effective establishment of the DRVN in 1945 and its subsequent, albeit partial, recognition by France were without parallel in the case of Korea. In the latter case the creation of a regime in the North was clearly a violation of the relevant agreements, so that the judgement that the government of the Republic of Korea, established under United Nations auspices and recognized as such by the previous territorial sovereign, was *de jure* the government of the whole State of Korea was justifiable, at least until 1954. With Vietnam, the DRVN preceded its rival; its creation was not internationally unlawful in any relevant respect; it achieved a measure of recognition, and it could legitimately claim to be the representative of the people of Vietnam. But the subsequent establishment of two separate zones in Vietnam must be taken to mark the establishment of two separate States,[132] neither of which, in law or in fact, ever extended over the whole territory of 'Vietnam'.[133] The legality of foreign involvement in Vietnam between 1954 and 1973 thus depended upon the premiss that there existed two Vietnams.[134]

Nothwithstanding Article 15 of the 1973 Agreement, military operations continued against the RVN and, on 30 April 1975 its Government collapsed. On 1 May, a Provisional Revolutionary Government was proclaimed in Saigon, renamed Ho Chi Minh City.[135] A National Assembly including

[132] Cf Johnson in Falk (ed), *The Vietnam War and International Law*, vol I, 201, 211–13. Both States acceded to the 1949 Geneva Conventions (RVN, 14 Nov 1953: 181 UNTS 351; DRVN, 28 June 1957: 274 UNTS 335). The RVN was a member of a large number of specialist organizations. It was accorded sovereign immunity in French courts: *Gugenheim v State of Vietnam* (Paris CA, 1955) 22 ILR 224. See also *Trésor Public v Air Laos* (Tribunal de Grande Instance de la Seine, 1960) 39 ILR 405, 407 (flight from Vientiane to Saigon 'international' under the Warsaw Convention).

[133] Problems of State succession in the Vietnamese situation were complex: see Nguyen-Huu-Tru, *Quelques problèmes de succession d'États concernant le Vietnam*. In French courts, the RVN was treated as the successor to France in Vietnam: *Re Compagnie des Eaux d'Hanoi* (Conseil d'État, 1963) 44 ILR 37.

[134] This view was held by some commentators: e.g., Brownlie, *Legal Aspects of the Armed Conflict in Vietnam*. Hull and Novogrod, *Law and Vietnam*, 53 went even further: 'both North and South Vietnam were separate and independent States prior to, during and after the 1954 Geneva Accords'. See also Johnson, in Falk (ed), *Vietnam War*, 505; Murti, *Vietnam Divided: The Unfinished Struggle*; Nguyen-Huu-Tru, *Quelques Problèmes*, 22–3, 137–9. Of the contrary view are Thierry [1955] *AFDI* 168 (North Vietnam not in 1955 a State); Wright (1966) 60 *AJ* 750, 756–9 (Vietnam in 1966 was 'one State'); Caty, *Le Statut*, 52–7, 187–95. The DRVN claimed a territorial sea of 12 nm; the Republic of Vietnam claimed only 3 nm. It is not altogether clear that the Gulf of Tonkin incident occurred outside the 12 mile limit: in any case the US stated it had no objection to the DRVN authorities being invited to appear before the Security Council (under what provision was not stated): *SCOR*, 1140th mtg, 5 Aug 1964, para 95. Two statements of the DRVN were subsequently circulated as 'official documents of the Security Council'. The Council made no determination as to the merits of the dispute: *SCOR* 1141st mtg, 7 Aug 1964.

[135] Herring, *America's Longest War: The United States and Vietnam*, 1950–1975, 261; *Trinh v Citibank*, 850 F 2d 1164, 1166 (6th Cir 1988, Jones J), 107 ILR 203, 206.

delegates from North and South was elected in April 1976. On 2 July 1976, South Vietnam was merged with North Vietnam, with the result that 'the Republic of Vietnam . . . is not simply moribund; it is defunct.'[136] A single Socialist Republic of Vietnam claiming the allegiance of the whole people of Vietnam was admitted as a Member State of the United Nations in 1977.[137]

### (3) China after 1948

The legal status of Taiwan, and its relation to China, have been discussed already. Caty excludes the Chinese situation from the rubric 'divided State' on the ground that Taiwan is a separate State,[138] but of the four situations he discusses, only China now constitutes a 'divided State' according to his definition. But, for the reasons that have been given, neither that category nor any general conception of divided statehood is of value in analysing the legal status of Taiwan.

## 10.4 Conclusions

Examination of these four cases demonstrates clearly enough the unhelpful character of the rubric 'divided State':

(1) The better view is that until 1951 Taiwan remained Japanese; the Republic of China was in effect a government-in-exile occupying the islands with the consent of the Allies. That Taiwan became part of China in 1951 resulted as much from the continuing claims of the Republic of China as from the Japanese Peace Treaty itself. So China only became a 'divided State' in 1951, and then not unequivocally.

(2) If Korea was ever a divided State, it can only have been for the relatively brief period between the Japanese Peace Treaty and the termination of the Korean War. Thereafter the Democratic People's Republic consolidated its position north of the ceasefire line.

(3) Vietnam was probably never a unified independent State, post-colonization. If it possessed any formal unity that was in the period 1954 to 1956, as a result of the Geneva Agreements and the absence of any claim to separate statehood on the part of the DRVN. Despite its equivocations the Paris Peace Agreement of 1973 recognized the effective separation of Vietnam into two States—though, to be sure, that separation proved to be temporary.

[136] *Republic of Vietnam v Pfizer Inc*, 556 F 2d 892, 893–4 (8th Cir 1977).

[137] SC res 413, 20 July 1977; GA res 32/2, 20 September 1977.

[138] Caty, *Le Statut*, 23–30.

(4) In the case of Germany the position of the Four Powers, and the subordination of the local authorities to them, supported for a time the claim to a single State of Germany. But after 1954, with the independence or putative independence of these local authorities the central 'State' authority came to appear less substantial. Apart from the special status of Berlin, such competences as remained were of a nominal kind; they did not prevent and probably could not have prevented the separate statehood of the two Germanies. Subsequent unification (unlike in Vietnam) was a consensual process; as will be seen in Chapter 12, it was not an exercise of dispositive authority, although quadripartite consent was obtained.

The four cases present many more differences than similarities. It is true that a State divided *de facto* into separate entities can continue to be regarded as a single State, whether because of the claims to and recognition of that unity, or because of overriding principles of legality. China is an example of the former, Cyprus of the latter. But such cases are to be referred to the general criteria of statehood, not to any special category of the 'divided State'.

# Chapter 11

# UNIONS AND FEDERATIONS OF STATES


| | | |
|---|---|---|
| **11.1** | **The classification of political unions** | 479 |
| **11.2** | **Federation, confederation and other forms of political union** | 481 |
| | (1) Real and personal unions | 482 |
| | (2) Federation and confederations | 483 |
| | (3) Unusual formations | 489 |
| | (4) 'Remedial federation': federal solutions in conflict situations | 490 |
| | (i) Cyprus | 490 |
| | (ii) Bosnia and Herzegovina | 491 |
| | (5) Associated States | 492 |
| **11.3** | **Unions of States in international organizations** | 492 |
| | (1) The United Nations Organization | 493 |
| | (2) The European Union | 495 |
| **11.4** | **Regional devolution in previously unitary States** | 500 |


## 11.1 The classification of political unions

Permanent links between States can take a multitude of forms. They are of little interest in an examination of territorial status unless they involve either the creation of a relation of dependency between one State and another, the partial or total merger of the States concerned in a new political entity or (what may amount to the same thing) the establishment of common and autonomous institutions for the conduct of some or all of the affairs of the States concerned.[1]

[1] One of the issues in the *Western Sahara* case was the status of the so-called 'Mauritanian entity', referred to in GA res 3292 (XXIX) of 13 December 1974, at the time of the colonization of the Spanish Sahara (1884–5). The Court held that 'despite some form of common activity, the absence . . . of any common institutions or organs, even of a quite minimal character' among the tribes and emirates in question precluded them from constituting 'a personality or corporate entity distinct from the several emirates and tribes which composed it'. The entity was accordingly incapable of enjoying any 'form of sovereignty in Western Sahara': ICJ Rep 1975 p 12, 63.

These latter types of union have traditionally been accorded separate treatment in textbook discussions of statehood and legal personality;[2] and it is indeed the case that certain typical forms of union (such as federations) raise interesting problems of personality and responsibility.[3]

According to the ILC's Commentaries on the Articles on the Responsibility of States for Internationally Wrongful Acts:

> [F]ederal States vary widely in their structure and distribution of powers, and . . . in most cases the constituent units have no separate international legal personality . . . nor any treaty-making power. In those cases where the constituent unit of a federation is able to enter into international agreements on its own account, the other party may well have agreed to limit itself to recourse against the constituent unit in the event of breach. In that case the matter will not involve the responsibility of the federal State . . . Another possibility is that the responsibility of the federal State under a treaty may be limited by the terms of a federal clause in the treaty. This is clearly an exception to the general rule, applicable solely in relations between the States parties to the treaty and in the matters which the treaty covers.[4]

As this passage implies, the fundamental principle in the context of political union, no less than in the context of status, is that the incidents of a particular arrangement are to be determined only by an examination of *that* arrangement, and not by deductions from some *a priori* category or construction. The basic principles—apart of course from the general principle of consent and the like—are those relating to the attribution of legal personality, and especially the criteria for statehood. The point was made succinctly by Kunz: 'Les conceptions des différents liaisons d'États ne sont pas conceptions normatives, ne sont pas des conceptions du droit, mais des conceptions de classification fournies par la doctrine.'[5] The doctrine commonly distinguished four typical kinds of political union: real and personal unions, federations and confederations.[6] These were not mutually exclusive or exhaustive categories but were rather discrete pairs of frequently occurring and contrasting institutions. Of

[2] Oppenheim (9th edn), vol I, 245–56 on composite international persons; Verzijl, *International Law*, vol II, ch 4; O'Connell, *International Law*, vol I 293–5; Whiteman, 1 *Digest* 373–429; Rousseau, *DIP*, vol II, 96–213.

[3] Bernier, *International Legal Aspects of Federalism*, chs 2–3; Michelmann and Soldatos, *Federalism and International Relations*; Trone, *Federal Constitutions and International Relations*. See also Kunz, *Staatenverbindungen*; Pilotti (1928) 24 *HR* 441; Kaufman (1924) 3 *HR* 177; Rapisardi-Mirabelli (1925) 7 *HR* 345; Conforti (1964) 18 *Dir Int* 324.

[4] Commentary to Art 4, para (10) (citations omitted), reprinted in Crawford, *Selected Essays*, 98.

[5] Kunz (1930) 11 *RDILC* 835, 849.

[6] Pufendorf, *De jure Naturae et Gentium* VII, ch 5 ('On the Forms of States') distinguished clearly between real and personal unions (§§17–18). Vattel, *Le droit des gens*, vol I, Ch 1 §§8–11 also dealt with the problem briefly. Cf the much fuller discussion in Wheaton, *Elements*, Pt I, ch 2, §§40–59.

the four 'classical' types, only federation has continued to be a durable form of political organization. However, with the virtual completion of the process of decolonization, various forms of voluntary political union other than federation are recurring, and some brief discussion of the problems of characterization is worthwhile. It is likely—and the post-1945 experience confirms this—that future political unions will be *sui generis* entities in transition towards more stable forms of organization. A related trend is that towards functional unification through regional organizations—although the European Union, which all take as the paradigm, is rather an exception to every rule.

Apart from the problem of characterization, the main legal problems of voluntary union have been those of succession to international obligations. In most cases the political union of two or more States coexists with substantial political and administrative continuity within the entities concerned, and a much more extensive degree of 'succession' to legal relations—extending even to membership in international organizations[7]—has accordingly been the practice.[8] It is, however, unnecessary to go into these questions in any detail here.[9]

## 11.2 Federation, confederation and other forms of political union

There follows a brief account of the more common forms of political union.

[7] O'Connell, *State Sucession*, vol II, 190–200. [8] Ibid, 54–87; and O'Connell (1963) 39 *BY* 54.

[9] The ILC Draft Articles on State Succession with respect to Treaties (1974) distinguished 'separation of States' from 'newly independent States' and provided for a more extensive degree of continuity in the former case (see also *ILC Ybk* 1972/II, 18–44; 1972/I, 158–81, 271–3). The contrast was heightened in the diplomatic conference which produced the Vienna Convention on Succession of States in Respect of Treaties, 23 August 1978, 1946 UNTS 3 (in force 6 November 1996), as to which see Crawford in *Selected Essays*, 243, 290–3. The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 8 April 1983, 22 ILM 306, adopted yet further formulations. Overall the categorisation in the three texts is as follows:

| ILC Articles | 1978 Convention | 1983 Convention |
|---|---|---|
| Part of territory: Art 14 | Part of territory: Art 15 | Transfer of territory: Arts 14, 27, 37 |
| Newly independent States: Arts 15–29 | Newly independent States: Arts 16–30 | Newly independent States: Arts 15, 28, 38 |
| Uniting of States: Arts 30–2 | Uniting of States: Arts 31–3 | Uniting of States: Arts 16, 29, 39 |
| Separation of parts of a State: Arts 33–7 | Separation of parts of a State: Arts 35–8 | Separation of part or parts of a State: Arts 17, 30, 40 |
| N/A | N/A | Dissolution of a State: Arts 18, 31, 41 |

## (1) Real and personal unions[10]

The classical treatises made a distinction between 'personal' and 'real' unions of States. Broadly, a personal union was said to exist 'where States, which are wholly separate and distinct, have the same ruling prince.'[11] England and Scotland from 1606 to 1707,[12] Great Britain and Hanover from 1714 to 1837, and the independent Commonwealth monarchies at the present time, are examples of personal unions.[13] The relationship between States in personal union can vary considerably, but in principle they remain separate international entities—a result achieved, in the context of the Commonwealth, by the 'divisibility of the Crown'.[14] With the decline in monarchical institutions, personal unions are likely to be increasingly rare.

The category of real unions is harder to define. 'Where States are not only ruled by the same prince, but are also united for international purposes by an express agreement, there is said to exist a real union.'[15] But the phrase 'united for international purposes' is unhelpful, since the constituent units of a federation are usually 'united for international purposes'. Rather than a general description of unitary States formed by treaty, the term 'real union' has tended to be used for those cases where two international units share joint institutions, for

[10] Verzijl, *International Law*, vol II, 133–59.

[11] Rivier, *Principes du droit des gens*, vol I, 77. Cf Moore, 1 *Digest* 21.

[12] See Dicey and Rait, *Thoughts on the Union between England and Scotland*; Galloway, *The Union of England and Scotland 1603–1608*; Levack, *The Formation of the British State*; Brown, *Kingdom or Province? Scotland and the Regional Union, 1603–1715*; Scott, *Andrew Fletcher and the Treaty of Union*.

[13] The union of Denmark and Iceland (1918–44) is also classified as a personal union, although Denmark was also responsible for Iceland's international relations until 1940; Whiteman, 1 *Digest* 366–8; 2 *Digest* 156–61. The US recognized Iceland's independence on 1 July 1941, but the Act of Union was not abrogated until 17 June 1944. On the relationship between Canada and the Crown see Ward, *Dawson's The Government of Canada* (6th edn), 173–94.

[14] See *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1982] QB 892, 916–17 (Lord Denning MR): '[I]n constitutional law the Crown was single and indivisible. But that law was changed in the first half of this century—not by statute but by constitutional usage and practice. The Crown became separate and divisible—according to the particular territory in which it was sovereign . . . [T]he Crown was no longer single and indivisible. It was separate and divisible for each self-governing dominion or province or territory.' See also *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178; *Attorney-General v Wellington Newspapers Ltd* [1988] 1 NZLR 129; *Sue v Hill* (1999) 119 CLR 462. The question has been raised whether the concept of divisibility would apply to the States of Australia and thus permit the preservation of personal union between individual states and the British crown in the event that Australia as a federation severed that link: Queensland Constitutional Review Commission, *Issues Paper*, July 1999, xvi. On the links between Queensland and the Crown generally, see ibid, 1202–3. The dominant view, however, is that within Australia the Crown is indivisible and that a republic adopted by referendum under s 128 of the Constitution would necessarily apply to Australia as a whole: see *Commonwealth v Queensland* (1975) 134 CLR 298.

[15] Rivier, *Principes dudroit des gers*, vol 1, 97–9. Cf Moore, 1 *Digest* 22.

example, for the purposes of foreign affairs, defence, or finance. The union of Austria-Hungary from 1867 to 1918 was described as a 'real union'.[16]

But labels are no substitute for analysis, and in particular the term 'real union' seems to lack precise legal meaning. It is significant that the Permanent Court saw no need to adopt the terminology in its discussion of the relationship between Austria and Hungary. The Court held that: 'the frontier between Hungary and Galicia was in August 1914 an international frontier, Galicia then being part of the Austrian Monarchy . . . Although Austria and Hungary had common institutions based on analogous laws passed by their legislatures, they were none the less distinct international units.'[17]

## (2) Federations and confederations

Of greater present-day significance is the distinction between federation and confederation, which can be described as a distinction of principle based on a difference in degree—specifically in the degree of decentralization of confederal as compared with federal systems.[18] A federation, it has been said, exists when a polity has the following features: '(1) a division of powers between a central and regional government; (2) a certain degree of independence between central and regional governments; (3) direct action on the people by the central and regional governments; and (4) some means of preserving the constitutional division of powers . . .'.[19] Federation represents a major form of State organization. Internationally it is usual for the central government to have full

[16] Other examples were the 'incorporating union' of Poland and Lithuania. In 1386, the Grand Duke of Lithuania married the Polish Queen, joining the two countries in a dynastic or personal union. In 1569, by the terms of the Union of Lublin, the two states created the Polish–Lithuanian Commonwealth, with a common legislature and a jointly elected sovereign. This union lasted until 1791. See Kamiński, *Republic vs Autocracy. Poland, Lithuania and Russia 1686–1697*. Cf also the Swedish-Norwegian union which ended on 7 June 1905 with Norway's separation: Seidl-Hohenveldern and Verosta, *Die völkerrechtliche Praxis der Donaumonarchie von 1859 bis 1918*, 83–5.

[17] *Delimitation of the Polish–Czechoslovakian Frontier (Question of Jaworzina)*, PCIJ ser B no 8 (1923), 42–3 (interpretation of the term 'international frontier'). To the same effect see *Administrative Decision No 1* (1927, US–Austrian-Hungarian Claims Commission), 6 RIAA 203, 209–10; *In re Ungarische Kriegsproduktien AG* (Swiss CA, 1920) 1 ILR 72. The view that Austria-Hungary prior to 1918 was a single international entity is espoused by Marek, *Identity and Continuity*, 204–7 and Udina, *L'estinzione del Impero Austro-Ungarico nel diritto internazionale* (2nd edn), 15–37.

[18] For some early examples of confederations see Lister, *The Early Security Confederations*.

[19] Bernier, *International Legal Aspects of Federalism*, 5. Variants of the definition are numerous: e.g., Rudolf, in 2 *Enc PIL* (1995), 362–3: 'A federal State is a union of states in which both the federation and the member states embody the constitutive elements of a State . . . State authority is divided between the federation, on the one side, and the member states on the other, both of which possess certain assigned competences and functions.' See also Michelmann and Soldatos; *Federalism and International Relations*; Taylor, *International Organization in the Modern World*; MacCormick, *Questioning Sovereignty*; Rosamund, *Theories of European Integration*.

authority over foreign affairs, although the local States may retain some external competences, usually minor ones. As a result it is said that: '[t]he federal state . . . constitute[s] a sole person in the eyes of international law.'[20] But the difficulty with such statements is that they either assume a constant entity, the 'federation', with constant legal incidents or they are circular. Thus Fitzmaurice, as ILC Rapporteur on the Law of Treaties, stated that: 'a constituent State of a Federation can never be a State *internationally* or, as such, party to a treaty—for the treaty will bind the Federation, and will bind the constituent State not as such, but only as an (internationally) indistinguishable part of the Federation.'[21] But this is either too categorical or it assumes the only federation properly so-called to be that State 'the local units of which are indistinguishably part' of the larger unit.[22] The question is—of which entities is this true?[23] There are entities that, though they may be termed federations, are indistinguishable from unitary States.[24] There are those which, though federations in the sense defined, are for all or most international purposes the same as unitary States (Australia, the United States). There are federations that may be called 'confederations' but which are closer to the former type (e.g., Switzerland, Canada).[25] There are entities, the local units of which are regarded as sovereign and the central government as their agent.[26] And there are entities

[20] Montevideo Convention on the Rights and Duties of States, 26 Dec 1933, Art 2, 165 LNTS 19.

[21] *ILC Ybk* 1956/II, 118 & n. [22] Ibid (referring to Switzerland).

[23] The same point is made by Bernier, *International Legal Aspects of Federalism*, 34–5. In order to formulate a coherent (unitary) theory of federal States, Kunz finds it necessary to distinguish between real and *'soi-disant'* federal States, a distinction which predetermines his conclusion: see (1931) 12 *RDILC* (3d) 130, 280.

[24] This is probably so with regard to India and Brazil: *Ceara (State of) v Dorr* (Cour de Cassation, 1928) 4 ILR 39; *Ceara (State of) v D'Archer de Montgascon*, (Cour de Cassation, 1932) 6 ILR 162; also (notwithstanding a trend in the 1980s and 1990s toward decentralization), Mexico: Rodríguez (1998) 29 *Publius* 235, 241. See Mexico: Law Regarding the Making of Treaties, 21 Dec 1991, reprinted 31 ILM 390.

[25] On Switzerland see Huber (1909) 3 *AJ* 62; Wildhaber (1974) 12 *Can YIL* 211. On the cantons see further *Répertoire suisse* I, 531–66; Basta and Fleiner (eds), *Federalism and Multi-ethnic States: The Case of Switzerland*; Schmitt, in *Dictionnaire international du Fédéralisme*, 38. On Canada see Hogg, *Constitutional Law of Canada* (4th edn), 106–7; Kennedy, *The Constitution of Canada 1534–1937* (2nd edn), 401–4.

[26] These will often be termed 'confederations' but terminology is not consistent. The Federation of Mali was probably such a case: Cohen (1960) 36 *BY* 375. It used to be thought, following US doctrine, that the distinction between federation and confederation was a rigid one: the central organs of a federal State could act with direct effect on subjects in the provinces, whereas the central organs of a confederation were restricted to acting through or upon the provinces themselves. But the better view is that in a confederation the local units remain States in the general sense, having delegated certain powers to the central organs, whereas in a federation there is only one State, even if the local units retain some degree of international involvement. In practice the distinction may only be one of degree (although there may be a presumption in favour of local or central authority as a result of the apparent choice of structure). Cf Oppenheim (8th edn), vol I, 182 with the original statement, 1st edn, vol I

which, though claiming to be unitary States, operate rather like loose unions of separate States: e.g., the United Arab Republic (1958–61) or the United Arab Emirates (1971–present).

For these reasons it is necessary to add to Bernier's purely formal criteria of federations a fifth substantive one: the central government's powers must include substantially the whole foreign affairs power, together with autonomous authority extending to aspects of the internal affairs of the local States. Where these five criteria are satisfied it will be true that 'the practically complete supersession of the international personality of the Member States must . . . be regarded as still constituting one of the . . . main distinguishing features of the federal system.'[27] Nevertheless the following points may be noted.

(1) To the extent that the constitution does not abrogate the international legal status and rights of the local units, these may be treated as continuing.[28] '[The federation is] sovereign as to all the powers of government actually surrendered: each State in the Union is sovereign, as to all the powers reserved.'[29] The way in which the local unit is treated in foreign courts may thus depend on its characterization as 'local'.[30]

(2) Absent some other provision in the law of the union, international law may govern aspects of relations between federal States, e.g., as to land or maritime boundaries or the use of shared watercourses. Judge Huber even

125–33; 9th edn, vol I, 129 § 77. Historically confederations have tended to be transitional organizations of unifying States: e.g. the Confederation of North American States (1778–87), the German Confederation (1815–66); but cf the Swiss Confederation (1291–1798, 1815–48). See Wadle (1984) 24 *Juristische Schulung* 586.

[27] Lauterpacht, *International Law and Human Rights*, 458. To the same effect Bernier, *International Legal Aspects of Federalism*, 146; Kunz (1930) 11 *RDILC* (3d) 835, 867.

[28] *Principality of Monaco v Mississippi*, 78 L ed 1282 (1934) (sovereign immunity of local States waived *inter se* by Constitution, but not with respect to foreign States). Bernier, *International Legal Aspects of Federalism* 121–46 concludes that member States of federations are not entitled to sovereign immunity in foreign courts. This is the position under UK law with respect to an individual emirate of the UAE, at least where it was not shown to have been discharging federal functions: *BCCI v Price Waterhouse* [1997] 4 All ER 108, 111 ILR 604. But see *Mellenger* v *New Brunswick Development Corporation* [1971] 1 WLR 604, 608, 52 ILR 324, 327 (CA) (New Brunswick entity held to have sovereign immunity). See also Convention on Jurisdictional Immunity of States and Their Property, adopted by GA res 59/38, 2 December 2004, esp Art 2(1)(ii).

[29] *Chisholm v Georgia*, 2 Dallas 419, 435 (1793).

[30] See *Restatement* 3rd (1987), §452, Comment b: 'Under international law, cities, towns, counties, and comparable subordinate units of government ordinarily are not entitled to sovereign immunity. The immunity of constituent units of federal states—e.g. provinces, cantons, States-is disputed, and may depend on their status and powers in the federation. The States of the United States enjoy immunity in United States courts under Amendment XI to the Constitution, but do not always enjoy immunity in their own courts or in those of sister States.' See also Trone, *Federal Constitutions and International Relations*.

described a federation as a State in which 'a jurisdiction is established in order to apply, as need arises, rules of international law to the interstate relations of the States members.'[31] Different explanations can be given for this undoubted phenomenon: either international law is regarded as imported into the constitutional law of the union,[32] or the local units are regarded as independent to the extent of their competence and so subject to international law,[33] or the basic rationale of international law rules is regarded as applicable to federations, at least in certain cases.[34]

(3) In many federal States (e.g., Australia, United States) the central unit has the power to legislate to give effect to treaties even though their subject matter would otherwise fall within the domain of the provinces.[35] But this is not always so: in certain federal States (e.g. Canada), the treaty-implementing power is limited to matters otherwise federal in character.[36] Even where the treaty power is in principle plenary, there may be political barriers to its exercise

[31] *Island of Palmas Case* (1928) 2 RIAA 829, 840; Cowles (1949/I) 74 *HR* 657.

[32] *Bremen (Hansa City of) v Prussia* (Germany Staatsberichtshof, 1925) 3 ILR 352.

[33] *Wurttemberg & Prussia v Baden* (Germany Staatsberichtshof, 1927) 4 ILR 128; cf *Mellenger v New Brunswick Development Corporation* [1971] 1 WLR 604, 608 (Lord Denning MR), 611 (Salmon LJ), 52 ILR 322, 324, 327.

[34] *New Jersey v Delaware*, 291 US 361, 380 (1934) (Cardozo J). See also *Kansas v Colorado*, 533 US 1 (2001) (dispute arising under Arkansas River Compact); *New Jersey v New York*, 523 US 767 (1998) (prescription and acquiescence in connection with acquisition of title based on *effectivités*); *Nebraska v Wyoming & Colorado*, 507 US 584 (1993) (water rights on the North Platte River); *Texas v New Mexico*, 482 US 124 (1987) (dispute over allocation of water resources); *Louisiana v Mississippi*, 466 US 96 (1984) (riverine boundary dispute); *Arizona v California*, 460 US 605 (1983), 7 ILR 434 (allocation of water resources); *Colorado v New Mexico*, 459 US 176 (1982) (allocation of water resources). Disputes between the federal government and a local unit may also call for the application of international law. See *US v Alaska*, 521 US 1 (1997) (title to coastal submerged lands). International law has been applied to intra-federal maritime boundaries: e.g., *Newfoundland and Labrador/Nova Scotia*, Award in the First Phase, 17 May 2001; Award in the Second Phase, 26 March 2002. See also *Dubai–Sharjah Border Arbitration* (1981) 91 ILR 543.

[35] For Australia see *R v Burgess, ex parte Henry* (1936) 55 CLR 608; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 68 ILR 181; *Tasmania v Commonwealth (Tasmanian Dams)* (1983) 158 CLR 1; *Richardson v Forestry Comm* (1988) 164 CLR 261; *Queensland v Commonwealth (Daintree Forest)* (1989) 167 CLR 232; *Victoria v Commonwealth* (1996) 138 ALR 129. See also Alston and Chiam (eds), *Treaty-Making and Australia*; Rothwell in Opeskin and Rothwell (eds), *International Law and Australian Federalism*. For the United States see *State of Missouri v Holland*, 252 US 416, 1 ILR 4 (1920); *Asakura v City of Seattle*, 265 US 332, 341 (1924); *Santovincenzo v Egan*, 284 US 30, 40 (1931); *United States v Lara*, 541 US 193, 201 (2004); and see Swaine (2003) 103 *Col LR* 403, 474–93; Rosenkranz (2005) 18 *Harv LR* 1867 (arguing that *Missouri v Holland* was wrongly decided).

[36] *AG for Canada v AG for Ontario* [1937] AC 326, 8 ILR 41; Hogg, *Constitutional Law in Canada*, 298–304; See also Strom and Finkle (1993) 25 *Ottawa LR* 39 (arguing the *AG for Canada* decision should be revisited); Struthers (1994) 26 Ottawa LR 305 (responding); *Thomson v Thomson* [1994] SCR 551, paras 112–14 (L'Heureux-Dubé J and McLachlin J (as she then was) concurring, suggesting no likelihood of imminent change).

on what are perceived as provincial matters.[37] This can militate against the full exercise by federal States of treaty-making powers, or it may allow a province to commit the responsibility of the State by refusal to implement treaties. Federal clauses in treaties may reduce this problem but are often resisted by other States because they imply differential obligations, or differential compliance, depending on internal arrangements.[38]

(4) In some federations the provinces may retain residual treaty-making competence, either with the consent of the central government or without it.[39] In the United States,[40] Canada,[41] Belgium,[42] Switzerland[43] and Germany[44] the local units possess some degree of treaty-making competence. The presumption in such cases is in favour of the treaty binding the State as a whole rather than the local unit; but this is only a presumption.[45] A special case is presented by Bosnia and Herzegovina, where two constituent 'Entities' may enter into 'special parallel relationships with neighboring states',[46] a concession to the relationship between the Republika Srpska and Serbia.

[37] Bernier, *International Legal Aspects of Federalism*, 169–71; Opeskin (1996) 43 *NILR* 353, 355; Hocking (ed), *Foreign Relations and Federal States*; Opeskin and Rothwell (1995) 27 *Case W Res JIL* 1

[38] Burmester (1985) 34 *ICLQ* 522; Opeskin (1996) 43 *NILR* 353, 360; Kälin in Gowland-Debbas (ed), *Multilateral Treaty-Making*, 119; van Ert, *Using International Law in Canadian Courts*, 65.

[39] In theory this was the case with the USSR, although the federal aspect was almost entirely formal: Duchacek in Michelmann and Soldatos, *Federalism and International Relations*,5 describing Soviet State structure as 'a . . . confederal façade superimposed on a tightly controlled monolithic centralism.' See generally Wildhaber, *Treaty-Making Power and Constitution*; Council of Europe, European Commission for Democracy through Law, *Federated and Regional Entities and International Treaties*.

[40] Yoo (2003) *Col JTL* 455.

[41] Jacomy-Millette, *Treaty Law in Canada*, 69–105; Hogg, *Constitutional Law in Canada*, 304–306; van Ert (2001) 42 C de D 1093, citing, *inter alia, AG Ontario v Scott* [1956] SCR 136. See also Poirier, *Keeping Promises in Federal Systems* (PhD thesis, Cambridge, 2003) (comparing intra-federal compacts in Canada and Belgium).

[42] Under the special law on institutional reform of 8 Aug 1980: Lejeune in Michelmann and Soldatos, *Federalism and International Relations*, 142, 152–62.

[43] Constitution of the Swiss Confederation, 18 April 1999, Arts 56(3), 172(3), provide that the cantons may enter into international agreements in cases where the Federal Council has determined that the object of the treaty is not contrary to Swiss interests. There are more than 100 such agreements, mostly on transboundary cooperation: Schmitt in Basta and Fleiner-Gerster (eds), *Federalism and Multiethnic States: The Case of Switzerland*, 131, 140–1, 149; Biaggini (1999) 8 *Aktuelle juristische Praxis* 722.

[44] Beyerlin, *Sammlung der internationalen Vereinbarungen der Länder der Bundesrepublik Deutschland*.

[45] The final Draft Articles on the Law of Treaties included a provision (Art 5(2)) to the effect that 'States members of the federal union may possess the capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.' After vigorous debate this was excluded from the Vienna Convention: see Bernier, *International Legal Aspects of Federalism*, 14–17; Steinberger (1967) 27 *ZfV* 411. Cf Vienna Convention, Art 3. See also *Bosnian Genocide Case* (Preliminary Objections), ICJ Rep 1996 p 595, 618–19 (para 37).

[46] Constitution of Bosnia and Herzegovina, Art III(2)(a), 35 ILM 120.

(5) The State (represented by its central government) is internationally responsible for any act of a local unit which results in a default or violation of international obligations of the State.[47] The governing principle here is that the central government may not plead its constitutional law to avoid its international obligations. The point is expressed by Article 4(1) of the Articles on State Responsibility:

> The conduct of any State organ should be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.[48]

This principle is widely recognized, even in cases where its implementation presents difficulties. Thus in the *LaGrand* case the United States argued that it was constitutionally unable to interfere in State criminal justice matters, despite its obligations to foreign nationals under the Vienna Convention on Consular Relations. It added:

> The United States does not refer to the central role of the states in matters of criminal justice in order to avoid its international legal obligations. The United States recognizes the fundamental principle that domestic law does not relieve a member of the international community of its obligations under international law . . . We explain our federal system so that the Court will understand that Federal Government officials do not have legal power to stop peremptorily the enforcement of a criminal sentence by the state of Arizona.[49]

The International Court for its part was categorical:

> Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be . . .
>
> whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona;

[47] Bernier, *International Legal Aspects of Federalism*, 83–120; cf *Hyacinth Pellat Case* (French–Mexican MAT, 1929) 5 ILR 145, 149: 'The principle of international responsibility of a Federal State for all acts of one of its States which might give rise to claims by foreign governments' (Verzijl P).

[48] See also commentary to Art 4, paras (9)–(10), reprinted in Crawford, *Selected Essays*, 97–8. See also McNair, *International Law Opinions*, vol I, 36–7, citing a note of Fox to Webster, 12 March 1841. But cf *Cayuga Indians Claim* (1926) 6 RIAA 173, 186–8, 3 ILR 203, 206.

[49] *LaGrand Case, US Counter-Memorial*, 27 March 2000, para 124. For criticism see Henkin (1998) 92 *AJ* 679, 680; Vasquez (1998) 92 *AJ* 683; Aceves (1998) 92 *AJ* 517, 523; but cf Bradley and Goldsmith (1998) 92 *AJ* 675; *Printz v United States*, 521 US 898, 907–8 (1997) (Scalia J); *New York v United States*, 505 US 144, 149 (1992) (O'Connor J); Tushnet (2000) 36 *Tulsa LJ* 11.

whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor;

whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States . . . [50]

In fact the Governor of Arizona ignored the Order, and the United States was held responsible.[51]

(6) Finally, the constituent units within a federation may, in accordance with the federal constitution, be recognized as possessing a degree of international personality. The most extreme cases were the Ukraine and Byelorussia which were actually United Nations Members, although constituent Republics of the Soviet Union.[52] But the presumption under international law is against the international personality of the provinces, unless this is clearly permitted by the federal constitution.

## (3) Unusual formations

States may form such political associations as they wish, and some of the unions or associations in fact created have proved very difficult to characterize.[53] A good example was the United Arab Republic (1958–61), formed ostensibly as a unitary State by the union of Egypt and Syria and dissolved three years later when Syria withdrew from the union.[54] By acquiescence and agreement, all international obligations of both States continued to bind the Republic with respect to the territory of the relevant subdivision. After 1961 these obligations continued in force, and by a special arrangement the separate United Nations memberships of Syria and Egypt (which retained the name 'United Arab Republic') were revived without formal readmission. In retrospect, despite the recognition of the Republic as a unitary State,[55] it appears to have been a loose association the existence of which was not inconsistent with the continuing international personality of its component parts. The union of Senegal and

[50] *LaGrand (Germany v United States of America), Provisional Measures*, ICJ Rep 1999 p 9, at p 16, para 28. See also the *Merits* judgment, ICJ Rep 2001 p 466, 495 (para 81).

[51] ICJ Rep 2001 p 466, 506–8 (paras 111–15). The provisional measure required the United States to 'take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings . . .' The Court held that it did not discharge this obligation. See also *Case Concerning Avena and Other Mexican Nationals (Mexico v United States)*, ICJ Rep 2004 p 12.

[52] Uibopuu (1975) 24 *ICLQ* 811. Cf Verzijl, *International Law*, vol II, 199–206. Dugard, *Recognition and the United Nations*, 54–5.

[53] Cf Verzijl, *International Law*, vol II, 199–206.

[54] Cotran (1959) 8 *ICLQ* 346; Young (1962) 56 *AJ* 482; Rousseau (1962) 66 *RGDIP* 413; O'Connell, *State Succession*, vol II, 71–4, 169–70.

[55] Whiteman, 2 *Digest* 230–3.

Gambia (1982–9)[56] and the even looser association of Morocco and Libya (1984–6)[57] are further examples.

### (4) 'Remedial federation': federal solutions in conflict situations

In a number of newly independent States, attempts at secession have resulted in the loss of effective control by the central government over parts of the State territory. Federal elements have been introduced in several instances in an attempt to preserve a degree of unity.[58] The federations in Bosnia and Herzegovina and in the Comoros[59] and those proposed for Cyprus and the Solomon Islands[60] do not involve the union of entities previously separate, let alone recognized as separate States. Special territorial settlements of a federal character differ from the classic federation but bear some of its hallmarks. The federal aspects of Cyprus and Bosnia are discussed here briefly.

#### *(i) Cyprus*

Cyprus was established as a bizonal State in 1960;[61] these complex arrangements broke down after a few years. But all plans for settlement since have

[56] Under which both States maintained their 'independence and sovereignty': Joint communiqué of the Presidents of Senegal and Gambia, 14 November 1981, (1981) 52 *BY* 379; Agreements on a Proposed Confederation, 14 November 1981, 21 ILM 44; Agreement concerning the Establishment of a Senegambia Confederation, 17 December 1981, 1261 UNTS 331; Protocols Concerning the Establishment of a Senegambian Confederation, 17 December 1981, 22 ILM 266. See also Gautron, 1982 *Année Africaine* 239; Coppa (1986) 7 *NYJICL* 45. On rights of intervention for the purpose of preserving the confederation structure, see Nolte, *Eingreifen auf Einladung: Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung*, 403–5.

[57] Libya–Morocco Federation Agreement, 13 August 1984, reprinted in (1984–5) 17 *Africa Contemporary Record: Annual Survey of Documents* C20; Sehimi (1984) 30 *AFDI* 111.

[58] Kymlicka in Lehning (ed), *Theories of Secession*, 142; Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflicts*; Dörr in Aulehner (ed), *Föderalismus-Auflösung oder Zukunft der Staatlichkeit?*, 207.

[59] The Comoros were reconstituted as a 'Union of the Comoros' under a Framework Agreement signed on 17 February 2001. The *Loi Fondamentale de l'Union* was ratified by referendum on 23 December 2001: http://www.km.undp.org/consunion.htm (visited May 2004). See Alwahti (2003) *Swords & Plowshares: A Journal of International Affairs* 65.

[60] Pursuant to the Townsville Peace Agreement of 15 October 2000, the Solomon Islands were to be reorganized under a new constitution to include autonomy provisions of a federal character for Malaita and Guadalcanal provinces: S/2000/1088, Annex. As at January 2002, consecutive governments had expressed varying levels of support for constitutional change to entrench such decentralization (see: Cabinet Decision of 30 January 2002, as cited in Office of the UN Resident Coordinator, *Common Country Assessment, Solomon Islands—Working Document for UNDAF: March 2002* (2002), 37). However, ongoing instabilities in the Solomon Islands, which led to the deployment of an Australian-led peacekeeping force in July 2003, seem to have prevented any such constitutional change from taking place.

[61] Republic of Cyprus Constitution, Cmnd 1093, App D; Treaty of Guarantee, 16 August 1960, Cmnd 1093, App B, 382 UNTS 3; Treaty of Alliance, 16 August 1960, 397 UNTS 287. See Chapter 5 above.

involved federal structures.[62] Thus the Annan Plan (2004)[63] would have established a 'United Cyprus Republic' consisting of a federal government and two constituent states, a Greek Cypriot state and a Turkish Cypriot state. Article 2 of the Foundation Agreement provided for a federal system 'modeled on the status and relationship of Switzerland, its federal government, and its cantons.' The proposal involved a federal model vesting extensive competences on two local units, with a central government discharging basic functions, mostly those associated with representation of the new Union at international and European level. It was rejected by Greek Cypriots at a referendum held on April 24, 2004, although the Turkish Cypriot side voted to accept.[64]

### *(ii) Bosnia and Herzegovina*

As noted in Chapter 9, following the break-up of the former Yugoslavia the Serbian community in Bosnia and Herzegovina attempted to secede from the new State and, for a time, exercised effective control over a substantial part of its territory. Republika Srpska was not recognized as a State and its integration into the Bosnian State was an objective of the negotiations leading to the Dayton Accord of November 1995.[65] The Constitution of Bosnia and Herzegovina (Annex 4 to the Dayton Agreement) established new structures along federal lines. The Entities possess extensive veto power over national decision-making, to an extent that made it doubtful whether the central government would be capable of deciding on or implementing any policies whatever.[66] Given the scope for independent action by the constituent Entities, the Constitution seeks to impose direct international constraints in place of the usual federal constitutional ones: the European Convention of Human Rights, the Universal Declaration of Human Rights, the ICCPR, the

[62] Numerous earlier plans did not lead to a comprehensive settlement. For an overview, see Hocknell, *Boundaries of Cooperation*; Chrysostomides, *The Republic of Cyprus*; Filos-Patsantaras (1999) 59 *ZaöRV* 185; Flory (1984) 30 *AFDI* 177; Necatigil, *The Cyprus Question and the Turkish Position in International Law* (2nd edn).

[63] Available at www.cyprus-un-plan.org (visited July 20, 2005).

[64] See Palley, *An International Relations Debacle*. For discussion of federal structures in other bicommunal States see Milne (1988) 18 *Publius* 101; Milne, *Politics in Ethnically Bipolar States*.

[65] General Framework Agreement for Peace in Bosnia and Herzegovina, Paris, 14 December 1995, 35 ILM 75.

[66] See Yee (1996) 7 *EJIL* 176; Slye (1996) 21 *Yale JIL* 459; Sloan (1996) 7 *EJIL* 207; Pajic (1998) 20 *HRQ* 125; Malik (2000) 36 *Stanford JIL* 303, 313: '. . . Dayton cripples the Bosnian Republic's federal institutions with decision making processes that grant to each ethnic group the power of veto. The Constitution weakens the central institutions not only by including these limitations, but also by omitting responsibilities traditionally held by federal governments.' The same was true of the 1959 Zurich Agreements for Cyprus, and the Annan Plan of 2004.

ICESCR, the Declaration on Rights of Persons Belonging to National or Ethnic and Religious and Linguistic Minorities are among the instruments incorporated by reference and directly applicable to the Entities.[67] According to Article II(8) of the Constitution:

> All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to: any international human rights monitoring mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in Annex I to this Constitution; the International Tribunal for the Former Yugoslavia . . . and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law.

The international element in the federal structure of Bosnia and Herzegovina is made explicit by the guarantee of five members of the 'Contact Group', which coordinated negotiations leading to the Dayton-Paris Accords, resulting in what Gaeta has termed a 'hypertrophy of international guarantees'.[68] Bosnia and Herzegovina is a pronounced example of the regulation of federal units by international law—and, simultaneously, a particularly loose confederal State.

### (5) Associated States

Certain 'associated States' constitute fully independent States which have delegated foreign affairs, defence or other powers to another State. Examples are the Marshal Islands, Palau, and the Federated States of Micronesia. Others are not States but have some separate international status by virtue of the relevant association agreements. These include Puerto Rico, the Northern Mariana Islands, the Cook Islands and Niue. The relationship of association is dealt with in Chapter 14.

## 11.3 Unions of States in international organizations

International organizations were in their origin treaty arrangements between States for the continuous implementation of collective policies or programmes: though often called 'Unions', the element of unification was slight and has

[67] Constitution, preamble, Art II(3); Annex I, paras 1–15; Annex 6.
[68] Gaeta (1996) 7 *EJIL* 147, 155.

tended to reduce over time.[69] Such unions were not States and were not aimed at becoming States.[70]

At the same time it came to be recognized that international organizations were legal persons with certain capacities under their constituent instruments and certain incidental powers under international law.[71] Furthermore, beyond a certain point, the formation of a union or league performing acts on behalf of Member States can be a step in the direction of some sort of confederal State, at least where important or 'sovereign' rights are transferred to the entity in question. The avowed aim of the European Union is the functional unification of the States of Europe into just such a league, and the same is apparently true (though much more contingently) of the African Union, successor to the Organization of African Unity.[72]

Whether any organization approaches statehood in any respect can only be determined by reference to the particular case. The United Nations, which has been described as 'the supreme type of international organization',[73] and the European Union, the most developed 'centralizing' organization so far, will be discussed briefly.

## (1) The United Nations organization

The United Nations, it has been said, is a:

political body, charged with political tasks of an important character, and covering a wide field, namely, the maintenance of international peace and security, the development of

[69] E.g. the Universal Postal Union, which was originally established as the General Postal Union pursuant to the Treaty of Berne, 9 Oct 1874 (see: Universal Postal Union, *Constitution and General Regulations* (2000)); and the International Telecommunications Union, which was originally formed as the International Telegraph Union pursuant to a convention of the same name signed in Paris on 17 May 1865. In 1932, the International Telecommunications Convention combined the Telegraph Convention with the International Radiotelegraph Convention, and the International Telecommunications Union was formed. See also: Peaslee, *Intergovernmental Organizations*; von Mangoldt and Rittberg (eds), *The United Nations System and Its Predecessors*; Elazar, *Constitutionalizing Globalization*.

[70] Cf *Namibia Case* (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Rep 1971 p 323, 341 (para 35) (Judge Gros, dissenting): 'The degree of solidarity accepted in an international organization is fixed by its constitution. It cannot be subsequently modified through an interpretation based on purposes and principles which are always very broadly defined, such as international co-operation or the maintenance of peace. Otherwise an association of States created with a view to international co-operation would be indistinguishable from a federation. It would be precisely the "super-State" which the United Nations is not.'

[71] *Reparations Case*, ICJ Rep 1949, p 174; and see Chapter 1.

[72] Constitutive Act of the African Union, 11 July 2000, 2158 UNTS 33; See also: *Treaty Establishing the African Economic Community*, June 3, 1991, 30 ILM 1241 (1991); Udombana (2002) *13 Ind ICLR* 185, 186 (on the fatuity of 'unity' without institutions); Symposium (2003) 13 *Trans L & Cont Probs* 1.

[73] *Reparations Case*, ICJ Rep 1949, p 174, 178–9.

friendly relations among nations, and the achievement of international co-operation in the solution of problems of an economic, cultural or humanitarian character . . . and in dealing with its Members it employs political means.[74]

It has separate international personality. It makes treaties[75] and maintains armed forces for certain purposes, whether under the authority of the Security Council under Chapter VII of the Charter, or as a peace-keeping or police force at the request of the territorial sovereign.[76] United Nations organs are authorized to administer territory, under Article 81 of the Charter and otherwise.[77] The United Nations exercises functional protection of its agents, extending to loss and injury to the person.[78] It enjoys extensive certain diplomatic privileges and immunities. Nevertheless, the extensive personality of the United Nations does not amount to 'saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is "a super-State," whatever that expression may mean.'[79] Thus it does not have plenary treaty-making power, but only to the extent that this is necessary for the performance of its functions. It probably cannot be a territorial sovereign: in each of the cases of territorial administration so far, its mission has been or would have been in the nature of a trust for a State or people. Its peacekeeping operations are not analogous to the peacekeeping or other military operations of States. In general:

> it is not a principal carrying out its policy through States acting as its agents. It is an instrument of collective policy which it enforces by using the sovereignty of its Members. In carrying out the policies each Member still retains its own sovereignty, just as any sovereign state, acting under its treaty obligations to another state would normally still retain its sovereignty.[80]

Equally, its jurisdictional immunity extends no further than is 'necessary to it for the fulfilment of its purposes.'[81] Not being a State, the *Lotus* presumption

[74] *Reparations Case*, ICJ Rep 1949, p 174, 179; and see generally Brownlie in Fawcett and Higgins (eds), *International Organization: Law in Movement*, 26.

[75] Parry (1949) 26 *BY* 108; Kasmé, *La Capacité de l'Organization des Nations Unies de Conclure les Traités*; Carroz and Probst, *Personnalité juridique internationale et capacité de conclure des traités de l'ONU et des institutions spécialisées*.

[76] See Higgins, *United Nations Peacekeeping, 1946–1967*; Nolte, *Eingreifen auf Einladung*.

[77] Trusteeships under UN administration were proposed for Jerusalem and Trieste: see Chapter 13. Practice in the 1990s led to speculation about a renewal of a form of international trusteeship: e.g., Klein (2003) 91 *Proc ASIL* 205; Stahn (2001) 61 *ZaöVR* 107, 114–28, and see further Chapter 12.

[78] *Reparations Case*, ICJ Rep 1949, p 174.

[79] Ibid, 179; cf *Namibia Opinion*, ICJ Rep 1971 p 6, 217 (Judge de Castro).

[80] *Nissan v AG* [1970] AC 179, 233 (Lord Pearce); cf ibid, 222 (Lord Morris).

[81] Charter, Art 105: *M v ONU & État Belge* (Brussels, Tribunal civil, 1966), 45 ILR 446, 453. See further Reinisch, *International Organizations Before National Courts*; Wellens, *Remedies Against International Organizations*.

does not operate in its favour nor the analogous rule of the restrictive interpretation of the jurisdiction of courts or tribunals.[82] Nor is it a State for the purposes of Article 34(1) of the Statute of the Court: it cannot appear in contentious proceedings before the Court, and the power to request advisory opinions is only a partial substitute for this procedural incapacity.[83] In its military operations it is bound by international humanitarian law, but it may not, it seems, become a party to the Geneva Conventions of 1949 which are open only to States.[84] The International Law Commission, in its work on international responsibility treats international organizations as distinct from States on the ground that there are distinct questions of the relationship between their own responsibility as international legal persons and that of their constituent States.[85]

## (2) The European Union

Undoubtedly the most far-reaching attempt at regional inter-State integration, the European Union goes well beyond the model of an international organization coordinating areas of State policy, and has marked confederal features.[86] The German Federal Constitutional Court, ruling on the Treaty on European Union, described the Community as a *Staatenverbund*,[87] a term suggesting a status intermediate between federation and confederation. That Court had earlier described Community law as

> neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source, for the

[82] *Administrative Tribunal of the ILO*, ICJ Rep 1956 p 77, 97: 'The arguments deduced from the sovereignty of States, which might have been invoked in favour of a restrictive interpretation of provisions governing the jurisdiction of a tribunal adjudicating between States are not relevant to a situation in which a tribunal is called upon to adjudicate upon a complaint of an official against an international organization.' But there is, it seems, a presumption of validity 'when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes': *Certain Expenses of the UN*, ICJ Rep 1962 p 151, 168.

[83] *Administrative Tribunal of the ILO*, ICJ Rep 1956, p 77, 109 (Judge Klaestad), 168 (Judge Cordóva). But see Weissberg, 195; *Anglo-Iranian Oil Co Case (First Phase)*, ICJ Rep 1952 p 93, 133 (Judge Alvarez, dissenting).

[84] Higgins, *UN Peace Keeping*, vol 2, 185–92; [1972] *UN Jur YB* 153.

[85] ARSIWA, Art 57 & commentary, reprinted in Crawford, *Selected Essays*, 449. Gaja, as Special Rapporteur on the responsibility of international organizations, also interprets as a saving clause ARSIWA, Art 33(2), which provides: 'This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.' First Report on Responsibility of International Organizations, 26 March 2003, A/CN.4/532, paras 9, 11, 27.

[86] For an account of the structure and workings of the EC/EU see Pinder, *The Building of the European Union* (3rd edn); Craig and de Búrca (eds), *The Evolution of EU Law*; Lasok, *Law and Institutions of the European Union* (7th edn). Generally see also: Burgess, *Federalism and the European Union*.

[87] *Maastricht Treaty 1992 Constitutionality Case*, 12 Oct 1994, BverGE 89, 184; 98 ILR 196. See Everling (1994) 14 *YB Eur L* 1.

Community is not a State, especially not a federal State, but a *sui generis* community in the process of progressive integration, an 'interstate institution' within the meaning of Article 24(I) German Constitution.[88]

The original treaty structure of the European organization has undergone major revisions as the original European Coal and Steel Community of 1951 with six Members has enlarged into a European Union with, so far, twenty-five Members, covering the whole of western Europe (Norway, Switzerland, Liechtenstein, San Marino, Monaco, Vatican City and Iceland excepted) and large parts of Central Europe.[89] Although no one speaks of the EU as a State, a 'federal plan'[90] is clearly in evidence as Community competences have grown in the fields of economics, the single currency, justice and home affairs and the common foreign and security policy (CFSP).

The first direct elections to the European Parliament took place in 1979. A Single European Act (1986) introduced harmonisation measures with a view to establishing the single European market, and instituted qualified majority voting to the Council. The Treaty on European Union (the Maastricht Treaty) of 1992 consolidated the original three-treaty system (EEC, ECSC, EURATOM) into a single entity entitled 'European Community'.[91] However,

[88] *Internazionale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540; 93 ILR 362, 365. So far the European Court has no jurisdiction under Art 177 of the EEC Treaty to rule on matters of international law which bind member States outside the framework of Community law: *Wandeweghe v BCI* [1973] ECJ Rep 1329. On the other hand, the Court has jurisdiction to determine the validity of *Community* acts under general international law: *International Fruit Co NV v Produktschap voor Groeten en Fruit (No 3)* [1975] 2 CMLR 1; 47 ILR 1, 3–5.

[89] The primary founding treaties of European integration are: Treaty Establishing the European Coal and Steel Community, 18 April 1951, 261 UNTS 140 (as amended); Treaty Establishing the European Economic Community, 25 Mar 1957, 298 UNTS 11 (as amended) (this treaty has now lapsed); Treaty Establishing the European Atomic Energy Community, 25 Mar 1957, 298 UNTS 167 (as amended); Treaty on European Union (Maastricht Treaty), 7 Feb 1992, 1757 UNTS 3, OJ C 224/1 (1992), 1 CMLR 719 (as amended). In addition, significant institutional and other reforms have been introduced by various amending treaties, including: Single European Act, 1987, OJ L 169/1, [1987] 2 CMLR 741; Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 2 Oct 1997, OJ C 340/1; Treaty of Nice amending the Treaty on European Union, the Treaties Establishing the European Communities and certain related acts, 26 Feb 2001, OJ C 80/1. Further, the above-mentioned founding treaties have been amended whenever a new member state accedes, by way of Acts or Treaties of Accession (see, for example, Acts of Accession of Denmark, Ireland and the United Kingdom, 22 Jan 1972; and Treaty of Accession 2003, 16 April 2003 (signed by Cyprus, Czech Republic, Estonia, Hungary, Lithuania, Latvia, Malta, Poland, Slovenia and Slovakia). See also: Charter of Fundamental Rights of the European Union, [2000] OJ C 364, Nice, 7 Dec 2000; de Búrca and Aschenbrenner (2003) 9 *Col JEL* 355. The ECJ described the EC Treaty as a constitutional document as early as 1986: Case 294/83, *Les Verts* [1986] ECR 1339, para 23.

[90] Lasok, *Law and Institutions*, 30.

[91] Maastricht Treaty, Arts G, H, I (Arts 8, 9, 10 EU), 1757 UNTS 3 (1993).

two broad fields—justice and home affairs and the common foreign and security policy—were excluded from this reformed Community legal system and committed to inter-governmental processes within the Council.[92] Article 8 of the Maastricht Treaty established an EU citizenship, overlaying that of the Member States without substituting for it. Proposals for explicit federalizing language in the Treaty were rejected,[93] but the trend toward greater integration was clear. Geographic expansion was a further feature of the development of the Union, new States joining through successive Treaties of Accession. The Union reached fifteen Members in 1995, twenty-five in 2004.[94]

Pending the adoption of the EU Constitution,[95] it has been suggested that two distinct international legal persons have taken shape under the process of European integration. The Communities, it is agreed, possess international legal personality: this is explicit in the Treaties,[96] the case law of the European Court of Justice[97] and State practice.[98] By contrast, writers have disagreed as to

[92] 1757 UNTS 3 (1993), Articles 11 EU to 28 EU; 29 EU to 42 EU.

[93] A Working Document prepared by the Netherlands Presidency of the Council of Ministers, 12–13 Nov 1991, proposed for Art A(3) of the Draft Treaty on the Union: 'The Treaty marks a new stage in the process leading gradually to a Union with a federal goal.' Maastricht Article A (Art 1 EU) as adopted reads: 'By this Treaty, the High Contracting parties establish among themselves a European Union, hereinafter called "the Union." This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen. The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.': 1757 UNTS 3 (1993).

[94] UK, Ireland & Denmark, 22 January 1972 ( 1972 OJ L 73); Greece, 1 January 1981 (1979 OJ L 291/9; EC 18 (1979)); Spain & Portugal, 12 June 1985 (1985 OJ L302/1, EC 27 (1985), see also 1447 UNTS 2); Austria, Finland & Sweden, 1 Jan 1995 (1995 OJ L 1); Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, 1 May 2004 (2003 OJ L 236). Maastricht Treaty, 1757 UNTS 3 (1993), Art O (Article 49 EU) provides for accession of further States meeting the qualification of a 'European State'. For the question whether Turkey meets that qualification see: Kanarek (2003) 9 *Col J Eur L* 457, citing: Commission Report on Europe and the Challenge of Enlargement, *Bull Eur Communities Supp*, 3-1992, at 11; Burskey (2004) 29 *NCJIL & Com Reg* 713.

[95] The draft Constitutional Treaty, signed on 29 October 2004 in Rome, provided for ratification by either parliamentary vote or national referendum before it was to take effect on 1 November 2006. By referenda held in May–June 2005, France and the Netherlands rejected the proposed constitution.

[96] EEC, Art 210; ECSC, Art 6(1); EAEC, Art 184; Lasok, *Law and Institutions*, 30–1.

[97] E.g., *Costa v ENEL*, Case 6/64, [1964] ECR 585, 93 ILR 23: 'As opposed to other international treaties, the Treaty instituting the EEC has created its own order. . . by creating a Community of unlimited duration, having its own institutions, its own personality and its own capacity in law, apart from having international standing and, more particularly, real powers resulting from a limitation of competence or a transfer of powers from the States to the Community, the member States, albeit within limited spheres, have limited their sovereign rights and created a body of law applicable both to their nationals and to themselves.' See Cremona, 'External Relations', in Craig and De Búrca, *The Evolution of EU Law*, 137, 139.

[98] The EC is a party to major multilateral treaties (e.g. the United Nations Convention on the Law of the Sea, the WTO); and a multitude of bilateral agreements, e.g., USA and EEC (table grapes),

whether the European Union possesses international legal personality.[99] There has been:

no express legal personality given to the Union, and no express treaty-making power, but the reality of its ability to formulate binding acts (common positions, joint actions) with external implications has led some to argue that such a personality may be *implied*, in that it would be (at least) very difficult to achieve some of the Union's objectives without such personality.[100]

These major developments notwithstanding, so far that the activities of the various community organs can be explained on the basis of an extensive delegation of power from Member States,[101] which remain sovereign though with the exercise of their powers considerably limited.[102] The European Court of Justice has tended to give an expansive interpretation to the powers of Community organs: thus the monopolies jurisdiction of the European Economic Community was held to cover, by way of their local subsidiaries acting as agents, the activities of companies in Switzerland and the United Kingdom (at that time a non-member). In argument the Advocate-General said of the European Commission:

. . . it has not all the powers of a State, but all the attributed powers necessary for the execution of its tasks. In the field of its competence—and that covers the field of

27 July 1979 (entered into force 18 October 1980), 1265 UNTS 281; EEC and Seychelles (fishing), 28 October 1987 (entered into force 28 October 1987), 1540 UNTS 219; Cooperation Council for the Arab States of the Gulf and EC (cooperation agreement), 1 January 1990, 1829 UNTS 54; EEC and Bulgaria (trade and commercial and economic cooperation), 8 May 1990 (entered into force 1 November 1990), 1961 UNTS 331; Brazil and EEC (cooperation agreement), 29 June 1992 (entered into force 1 November 1995) 1907 UNTS 285; Australia and EC (wine), 26 January 1994 (entered into force 1 March 1994), 1820 UNTS 3; EC and Ukraine (partnership and cooperation), 14 June 1994 (entered into force 27 September 1995), 2064 UNTS 144; Israel and EC (scientific and technical cooperation), 25 March 1996 (entered into force 6 August 1996), 1979 UNTS 62; EC and Laos (cooperation), 29 April 1997 (entered into force 1 December 1997), 2003 UNTS 70; EC and Mexico (spirit drinks), 27 May 1997 (entered into force 1 July 1997), 2003 UNTS 285; EC and South Africa (scientific and technological cooperation) (entered into force 11 November 1997) 2002 UNTS 224; EC and Swiss Confederation (air transport) 21 June 1999, 2227 UNTS 168.

[99] See Curtin and Dekker in Craig and de Búrca (eds), *The Evolution of EU Law*, 83, 84.

[100] Cremona, 'External Relations' in Craig and de Búrca, *The Evolution of EU Law*, 147. Cf Timmermans (2001–2) 21 *YBEL* 1, 4; Dekker and Wessel in Blokker and Schermers (eds), *Proliferation of International Organizations*, 381, 392–4.

[101] Constitutional provisions of certain Member States provide expressly for such delegation: e.g., Italian Constitution 1948, Art 11; German Constitution, Art 24; Belgium constitutional amendments of 1970, Art 25 *bis*; Luxembourg Constitution, Art 49 *bis* (amendment).

[102] Cf *Administration des Douanes v Société Cafés Jacques Valore* [1975] 2 CMLR 336 (France, Cour de Cassation).

cartels—the Community has quite as much power as a State, provided that it is a question of cartels affecting competition in the Common Market.[103]

As this suggests, the 'sovereignty' of Member States has no particular salience as against the necessity for EC implied powers in an increasing range of fields. In an earlier decision, *Re the European Road Transport Agreement*, the Court gave an extensive interpretation to the exclusive treaty-making power of the Community within its fields of interest under then-Article 228 of the Rome Treaty (Article 308 EC), despite the argument that such competence was not explicitly granted and could not be presumed.[104] Subsequent case law and practice have strengthened the position.[105] Thus the internal regulation by the Community of common policy can preclude individual Member States from acting whether internally or internationally in respect of that field: understandably the Council of Ministers has shown some reluctance to allow the full implications of the terms of the Treaty as so interpreted, and there are limits to the extension of Community competence in the field of treaties:

> an internal power to harmonise which has not been exercised in a specific field cannot confer exclusive external competence in that field on the Community . . . . Save where internal powers can only be effectively exercised at the same time as external powers . . . internal competence can give rise to exclusive external competence only if it is exercised.[106]

Nevertheless machinery for an unprecedented degree of functional unification exists under the Treaties, and this has been developed, if not to the fullest extent possible, then certainly to an extent greater than has been seen under other unions of States.[107]

[103] *ICI Ltd v Commission of the European Communities* (1972) 21 CMLR 557, 602; and see Mann (1973) 22 *ICLQ* 35.

[104] Case 22/70, *Commission v Council (AETR)* [1971] ECR 263, 113 ILR 339. Cf also *NV Algemeine transport- en Expeditie Ondernenning Van Gend en Loos v Nederlandse Tariefrommissie* [1963] CMLR 105, 129: 'the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member-States, but also their nationals.'

[105] See, e.g., *Opinion 2/91 (re ILO Convention 170 on Chemicals at Work)* [1993] ECR I-1061; *Commission v Austria & ors (Re the 'Open Skies' Agreements with the USA)* [2003] 1 CMLR 7. The preamble to Council Decision 94/800 of 22 Dec 1994 concerning EC accession to the WTO recites 'Whereas the competence of the Community to conclude international agreements does not derive only from explicit conferral by the Treaty but may also derive from other provisions of the Treaty and from acts pursuant to those provisions by Community institutions.' [1994] OJ L 336/1.

[106] *Opinion* 1/94 (*Re WTO Agreements*) [1994] ECR I-5267, paras 88–9. *See also* Norton (1973) 7 *Int L* 589–611, 591. Cf *Re the OECD Understanding on a Local Cost Standard* [1976] 1 CMLR 85; *Officier van Justitie v Kramer & ors* [1976] 2 CMLR 440; *France v Commission* (*re EC-US Anti-Trust Agreement*), Case C-327/91 [1994] ECR I-3641.

[107] On the question whether nonetheless EU law is a species of international law see Hartley (2001) 72 *BY* 1 and works cited.

## 11.4 Regional devolution in previously unitary States

The union of previously independent States or equivalent units is not the only federal process. A State may devolve certain powers upon part of its territory without transferring any plenary competence. The result may be the substantial reorganization of the internal structure of the State, until that State comes to resembles the federations discussed earlier in the present chapter.

Devolution within the State tends to differ from federal arrangements between previously existing States in a number of ways. In particular the emphasis in classic federalism is on the equality of the constituent units which are (at least) historically prior to the federation.[108] By contrast devolution will often be applied differentially to different regions (sometimes referred to as 'asymmetric federalism'[109]). Belgium,[110] Spain,[111] Russia[112] and the United Kingdom[113] are prominent examples. But the movement within such polities is dynamic and to an extent unpredictable: for example, the founders of the Australian federation rejected the Canadian model as too centralized, yet Canada has retained decentralized elements to a far greater extent than Australia,[114] and Belgium, which was once a unitary State, is more confederal than either. Regional devolution may produce results more or less indistinguishable from that of federal States, even though the starting point is different.[115]

[108] A major issue in federal constitutional law tends to be whether this historical precedence implies any priority in constitutional interpretation, a view associated with the 'compact' theory of federation and with theories of 'original intent'. After a transitional period, constitutional courts have tended to reject such views: see, e.g., in the US, Gutmann (ed), *A Matter of Interpretation: Federal Courts and the Law. An Essay by Antonin Scalia* (and esp commentaries by Wood, Tribe, Glendon and Dworkin); Australia, Goldsworthy (1997) 27 *FLR* 1.

[109] Agranoff (1993) 3 *Regional Politics & Policy* 1 (1993); Morena (1997) 27:4 *Publius* 65; Keating (1999) 29:1 *Publius* 71.

[110] de Visscher (1986) 19 *RBDI* 5; Alen and Peeters, 'Federal Belgium within the international legal order: theory and practice', in Wellens (ed), *International Law: Theory and Practice*, 123; Van den Brande, ibid, 145.

[111] Börzel (2000) 30 *Publius* 17; Conversi, *The Basques, the Catalans and Spain*; Morono, *The Federalisation of Spain*.

[112] Pustogarov (2001) 2 *Gosudarstvo i pravo*, 45–50; Atrokhov (1999) 32 *Cornell ILJ* 367; Beliaev (1995) 41 *Osteuropa-Recht* 121; Pascal, *Defining Russian Federalism*.

[113] Bogdanor, *Devolution in the United Kingdom*; Keating (1998) 28:1 *Publius* 217; Laffin and Thomas (1999) 29:3 *Publius* 89; Burgess (1999) 40 *S Tex L Rev* 715.

[114] Crommelin in Craven (ed), *Australian Federation: Towards the Second Century*, 33, 39–40, 43–4; Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution*, 64.

[115] But see Rudolf, 2 *Enc PIL* (1995), 362, 364. See further Elazar (ed), *Federal Systems of the World: A Handbook of Federal, Confederal and Autonomy Arrangements* (2nd edn); Lapidoth, *Autonomy*.

# PART III

# THE CREATION OF STATES IN INTERNATIONAL ORGANIZATIONS

In the types of case discussed in Part II we have been concerned with what may be called local, usually discretionary, creations of new States. But in many cases, and this is as true of the nineteenth century as of the twentieth,[1] international action has been determinative: international organizations or groups of States—especially the so-called 'Great Powers'—have exercised a collective authority to supervise, regulate and condition such new creations. In some cases the action takes the form of the direct establishment of the new State: a constitution is provided, the State territory is delimited, a head of State is nominated.[2] In others it is rather a form of collective recognition—although the distinction is not a rigid one. Alternatively, various international regimes have been established for particular territories or groups of territories, with eventual independence in view—in particular, the Mandate and Trusteeship systems, and the procedures established under Chapter XI of the Charter. In Chapter 12, the general issues of international disposition relating to the creation of States will be discussed, and in Chapters 13 and 14, the three territorial regimes aimed at independence or self-government.

[1] But cf Briggs (1950) 44 *PAS* 169, 170.

[2] For example Albania (1913–23), Korea (1948), Libya (1952), Austria (1955).

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# Chapter 12

# INTERNATIONAL DISPOSITIVE POWERS


**12.1 Introduction** 504

**12.2 Territorial dispositions by multilateral treaty** 505
(1) Dispositions in treaties of peace 505
(i) The nineteenth-century practice 505
(ii) The World War I settlements 516
(iii) The World War II settlements 518
(iv) Peace settlements since 1945 523
(2) Dispositions anticipatory of peace treaties 530
(3) Dispositions delegated to groups of States 531
(i) The Conference of Ambassadors and Albania 532
(ii) The Principal Allied and Associated Powers after 1918 533
(iii) The Allied Powers 1945 to 1955 535
(4) Conclusion: powers of disposition pursuant to multilateral treaties 535

**12.3 The exercise of dispositive power through collective recognition** 539
(1) The concept of 'collective recognition' 539
(i) Greece, 1822 to 1830 540
(ii) Belgium, 1830 to 1839 542
(iii) Albania, 1913 to 1921 544
(iv) New States in the former Soviet Union and the dissolution of Yugoslavia, 1990 to 1995 544
(2) Collective recognition within international organizations 544
(3) Collective conditional recognition 545

**12.4 Territorial dispositions by international organizations** 546
(1) General principles 546
(2) The Concert of Europe 547
(3) The League of Nations 548

(4) The United Nations and territorial dispositions 549
(i) General principles: delegated and inherent authority 549
(ii) Functions pursuant to the peace treaties 553
(iii) Functions pursuant to the Mandate and Trusteeship systems 555
(iv) Other cases 555
(v) Conclusion 564
**12.5 The notion of 'international dispositive powers'** 564

Prince Bismarck observes that the question is whether or not the powers are agreed to recognize the independence of Roumania . . . Europe alone has the power to sanction independence. She has then to ask herself under what conditions she will adopt that important decision.[1]

From time to time it happens that a group of great Powers, or a large number of States both great and small, assume a power to create by a multilateral treaty some new international regime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence. This power is used when some public interest is involved, and its exercise often occurs in the course of the peace settlement at the end of a great war.[2]

The Security Council . . . [d]ecides that the main responsibilities of the international civil presence will include . . . [p]romoting the establishment . . . of substantial autonomy and self-government in Kosovo.[3]

## 12.1 Introduction

The principle of the equality of States—one of the basic principles of international law and of the United Nations Charter—implies that new legal obligations may not be imposed on States nor may their existing legal rights be impaired by the actions of other States without their consent.[4] But apart from certain more general exceptions to this rule, a quantity of practice attests to the existence of certain international powers to bring about territorial change and to create new territorial entities (States or entities approximating to States) with effects extending beyond the immediate contracting parties.

The relation between the legal principles of equality and consent and this area of international practice is unclear, and the problem has been neglected to

[1] *Protocols of the Berlin Conference* (1878) 69 BFSP 982; cited Munro, *The Berlin Congress*, 33.

[2] *South West Africa (Status) Advisory Opinion*, ICJ Rep 1950 p 128, 153 (Judge McNair (separate opinion)).

[3] SC res 1244, 10 June 1999, para 11(a).

[4] Cf Kelsen, *Peace through Law*, 34–49. For the principle and the exceptions to it see Tomuschat (1993) 241 HR 195.

a degree.[5] Three general areas may be distinguished: the exercise of dispositive powers by means of multilateral acts or treaties, their exercise through a more-or-less organized practice of collective recognition, and their exercise by standing international organizations.

## 12.2 Territorial dispositions by multilateral treaty

### (1) Dispositions in treaties of peace

As Judge McNair pointed out, new States or territorial regimes have often been created by or pursuant to general treaties of peace. There follows a summary of dispositive elements of peace treaties in the period 1815 to 2005.

#### *(i) The nineteenth-century practice*

The difficulty with assessing nineteenth-century practice hinges on the claim of the Great Powers to some sort of primacy with respect to the territorial status quo in Europe, the Near East, and later, Africa—a claim that major political changes, in Bismarck's words, required 'the assent of Europe'. A survey of territorial dispositions by multilateral treaty during the nineteenth century certainly reveals a practice of Great Power agreement on the action to be taken and a refusal to allow such changes to be brought about unilaterally. But the various dispositive acts took the form of a series of multilateral arrangements the validity of which must first be referred to the consent or acceptance of the States or other entities affected. Only international acts founded upon a claim of right to Great Power hegemony would raise the question whether the European system constituted some form of international organization or para-statal entity.

#### (a) The Congress of Vienna, 1815[6]

The positive dispositions of the Vienna settlement, so far as relevant here, were as follows. The third partition of Poland of 1795 was effectively confirmed.[7] A Free City of Cracow was established, 'libre, indépendente, et strictement neutre, sous la protection de la Russie, de l'Autriche, et de la Prussie';[8] its territory

[5] See, however, Verzijl, *International Law*, vol II, 97–104; Brownlie, *Principles* (6th edn) 121, 151–2; Langer, *Seizure of Territory*, 6–16; Dickinson, *Equality of States*, 124–31, 138–45, 292–310; Lande (1947) 62 *Pol Sc Q* 258, 398.

[6] See Albrecht-Carrié, *The Concert of Europe*, 23–5; Seaman, *From Vienna to Versailles*, 1–15; Nicolson, *The Congress of Vienna*; Schroeder, *The Transformation of European Politics 1763–1848*, 517–82.

[7] Act of the Congress of Vienna, 9 June 1815; 2 BFSP 7 (Austria, Spain, France, Great Britain, Portugal, Prussia, Russia, Sweden, Norway) Arts 1–5; Annexes I, II.

[8] Article VI.

was delimited[9] and its Constitution laid down.[10] Frankfort too was declared a Free City, part of the Germanic Confederation,[11] which was itself declared established by Articles 53 to 64.[12] The United Provinces of the Netherlands and the Belgian Provinces were joined in a Kingdom of the Netherlands.[13] The Grand Duchy of Luxembourg, after cession of part of its territory to the Netherlands, was made a Member State of the German Confederation.[14] The Swiss Confederation was enlarged,[15] given certain fiscal privileges by France,[16] and guaranteed perpetual neutrality by the Powers.[17]

To these dispositions the States present at the Congress and the Princes and Free Cities involved were invited to accede,[18] although the term 'invitation' was not intended to imply any degree of free choice in the smaller States or principalities. As Peterson points out:

> The lesser or 'small' Powers were denied equality of representation; they had no voice in the decisions except as they were required to ratify what the Great Powers had done; and they had no choice but to accept a settlement which the concert had agreed upon and which it stood ready to enforce.[19]

### (b) The Concert of Europe, 1815 to 1848[20]

Much the same was true of the interventions to secure the independence of Greece (1827) and Belgium (1831). In Greece the insurgents had maintained their independence against Turkish opposition since 1822. In Belgium, the revolt of 1830 resulted in effective separation from the Netherlands, though the Dutch would take several years formally to accept the result. Great Power action is thus best regarded as a matter of collective conditional recognition, and the two cases will be dealt with below under that rubric.

### (c) The Treaty of Paris, 1856

The Crimean War (1853–1856) had been fought to prevent 'the destruction of the Ottoman Empire . . . the integrity and independence of [which] have been recognized as essential to the peace of Europe.'[21] It was terminated by a General

[9] Article VII.

[10] Articles VIII–X, Annex III. Cracow's separate existence continued until 1846 when it was, by agreement between the Protecting Powers but without the consent of the organs of the Free City, annexed by Austria: Treaty of Vienna, 3 November 1846: de Martens, 9 NRG 575.

[11] Act of the Congress of Vienna, 9 June 1815, Art 46. [12] Ibid, Annex IV.

[13] Articles 65, 66, 73; Annex X. [14] Articles 67–8. [15] Articles 74–8, 80.

[16] Articles 79. [17] Articles 34, Annex XIA. For Swiss accession see Annex XI B.

[18] Article 119. [19] Peterson (1945) 60 *Pol Sc Q* 522, 552.

[20] Schroeder, *Transformation of European Politics*, 583–894.

[21] British Declaration of the Causes of War against Russia, 28 March 1854, 46 BFSP 33. See also Albrecht-Carrié, *Concert of Europe*, 152–84.

Treaty for the Re-establishment of Peace signed at Paris on 30 March 1856.[22] As part of the plan to secure 'through effectual and reciprocal guarantees, the Independence and Integrity of the Ottoman Empire', all Russian-occupied Ottoman territory was returned to the Porte.[23] The Principalities of Moldavia and Wallachia were to continue to enjoy, under the suzerainty of the Porte and the collective guarantee of the Powers, 'une administration indépendente et nationale, ainsi que la pleine liberté de culte, de legislation, de commerce et de navigation.'[24] Provision was made for a guaranteed constitution to be drawn up in consultation with the inhabitants.[25] The Principalities were to have their own armies, and military intervention by the Porte required prior agreement of the Powers. Although many of these liberties had been accorded to the Principalities under Russo-Turkish agreements,[26] the replacement of Russian by multilateral guarantee and the precise definition in wide terms of the autonomy of the Principalities meant a substantial increase in their effective independence; and this against both Turkey and Russia. On 17 January 1859, by the expedient of electing a common prince the two Principalities were united *de facto* as Roumania. The Union was ratified by the Porte and the Powers in 1861.[27]

The status of Serbia under Articles XXVIII and XXIX of the Treaty of Paris was subject to greater limitations. Existing liberties of the Principality under Imperial decrees and treaties with Russia were reaffirmed, and placed under the collective guarantee of the Contracting Powers.[28] The important difference

[22] 46 BFSP 8. The signatories were the belligerents (Great Britain, France, Sardinia, Russia and Turkey) as well as Austria and Prussia, which had remained neutral.

[23] Preamble, Art 3. Renewed undertakings of improved conditions for the Christian population of Turkey, given in Art 9, were not to be regarded 'as giving the right to the said powers to interfere whether collectively or separately in the relations of His Majesty the Sultan with his subjects, [or] in the internal affairs of his Empire.'

[24] Articles 22, 23.

[25] Articles 23–5; also 48 BFSP 81 ff; 49 BFSP 454 ff.

[26] Especially the Treaty of Kuçuk Kainardji, 10 July 1774: 45 CTS 349, Art 16, providing for various liberties including freedom of action for Servian leaders 'malgré leur peu d'importance, comme des hommes jouissant du droit des gens', with a right of mediation of Russian ministers; confirmed by the following Treaties: Ainchi-Kavak, 10 March 1779, 47 CTS 103; Jassy, 9 Jan 1792, 51 CTS 279; Bucharest, 16 May 1812, 62 CTS 25; Akkerman, 25 Sept 1826, 13 BFSP 899, with Acte Séparé, 904, 76 CTS 411; Adrianople, 14 Sept 1829, 16 BFSP 647, with Act Séparé 654, 80 CTS 83, Actes Séparés 91, 95; Balta-Liman, 10 Apr 1849, 37 BFSP 136, 103 CTS 45; and cf the Organic Statutes of 1829 and 1831 granted under Russian occupation and ratified by the Porte in 1834: 32 BFSP 586.

[27] See also Marriott, *The Eastern Question* (4th edn), 285–308; Verzijl, *International Law*, vol II, 372–8.

[28] Serbia, long a Pashalik of the Ottoman Empire, revolted in 1805, and was given internal autonomy under the Treaty of Bucharest. Further revolt in 1815 lead to reaffirmation of this promise in the Treaty of Akkermann; again reaffirmed in the Treaty of Adrianpole, Art 6. Serbia remained neutral during the Crimean War.

between the case of Serbia and the Roumanian principalities was that provided for by Article 28, retaining to the Porte 'le droit de garnison . . . tel qu'il se trouve stipulé par les règlements antérieurs.' Apart from that, no armed intervention in Serbia was permitted without previous agreement of the Powers.[29] Like Roumania, Serbia had achieved the substance of independence at Paris: complete independence was to follow in 1878.[30]

**(d) The Congress of Berlin, 1878**

The situation in the Balkans remained unstable. Insurrections in Bosnia and Herzegovina in 1875 and war between Serbia, Montenegro and Turkey in 1876, led to war between Turkey and Russia.[31] The Treaty of San Stefano of 3 March 1878 was the immediate result: the defeated Sultan was required to recognize the independence of Montenegro, Serbia and Roumania and autonomy for Bulgaria, i.e. most of European Turkey.[32] Neither Britain nor Austria could accept this unilateral extension of Russian influence in the Balkans: the peace settlement, as Salisbury stated, 'would not be valid without the assent of the Powers who were parties' to the treaties of 1856 and 1871.[33] Revision of the Treaty of San Stefano was undertaken by a general congress, and the resulting Treaty made extensive changes in the status quo.[34]

Bulgaria became an autonomous tributary Principality under Turkish suzerainty, with its own government and militia (Art 1). Its territory was delimited (Art 2); and provision was made for election of a Prince, to be confirmed by the Signatories, and the drafting of a Constitution (Arts 3–5). An annual fixed tribute was payable to the Porte (Art 9); and the Turkish army excluded from Bulgaria (Art 11). The new territory of Bulgaria was substantially smaller than that envisaged by the Treaty of San Stefano: of the territory not ceded to the new State most went to form the autonomous province of Eastern Roumelia, placed under the direct political and military authority of

[29] By a firman of 1867 Turkey evacuated the Serbian fortresses: 61 BFSP 1065. But Serbia remained 'an integral part of our Imperial Dominions'.

[30] For the five Ancillary Conventions annexed to the Treaty of Paris see 46 BFSP 18–26. For the Protocols, ibid, 63–138.

[31] For the Andreassy note and the various diplomatic manoeuvrings see Marriott, *Eastern Question*, 309–45; Albrecht-Carrié, *Concert of Europe*, 247–64.

[32] 69 BFSP 732, 152 CTS 395.

[33] Circular of 1 Apr 1878: 69 BFSP 808; Woodward, *The Congress of Berlin 1878*, 8. The Treaty of London of 13 March 1871 had ratified Russian repudiation of those articles of the Treaty of Paris demilitarizing the Black Sea: 61 BFSP 7, 143 CTS 99; Albrecht-Carrié, *Concert of Europe*, 243–7; Marriott, *Eastern Question*, 280–4.

[34] Treaty between Great Britain, Austria-Hungary, France, Germany, Italy, Russia, Turkey for the settlement of Affairs in the East: Berlin, 13 July 1878: 69 BFSP 749, 153 CTS 171; Albrecht-Carrié, *Concert of Europe,* 269–74.

the Sultan.[35] Equally the two provinces of Bosnia and Herzegovina remained formally Turkish but were to be occupied and administered by Austria-Hungary (Art 25). Montenegro's independence, maintained since 1355, was by Article 31 'reconnue par la Sublime Porte et par toutes celles des Hautes Parties Contractantes qui ne l'avaient pas encore admise.' Serbia was also formally recognized as an independent State, subject to certain conditions.[36] But the most controversial issue at the Congress of Berlin was the question of Roumania, the independence of which was only recognized on condition of the retrocession to Russia of part of Bessarabia.[37] Of this in particular it could be said that '[t]he Congress of Berlin in 1878 offers one of the most extreme cases of the concerted action of the Great Powers, taking and carrying out decisions affecting smaller nations without their consent.'[38]

### (e) The Conference of Berlin, 1884 to 1885

No specific territorial changes were effected by the General Act,[39] although the Independent State of the Congo was recognized by all the signatories during the Conference and subsequently acceded to the General Act. The Independent State was not, as has sometimes been asserted, 'brought into existence by the General Act': it was not therefore liable to be dissolved under Article 36.[40]

### (f) The International Government of Crete, 1897 to 1913

Most Cretans sought union with Greece, a desire expressed in frequent revolts against the Porte. The issue was raised at Paris in 1856 and at Berlin in 1878, but the latter Congress provided only for the execution by the Porte of the *Règlement Organique* of 1868 with necessary modifications.[41] A further revolution in 1896 led to the international occupation of Crete by the Powers and the institution of an International Government under Turkish suzerainty.

[35] Article 13. A Christian Governor-General was to be appointed by the contracting Powers; who were also to draw up a Constitution (Arts 16–17). But the Sultan retained substantial powers (Art 15), and treaties made by him were to be 'applicable dans la Roumélie Orientale comme dans tout l'empire Ottoman' (Art 20). Eastern Roumelia was united with Bulgaria in 1885–6: Albrecht-Carrié, *Concert of Europe*, 293–97; Marriott, *Eastern Question*, 352–8.

[36] Articles 34–42. The conditions were accepted by a Serbian Proclamation of 10 Aug 1878: 69 BFSP 1109.

[37] Articles 43–45.

[38] Lande (1947) 62 *Pol SQ* 258, 265.

[39] The General Act of the Conference of 26 February 1885 laid down provisions relative to freedom of trade and navigation, and neutrality, for the Congo Basin and the Rivers Congo and Niger: 76 BFSP 4; Albrecht-Carrié, *Concert of Europe*, 309–15.

[40] *Colony of the Belgian Congo v Lehideux* (1933) 7 ILR 29. On the Independent State of the Congo see further Chapter 6.

[41] Treaty of Berlin, 1878, Art 23: 69 BFSP 758. For the *Règlement* see 58 BFSP 138, and its modifications, 70 BFSP 759.

The collective intervention of the Powers in 1897 was termed a 'decision' and was apparently peremptory.[42] The *de facto* union of Crete with Greece dated from 1909, and the technical surrender of Turkish sovereignty—to the Powers, not to Greece—from 1913.

### (g) The Act of Algeciras, 1906

The General Act of the International Conference at Algeciras relating to the Affairs of Morocco has been referred to already.[43] Based on the 'triple principle of the sovereignty and independence of the Sultan, the integrity of his Dominions and of economic freedom without inequality' the General Act survived the French and Spanish protectorates and provided the most convincing basis—probably the only basis—for the International Court's later characterization of Morocco as 'a State in international law'.[44] In fact the Sultan convened the Algeciras Conference and was a party to the General Act.[45]

### (h) The Treaty of London, 1913 and the creation of Albania

The Albanian case is of particular interest. The geographical entity called Albania, comprising the Turkish provinces of Scutari and Janina and the vilayets of Kosovo and Monastir, was never a separate political entity and had been under Turkish sovereignty since 1571. After frequent revolts, local autonomy was granted by the Sultan in 1912, but the future status of the territory was a central issue of the First Balkan War (17 October 1912–30 May 1913). As a result of British mediation the problem of Albania was referred to the six Powers by Article III of the Treaty of London.[46] Grave difficulties were encountered, both with regard to territorial delimitation and the new administration of the territory: nevertheless, as Sir Edward Grey stated at the time, Great Power action over Albania was 'regarded as the symbol of the existence of the Concert of Europe.'[47] On 29 July 1913 the Conference of Ambassadors established an Organic Statute for the Albanian State, Article 1 of which

[42] See the Collective Notes of 2 March 1897: 91 BFSP 175; Albrecht-Carrié, *Concert of Europe*, 291; Verzijl, *International Law*, vol II, 387–9; Ydit, *Internationalized Territories*, 109–26; Dutkowski, *L'Occupation de la Crète 1897–1909*. For the Provisional Statute of 1897 and subsequent Constitutions of 1899 and 1907 see PCIJ ser C no 82, 82–131. The status of Crete during this period is discussed in Chapter 8.

[43] Act of Algeciras, 7 April 1906, 99 BFSP 141. See Chapter 7.

[44] *United States Nationals in Morocco*, 1952 ICJ Rep 179, 185, discussed in Chapter 7.

[45] Cf Lande (1947) 62 *Pol SQ* 258, 274–80; Albrecht-Carrié, *Concert of Europe*, 315–22.

[46] Bulgaria, Greece, Montenegro, Serbia and Turkey, 17/30 May 1913, 107 BFSP 656: 'S.M. l'Empereur des Ottomans et leurs Majestés les Souverains Alliés déclarent remettre à S.M. l'Empereuer d'Allemagne, à S.M. l'Empereur d'Autriche . . . à M. le Président de la République française, à S.M. le Roi de Grande-Bretange, à S.M. le Roi d'Italie et à S.M. l'Empereur de toutes les Russies le soin de régler la délimitation des frontières de l'Albanie et toutes autres questions concernant l'Albanie.'

[47] *HC Deb*, 5th ser, vol 56, cols 2281–96 at 2282 (12 Aug 1913).

provided that: 'L'Albanie est constitutuée un principauté autonome, souveraine et héréditaire par ordre de primogéniture, sous la garantie des six Puissances. Le Prince sera désigné par les six Puissances.'[48] The Principality was freed from Turkish suzerainty (Art 2), neutralized (Art 3), and had its civil and fiscal administration placed under the control of an international commission for an initial period of ten years (Arts 4–5).[49] An international police force was established to ensure public order (Arts 8–11). Subsequently, by the Protocol of Florence of 17 December 1913, Albania's boundaries were delimited: *de jure* recognition of the new State was accorded, and a German prince appointed as Head of State.[50]

So far the action of the Great Powers in Albania was hardly unusual. However, no effective government could be established. The elected Prince was unable to take office; a local insurrection in Epirus proved troublesome, and with the onset of World War II Albania was successively occupied by various belligerent forces.[51] Article VII of the Secret Treaty of London of 26 April 1915 provided for the partition of most of Albania between Montenegro, Serbia and Greece, with the remainder reserved 'pour la constitution d'un petit Etat autonome neutralisé,' the foreign relations of which were to be conducted by Italy.[52] At the end of the war the question of the implementation of the Treaty of London, or its replacement by alternative dispositions, became a matter of some contention between President Wilson and the British and French Governments.[53] An initial proposal that Albania be placed under an 'A' Mandate, with Italy as Administering Authority, was rejected.[54] Instead France and Great Britain proposed, in effect, the partition of Albania between Italy, Yugoslavia and Greece—a proposal that met with strenuous criticism from President Wilson.[55] Faced with the latter's continued insistence on the

[48] 11 *NRG* 3rd ser 650.

[49] The Commission drew up a detailed Statute for Albania (Valona, 10 April 1914). See also Ydit, *Internationalized Territories*, 29–33.

[50] For the Protocol of Florence see PCIJ ser C no 5 (II) 266. See also *Monastery of Saint-Naoum (Albanian Frontier)*, PCIJ ser B no 9 (1924), 9–10; 2 ILR 385.

[51] See Marriott, *Eastern Question*, 471–2; Ydit, *Internationalized Territories*, 32–3.

[52] 26 Apr 1915: 112 BFSP 973, 221 CTS 56.

[53] See the Correspondence relating to the Adriatic Question, December 1919–February 1920; 113 BFSP 807.

[54] Cf the Allied Memoranda of 9 December 1919: 113 BFSP 810, 816, 831. Yugoslavia stated its preference for 'un Gouvernement local autonome sans ingérence d'aucune Puissance étrangère': ibid, 834. Italy eventually renounced the possibility of an Albanian mandate: 131 *HC Deb* (5th ser), col 1625, 8 July 1920.

[55] Cf his Note of 10 February 1920: 113 BFSP 842, and the British and French Reply of 14 February: 1920, reciting that 'the Albanian people have never been able to establish a settled Government for themselves' and referring to the conflict between 'national aspirations and ideals, many of which are only transitory and ephemeral,' and 'international treaties': ibid, 848, 851.

'territorial integrity' of Albania, the European Allies declared themselves in favour of 'a reconsideration of the Albanian question',[56] a change of position reflected in ministerial replies to questions in the House of Commons.[57] It was reflected also in a conflict of opinion within the League of Nations, which was at the time considering the applications for membership of five more or less marginal political formations in Europe—Albania, Armenia, Azerbaijan, Georgia and Liechtenstein. The Fifth Committee reported against all five applications: with respect to Albania it doubted that the '*de jure* recognition by the Powers in 1914 could be considered as effective'.[58] The Assembly rejected the other four applications, but by a large majority admitted Albania to membership on 15 December 1920.[59] Of these decisions Walters comments:

> As for Albania, her frontiers were still undefined and her government was not recognized by that of any other country. Her admission, which again was mainly the work of Cecil, was in essence a notification by the League to the Supreme Council to hasten its decisions concerning her frontiers, and to her neighbours not to try and appropriate part of her territory in the meantime.[60]

The European Allies were still slow to act, and the position remained unsettled throughout 1921. But the Yugoslav invasion of Albania forced some collective action: on 7 November 1921, Great Britain extended *de jure* recognition, and on 9 November the Conference of Ambassadors issued a Declaration regarding the Integrity of the Frontiers of Albania: 'reconnaissant que l'indépendance de l'Albanie, ainsi que l'integrité et l'inalienabilité de ses frontièrs, telles qu'elles ont étés fixées par leur décision en date du 9 novembre 1921, est une question d'importance internationale' and providing for protection of Albania's territorial integrity by the Council of the League.[61] Albania was recognized *de jure* by the United States in 1922.[62]

**(i) The nineteenth-century Congresses and the principle of consent**

In general, the dispositions referred to above, though concluded under the aegis of the 'Concert of Europe', were consented to by the parties affected.

[56] 113 BFSP 855, 859.

[57] In August 1920, Lloyd George stated that 'His Majesty's Government have every sympathy with Albanian nationalism, but they are unable to act independently in a matter which directly concerns the interests of other Allied Powers': 132 *HC Deb* col 1977. But on 2 November Cecil agreed that Albania had been constituted 'a State under European guarantee' in 1913: 148 *HC Deb* cols 28–9.

[58] LNOR Ctee Mtgs, 1st Ass. vol II, 191.

[59] LNOJ, Sp Supp No 5, 28 (35–0: 7 abst). For Albanian accession to the Covenant see 114 BFSP 858.

[60] Walters, *A History of the League of Nations*, vol I, 123. See also PCIJ ser C no 5(II), 156–8; Graham, *The League of Nations and the Recognition of States*, 25–6, 65–6.

[61] 117 BFSP 452, and cf the Assembly Resolution of 2 Oct 1921: LNOJ Sp Supp No 6, 35–6.

[62] Hackworth, 1 *Digest* 196–8.

The actual exercise of authority by the powers—with certain exceptions—did not extend beyond negotiation, conciliation and the exercise of political influence. Thus the relevant dispositions of the Treaty of Paris were assented to by Turkey and Russia, and to the extent that they altered the position of Turkish provinces in Europe did so to their manifest advantage. Likewise the Berlin Conference of 1885 and the Algeciras Conference of 1906 raised no difficulties in terms of the principle of consent. True, there were exceptions, but these related not to Europe as a whole but to the affairs of the Ottoman Empire, so much so that Holland described the action of the Great Powers there as 'a sort of *corpus iuris publici orientalis*'.[63] The three most important cases for present purposes were the Bessarabian controversy at the Congress of Berlin in 1878; the imposition of an International Government on Crete in 1897, and the action taken with respect to Albania in the period 1913–22. But it is clear that no general rule can be established from these cases.

The compulsory retrocession of Bessarabia was admittedly an extreme example. Romania's claims were, however, as Lord Salisbury pointed out: 'not wholly free from question, first, because they [*sc* Romania and Serbia] are not as yet independent governments, and, secondly, because by allying themselves to Russia they placed their rights in the hands of that Power, which did not think them entitled to be made parties to the Treaty of San Stefano . . .'.[64] Moreover, the Romanian Declaration of Independence of 3 June 1877 referred expressly to the need for confirmation by international agreement.[65] On the other hand Romania was substantially independent before 1878 and little compensation was offered it for the loss of Bessarabia.[66] The retrocession was substantially unlawful, and brought about only by Russian threats of force and its strategic superiority. The British Plenipotentiary was accordingly instructed to protest 'against a violation of international law, for which there seems to be little excuse, and which cannot be justified by reference to the purpose of which the war was undertaken.'[67]

The question of Crete in 1897 saw the collective military intervention of the Powers in a vain attempt to keep the peace between Greece and Turkey. Subsequent action there must be regarded in part as a consequence of Greek consent following her defeat in the Thirty Days War and in part as an expression of the hegemony of the Powers over the Ottoman Empire, already referred to.

[63] Holland, *The European Concert in the Eastern Question*, 2; cf Lande (1947) 62 *Pol SQ* 258, 282; Langer, *Seizure of Territory*, 9–11. For the impact of the Berlin Declaration on the status and rights of indigenous communities see above, Chapter 6.

[64] 69 BFSP 832.

[65] 68 BFSP 871.

[66] Cf Protocols of the Conference (Nos 9–10): 69 BFSP 972, 978.

[67] Salisbury to Russell, 8 June 1878: ibid, 834.

The case of Albania in 1913 presents fewer difficulties: intervention there was a direct result of Article 3 of the Treaty of London, delegating to the Powers the settlement of the Albanian question. However, the dispositions of 1913–14 were not effectively executed, and the Allies seem to have thought that further disposition of Albanian territory remained in their hands. It may be doubted whether their freedom of action was complete: as President Wilson argued, the agreements of 1913 had established a State territory for Albania which the Allies were not subsequently at liberty to dismember. The question arose in modified form in the *Affair of the Monastery of Saint Naoum (Albanian Frontier)*.[68] In that case, although the Court unanimously accepted that the Conference of Ambassadors by its decisions of 9 November 1921 had effectively delimited Albanian territory,[69] it is significant that this power was referred to the consent and acquiescence of the parties given in 1921 rather than at any earlier date.[70] Moreover, the power was, it was held, not unlimited: although 'the Conference, whose mission it was to "settle the frontiers of Albania", had, in the fulfilment of its task, a certain amount of latitude',[71] they had no power to alter any decision once made, or even to rectify it on grounds of error.[72] Their decision was, it was held, in the nature of 'arbitration'.[73] There was no question of any supranational authority of the Powers—authority which presumably would have included power to change a decision for sufficient reason—either with respect to Albania in particular or Europe generally.

The question of the validity of Great Power action taken without the consent of 'minor' Powers arose directly in the case concerning the *Jurisdiction of the European Commission of the Danube between Galatz and Braila*.[74] The European Commission of the Danube had been established by the Treaty of Paris in 1856 and its jurisdiction extended to Galatz, in Romania, by Article 53 of the Treaty of Berlin 1878 which also, as we have seen, recognized Romania as independent of the Ottoman Empire.[75] The Commission's jurisdiction was further extended, to Braila, by the Treaty of London of 10 March 1883.[76] 'Roumania

[68] PCIJ ser B no 9 (1924).

[69] 'The character of the decision of November 9th, 1921, has been discussed. Its legal foundation is to be found in the fact that the Principal Powers, acting through the Conference of Ambassadors, had the power to render a decision': ibid, 14. Cf Lauterpacht, *Recognition*, 68n.

[70] PCIJ ser B no 9, 13. [71] Ibid, 16.

[72] The Court found that the 1913 Protocols had left the St Naoum frontier undetermined: ibid, 16ff. It expressly did not decide whether, if the frontier had been fixed, it could have been validly altered in 1921: ibid, 21–2. Presumably that would have required an analysis of the terms by which the Parties had in 1921 accepted the competence of the Conference of Ambassadors.

[73] Ibid, 15, approving the *Jaworzina Frontier Opinion*, ser B no 8 (1923), 29.

[74] ser B no 14 (1927). [75] Turkey was but Romania was not a party to the Treaty.

[76] 74 BFSP 1231, 161 CTS 353.

did not sign this Treaty, or take part in the Conference by which it was drawn up, the Conference having refused to admit her delegates except in a consultative capacity.'[77] Article 346 of the Treaty of Versailles[78] reaffirmed the *de facto* position existing before the war and this was incorporated in the Definitive Statute of the Danube of 23 July 1921, to which Romania was also a party.[79] The Court held that the jurisdiction of the Commission did extend as far as Braila as a matter of interpretation of the treaties of 1919 and 1921. It did not suggest that the Treaty of London of 1883 had itself had that legal effect. The fact that since 1883 'the European Commission had exercised some powers on the sector from Galatz to Braila, no matter what the legal ground and nature of these powers may have been'[80] was a reason for construing the post-war treaties as referring to the previous *de facto* situation. But it was not relied upon to prove Romanian acquiescence in the Treaty of London, still less any competence of the Powers to bind Romania without its consent.[81] Judge Negulesco, the only dissentient, was even more emphatic:

> It has been sought to explain that independently of Roumania the Treaty of London possesses legal force as being an application of the system adopted by the Concert of Europe which left to the Great Powers alone the task of deciding the principal affairs of Europe. The Concert of Europe has always been regarded as a political system and has never been considered as a legal organization; in other words the decisions of the Great Powers, met together as the Concert of Europe, have sometimes been able to command respect by reason of the power behind these decisions, but they have never been held to be legally binding upon States not represented in the Concert . . . [S]ince the Conference of London considered it necessary territorially to extend the powers of the European Commission by making its authority extend as far as Braila, it was necessary that Roumania, who was entitled to sit upon this Commission under Article 53 of the Treaty of Berlin, should be summoned to take part in the London Conference with the right to vote . . . .[S]uch were the principles of the public law of Europe at the time of the Treaty of London.[82]

The conclusion must be that nineteenth-century precedents did not support the claim of the Great Powers to legal hegemony in the territorial affairs of Europe.[83] The competence to create 'objective' settlements derived not from the position of the Powers as such but from the importance of the

[77] PCIJ ser B no 14 (1927), 11. [78] 112 BFSP 1, 225 CTS 189, 360.
[79] 114 BFSP 535, Arts V, VI. [80] PCIJ ser B no 14, 27. [81] Ibid, 75 (Judge Nyholm).
[82] Ibid, 95.
[83] The doctrine is canvassed by Dickinson, *Equality of States*, 126–31 (writers affirming equality), 131–45 (writers doubting or denying equality): his conclusion (145) is equivocal; see also ibid, 173–5, 292–311. The conclusion in the text is supported by Lande (1947) 62 *Pol SQ* 258, 282–6; Albrecht-Carrié, *Concet of Europe*, 22, 59; Dupuis, *Le Principe d'équilibre et le concert européen*, 496; Nys (1899)

common interests involved, and the express, tacit or implied acceptance of the States concerned. The question then is, whether, on what basis and to what extent subsequent developments have gone beyond the legal position as it stood in 1918.

### *(ii) The World War I settlements*[84]

As victors in a major war, with no neutral powers available to mediate or moderate the terms of any settlement, the Entente Powers had virtually complete freedom of action with respect to the peace settlements after the Great War. Nonetheless they had by 1919 circumscribed their freedom of action to a degree by secret treaties[85] and by the famous Fourteen Points of President Wilson as amended.[86] The recognition of new States in Eastern Europe and elsewhere was a further, substantial limitation. The final settlement was a series of compromises between these various commitments and political exigencies.

Although they were not followed in important respects the Fourteen Points, as a public declaration of Entente war aims (accepted by the Central Powers as the basis for the armistice) and as the avowed basis of the peace settlement, have juridical interest. As far as relevant here, they provided for:

> *Five*. A free, open-minded, and absolutely impartial adjustment of all colonial claims based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the Governments whose title is to be determined.
> *Seven*. Belgium . . . must be evacuated and restored without any attempt to limit the sovereignty which she enjoys in common with all other free nations . . .
> *Ten*. The peoples of Austria-Hungary, whose place among the nations we wish to see safeguarded and assured, should be accorded the freest opportunity of autonomous development.

1 *RDILC* (2d) 271, 279; Langer, *Seizure of Territory*, 10–11; and cf Westlake, in *Collected Papers*, 92–101. But in his *International Law* (2nd edn), vol I, 321–5, Westlake cites Salisbury's reference to the 'federated action of Europe'. Lawrence, in *Essays on Some Disputed Questions in Modern International Law*, 191, 209 refers to 'what can hardly be distinguished from a legal right to settle disputed questions . . .'.

84 The main treaties were as follows: Versailles, 28 June 1919 (112 BFSP 1); St Germain-en-Laye, 16 July 1920 (ibid, 317); Neuilly, 27 November 1919 (ibid, 781); Trianon, 4 June 1920 (113 BFSP 186); and Lausanne, 24 July 1923 (117 BFSP 543, 28 LNTS 11), replacing the unratified Treaty of Sèvres, 10 August 1920 (113 BFSP 652). After the Senate's failure to ratify the Treaty of Versailles, the USA made separate Treaties of Peace with Austria (Vienna, 24 Aug 1921, 114 BFSP 633); Germany (Berlin, 25 Aug 1921, 114 BFSP 828); and Hungary (Budapest, 29 Aug 1921, 114 BFSP 841). There was no treaty with Turkey. (Cf *USFR*, 1927/III, 765; Exchange of Notes, 17 Feb 1927, ibid, 794.) The USA was not at war with Bulgaria.

85 E.g., the Treaty of London, 26 April 1915; 112 BFSP 973, 221 CTS 56.

86 Cf Temperley, *A History of the Peace Conference at Paris*, vol I, 192–5, 275, 409.

*Eleven*. Rumania, Serbia, and Montenegro should be evacuated . . . and the relations of the several Balkan States to one another determined by friendly counsel along historically established lines of allegiance and nationality, and international guarantees of the political and economic independence and territorial integrity of the several Balkan States should be entered into.
*Twelve* . . . [T]he other [sc non-Turkish] nationalities which are now under Turkish rule should be assured an undoubted security of life and an absolute unmolested opportunity of autonomous development . . .
*Thirteen*. An independent Polish State should be erected which should include the territories inhabited by indisputably Polish populations, which should be assured a free and secure access to the sea, and whose political and economic independence and territorial integrity should be guaranteed by international covenant.

In accordance with the seventh of the Fourteen Points, Belgium was restored to independence with various modifications of its previous status.[87] The British protectorate over Egypt, unilaterally declared in 1914, was recognized by the defeated States with retrospective effect.[88] The Treaty of Protection between France and Monaco of 17 July 1918 was 'noted.'[89] The French protectorate in Morocco was recognized.[90]

Apart from a relatively few immediate dispositions, most of the dispositive clauses in the peace treaties of 1919–23 recognized pre-existing States or delegated authority to the Powers or the League to decide on the future regime of the territories concerned. In this respect these treaties differ from the nineteenth-century practice. The continuing authority of the Allied Powers, and in particular of the Principal Allied and Associated Powers (Great Britain, the United States, France, Italy and, for certain purposes, Japan) after 1918 was explicit and extensive. Nevertheless, the principle of consent was, with one exception, maintained: no general authority was claimed to impose particular duties on third parties.[91]

The exception, again, was Bessarabia, the shuttlecock of the Balkans. Bessarabia had been occupied by Romania on its re-entry into the war in late 1918. Retention of the province became a condition of Romanian co-operation

[87] Versailles, Arts 31–9; Saint-Germain, Art 83; Trianon, Art 67.

[88] Versailles, Arts 147–54; Saint-Germain, Arts 102–9; Neuilly, Art 63; Trianon, Arts 86–93; Lausanne, Arts 16–19.

[89] Versailles, Art 436; Saint-German, Art 374; Neuilly, Art 292; Trianon, Art 357; Sèvres, Art 416—not in Treaty of Lausanne.

[90] Versailles, Arts 144–6; Saint-Germain, Arts 96–101; Neuilly, Art 62; Trianon, Arts 80–5; Lausanne, Arts 16, 29 (by implication).

[91] Thus 'the Treaty of Versailles, to which Switzerland was not a Party, had no power to provide for the establishment of the new régime (which it clearly considered as having to be effected, taking as a basis the inconsistency between the "former provisions" and the "present conditions") in any other way than by an agreement between Switzerland and France.' *Free Zones Case*, ser A/B no 46 (1932), 89 (Judges Altamira, Hurst, diss) (no disagreement with the majority on this point).

in the peace-making, but Bessarabia was not in the gift of the Allies.[92] Nevertheless, on 3 March 1920 Lloyd George signified British 'recognition of the reunion of Bessarabia and Roumania . . . Should . . . Soviet Russia attack Roumania within its legitimate frontiers the Allies will give her every possible support.'[93] There followed a treaty between the Principal Allied Powers (excluding the United States) and Romania, recognizing its sovereignty over Bessarabia,[94] providing for boundary delimitation by a tripartite commission (two members from the signatories, and one nominated by the League Council 'pour le compte de la Russie': Article II) and stating that the parties would:

> invite Russia to adhere to the present Treaty when there shall be a Russian Government recognized by them. They reserve the right to submit to the arbitration of the Council . . . all questions which may be raised by the Russian Government concerning the details of this Treaty, on the understanding that the frontiers laid down in the present Treaty, as well as the sovereignty of Roumania over the territories there defined, shall not be called in question.[95]

This time it was the United States turn to protest at action, which gave the Soviets 'another pretence for arousing national spirit on the ground that the Allies were disposing of Russian territory at a time when a representative Russian Government could not be heard.'[96] Once again it seems that a transaction resulting in the transfer of Bessarabia was substantially unlawful.[97]

### *(iii) The World War II settlements*[98]

The World War II settlements, in their dispositive elements, were less complex and far-reaching than those of 1919–23. Internationalization was not regarded

[92] Bessarabia was not among the extensive territories (Poland, Courland, Lithuania, Ardahan, Kars, Batum, the Ukraine, Esthonia, Livonia and Finland) detached from Russia by the Treaty of Brest-Litovsk, 3 March 1918, 223 CTS 80, Arts III, IV, VI. [93] USFR, 1920/III, 431.

[94] Paris, 28 October 1920, 113 BFSP 647, Art 1. [95] Ibid, Art 5.

[96] 5 October 1920: USFR, 1920/III, 433. For Tchitcherin's refusal to recognize the Bessarabian transaction, see ibid, 434.

[97] Spector, *Rumania at the Paris Peace Conference*, 101–2, 222–5; Langer, *Seizure of Territory*, 29–31; Temperley *A History of the Peace Conference at Paris*, vol IV, 213–36. But a Romanian–German Mixed Arbitral Tribunal in *Wildermann v Stinnes* held that Bessarabia had ceased to be Russian territory in 1917 by a process of secession and union with Romania, a process recognized by the Allies: (1925) 4 *Rep MAT* 842, 847, 2 ILR 224: 'La sécession et l'union ont en lieu au moment où l'empire russe se désagrégait et où la carte de l'Europe se remanait suivant le principe de droit des peuples se disposer d'eux-mêmes. Historiquement et ethnographiquement, la Bessarabie est terre roumaine.' For State succession issues see *Sechter* v *Minister of the Interior* (1929) 5 ILR 61; *Mordovici* v *General Administration of Posts & Telegraphs* (1929) 5 ILR 62; *Vozneac* v *Autonomous Admn of Posts & Telegraphs* (1931) 6 ILR 60. But cf 42 UNTS 3, Art 1; Whiteman, 3 *Digest* 131–8.

[98] See generally Whiteman, 3 *Digest* 1–623; Wheeler-Bennett and Nichols, *The Semblance of Peace. The Political Settlement after the Second World War*.

as the panacea for all intractable conflicts of nationality: where the earlier settlements saw the creation of Danzig, Fiume, the Memel and Saar Territories and the formation of a large number of Mandated Territories, the later ones saw only the abortive Trieste experiment, the unilateral establishment by France of a new Saar Territory, and the rather reluctant transfer, with one addition, of all but one of the remaining Mandates to the analogous Trusteeship system. In the former case a large number of new States had come into existence: in the latter, the emphasis was on the re-establishment of States which had been overrun during the hostilities. Disputes arose not about whether they should be re-established, but over their territory and form of government.

Most significantly, after 1918 peace treaties had been concluded with virtually all the belligerents: in 1945 the most important enemy power, Germany, was not in a position to sign a peace treaty. The replacement of the German government by a Quadripartite Allied government, and the subsequent division of the Reich into two German States, necessitated a prolonged, piecemeal, method of settlement, a 'functional peace treaty', eventually ratified by the transactions that accompanied German reunification in 1990. Indeed the entire post-war settlement was to some extent functional in this sense: decisions were taken at a series of inter-Allied Conferences,[99] which were regarded as binding and which were in fact final. By assuming complete control over the government of Germany and Austria, the Allied Powers acquired virtually complete control over them; and in other respects their combined authority, together with the presence of their armies in 'liberated' Europe, meant that the smaller Allied Powers had little choice but to acquiesce in their decisions. Of this Poland, an Allied not an enemy State, provided much the best example.

Against this background, the dispositions in the seven peace treaties may be outlined.[100]

**(a) The re-establishment of annexed or conquered States**

In 1935 Ethiopia had been invaded and annexed by Italy in violation of the Covenant and the Kellogg–Briand Pact.[101] The annexation received some

[99] The most important of these Conferences and Declarations were the Atlantic Charter, 14 August 1941, (1941) 35 *AJ Supp* 191; the Moscow Conference of Foreign Ministers, 1 December 1943, (1944) 38 *AJ Supp* 3; the Teheran Conference, 1 December 1943, (1944) 38 *AJ Supp* 9; the Yalta Conference, 11 February 1945, (1945) 12 *DSB* 215; and the Potsdam Conference, 2 August 1945, 145 BFSP 852.

[100] The Treaties were concluded with: Bulgaria, 41 UNTS 21; Finland, 48 UNTS 203; Hungary, 41 UNTS 135; Italy, 49 UNTS 3; Roumania, 42 UNTS 3, all signed at Paris, 10 February 1947; Japan, signed at San Francisco, 8 September 1951, 136 UNTS 45; Austrian State Treaty, Vienna, 15 May 1955, 217 UNTS 233.

[101] See Marek, *Identity & Continuity*, 263–82; Langer, *Seizure of Territory*, 132–54.

degree of international recognition, but its legal nullity was affirmed by the Peace Treaty with Italy.[102]

Albania, where a puppet government had been established in union with Italy,[103] was also restored to independence, acts of the puppet government between 1939 and 1943 being recognized as null and void.[104]

Korea was a somewhat different case: its annexation by Japan in 1905 was undoubtedly effective in international law so that it had ceased to exist as a separate State. By Article 2(a) of the Japanese Peace Treaty of 1951, the independence of Korea was recognized and the matter effectively left in the hands of the occupying Allied States.

Perhaps the most interesting of the post-World War II cases was that of Austria. The annexation of Austria by Germany in 1938 was a clear violation of Article 80 of the Treaty of Versailles,[105] but recognition (at least *de facto*) of the *Anschluss* was widespread.[106] Despite this the Moscow Declaration of 30 October 1943 affirmed that the *Anschluss* was 'null and void', and declared a joint desire 'to see re-established a free and independent Austria'.[107] Austria in the period 1938–45 thus appears to have been regarded as in the same legal position as Ethiopia and Albania; its 'sovereignty . . . not . . . destroyed but only suspended'.[108] In the absence of any claimant Austrian Government or Government-in-exile, the collapse of the German Government in May 1945 necessitated the assumption by the Allies of governmental authority in Austria as well.[109] The machinery of administration likewise involved quadripartite

[102] By Art 33 Italy recognized and undertook to respect 'the sovereignty and independence of the State of Ethiopia . . .'. By Art 35 it recognized 'the legality of all measures which the Government of Ethiopia has taken or may hereafter take in order to annul Italian measures respecting Ethiopia taken after 3rd October 1935, and the effects of such measures . . .'. By Art 38, 'The date from which the provisions of the present Treaty shall become applicable as regards all measures and acts of any kind whatsoever entailing the responsibility of Italy or of Italian nationals towards Ethiopia, shall be held to be 3rd October, 1935.' By Art 74 reparations of $25 million were payable to Ethiopia. See Bentwich (1945) 22 *BY* 275.

[103] Langer, *Seizure of Territory*, 245–53; Marek, *Identity and Continuity*, 331–37; Lemkin, *Axis Rule in Occupied Europe*, 99–107; *Case of Gold Looted by Germany from Rome in 1943* (Sauser-Hall Arb 1953), 20 *ILR* 441, 450–1; cf *Monetary Gold Removed from Rome*, ICJ Rep 1954 p 19, 20 ILR 441.

[104] Italian Peace Treaty, Arts 27, 31. Reparations of $5 million were paid under Art 74.

[105] Whiteman, 3 *Digest* 425–77; Clute, *The International Legal Status of Austria 1938–1955*, 1–22; Lemkin, *Axis Rule in Occupied Europe*, 108–16; Langer, *Seizure of Territory*, 155–206; Marek, *Identity and Continuity*, 338–68; Wright (1944) 38 *AJ* 621.

[106] Marek, *Identity and Continuity*, 343–6; Clute, *International Legal Status*, 8–12.

[107] (1944) 38 *AJ Supp* 7.

[108] Lemkin, *Axis Rule*, 115. Whether Austria had been annexed or occupied bore heavily on the question of continuity: Schweitzer (1985) 23 *AdV* 130, 136–41. See further Chapter 17.

[109] 145 BFSP 846, 850; 146 BFSP 504; Mair, in RIAA, *Four Power Control in Germany and Austria* (1956), Pt II; Wheeler-Bennett and Nichols, *Semblance of Peace,* 465–86.

control, with four zones allocated one to each of the Allies and joint control of the capital.[110] But while in Germany an extensive period of occupation was envisaged, in Austria the Allied presence was intended to be temporary: 'the primary tasks of the Allied Commission for Austria' were 'to achieve the separation of Austria from Germany' and 'to secure the establishment, as soon as possible, of a central Austrian administrative machine.'[111] In the Soviet Zone an Austrian administration was soon formed,[112] the authority of which was extended to all Austria by a further Agreement on Control Machinery of 28 June 1946.[113]

The status of Austria in the period 1946 to 1954 has been the subject of some debate. On the view taken by the Allies after 1943, it seems that Austria was a State throughout;[114] the question was one of governmental authority rather than statehood. On this view governmental authority with respect to the State of Austria was divided between the Austrian Government and the Allied Commission for Austria. It was not that Austria as a State was 'limited in her capacity for action under international law';[115] rather that, as with Germany, the government of Austria was shared between different persons and instrumentalities.

Eventually the Austrian State Treaty of 1955 terminated control machinery in Austria and recognized 'that Austria is re-established as a sovereign, independent and democratic State'.[116] Political or economic union with Germany was prohibited and Article 80 of the Treaty of Versailles in substance re-enacted.[117] Austria was not regarded as a World War II belligerent,[118] and Article 21 provided that reparations 'should not be exacted from Austria' arising out of the existence of a state of war after 1 September 1939.[119] Austria was admitted to the United Nations, without opposition, on 14 December 1955.[120]

[110] Agreement on the Control Machinery in Austria, 4 July 1945, 145 BFSP 846; Agreement on the Zones of Occupation in Austria and the Administration of the City of Vienna, 9 July 1945, 145 BFSP 850.

[111] Agreement on Control Machinery, Art 8(b), (c). See Mair in RIAA, *Four Power Control in Germany and Austria*, 269–378.

[112] Wheeler-Bennett and Nicholls, *Semblance of Peace*, 465–70; Schweitzer (1985) 23 *AdV* 130, 133–6.

[113] 146 BFSP 504. This was subject to the directions of the Allied Commission, acting through the Austrian Government except in relation to certain reserved matters (Art 2(c), 5).

[114] Cf 1946 Agreement, Art 3; Clute, *International Legal Status*, 130–8.

[115] Brandweiner in Lipsky (ed), *Law and Politics in the World Community*, 221, 225, describing Austria as a 'Protected State'.

[116] 15 May 1955, 217 UNTS 223, Art 1. For the background to the negotiations see Whiteman, 3 *Digest* 437–68; Schweitzer (1985) 23 *AdV* 130, 142–8.

[117] Article 4(1), (2), but no reference was made to any UN guarantee of independence. On permanent neutrality, see Schweitzer (1985) 23 *AdV* 130, 148–52.

[118] Lemkin, *Axis Rule in Occupied Europe*, 116 n 36.

[119] Potsdam Proclamation, Pt. VII; 145 BFSP 852; Feis, *Between War and Peace. The Potsdam Conference*, 65–9, 274–9.

[120] SC res 109; GA res 995 (X).

**(b) Internationalized territories**

The World War II settlement provided two further examples of this dubious genre. The Free City of Trieste was established by Articles 21 to 22 and Annexes VI to X of the Italian Peace Treaty, but due to the failure of the Security Council to appoint a Governor those provisions never came into effect. The former Saar Territory became part of the French zone of occupation in 1945, and was given *de facto* autonomy by France. It was reincorporated into the German Federal Republic in 1956.

**(c) Poland, 1939 to 1946**

By comparison with the fictionally neutral Austria (effectively merged with Germany before the outbreak of hostilities), the continued legal existence of the furiously belligerent Poland (after its partition between the USSR and Germany in 1939)[121] was clearly called for. The German invasion of Poland in 1939 was the *casus belli*, and even the older doctrine preserved the legal existence of an occupied State pending a peace settlement. Moreover, (although this was not legally necessary) substantial Polish forces remained in the field under the direction of a recognized government-in-exile. Disagreement between the Allies over Poland in the period 1944 to 1946 related to the composition of the Polish Government and the boundaries of Poland, over which the Allies asserted authority whatever the legal rights and wrongs of the situation may have been.[122]

**(d) Other dispositions**

Certain other immediate dispositions may be mentioned. By Article 23 of the Peace Treaty Italy renounced its territorial possessions in Africa, in favour of the Principal Allied Powers.[123] Italian rights, titles and claims relating to the Mandate system or particular territories were also renounced by Article 40. Japan renounced its title over Formosa and the Pescadores (Taiwan) by Article 2(b) of the Japanese Peace Treaty.[124] Bessarabia was ceded to the Soviet Union by Article 1 (with Annex I) of the Romanian Peace Treaty.[125]

[121] Secret Protocol to the Non-Aggression Pact of 23 August 1939: 143 BFSP 503; Grenville, *Major International Treaties*, 200.

[122] See Crawford (1977) *Studies for a New Central Europe* ser 4 nos 1–2, 89. See also Whiteman, 3 *Digest* 177–392; Feis, *Between War and Peace*, 31–8, 203–34; Clemens, *Yalta*, 8–28, 173–215; Woolsey (1944) 38 *AJ* 441; Woolsey (1945) 39 *AJ* 295; Wright (1945) 39 *AJ* 300; Marek, *Identity and Continuity*, 417–526. Cf Lauterpacht, *Recognition*, 353 n 1.

[123] 49 UNTS 3, Art 23, Part II, Section IV, 29 UNTS 749, Part III, s IV.

[124] 136 UNTS 45.

[125] 42 UNTS 33; Whiteman, *Digest,* 3 131–8.

### *(iv) Peace settlements since 1945*

Although some have doubted whether the status of war is consistent with the Charter, the period since 1945 has seen its fair share of wars and of peace settlements, whether or not formally referred to as such.[126]

#### (a) Germany, 1990

According to the Berlin Declaration of 5 June 1945:

> The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany.[127]

The scope of this power, in 1945 plenary, was curtailed by separate arrangements between the FRG and the three western powers on the one hand and between the GDR and the USSR on the other. These developments were discussed in Chapter 10. Even forty years later the situation appeared stable, but through a rapid and complex political process in 1989 to 1990 the GDR ceased to function as a 'socialist State',[128] and the groundwork was laid for a definitive resolution of the 'German question'—including the absorption of Berlin and the GDR in the FRG and the termination of quadripartite authority.

In principle the decision by a State to consent to its incorporation into another requires no special explanation under the heading of dispositive powers. Statehood is not indefeasible and one people or community can freely elect, directly or through their representatives, to become part of another. However, the special position of Germany and the subsisting rights and responsibilities of the four powers for Berlin and for 'Germany as a whole', gave the case an added multilateral dimension.

As between the two German States, two treaties dealt with the mechanics of reunification: a Treaty of 18 May 1990 established a union for monetary, economic and social purposes,[129] and a Unification Treaty of 31 August 1990

[126] The following section is limited to peace settlements with dispositive elements and multilateral participation. It does not cover bilateral agreements even when reached under multilateral pressure or mediation: e.g., Israel–Jordan, 26 October 2004, 2042 UNTS 351; Ethiopia–Eritrea, Peace Agreement, 12 December 2000 (S/2000/1183).

[127] TIAS No 1520, preamble.

[128] See, e.g., Lamm & Bragyova (1990) 36 *AFDI* 125; Elbe (1993) 36 *German YB* 371, 371–3; Zelikow and Rice, *Germany Unified and Europe Transformed*, 63–101; Smyser, *From Yalta to Berlin: The Cold War Struggle Over Germany*, 295–396.

[129] Federal Republic of Germany–German Democratic Republic, Treaty Establishing a Monetary, Economic and Social Union, 18 May 1990, (1990) 29 ILM 1108.

set out details for political union following a plebiscite.[130] The matter was not, however, treated as one for the German parties alone. A Treaty on the Final Settlement with Respect to Germany[131] was concluded on 12 September 1990 by the two German States and the four Powers. Article 7 provided:

(1) [The four Powers] hereby terminate their rights and responsibilities relating to Berlin and to Germany as a whole. As a result, the corresponding, related quadripartite agreements, decisions and practices are terminated and all related Four Power institutions are dissolved.

(2) The united Germany shall have accordingly full sovereignty over its internal and external affairs.[132]

To suggest that sovereignty reverted to Germany at this time begs the question of the locus of sovereignty in the period 1945 to 1990.[133] In practice the incidents of sovereign authority were restored in increments by the four Powers, though not always in concert. Article 7(1) fails to identify what quadripartite 'rights and responsibilities' remained after the various transactions establishing the FRG and the GDR as separate States and confirming their frontiers. The conclusion of a series of bilateral treaties and the admission of the two German States as members of the United Nations[134] made it clear that most powers had by then devolved to the two Germanies. Hendry and Wood identify several items in the residue of quadripartite rights: among them, the maintenance of liaison missions by the four Powers in their respective zonal headquarters, control of FRG airspace with respect to Soviet aircraft and rights of access to Berlin from the territory of the FRG.[135] Two four-Power institutions—the Berlin Air Safety Center and the Spandau Allied Prison—continued. Hendry and Wood also suggest that the rights of Allied military forces in Germany could not be disentangled from quadripartite powers, even after occupation ended in 1954 to 1955 and NATO and Warsaw Pact deployments were put on the basis of bilateral treaties.[136] Yet at least some elements of German–Allied

[130] Treaty on the Establishment of German Unity, 31 August 1990, (1991) 30 ILM 457. Consultation with the people of the GDR took the form of elections for the Volkskammer and produced a decisive result. On the election of 18 March 1990, see Müller, *Der '2+4'—Vertrag und das Selbst-bestimmungsrecht der Völker*, 123–4.

[131] (1990) 29 ILM 1187. By Council Regulation 2684/90 of 17 Sept 1990, 1990 OJ (L263) 1, treaties and secondary law of the European Communities were also extended in their application to the territory of the former DDR: see Giegerich (1991) 51 *ZaöRV* 384.

[132] The Treaty entered into force on 15 March 1991, upon ratification of the USSR. A Declaration of 1 October 1990 had already suspended the operation of quadripartite powers: (1990): 30 ILM 555.

[133] Seidl-Hohenveldern called it 'one of the most difficult and thankless subjects': (1982) 32 *ÖZfOR* 159.

[134] SC res 335, 22 June 1973; GA res 3050 (XXVIII), 18 September 1973.

[135] Hendry and Wood, *Legal Status of Berlin*, 24–5, 101; Hailbronner (1991) 2 *EJIL* 18, 21.

[136] Hendry and Wood, *Legal Status of Berlin*, 24–5. See also Schröder (1985) 23 *AdV* 42, 56–65.

relations—for example, military bases and defense arrangements—could equally have been seen as the product of ordinary processes of agreement on the part of the FRG and the GDR respectively.[137] In any event, by the 1980s the legal consequences of the statehood of the two Germanies were incontestable. Quadripartite responsibility remained important not in relation to the two Germanies as States but rather in relation to any settlement they might propose encompassing Berlin and 'Germany as a whole'. It was in the field of such a settlement that the German question remained open—even if, in practice, refusal to agree was hardly an option.

In particular, quadripartite consent was important if the two German States were to address the status of Berlin and of 'Germany as a whole'. Pre-1990 treaties,[138] reinforced by the Helsinki Final Act,[139] had established Germany's external frontiers.[140] It had been suggested that these treaties were reversible in the context of a final settlement; that the existing agreements were merely a *modus vivendi*[141] within a framework of quadripartite rights which qualified the independence of the two German States. While this is very doubtful,[142] what is clear is that the disposition of Berlin lay beyond the authority of the two German States.[143]

[137] A view widely held: e.g., Fuchs (1989) 22 *Zeitschrift für Rechtspolitik* 181, 185. Yet the idea that the Allied military presence in the FRG and GDR had some connection with Quadripartite powers as established in 1945 was persistent. See, e.g., Hendry and Wood *Legal Status of Berlin*, 24–5; Czaplinski (1990) 36 *AFDI* 89, 104–5.

[138] Poland–GDR, Treaty of Görlitz, 6 July 1950, 319 UNTS 93; Poland-FRG, Treaty of Warsaw, 7 Dec 1970, 830 UNTS 327.

[139] Signed on 1 August 1975, 14 ILM 1292

[140] The FRG claimed that the borders of Germany were not opposable to 'Germany as a whole': Schricke (1990) 36 *AFDI* 47, 56, 61; Arndt (1989) 74 *AJ* 122, 128–9, 131–2; Czaplinski (1992) 86 *AJ* 163, 164.

[141] E.g., Piotrowicz and Blay, *The Unification of Germany in international and domestic law*, 27; Arndt (1980) 74 *AJ* 122, 127; Blumenwitz, *Die Rechtslage*, 19. See also Klein (1980) 31 *Außenpolitik* 394, 398–9. For a balanced statement of the problem, see Ress, 27.

[142] For a thorough review of the legal position, including western and southern frontiers, see Blumenwitz (1985) 23 *AdV* 1. On the Oder-Neisse Line see Frowein (1979) 34 *Europa Archiv* 591, 593–5; Gelberg (1982) 76 *AJ* 119, 123–4; Koenig (1990) 36 *AFDI* 107. Generally on the finality thesis see Skubiszewski (1985) 23 *AdV* 31, 40: 'What normally would have been dealt with in a peace treaty that was to be concluded soon after the war, has so far and to a large extent been achieved through a series of settlements consisting of a variety of instruments which cover the whole span of postwar history. Consequently, the rights and responsibilities of the Four Powers, forty years after Potsdam, do not include the competence to impose a territorial regulation that would be different from the present.'

[143] The separate status of Berlin was reflected in Art 37 of the Treaty on Monetary, Economic and Social Union, which provided that the Treaty could be extended to Berlin (West) only in accordance with the Quadripartite Agreement of 3 September 1971; in the Unification Treaty, which treated the 23 boroughs of the city separately (Art 1(2)) from the five *Länder* of the GDR (Art 1(1)) 30 ILM 464; in an Agreement on the Settlement of Certain Matters Relating to Berlin of 25 September 1990 ((1991) 30 ILM 445), which provided for continued application of pre-unification judgments in Berlin (West) (Art 4); and in the Treaty on the Final Settlement, which defined united Germany as

The Treaty on the Final Settlement was, then, different in kind from any of the unilateral or bilateral acts affecting Germany since 1945. It was an authoritative agreement between the two German parties and the four Powers—a necessary, or at least a sufficient, collective step to the final disposition of the 'German question'. According to the Treaty the united Germany would exist in perpetuity within the boundaries settled by the post-War treaties.[144] The border between Germany and Poland was particularly reaffirmed.[145] The German parties further agreed that the Constitution of the united Germany would be made and kept consistent with these provisions.[146] The Treaty made clear that settlement of the German question was a matter of European interest—reaffirming that the capacity of a group of powers to make a final disposition relates to considerations of general public order.[147]

**(b) Cambodia, 1991**

Cambodia had been governed since January 1979 as the People's Republic of Kampuchea (PRK) with the support of Vietnam and the Soviet Union.[148] The Khmer Rouge movement, which the Vietnamese invasion had overthrown, existed on the northwest fringes of Cambodia and in Thailand. Vietnam, the Soviet Union and their allies recognized the PRK as the government of Cambodia; China and States of the Non-Aligned Movement recognized successive iterations of the exiled factions.[149] Armed opposition to the PRK continued with varying intensity through the 1980s, and international disagreement over which was the legitimate Cambodian

consisting in three parts, the territories of the FRG, GDR and, separately, Berlin (Art 1(1)); and referred to Soviet forces stationed in the DDR and, separately, in Berlin (Arts 4(1), 5). This was consistent with well-established Allied practice: e.g., Three Powers Note circulated by the United Kingdom at UN headquarters, Geneva, 17 Aug 1984: 'Any change in the status of Greater Berlin . . . would require the agreement of all Four Powers' (1984) 55 *BY* 535. See also Chapter 10.

144 Article 1(1).

145 Article 1(2). See also FRG–Poland Agreement in Relation to Ratification of the Border Between Them, 14 November 1990, (1992) 31 ILM 1292. Article 4(2) of the Unification Treaty of 31 August 1990 had already abrogated Art 23 of the Basic Law, by which the western provinces of Poland were authorized to join the Federal Republic. See also Whomersley (1993) 42 *ICLQ* 919, 924–7; Prokop'ev (1995) 41 *Osteuropa-Recht* 57.

146 Article 1(4); Frowein (1992) 86 *AJ* 152, 162–3.

147 Cf Delbrück (1990) 11 *Michigan JIL* 897, 911; Skubiszewski (1990) 45 *Europa Archiv* 195, 199. For issues of identity and continuity see Chapter 16. For issues of State successsion post-unification see K-G Lee, 'The Law of State Succession in the Post-Decolonisation Period with Special Reference to Germany and the Former Soviet Union' (PhD thesis, Cambridge, 1998), ch 4.

148 On the Vietnamese invasion, its antecedents and aftermath, see Chandler in Doyle, Johnstone and Orr (eds), *Keeping the Peace: Multidimensional UN Operations in Cambodia and El Salvador*, 25, 43–51. On the PRK, see Ross (ed), *Cambodia: A Country Study*, 208–24.

149 See Talmon, *Recognition of Governments*, 309–10.

government led to disputes as to credentials in the Security Council and elsewhere.[150]

The General Assembly called for the withdrawal of foreign military forces from Cambodia and respect for its sovereignty and territorial integrity.[151] It also called for an organized international response to the question.[152] Following various preliminary meetings, the five permanent members of the Security Council on 28 August 1990 put forward a Framework for a Comprehensive Political Settlement of the Cambodia Conflict.[153] This provided for a United Nations Transitional Authority in Cambodia (UNTAC) and a multilateral agreement by the States participating in the Paris Conference (open to adherence by all UN Member States) guaranteeing the settlement.[154] The Cambodian parties accepted the framework,[155] and the Security Council and General Assembly endorsed it.[156] The Cambodian parties agreed to form a Supreme National Council (SNC) which would represent Cambodia at the international level.[157]

On 23 October 1991, the SNC and a group of eighteen States adopted a Final Act of the Paris Conference, including Agreements Elaborating the Framework for a Comprehensive Political Settlement of the Cambodia Conflict,[158] which gave UNTAC comprehensive transitional powers for the administration of Cambodia pending elections. Under Article 6 of the Agreement and Section B of Annex 1, UNTAC would exercise complete administrative responsibility in Cambodia.[159] And so it proved: during the time it was operational (March 1992 to September 1993), UNTAC carried out legislative, executive and judicial functions in Cambodia and discharged much of its day-to-day administration.

UNTAC was created under Chapter VI not Chapter VII of the Charter. It was therefore important that a competent Cambodian entity consent to

[150] On the credentials controversy in UN organs see (1979) 33 *UNYB* 271; (1980) 34 *UNYB* 330; (1980) 35 *UNYB* 247; (1982) 36 *UNYB* 341; Warbrick (1981) 30 *ICLQ* 234; Sciso 64 *Rdi* 83; Isoart (1983) 87 *RGDIP* 42.

[151] GA rsns 34/22, paras 7, 9, 14 Nov 1979; 35/6, para 3, 22 Oct 1980; 36/5, para 2, 21 Oct 1981; 37/6, para 2, 28 Oct 1982; 38/3, para 2, 27 Oct 1983; 39/5, para 2, 30 Oct 1984; 40/7, para 2, 5 Nov 1985; 41/6, para 2, 21 Oct 1986; 42/3, para 2, 14 Oct 1987.

[152] See, e.g., GA res 34/22, para 12, 14 Nov 1979. See also Schier (1987) 6 *Südostasien aktuell* 378.

[153] A/45/472-S/21689, annex, 31 Aug 1990.

[154] Framework, paras 8, 33.

[155] S/21732, A/45/490, 17 Sept 1990.

[156] SC res 668, 20 Sept 1990; GA res 45/3, 15 Oct 1990.

[157] GA res 45/3, para 5, 15 Oct 1990: 'the Supreme National Council will therefore represent Cambodia externally and occupy the seat of Cambodia at the United Nations, in the United Nations specialized agencies and in other international institutions and international conferences.'

[158] (1992) 31 ILM 174 (1992); A/46/608, S/23177. See Suntharalingam in Doyle *et al*, 82; Ratner (1993) 87 *AJ* 1.

[159] On the civil administration see Doyle, *UN Peacekeeping in Cambodia; UNTAC's Civil Mandate*.

international administration.[160] The Security Council and other interested States assisted in the resolution of the Cambodian question, not only by assuming responsibility for an interim administration, but also by overseeing the establishment of the SNC as the 'the unique legitimate body and source of authority' capable of consenting.

**(c) Bosnia and Herzegovina, 1992 to 1995**

The disintegration of the Socialist Federal Republic of Yugoslavia and creation in its territory of new States is discussed in Chapter 9.[161] Bosnia and Herzegovina, a component of SFRY, contained Bosnian Muslims, Serbs and Croats, amongst whom in spring 1992 a civil war erupted. The central government, in which Bosnian Muslims held key offices, did not exercise effective control outside Muslim-majority areas; elsewhere Serbian separatists established the 'Republika Srpska', putatively an independent State. The situation was greatly complicated by involvement of the Federal Republic of Yugoslavia on the side of local Serbs.

In March 1992, immediately before the outbreak of hostilities, talks under European Community auspices had led to a Statement of Principles for new constitutional arrangements for Bosnia and Herzegovina.[162] These arrangements could not be implemented. The United Nations then joined the EC to form an International Conference on the Former Yugoslavia.[163] Two plans were put forward by the Conference: the Vance-Owen Plan, which the Bosnian Serbs rejected in May 1993;[164] and the 'Invincible Plan', which the Bosnian Muslims rejected definitively by January 1994.[165] The United States sponsored negotiations from 27 February to 18 March 1994, resulting in an agreement between the Muslim and Croat parties.[166] The Bosnian Serbs at length delegated negotiating authority to representatives under the chairmanship of the President of Serbia,[167] and 'proximity talks' were carried out, effectively under United States auspices, in November 1995 in Dayton, Ohio. These talks resulted in a General Framework Agreement (GFA) with extensive Annexes and two side agreements: the package of agreements was binding on signature.[168]

[160] Matheson (2001) 95 *AJ* 76, 77.

[161] See also, e.g., Weller (1992) 86 *AJ* 569, 569–70; Woodward, *Balkan Tragedy: Chaos and Dissolution after the Cold War*.

[162] For the international organizations involved at this stage see Szasz (1992) 31 ILM 1421; Weller (1992) 86 *AJ* 596, 570–7.

[163] (1992) 31 ILM 1527.

[164] S/24795, Annex VII; S/25050, Annexes; S/25479, Annexes.

[165] S/26337/Add.1; S/26486, Annex.

[166] (1994) 33 ILM 743.

[167] Cf *Prosecutor* v *Tadic* (1999) 38 ILM 1518, 1548 (para 157); (1999) 124 ILR 61, 128.

[168] (1996) 35 ILM 75.

The Dayton Agreements sought to settle several interconnected conflicts. Hostilities between Serbs and Croats were addressed in a Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium.[169] Conflict between the FRY and Bosnia and Herzegovina was addressed through the mutual recognition of the two States stipulated in GFA Article X.[170] Special territorial regimes were created within Bosnia for the city of Mostar[171] and the Brčko corridor, areas of Croat-Muslim and Serb-Muslim conflict respectively—the latter through an agreement to arbitrate.[172] Complex provisions established new mechanisms for government within Bosnia and Herzegovina, including a constitution embodying a federal arrangement between two Entities, one Croat-Muslim and one Serb.[173]

The modalities through which these agreements were adopted and implemented were heavily internationalized. By an Agreement on Military Aspects of the Peace Settlement, the parties consented to an international Implementation Force (IFOR) under NATO command, and a Joint Military Commission.[174] By GFA Annex 10 the parties requested 'the designation of a High Representative, to be appointed consistent with relevant United Nations Security Council resolutions, to facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement.'[175] The Security Council 'endorsed' establishment of the office of the High Representative,[176] which remained active throughout the decade following adoption of the Framework Agreement. The Constitution

[169] A/50/757-S/1995/951, Annex; 35 *ILM* 184. See also Agreement on the Normalization of Relations (Croatia–FRY), 23 August 1996, 35 ILM 1219.

[170] On the international dimension of the civil war in Bosnia see *Prosecutor v Tadic* (1999) 38 ILM 1518, 1536–49 (paras 88–157), 124 ILR 63.

[171] Agreed Principles for the Interim Statute for the City of Mostar (1996) 35 ILM 170. The Agreed Principles were adopted by the Mayors of East and West Mostar and the EU Administrator. A Memorandum of Understanding on the European Union Administration of Mostar had been concluded between the Muslim–Croat federation and the EU on 6 July 1994: Szasz, 35 ILM 76–7.

[172] See Karnavas (2003) 97 *AJ* 111; *Federation of Bosnia and Herzegovina v Republika Srpska (Final Award)*, 5 March 1999, 38 ILM 534, stipulating 'Brcko District of Bosnia and Herzegovina', a 'condominium' of the two Entities in which actual authority is exercised by the common institutions of Bosnia and Herzegovina, an international Supervisor and a District Assembly. The Inter-Entity Boundary Line is to continue within the District until the Supervisor determines that 'it has no further legal significance and may cease to exist.' The Tribunal retained the authority to revise the Final Award in the event of breach by one or another entity. Following the Final Award, the Office of the High Representative adopted a Statute of the Brcko District of Bosnia and Herzegovina, 7 December 1999; (2000) 39 ILM 879. The District is a legal person succeeding to the rights and obligations of certain municipal organs that existed in the territory.

[173] GFA Annex 4, Arts I(3), III.

[174] GFA, Annex 1-A. IFOR was authorized by the Security Council in resolution 1031, 15 Dec 1995, para 14. There was also an International Police Task Force: GFA, Annex 11.

[175] GFA, Annex 10, para 2.

[176] SC res 1031, 15 Dec 1995, para 26.

of Bosnia and Herzegovina expressly incorporated a variety of international agreements into the law of the country.[177] Three of the nine members of the Constitutional Court are selected by the President of the European Court of Human Rights from outside the region.[178]

## (2) Dispositions anticipatory of peace treaties

The phenomenon of dispositions anticipatory of peace treaties has been little remarked.[179] In some circumstances a formal peace treaty may be excluded, or it may be deferred and the issues dealt with on an ad hoc basis with the consent of affected parties. The question is not what type of treaty is necessary, but what are the rights and duties of States concerned, and which issues remain open for disposition. The problem here is a slightly different one: that is, the legal basis of dispositions made before the formal peace treaty which affect the rights of the defeated or third States. Examples include the institution of the Mandate system in 1919, before the Peace Treaties, and the Agreement for the Pacific Islands Strategic Trust Territory in 1947, before the Japanese Peace Treaty. For present purposes the case of Poland in 1919 may be taken as illustrative.

The creation of a Polish State was one of President Wilson's Fourteen Points and a cardinal war aim of the Entente.[180] As stated in the Reply to the German Observations on the Conditions of Peace: 'there is imposed upon the Allies a special obligation to use the victory which they have won in order to re-establish the Polish Nation in the independence of which it was unjustly deprived more than 100 years ago.'[181] Even before German withdrawal from Polish areas, the Polish National Committee in London had been accorded a certain status by recognition as a co-belligerent and as the government of a future State of Poland.[182] After the armistice, the Polish National Committee became the basis for a generally effective government in Poland; it was recognized *de facto* by the admission of Polish plenipotentiaries to the Paris Peace Conference on 18 January 1919.[183] Although formal recognition was accorded to Poland by

[177] Constitution, Art II(7). [178] Constitution, Art VI(1)(b).

[179] But cf Brownlie, *Principles* (6th edn) 121, 130–1, 163.

[180] Temperley, *History of the Peace Conference at Paris*, vol I, 181, 183, 191, 192–5, 199, 335–8; ibid, IV, 238.

[181] Paris, 16 June 1919: 112 BFSP 245, 265. They added that 'there shall be included in the restored Poland those districts which are now inhabited by an indisputably Polish population.' See also Temperley, *History of the Peace Conference at Paris* (1920), vol I, 181, 183, 191 (Lloyd George), 199 (Wilson) 335–8. The German Government agreed on this point: Temperley, *History of the Peace Conference at Paris*, vol VI, 218, 238. [182] Smith, *GB & LN*, vol I, 234–5 (15 October 1917).

[183] Temperley, *History of the Peace Conference at Paris*, vol V, 158; but see Chen, *Recognition*, 201. Chen's view is that admission to negotiations cannot constitute recognition, but since recognition is a matter of intent that is too rigid. In this case, against a background of obligations to reconstitute Poland, intent can be presumed.

Articles 87 to 93 of the Treaty of Versailles (to which Poland was a signatory), there can be no doubt that a Polish State had been effectively reconstituted well before.[184]

The same is true, in varying degrees, of the other States created in the period 1918 to 1920: that is, Czechoslovakia,[185] the Serb-Croat-Slovene State (Yugoslavia),[186] Armenia[187] and the Hedjaz.[188] A general provision covered 'States now existing or coming into existence in future in the whole or part of the former Empire of Russia',[189] and may be taken to have included Finland,[190] the Baltic States (Latvia, Lithuania and Estonia)[191] and transient political formations elsewhere on the fringe of the Russian Empire (Azerbaijan, the Ukraine, etc). As explained in Chapter 15, the criteria for statehood take priority over other forms of territorial transfer and it may be that these 'anticipatory dispositions' merely reflected this. In any event if the Powers were to influence situations, they had to act more quickly than the timetable for treaty-making allowed, whatever status their acts may have had.

## (3) Dispositions delegated to groups of States

Under traditional international law a territorial sovereign could in principle dispose of its territory at discretion. Thus a territorial sovereign could delegate to a group of States the authority to decide on the future status of the territory or part of it. Such a delegation might take various forms: the outright cession of sovereignty to designated States, with the further disposal of the territory left at their discretion, was only one possibility. Subject to any relevant rule

[184] To the same effect *Deutsche Continental Gas Gesellschaft v Polish State* (1929) 5 ILR 11; Herz (1936) 17 *RDILC* 564; Blociszewski, (1921) 28 *RGDIP* 5, (1924) 31 *RGDIP* 89.

[185] Versailles, Arts 81–6; Saint-Germain, Arts 53–8,; Trianon, Arts 48–52; Temperley *History of the Peace Conference at Paris*, vol IV, 237–77; vol V, 159–60; Perman, *The Shaping of the Czechoslovak State*; Hobza (1922) 29 *RGDIP* 385.

[186] Saint-Germain, Arts 46–52; Neuilly, Arts 36–41, 781; Trianon, Arts 41–4; Temperley, *History of the Peace Conference at Paris*, vol IV, 170–217; vol V, 158–9.

[187] Sèvres, Arts 88–93, omitted from Treaty of Lausanne after Armenia's reincorporation into Russia.

[188] Sèvres, Arts 98–110; Lausanne, Art 16 (in general terms only). The Hedjaz was listed as an original Member of the League by the Treaty of Versailles, Annex to Part I; but did not ratify the Treaty. After a two year war the Hedjaz was united with the Nejd under King Ibn Sa'ud as the Kingdom of Hedjaz, Nejd and Dependencies: 130 BFSP 789; after 1932 called Saudi Arabia. For British recognition (1927), 134 BFSP 273; for Turkish recognition (1929), 131 BFSP 491. For the political background, see Madawi Al-Rasheed, *A History of Saudi Arabia*, 43–71.

[189] Versailles, Arts 116–17; Saint-Germain, Art 87; Neuilly, Art 58; Trianon, Art 72(2); Sèvres, Art 135.

[190] Finno-Russian Peace Treaty, 14 October 1920, 113 BFSP 977. See also Chapter 2 for the relationship between the independence of Finland and self-determination for the Åland Islands.

[191] Laserson (1943) 37 *AJ* 233–47; Graham, *The Diplomatic Recognition of the Border States*; Hackworth, 1 *Digest* 201.

of law[192] the question was one of intent. But, at least where a particular purpose was stated or implied, it was unlikely that renunciation in favour of a group of States would be interpreted as involving 'even a momentary or technical lodgement of sovereignty'.[193]

In the *Jaworzina* case the Permanent Court was concerned with the authority of the Principal Allied and Associated Powers under the post-World War I treaties to delimit the Polish-Czechoslovak frontier. Their decision on the question, the Court held:

> was taken in accordance with a common desire on the part of all concerned to arrive at a final settlement of the dispute between Poland and Czechoslovakia. In this respect it has much in common with arbitration . . . Only by a settlement emanating from a duly authorised body could the whole dispute be disposed of without leaving any important point for subsequent decision, and the task with which the Conference of Ambassadors was entrusted be fulfilled.[194]

As a result, the Conference of Ambassadors having completed their task, no further power remained to vary the boundary in the absence of fresh consent of the parties concerned.[195]

A number of further cases of delegated dispositive power should be mentioned.

### *(i) The Conference of Ambassadors and Albania*

Much the same limitations as applied to the Conference of Ambassadors in delimiting the Polish–Czechoslovak frontier appear to have applied to the five-Power authority over Albania in 1919. Turkey's renunciation of sovereignty over Albania in 1913, when the future of the territory was entrusted to five Great Powers, has been discussed already. The difficulty was not the exercise of that power prior to 1914 but its reassertion after the War in terms which implied a right on the part of the Powers substantially to vary the dispositions of 1913. The continuance of the power itself may perhaps be justified by the fact that the earlier dispositions remained executory. Reasonable variation to fit the changed circumstances of Albania in 1919 may also have been permissible—on the other hand, dismemberment, as proposed by the Treaty of London of 1915, was quite another thing. It is significant that the Allies did not pursue that course in the face of strong protests by President Wilson.

[192] E.g. the *nemo dat quod non habet* rule. After 1856 Turkey could not have ceded the Principalities of Moldavia and Wallachia under its suzerainty on any terms other than those by which Turkey itself possessed them.

[193] *South West Africa Case (Second Phase)*, ICJ Rep 1966 p 6, 422 (Judge Jessup, dissenting).

[194] PCIJ ser B no 8 (1923), 29. [195] Ibid, 37–8.

### *(ii) The Principal Allied and Associated Powers after 1918*[196]

Very extensive authority was delegated, in the settlements of 1919 to 1923, to the Principal Allied and Associated Powers. Relevant cases were as follows:

#### (a) The Mandate system

Point Five of the Fourteen Points called for a 'free, open-minded and absolutely impartial adjustment of all colonial claims', and resulted, after a considerable debate, in the Mandate System under Article 22 of the Covenant.[197] Article 22 provided for tutelage of ex-enemy colonies by 'advanced nations . . . as Mandatories on behalf of the League'. Two groups of territories were involved: German and Turkish. By Article 119 of the Treaty of Versailles, Germany renounced 'in favour of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions.'[198] These were divided into two categories: 'B' Mandates in central Africa and 'C' Mandates in South West Africa and the Pacific. The Mandates were assigned by the Supreme Council on 7 May 1919[199] except for Ruanda, Urundi, the Togo and Cameroons which were assigned on 21 August 1919.[200] The terms of the 'B' Mandates were approved by the League Council in July 1922; those of the 'C' Mandates in December 1920. Having allocated the Mandates, the Supreme Council played no further part in the functioning of the Mandate system. Rather, Article 22 provided for 'authority, control [and] administration' to be exercised by the Council of the League.

The Turkish territories in the Middle East, however, did present problems. Articles 94 to 97 of the Treaty of Sèvres provided for 'A' Mandates over Syria, Mesopotamia and Palestine, but it was never ratified. Nevertheless the Supreme Council at San Remo allocated the Mandates to France and Great Britain on 25 April 1920 (confirmed 5 May 1920);[201] and the League Council

[196] The Principal Allied and Associated Powers were Britain, France, Italy and Japan. By its non-ratification of the various treaties the United States disavowed the rights conferred on the Powers collectively. Art I of each of the separate Peace Treaties concluded by the United States provided instead for enjoyment by the US of all rights allowed it whether separately or as one of the Principal Allied and Associated Powers in the relevant (unratified) Treaty, but rights concerning political and territorial settlements were excepted. The only political or territorial right acquired in the separate Treaties was the right to rank as one of the Principal Allied and Associated Powers in relation to Arts 116–19 of the Treaty of Versailles ('German Rights and Interests outside Germany' including the Mandate System). No similar right was acquired with respect to 'A' Mandates.

[197] The Covenant was contained in all the peace treaties except Lausanne. See Temperley *History of the Peace Conference at Paris*, vol VI, 500–23; Wright, *Mandates under the League*, 24–126; Miller, *The Drafting of the Covenant*, vol I, 101–17; Smuts, *The League of Nations*, reprinted in Miller *Drafting of the Covenant*, II, 27–34.

[198] 112 BFSP 73, 225 CTS 255.

[199] Temperley, *History of the Peace Conference at Paris*, vol VI, 503.

[200] Ibid, 504.

[201] Ibid, 134–69, 505.

approved the terms of these Mandates on 24 July 1922. At this point, then, the territories were being administered under a regime inconsistent with belligerent occupation. The view appears to have been taken (and it found some support in the terms of Article 22)[202] that the 'A' Mandates had come into effect prior to Turkey's relinquishment of the territories concerned in a treaty of peace.[203] Formally the Mandate instruments came into force on 29 September 1923, after the signature, though prior to the ratification by Turkey, of the Treaty of Lausanne.[204] Article 16 of that Treaty provided for renunciation by Turkey of all territories outside its new boundaries, 'le sort de ces territoires . . . étant réglé ou à régler par les intéressés.' Any formal defect in this proceeding was thus cured by subsequent ratification.

**(b) Danzig**

By Article 100 of the Treaty of Versailles, Germany renounced 'in favour of the Principal Allied and Associated Powers' the territory which was to become, under Article 102, the Free City of Danzig. The Free City was constituted by a 'Decision of the Conference of Ambassadors' in Paris on 27 October 1920.[205] Its status is discussed in Chapter 5.

**(c) Memel**

By Article 99 of the Treaty of Versailles Germany renounced 'in favour of the Principal Allied and Associated Powers' territory around the port of Memel, disposition of which was left at the discretion of the Powers. In fact, an autonomous Territory within Lithuania was established in 1924. The Memel Territory provides an interesting contrast with Danzig and is also discussed in Chapter 5.

**(d) Fiume**

By Article 53 of the Treaty of Trianon[206] Hungary renounced its sovereignty over the Adriatic port of Fiume and undertook to accept any disposition of it 'in the treaties concluded for the purpose of completing the present settlement'. No solution to the dispute between Italy and Yugoslavia was reached at Paris: by Article 4 of the Treaty of Rapallo the two States involved agreed upon the establishment of a Free State of Fiume.[207] This proved impossible to implement and

[202] *Sc* 'colonies and territories which, as a consequence of the late war, *have ceased to be under the sovereignty* of the States which formerly governed them' (emphasis added): cf the Harbord Report on Armenia, 16 October 1919: 'The Covenant . . . [appears] to recognize in advance the dismemberment of some degree of the Ottoman Empire': cited by Temperley, *History of the Peace Conference at Paris*, vol IV, 55.

[203] Cf Temperley, *History of the Peace Conference at Paris*, vol VI, 37.

[204] 24 July 1923: 117 BFSP 543, 28 LNTS 11; ratified by Turkey on 31 March 1924.

[205] 113 BFSP 874. [206] 4 June 1920, 113 BFSP 486.

[207] 18 LNTS 387, 12 Nov 1920. See also the treaty of 20 October 1922, 18 LNTS 405.

in 1924 the territory was divided between the two States.[208] It has been argued that these dispositions required ratification by the Principal Allied and Associated Powers[209] but no express assent was given to the partition of 1924.

**(e) Luxembourg**

By Article 40 of the Treaty of Versailles, Germany accepted 'in advance all international arrangements which may be concluded by the Allied and Associated Powers relating to the Grand Duchy.'[210] Luxembourg ceased to be part of the German customs union. No international arrangements were made by the Powers as such: instead, by a Treaty of 25 July 1921 Luxembourg entered into a customs and economic union with Belgium.[211]

### *(iii) The Allied Powers 1945 to 1955*

Although the Principal Allied Powers exercised overwhelming authority in determining the contents of the peace settlement after World War II,[212] that authority was mostly not perpetuated by express delegations in the various peace treaties, as had been done after 1918. The most extensive formal authority possessed by the World War II Allies existed not under any peace treaty but as a result of the collapse of government in Germany and Austria and the consequent assumption of supreme authority there.

The exception was the cession of the Italian colonies by Article 23 of the Italian Peace Treaty, and it proves the rule, in that the Allies were unable to agree on the disposition of the territories, which was then referred, in accordance with Annex XI, to the United Nations. The contention that Taiwan was ceded to the Allied Powers to await disposition by them is examined in Chapter 5.

## (4) Conclusion: powers of disposition pursuant to multilateral treaties

The dispositions discussed above were in general either carried out pursuant to the consent of affected parties, or, as in the case of Bessarabia in 1878, were probably unlawful. There is, however, at least some authority for the proposition that international settlements, regimes or institutions once established may acquire, as it is said, 'objective' or 'dispositive' effect and thus become valid and binding on all (*erga omnes*).[213] Given the modern rule that consent to

[208] Agreement of 27 January 1924, 120 BFSP 685.
[209] Temperley, *History of the Peace Conference at Paris*, vol IV, 336–7.
[210] 112 BFSP 1. See also Treaties of St Germain, Art 83; Trianon, Art 67.
[211] 114 BFSP 639; Verzijl, *International Law*, II, 473.
[212] Wheeler-Bennett and Nicholls, *Semblance of Peace*, 436.
[213] Cf Wright (1917) 11 *AJ* 566, 573.

a settlement may not be coerced by unlawful force, this area of law may well be important in validating at least those parts of peace settlements which are consistent with the general interest. For example, the International Court held that: 'fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality.'[214] And in the *Namibia* case, the Court held that: 'the termination of the Mandate and the declaration of the unlawfulness of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law.'[215] The particular decisions in those cases are not of concern here: the point is that they emphasize the possibility, even in a decentralized international system, of legal rights and obligations transcending the principle of consent. Nor is this without precedent: In a series of cases, international tribunals have accorded to territorial regimes, when elements of public interest are involved, characteristics of permanence and opposability not possessed by ordinary transactions.

The permanence of major territorial settlements is sometimes referred to the concept of servitude, by analogy with Roman law. But the terminology of servitudes has not been adopted in international law.[216] More often reference is made to 'territorial regimes'. In the *Åland Islands* case the question arose whether the provisions of the Peace of Paris of 1856,[217] demilitarizing the islands, had survived the war and bound the new State of Finland. The Commission of Jurists reported that the demilitarization of the islands, though not a servitude, was a matter of 'general European interest':

> The intention was to make the Convention concerning the demilitarization of the Åland Islands into 'European law' just as the other provisions did in the Treaty of 1856 . . . Indeed the Powers have, on many occasions since 1815, and especially at the conclusion of peace treaties, tried to create true objective law, a real political status the effects of which are felt outside the immediate circle of the contracting parties. In the case in point, the permanent international interests which require the maintenance of the situation created in 1856, showed themselves once again after the constitution of Finland as an independent State; as evidence of this there is the agreement entered

[214] *Reparations Case*, 1949 ICJ Rep 174, 185.

[215] 1971 ICJ Rep 6, 56; 49 ILR 2, 46. For discussion of the issues concerning termination of the Mandate see chapter 13.

[216] *The Wimbledon*, PCIJ ser A, no I (1923), 24; *North Atlantic Coast Fisheries Case* (1910, PCA), Scott, 1 *Hague Court Reports* 141, 159–61; *Right of Passage Case*, ICJ Rep 1960 p 6, 90 (Judge Moreno Quintana).

[217] For the Convention of 30 March 1856, annexed to the Treaty of Paris, see 46 BFSP 23, 114 CTS 405.

into on 30th December 1918, concerning the demolition of the fortifications erected on the Åland Islands by Russia, by those of the Powers most directly interested on account of their geographical position, namely, Sweden, Finland and Germany.[218]

This 'true objective law', it was held, had three results. In the first place, the demilitarized status of the islands survived even a general European war; secondly, it could be relied upon by and was opposable to other States such as Sweden or Finland; and thirdly it could not, as a settlement regulating European interests 'be abolished or modified either by the acts of one particular Power or by convention between some few of the Powers which signed the provisions of 1856.'[219]

These legal effects of dispositive settlements were also illustrated in the *South West Africa (Status)* Opinion. There the Court unanimously held that the Mandate for South West Africa continued to exist despite the demise of the League of Nations in 1946 because of the general public interest involved. Although the Mandate was in form a bilateral treaty between the League of Nations and the mandatory State, it had, in Judge McNair's words, 'a special legal status, designed to last until modified in the manner indicated by Article 22.'[220]

The question remains whether and how such dispositive settlements can be changed in light of changed circumstances. In the *Åland Island* case, as has been seen, the Commission denied the possibility of modification as between some only of the States parties. In two cases before the Permanent Court the same problem arose, though in neither was discussion of it particularly satisfactory.

In the *Austro-German Customs Union* case,[221] a majority of the Court apparently took the view that the Geneva Protocol of 1922 had extended Austrian and German obligations with respect to Austrian independence beyond the requirements of Article 88 of the Treaty of Versailles. The Protocol (to which seven States, not including Germany, were parties by signature or accession) was, it was held, 'a special and distinct instrument open to the accession of all Powers, whether signatory to the Peace Treaty or not . . . [and having its] own value and on that account a binding force capable in itself of independent application.'[222] The Court's judgment on this point is more like a separate

[218] LNOJ Sp Supp No 3 (1920), 17; cited with approval by Judge McNair, *Status Opinion* ICJ Rep 1950 p 128, 153–4.

[219] Report, 18. The demilitarized status of the Islands was reaffirmed by a Convention of October 1921 (10 States), 9 LNTS 212, designed 'to supplement, without prejudice thereto, the obligations assumed by Russia in the Convention of March, 30, 1856'.

[220] ICJ Rep 1950 p 128, 154–5. The Court held (by 12 votes to 2) that supervision of the Mandate was to be carried out by the General Assembly.

[221] PCIJ ser A/B no 41 (1931).

[222] Ibid, 48–9.

opinion, since six of the seven members of the majority held the proposed customs union a violation of both Article 88 and of the 1922 Protocol.[223] Only Judge de Bustamante held the customs union incompatible with the Protocol but not with Article 88. What is of interest is that Judge Anzilotti found it:

> an arguable question whether the States who in 1922 signed the Geneva Protocol were in a position to modify *inter se* the provisions of Article 88, which provisions . . . form an essential part of the peace settlement and were adopted not in the interests of any given State, but in the higher interest of the European political system and with a view to the maintenance of peace. However that may be as regards the obligations devolving upon Austria the Protocol is covered by the provisions of Article 88.[224]

Bearing in mind the strong joint dissenting opinion, the actual decision thus seems to rest on a point unargued in the Court's judgment and in part at least conceded in the crucial separate opinion of Judge Anzilotti, for the view that the proposed union violated Article 88 is very difficult to accept. But, on the point at issue, it was arguable that the 1922 Protocol constituted an interpretation of Article 88, contrary neither to its terms nor to the general European interest involved, and that as such it was authoritative at least so far as its signatories were concerned.

In the *Oscar Chinn* case[225] the Court by majority held that the provisions of the Berlin Act of 1884 to 1885 regarding freedom of commerce in the Congo Basin[226] had been materially amended by some of the parties to that Act, as a result of the Convention of Saint Germain of 10 September 1919.[227] Judge van Eysinga, dissenting, held that, since the General Act created 'a highly internationalized regime . . . recognized, as henceforward a part of public international law . . . a regime, a statute, a constitution . . .'.[228] it could not be modified by only some of the Signatories. Judge Schucking agreed.[229] Judge Hurst left the point open.[230] However, again it was arguable that the post-war settlement was of such a nature that multilateral adjustment of the 1885 Act was permissible between consenting parties.

But if some of the parties to a multilateral dispositive settlement can vary its provisions as between themselves, such variations cannot affect non-consenting States. This point was made in the joint dissent in *United States Nationals in Morocco*:

> The Act of Algeciras is a great multilateral convention directly binding upon Morocco and the United States as well as the other signatory Powers. Its status in regard to the

[223] PCIJ ser A/B no 41 (1931) 53. [224] Ibid, 64. [225] PCIJ ser A/B no 63 (1934).
[226] 76 BFSP 4. [227] 112 BFSP 901; see PCIJ ser A/B no 63 (1934), 84.
[228] Ibid, 132, 134. [229] Ibid, 148. [230] Ibid, 122–3.

old bilateral treaties, as an independent and superior act, is formally expressed in its last Article 123. The scheme of rights and obligations which it established, whether expressly or by necessary implication, as between Morocco and the United States can not, therefore, be allowed to be impaired by any transactions concluded between any of the other signatories without the concurrence of both Morocco and the United States. This appears to us to be fundamental.[231]

Nor did the Majority deny that the Act was 'still in force as far as the relations between the United States and Morocco are concerned.'[232] The difference between them related rather to matters of interpretation and evidence.

Apart from any asserted primacy or hegemony of groups of States either generally or with respect to a particular region, multilateral territorial settlements may possess certain special features as a matter of general international law.[233] They are relatively impervious to termination by operation of law, for example by way of fundamental change of circumstances, the effects of war or even the disappearance of some of the original parties. Although they may—at least in the absence of any stipulation to the contrary—be amended by agreement as between some of the Parties, such amendments are not to affect the rights of the other signatories and will, in general, be restrictively interpreted.[234] Moreover, where the settlement relates to some general international interest in respect of territory or political status, it may be held to be dispositive in character, so as to bind third parties, whether by virtue of the rules of State succession[235] or otherwise.

## 12.3 The exercise of dispositive power through collective recognition

### (1) The concept of 'collective recognition'[236]

As we have seen, recognition in modern practice is the formal acknowledgment by existing States of the normal political consequences flowing from the status

[231] ICJ Rep 1952 p 176, 199 (majority), 217 (joint dissent). [232] Ibid, 199.

[233] See McNair, *Law of Treaties*, 255–71, esp 268–9; Judge Huber, dissenting, *Free City of Danzig and the ILO*, PCIJ ser B no 18 (1930), 29. To the contrary Schwarzenberger, *International Law*, vol II, 735–6; Erle-Richards in Oakes and Mowat (eds), *The Great European Treaties of the Nineteenth Century*, v–ix. [234] Cf *Oscar Chinn Case*, PCIJ ser A/B no 63 (1934), 84.

[235] On the distinction between 'dispositive' and 'personal' treaties in the law of State succession see O'Connell, in O'Brien (ed), *New Nations*, 7, 13–14; and further in Bos, (ed), *The Present State of International Law and other Essays*, 331–8. See also Waldock's commentary on draft Arts 22 & 22 *bis* on State Succession with Respect to Treaties: *ILC Ybk*. 1972/II, 44–59 and works there cited; and for discussion, ibid, 1972/I, 247–54, 258–66, 275–6.

[236] Lauterpacht, *Recognition*, 67–9, 165–74, 253–5; Chen, *Recognition*, 221–3; Verhoeven, *Reconnaissance*, 521–33; Hackworth, 1 *Digest* 173–4; Grant, *Recognition*, 32–3, 214–18.

of the entity that is recognized. As such, it may be either an individual or a collective act. But for those adopting a constitutive view of recognition, individual recognition presents serious difficulties. In response both Lauterpacht and Jessup argued for 'the establishment of a standard [collective] procedure for the recognition of new States.[237]

In practice, however, certification of status is achieved in a variety of ways, and this is appropriate to a system in which such certification is in principle of evidential importance. Thus in some situations the collective acknowledgement of status (or its collective denial) is of substantial probative value. In others, its effect is to legitimize a *de facto* situation (for example, Goa), or conversely to underwrite a particular status so as to preclude the possible operation of prescription (as with South West Africa or Rhodesia). In more normal situations, the collective acknowledgment of status that might have been effected by a system of organized collective recognition is achieved by admission to the United Nations (as we have seen in Chapter 4). It cannot be expected, then, that collective recognition will play a major or predominant role in matters of territorial status: on the other hand in a number of cases it has been of considerable importance. Four examples may be cited.

### *(i) Greece, 1822 to 1830*[238]

The Greek War of Independence effectively began with the Greek National Assembly's Proclamation of Independence of 27 January 1822.[239] The Assembly appealed to the Congress of Verona for assistance and recognition but were not admitted;[240] nor was recognition accorded by the United States to which a separate appeal was made. On the other hand, the revolution was largely effective in excluding Turkish authority in Greece: the ascendancy of the Greek fleet impelled Canning to recognize the Greeks as belligerents on 25 March 1823.[241] Britain maintained a position of complete neutrality,[242] until the intervention on behalf of the Porte of the armies of Mehmet Ali of Egypt, and the fear of what would now be called the genocide of the Greek population, impelled some form of intervention by the Great Powers. Indeed Great Power mediation was only offered when the Greek revolution appeared in imminent danger of defeat, whereas it had been refused during four years of comparative

[237] Jessup, *A Modern Law of Nations*, 45; cf Lauterpacht, *Recognition*, 67; also Chen, *Recognition*, 221.

[238] Marriott, *Eastern Question*, 193–224; Anderson, *The Eastern Question*, 53–77; Albrecht-Carrié, *Concert of Europe*, 99–128; Crawley, *The Question of Greek Independence*; Schroeder, *Transformation of European Politics*, 614–21, 637–58, 662.

[239] 9 BFSP 629; 8 BFSP 1247.

[240] Declaration of the Greek Government to the Monarchs Assembled at Verona, Argos, 29 Aug 1822; 10 BFSP 1021.

[241] Marriott, *Eastern Question*, 209.

[242] Cf 12 BFSP 899.

military success on the Greek side. In any case the St Petersburg Protocol of 4 April 1826[243] offered mediation upon terms subsequently affirmed, with French support, in the Treaty for the Pacification of Greece, London, 6 July 1827.[244] Under the Treaty of London the three Powers offered substantial independence for Greece under Turkish suzerainty 'as under a Lord paramount'; the payment by Greece of an annual tribute, and the retention by the Porte of a 'defined right' in the appointment of the local government. A significant Additional Article was inserted in 1827 threatening the Porte, in the case of refusal within a month of 'the mediation which is to be proposed to it', of 'a connection with the Greeks': 'It is understood that this shall be effected by establishing commercial relations with the Greeks, and by sending to and receiving from them, for this purpose, Consular Agents, provided there shall exist in Greece Authorities capable of supporting such relations.'[245] The Greek Provisional Government, which had requested mediation, hastened to accept these terms,[246] but they were rejected by the Porte.[247] There followed a naval blockade of Greece by the Allies leading to the Battle of Navarino,[248] but the Porte persisted in rejecting an armistice.[249] Meanwhile war had broken out, for reasons partly connected with the Russian interest in Greece and partly independent, between Russia and Turkey.[250] It was to forestall this that the Conference of Ambassadors in London, which sat at intervals throughout the Greek affair, agreed upon a joint military expedition under French control to expel the Egyptian armies from Greece.[251] This was done, and the Allies thereupon issued a declaration placing Morea (the body of Greece) under provisional guarantee pending a decision as to the future status of Greece.[252]

The situation was transformed by the Russian victory over Turkey and the Treaty of Adrianople, by Article 10 of which Turkey agreed to accept the mediation offered under the Treaty of London.[253] The Allies now had the

[243] 14 BFSP 629 (Russia–Great Britain). [244] 14 BFSP 632, 77 CTS 307.

[245] 14 BFSP 637. Of this proposal, Canning wrote on 4 September 1826: 'What the . . . Plenipotentiaries mean . . . we conclude to be this: that we should intimate to the Turks that [in the case supposed] we should look to Greece with an eye of favour and with a disposition to seize the first occasion of recognizing as an independent State such portion of her territory as may have freed itself from Turkish dominion . . . a judicious, and what would probably be an effective, course of action.'

[246] 14 BFSP 1048. [247] 14 BFSP 1042.

[248] About which see Schroeder, *Transformation of European Politics*, 652–4.

[249] 14 BFSP 1052. [250] 15 BFSP 664. [251] 16 BFSP 1084–5.

[252] 16 BFSP 1094.

[253] 16 BFSP 647. A Turkish Declaration of 9 September 1829 (17 BFSP 195) signified Turkish accession to the Treaty of London and to 'toutes les déterminations que prendra la Conférence de Londres, relativement à son execution.' For an interesting (though in the event unnecessary) debate as to whether the Turkish accession was or was not conditional, see 17 BFSP 187, 195.

effective disposition of Greece in their hands, the alternatives being Turkish suzerainty[254] or complete Greek independence.[255] The latter was decided upon by the Protocol of 3 February 1830, Article 1 of which provided, 'Greece shall form an independent State, and shall enjoy all the rights, political, administrative and commercial, attached to complete independence.'[256] The three Powers at length nominated a Monarch and made dispositions in respect of various supplementary matters, including territorial delimitation and the finances of the new State.[257] Thus what was presented as 'mediation' and the exercise of the normal power of recognition came to resemble full dispositive authority with regard to the future status of Greece.

### *(ii) Belgium, 1830 to 1839*[258]

The same is true of Belgium, which successively under Spanish, Austrian and French control over two centuries, had been reunited with the Netherlands Provinces in 1815.[259] The new union was for various reasons not a happy one and on 4 November, 1830 a Provisional Government in Brussels declared the independence of the Belgian Provinces.[260] Great Power intervention was almost immediate: the first of a long series of Protocols between the Ministers of the five Great Powers in London called in strong terms for an armistice.[261] Following its acceptance by the Belgian Provisional Government and the Government of the Netherlands[262] a further Protocol recited that 'the very object of the union of Belgium with Holland is destroyed', and began to concert 'such new arrangements, as may be most proper for combining the future independence of Belgium with the stipulations of Treaties, with the interests and security of other Powers, and with the preservation of the balance of Europe.'[263]

On 14 October 1831 the Ambassadors announced their 'definitive agreement' on twenty-four articles . . . 'comme devant servir à la séparation de la Belgique d'avec la Hollande et régler toutes les questions auxquelles ont donné

[254] See, e.g., Protocol of the Conference of 22 March 1829: 16 BFSP 1095.

[255] Anderson, *The Eastern Question*, 74–5. [256] 17 BFSP 192.

[257] See 18 BFSP 597–637; 19 BFSP 2–54, including the Convention of 7 May 1832 relative to the Sovereignty of Greece, London, 33 and Supplementary Article of 30 April 1833, 20 BFSP 281; also 22 BFSP 931–62; 25 BFSP 727–79; 32 BFSP 938 ff. A further Treaty of 20 November 1852 (Great Britain, Bavaria, Russia, France, Greece) relative to the Succession to the Crown of Greece amended the rules relating to the succession: 41 BFSP 36. The King of Greece was invited to attend 'comme directement intéressé à prendre part à une transaction destinée à assurer le repos à venir de la Grèce.'

[258] Schroeder, *Transformation of European Politics*, 670–91.

[259] Final Act of the Congress of Vienna, 9 June 1815, Arts 65–69: 2 BFSP 7. 17 BFSP 1232, 1241.

[260] 17 BFSP 1232, 1241. See Oakes and Mowat, *The Great European Treaties of the Nineteenth Century*, 130–3; Albrecht-Carrié, *Concert of Europe*, 60–98; Fleury de Lannoy, *Histoire diplomatique de l'indépendence belge*. [261] 18 BFSP 728.

[262] Ibid, 731, 734. [263] Ibid, 749.

lieu cette séparation, ainsi que l'indépendance et la neutralité de la Belgique.'[264] Article VII provided that Belgium would become an independent and permanently neutral State. It was made quite clear that no alteration of this proposed settlement was possible; and, on the Netherlands rejecting it,[265] the five Powers forthwith signed a treaty 'relative to the separation of Belgium from Holland' with Belgium alone, reciting the Twenty-Four Articles, and formally guaranteeing their execution.[266] Dutch protests continued until 1839, when all parties concluded practically identical treaties embodying the Twenty-Four Articles. The Netherlands recognized the separation of Belgium as effective (from what date was not stated); the Treaty of 15 November 1831 was declared to be no longer binding, and the re-enacted Articles were again 'placés sous la garantie de Leurs dites Majestés'.[267]

These transactions are easier to describe than they are to analyse. By normal rules of recognition and statehood there can be no doubt that the action of the Great Powers in intervening within a month of the revolt constituted unlawful intervention and premature recognition. Lauterpacht sought to justify this on grounds of 'collective intervention',[268] but the parties themselves seemed to have acted as much upon the assumption of a continuing right to enforce and regulate the terms of the Congress of Vienna.[269] The Netherlands Government argued that Allied action was a breach of paragraph 4 of the Protocol of Aix-la-Chapelle. In reply the Allies denied any such violation:

> Elle ne saurait, en revanche, trop vivement repousser le souçon de n'avoir laisser désormais à Hollande qu'une place honoraire dans l'association Européenne. Ce résultat n'est jamis entré dans les intention du 5 Cours, et il serait aussi contraire à leurs sentiment qu'à leurs propres intérêts. Replacées involontairement, et par la force des choses, dans l'obligation de contribuer, comme en 1814, à déterminer l'avenir et le mode d'existence de la Belgique, les Cours n'ont point abusé de leur position.[270]

Even more than the Greek case, where both the continuance of Greek resistance over a long period and strong humanitarian interests combined to compel intervention, the case of Belgium is harder to reconcile with the Allies' general approach to recognition as evidenced, for example, in the case of former Spanish and Portuguese colonies (see Chapter 9). The strongest element seems to have been the assertion of overriding authority of the Great Powers in matters

[264] Ibid, 893. [265] Ibid, 906. [266] London, 15 November 1831: ibid, 645.
[267] 27 BFSP 990, 1000.
[268] *Recognition*, 10n: 'probably the very fact that the recognition took place through a collective act of the Powers in a manner indicative of an international settlement raises the presumption that the recognition was not premature.' But cf ibid, 62n.
[269] For the Dutch protest and the Allied reply, see 19 BFSP 57, 73. [270] 19 BFSP 57, 73.

regulated by the Congress of Vienna—in which case the relevance for modern law of the Belgian precedent would be very limited.[271]

### *(iii) Albania, 1913 to 1921*

Some mention should be made of Albania. The creation of Albania in 1913, and its reconstitution after World War I, have been described above. Whatever the exact status of the decision of the Conference of Ambassadors in 1921 in certifying the statehood of Albania its effect was evident. The United States had refused recognition before 1921 on the grounds of lack of governmental stability but the Department of State on 9 May 1922, while reaffirming doubts about the stability of the government, stated that: 'The international status of Albania has . . . been so affected by the decisions regarding that country which were taken by the Conference of Ambassadors on November 9, 1921, that the Department is no longer disinclined, in principle, to recognize that country . . .'.[272] Recognition followed on 28 July 1922.

### *(iv) New States in the former Soviet Union and the dissolution of Yugoslavia, 1990 to 1995*

The appearance of new States in the former territories of Yugoslavia and the Soviet Union was treated by States, especially those of the European Union, as a matter for collective decision. As in the earlier cases, it was in the least certain situations that collective recognition was most important. The cases of Slovenia and Croatia were clear enough: apart from a controversy over the precise timing of recognition[273] and challenges to the eastern frontiers of Croatia, their independence was accepted with little incident. Macedonia, Bosnia and Herzegovina, and the 'remainder' or 'rump' Yugoslavia, however were problematic for different reasons. Questions of collective recognition of the former Republics have already been discussed in Chapter 9.

## (2) Collective recognition within international organizations

Membership of universal political organizations is commonly restricted either to 'States' (as with the United Nations) or to entities which whatever their formal status possess substantial independence (as with the League of Nations). Since it requires substantial support from existing Member States, admission is

[271] See also Smith, *GB & LN*, vol I, 245–7; Moore, 1 *Digest* 110; Harcourt, *Letters by Historicus*, 5–6. In the *Case concerning Sovereignty over certain Frontier Land*, 1959 ICJ Rep 209, 213, the International Court stated that the 'separation of Belgium from the Netherlands was sanctioned by the Treaty of London of 19 April 1839 . . .'.

[272] USFR 1922/I, 598; Hackworth, 1 *Digest* 196–8.

[273] See Grant, *Recognition*, 169–98, and see further Chapters 9 and 15.

strong evidence of the necessary status. However, it is clear that such admission does not constitute recognition by the other members as a whole, or, it seems, even by those voting in favour of admission.[274] The admissions practice of the two organizations has been examined in Chapter 4.

### (3) Collective conditional recognition

Conditional recognition has been defined as 'recognition the grant or continuance of which is made dependent upon the fulfilment of stipulations other than the normal requirements of statehood . . .'.[275] It was, though not general practice, an accepted mode of recognition in the nineteenth century:[276] for example the conditions upon which Serbian independence was recognized at Berlin in 1878 have been referred to already. The new States that emerged after World War I were required, as a condition of their recognition and, in some cases, of the transfer of disputed territory to them, to accept and sign treaties protecting minority rights in their territories. In forwarding the text of a revised Minorities Treaty to be signed by Poland under Article 93 of the Treaty of Versailles, Clemenceau stated:

> It has for long been the established procedure of the public law of Europe that when a State is created . . . the joint and formal recognition by the great Powers should be accompanied by the requirement that such State should, in the form of a binding international convention, undertake to comply with certain principles of government. This principle, for which there are numerous other precedents, received the most explicit sanction when, at the last great assembly of European Powers—the Congress of Berlin—the sovereignty and independence of Serbia, Montenegro and Roumania were recognized . . .[277]

In these cases the focus was on the treatment by the new States of minorities included in their territory by peace settlements. Likewise Croatia and other States emerging in the period 1990 to 1992 were required as a condition of their recognition to adopt guarantees respecting the rights of their minorities.[278]

[274] Aufricht (1949) 43 *AJ* 679; Chen, *Recognition*, 215–16.

[275] Lauterpacht, *Recognition*, 358. See generally Moore, 1 *Digest* 73–4; Hackworth, 1 *Digest* 192–5; Whiteman, 1 *Digest* 119–33; Chen, *Recognition*, 265–9; Lauterpacht, *Recognition*, 357–64; Lauterpacht (1945) 22 *BY* 164, 186; Verhoeven, *Reconnaissance*, 648–56.

[276] Cf Hall, *International Law* (8th edn), 113–14; *US v Pink*, 315 US 203, 229; also ibid, 250 (Stone CJ, dissenting) (1941); 10 ILR 28.

[277] 112 BFSP 225. For the Treaty of 28 June 1919, see ibid, 232. Cf Temperley, *History of the Peace Conference at Paris*, vol V, 112, 143; *Acquisition of Polish Nationality*, PCIJ ser B no 7 (1923), 15–16.

[278] Minority rights stipulations were made, for example, by the European Parliament respecting Croatia and Slovenia, and the Guidelines of 16 December 1991, required 'guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE', 31 ILM 1485. See Caplan (2002) 8 *Nations & Nationalism* 157.

However, the institution of conditional recognition has been criticized,[279] and would seem only to be justified in cases where some *quid pro quo* is offered in return for the undertaking. States are not entitled to refuse to treat unrecognized States as such except upon compliance with legally irrelevant conditions: what are bargained, in cases of conditional recognition, are the advantages that may accompany friendly relations between States.[280] In any case, breach of a condition attached to a grant of recognition does not avoid the recognition but is to be treated as 'the violation of an international obligation'.[281] Collective conditional recognition is thus of limited value in qualifying the authority or conduct of new States.

This judgement may be tested against the experience of collective recognition in relation to new States in the Soviet Union and Yugoslavia in the period after 1991. Though recognition was conditioned upon promises regarding future conduct, non-compliance—for example, failure in several former republics of the USSR to adhere to democratic standards respecting electoral procedure—did not lead to a suspension of recognition, or even a rupture of relations. Breaches of such conditions seem to have been widespread and had material consequences only in few cases.[282]

## 12.4 Territorial dispositions by international organizations

### (1) General principles

Just as a State may delegate to a group of States the authority to dispose of its territory, so it may delegate such authority to an international organization. The main legal issue is whether the constitution of the organization allows its

[279] Chen, *Recognition*, 221, Jessup, *A Modern Law of Nations*, 48; Lauterpacht (1945) 22 *BY* 164, 190. Cf Lauterpacht, *Recognition*, 361–2 (Finland).

[280] An analogy is UN membership, to which, it has been held, irrelevant conditions may not be attached: *Admissions Case*, 1948 ICJ Rep 65. For conditional recognition of Lithuania in 1922 see Hackworth, 1 *Digest* 201–2.

[281] Resolutions of the *Institut de Droit International* 1936, Art 6; Whiteman, 2 *Digest* 119.

[282] The OSCE Office for Democratic Institutions and Human Rights reported that the parliamentary elections of 17 October 2004 in Belarus did not meet international standards: *International Election Observation Mission, Statement of Preliminary Findings and Conclusions*, OSCE/ODIHR, available at http://www.osce.org/documents/odihr/2004/10/3733_en.pdf. The United States adopted financial sanctions. Belarus Democracy Act of 2004, PL 108–347, 20 October 2004, 118 Stat 1383. See also EU Presidency Declaration on Belarus parliamentary elections and referendum, 20 October 2004. A Council Common Position of 24 September 2004 had established a travel ban on certain officials of the Belarus government in response to curtailment of the press. 2004/661/CFSP. The possibility of diplomatic sanctions was also raised after irregularities in a presidential election of 21 November 2004 in Ukraine. See *Keesing's* 46322.

members to exercise the delegated authority by means of its procedures and with the use of its facilities, a problem that only arises when the constitution permits decisions by majority vote. In the League of Nations period it did not therefore arise, but it has done so on various occasions since 1945. As will be seen, United Nations practice supports the conclusion that at least certain delegated functions may be exercised by United Nations organs without the consent of all Member States. It may also be that an international organization has some power of disposition pursuant to its constituent instrument—though this would be exceptional. Some relevant cases will be discussed here.

## (2) The Concert of Europe

The status of the Concert of Europe in nineteenth-century international relations has been discussed above; the precedents do not support the claim that the major Powers had any legal hegemony in the territorial affairs of Europe. Indeed it is not clear that they asserted such a claim. Even Baron Humboldt, who regarded the Great Powers as having political authority to settle general European questions, admitted that

> The Congress of Vienna is in no way a deliberative assembly of Europe. For Europe does not form a constitutional whole; and in order that there might be an assembly of this kind, the part that each Power should take in the decision would have to be fixed, which is not and cannot be the case.[283]

The same question arose at the Conference of Aix-la-Chapelle in 1818, when a British Government memorandum recorded the view that, although the settlement of 1814 to 1815 constituted a 'Great Charter, by which the territorial system of Europe has been restored to order', that settlement could 'hardly be stated to give any special or superior security to the parts of the European system thus regulated, as compared with those parts which were not affected by the negotiations . . . and which rest for their title upon anterior treaties or public acts of equal and recognized authority.' Rather, in the British view, the true function of the Powers in Europe was:

> without . . . transgressing any of the principles of the law of nations or failing in the delicacy which they owe to the rights of other States . . . to interpose their good offices for the settlement of differences subsisting between other States, to take the initiative

[283] 'Baron Humboldt's Project for the Regulation of the Congress, Vienna, September 1814', Appendix IV of Webster, *The Congress of Vienna* (1919); cited by Peterson (1945) 60 *Pol ScQ*, 522, 535–6. Castlereagh was not prepared to accept even this, as he termed it, 'broad' and 'ostensible' claim to lay down the terms for a general settlement: Peterson, 536.

in watching over the peace of Europe, and finally in securing the execution of its treaties in the mode most consonant to the convenience of all the parties.[284]

The Vienna settlement and the Holy Alliance were not, on this view, a system of collective guarantee of the territorial and political status quo, or an arrangement for the government of Europe by the major powers, but a form of mediation backed by political primacy, a semi-organized system of good offices backed by powerful political interests.[285] It was not, therefore, a charter for intervention on principle—as distinct from intervention in the pursuance of individual interest, which was of course permitted.

The issue arose again over the Holy Alliance's intervention in the revolution in Naples[286] and the Congresses of Troppau and Laibach.[287] Again Castlereagh made the critical objection:

> the British Government . . . regard the principles on which these measures rest, to be such as could not safely be admitted as a system of International Law. They are of opinion that their adoption would inevitably sanction . . . a much more frequent and extensive interference in the internal transactions of States, than they are persuaded is intended by the August Parties from whom they proceed, or can be reconcilable either with the general interest, or with the efficient authority and dignity, of independent Sovereigns. They do not regard the Alliance as entitled, under existing Treaties, to assume, in their character as Allies, any such general powers, nor do they conceive that such extraordinary powers could be assumed, in virtue of any fresh Diplomatic Transaction amongst the Allied Courts, without their either attributing to themselves a supremacy incompatible with the rights of other States, or, if to be acquired through the special accession of such States, without introducing a federative system in Europe, not only unwieldy and ineffectual to its object, but leading to many most serious inconveniences.[288]

The Concert of Europe, then, although possessing certain characteristics of an international regional organization, had no legal power with respect to territorial settlements or the creation of new States in Europe.

## (3) The League of Nations

With certain exceptions, the League of Nations did not possess dispositive powers with respect to States or other territorial entities. There was a certain

[284] British Memorandum, October 1818: Albrecht-Carrié, *Concert of Europe*, 36.

[285] Cf Protocol of the Conference at Aix-la-Chapelle, para 4: 6 BFSP 18; and the Duke of Argyll, cited Satow, *International Congresses*, 1–2. Cf also Schroeder, *Transformation of European Politics*, 592–3.

[286] See Schroeder, *Transformation of European Politics*, 606–14.

[287] Ibid, 610–12.

[288] Circular of Viscount Castlereagh to British Ministers at Foreign Courts, 19 June 1821, 8 BFSP 1160; Albrecht-Carrié, *Concert of Europe*, 49–50. The conflict of opinion between Britain, Austria and Prussia is the theme of Holbraad, *The Concert of Europe*; see also Nichols, *The European Pentarchy and the Congress of Vienna, 1822*; Bourquin (1953) 83 *HR* 381.

political continuity between the Conference of Ambassadors of the Powers and the Council of the League.[289] Nevertheless the voting procedure in the Council under Articles 4 and 5 of the Covenant was such that, in general, decisions contrary to the interests of Member States could not be taken without their consent.[290] Protective or dispositive powers were delegated to the League or assumed under the Covenant with respect to the independence of Austria and Hungary,[291] the protection of the Free City of Danzig,[292] the Government of the Saar Basin[293] and the supervision of the Mandate system.[294]

## (4) The United Nations and territorial dispositions

### *(i) General principles: delegated and inherent authority*

The question whether an international organization can undertake functions not authorized by its constitution but by some extraneous treaty has arisen quite frequently in United Nations practice, both because of the extensive tasks undertaken in this way, and of the expense and political controversy involved in some of them. This was the key issue in the *Expenses* case, although on the view adopted by the majority the operations of UNEF and ONUC were carried out pursuant to the Charter.

Thus it is necessary to distinguish three categories of 'United Nations acts': acts pursuant to the Charter; acts not unlawful under the Charter and delegated to United Nations bodies to perform; and acts not authorized by the Charter which States members may perform individually or collectively and choose to perform in the course of proceedings of the United Nations. For example, the admission of Libya in 1955 was an act pursuant to the Charter; the establishment of Libya by the General Assembly under Article 23 and

[289] Albania had argued before the Assembly that the League was successor to the European concert of nations, and thus had power to delimit Albanian frontiers, a contention rejected unanimously on 2 October 1921. See *Monastery of St. Naoum Case*, PCIJ ser B no 9 (1924), 10, 2 ILR 358.

[290] For voting procedure in the exercise of dispositive functions see *Interpretation of the Treaty of Lausanne*, PCIJ ser B no 12 (1925) discussed in Chapter 13 in its application to the Mandate system.

[291] The independence of the two States was inalienable except with the consent of the League Council: Versailles, Art 80; Saint-Germain, Art 88 (Austria), 226 CTS 8; 112 BFSP 317; Trianon, Art 73 (Hungary).

[292] The Free City was 'placed under the protection of the League' by Art 102, Treaty of Versailles. By Art 103, the League was to appoint a High Commissioner for Danzig. Its constitution was placed 'under the guarantee of the League.' For analysis see Chapter 5.

[293] By Art 49, Treaty of Versailles, Germany renounced in favour of the League 'in the capacity of trustee' the government of the Saar territory. After a plebiscite in 1935 the League resolved that territory be returned to Germany.

[294] Under Art 22 of the Covenant, Mandates were administered 'on behalf of the League', and supervision of them was entrusted to the League and the Permanent Mandates Commission. See further Chapter 13.

Annex XI of the Italian Peace Treaty was an act performed under delegated authority; whilst the recognition of the new State, even if it had been performed by unanimous resolution under United Nations auspices, would have been an act in the third category, an act of individual Members not an act of the organization itself. Acts in the first category will always be acts of the Organization, and expenses incurred in doing them will be 'expenses of the Organization' under Article 17. Acts in the third category, whatever their legal effect, will never be acts of the Organization, nor will expenses incurred be 'expenses of the Organization'. But it appears that acts in category 2 ('delegated' or 'extramural' functions) may sometimes be 'acts' (and thus involve 'expenses') of the Organization, depending on the relation they bear to the purposes of the United Nations.[295]

These questions of acceptance by the United Nations of delegated dispositive authority were discussed by Judge Lauterpacht in the *Voting Procedure* Opinion.[296] There the question was the voting procedure to be adopted by the General Assembly in supervising the South West Africa Mandate, its authority to do so having been upheld by the Court in the *Status of South West Africa* Opinion.[297] The Court chose to focus on the phrase 'degree of supervision' in the *Status* Opinion,[298] interpreting it as limited to substance and not procedure, on the basis that the General Assembly was bound to adopt the voting procedure provided by the Charter.[299] The Court did not go on to discuss the crucial point whether on this assumption it had been correct in 1950 in allowing the Assembly to exercise Mandate functions, a point which could not be answered merely by interpretation of that decision. Moreover, if the General Assembly could not have altered its voting procedure in order to carry out delegated functions, it might have seemed equally arguable that it could not carry out delegated functions, not authorised by the Charter, at all.[300]

Judge Lauterpacht was more cautious:

> it cannot be said, by way of an absolute rule, that in no circumstances may the General Assembly act by a system of voting other than that laid down in the Charter . . . On the other hand . . . it does not seem to me permissible . . . to hold that a modification of the system of voting is permitted every time when the Organization acts under a treaty other than its own constitutional Charter. The correct rule seems to lie half-way

[295] This formulation follows from the *Expenses Opinion*, ICJ Rep 1962 p 151, 167–78; cf the subtly different view of Judge Fitzmaurice, ibid, 205, 214n, 215. See also Sarooshi, *International Organizations and their Exercise of Sovereign Powers*.

[296] ICJ Rep 1955 p 67.

[297] ICJ Rep 1950 p 128.

[298] Ibid, 138.

[299] ICJ Rep 1955 p 67, 74–5; Judge Basdevant, ibid, 82.

[300] The Majority Opinion in *Voting Procedure* relied essentially on the proposition that the Assembly possessed Mandate functions pursuant to the Charter rather than by delegation.

between these two solutions. The available practice and considerations of utility point to the justification of a rule which recognizes in this matter a measure of elasticity not inconsistent with the fundamental structure of the Organization. Within these limits, it is in my view a sound legal proposition that such modification is permissible under the terms of a general treaty, in the general international interest, and in relation to institutions and arrangements partaking of an international status in particular, in cases in which the General Assembly acts in substitution for a body which has hitherto fulfilled the functions in question.[301]

One may infer from this a similar principle relating to delegated functions in general: the United Nations may undertake such functions provided that they come within the general purposes of the Organization and that their exercise is not 'inconsistent with the fundamental structure of the Organization'. Such functions, in line with the Court's reasoning in *Certain Expenses*, will be not only 'acts' but may result in 'expenses' of the Organization.

To summarize, where a United Nations organ does something pursuant to the Charter, that is an act of the United Nations for all purposes. And where an act is not unlawful (that is, not forbidden by the Charter, or in Judge Lauterpacht's terms not 'contrary to the fundamental structure of the United Nations') and is authorized by the appropriate organ by its normal voting procedure, that act will be an act of the Organization, provided that it comes within the purposes of the United Nations under Articles 1 and 2. United Nations practice in the area of delegated functions supports these propositions.

A further question is the extent of dispositive authority possessed by United Nations organs under the Charter itself. This is important for a number of reasons: if the exercise of dispositive authority by United Nations organs is not merely not authorized but by some implication prohibited under the Charter, then equally exercise of dispositive power by delegation must be regarded as prohibited. The two relevant organs, of course, are the General Assembly and the Security Council.

**(a) The General Assembly**

Overall the General Assembly's powers are recommendatory and advisory only. However, there are exceptions to this. For example the General Assembly admits new Members, thereby binding existing Members to treat the newly admitted entity as a State. More specifically, the power of the Assembly to terminate Trusteeship status shows that if the Assembly does not possesses any

[301] ICJ Rep 1955 p 67, 111–12. But see Judge Fitzmaurice (dissenting) in *Namibia*, ICJ Rep 1971 p 6, 285–9, where the effect of Judge Lauterpacht's opinion is misstated.

broad dispositive powers under the Charter, it is not necessarily contrary to its 'constitutional structure' for such powers to be conferred on it.[302]

**(b) The Security Council**

By contrast the powers of the Security Council in relation to international peace and security are much more extensive. Under Article 39 the Security Council is empowered, upon determining 'the existence of any threat to the peace, breach of the peace, or act of aggression', to decide upon 'measures' (as distinct from 'recommendations') 'to maintain or restore international peace and security'; under Article 42 such measures may include, not only non-military ones, but 'such action by air, sea, or land forces as may be necessary.' These powers under Chapter VII would seem to be limited only by the discretion, and the voting procedure, of the Council. However Judge Fitzmaurice was again prepared to imply a limitation concerning 'territorial rights'. In his view:

> Even when acting under Chapter VII of the Charter itself, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration. Even a war-time occupation of a country or territory cannot operate to do that. It must await the peace settlement. This is a principle of international law that is as well established as any there can be,—and the Security Council is as much subject to it (for the United Nations is itself a subject of international law) as any of its individual member States are. The Security Council might, after making the necessary determinations under Article 39 . . . order the occupation of a country or piece of territory *in order to restore peace and security*, but it could not thereby, or as part of that operation, abrogate or alter territorial rights;—and the right to administer a mandated territory is a territorial right without which the territory could not be governed or the mandate be operated. It was to keep the peace, not to change the world order, that the Security Council was set up.[303]

It is true that valid annexations of territory may not be effected during hostilities. But transfers of territory may take place either by consent of parties affected before a formal peace settlement (and the Security Council would be competent, if such transfer was regarded as necessary to 'maintain or restore international peace and security', to require and enforce it), or by the creation in compliance with the principle of self-determination of a new State in the territory affected. The point is that if such action is authorized by the terms of Chapter VII, the exercise of dispositive authority by the Council cannot be said to be contrary to the 'structure' of the Charter.

Certain instances of territorial disposition by United Nations organs will now be discussed.

[302] But cf Judge Fitzmaurice's conclusion: ICJ Rep 1971 p 6, 283: 'The Assembly has no power to terminate any kind of administration over any kind of territory.'

[303] Ibid, 294.

### *(ii) Functions pursuant to the peace treaties*

By contrast with the extensive delegations to the League, only a few powers were delegated to the United Nations pursuant to the World War II settlements.

#### (a) Trieste

The Free City of Trieste created under Article 21 of the Italian Peace Treaty, was to have its 'integrity and independence . . . assured by the Security Council . . .'.[304] The Provisional Statute for the Territory was to be approved by the Council, pending its approval of a Permanent Statute.[305] The Governor of the Territory was to be appointed by the Council.[306] When the matter came before the Security Council in 1947, the Australian representative argued that the Charter did not authorize the Council:

> to give any general guarantee of integrity and independence to a particular territory . . . Before the Council may act, there must be a dispute or a situation which might lead to international friction or give rise to a dispute or a threat to the peace, or a breach of the peace. These powers operate independently of any peace treaties drawn up by the Council of Foreign Ministers, and they operate in respect of all territories, including Trieste. The proposals now before the Security Council, however, are to the effect that the Council should accept various new responsibilities and, in particular, the responsibility of assuring the integrity and independence of the Free Territory. The acceptance of such responsibilities is clearly not authorized by the Charter.[307]

But this interpretation was not accepted by a majority of the Council. Various Members emphasized the connection between the Trieste problem and international peace and security[308] and the practical necessity for the Council to cooperate in reaching a solution to the Trieste problem.[309] The Secretary-General went further and argued for a general competence in the Council to perform acts not coming under specific Articles of the Charter, but incidental to the responsibility for international peace and security, always 'subject to the purposes and principles of the United Nations' (which is—though he did not say this—not a constraining formula).[310] Jurisdiction was thus accepted.[311] In the event the Security Council was unable to agree on the choice of a Governor[312] and the Trieste problem was at length settled by bilateral negotiations without Council participation.

[304] 49 UNTS 3, Annex VII. [305] 49 UNTS 3, Annex VI.
[306] Permanent Statute, Art 11.
[307] *SCO* 89th mtg, 7 Jan 1947, 5–7; cited Kahng, *Law, Politics and the Security Council*, 75–7.
[308] France, USSR: ibid, 15–6, 9. [309] USA: ibid, 11.
[310] *SCOR* 91st mtg, 10 Jan 1947, 44–5; Kahng, 77. [311] Ibid, 60 (10:1 (Aust)).
[312] *SC Repertory 1946–51*, 314; *SC Repertory 1952–5*, 110, 134–5.

**(b) Disposition of Italian colonies in Africa**[313]

The Italian colonies in Africa (Libya, Eritrea, Italian Somaliland) had been placed at the disposal of the four Allied Powers by Article 23 of the Italian Peace Treaty: such disposal was to be determined within a year of the Treaty coming into force. The four Powers failed to agree,[314] and in accordance with Annex XI(3) of the Treaty the matter was 'referred to the General Assembly of the United Nations for a recommendation, and the Four Powers agree[d] to accept the recommendation and to take appropriate measures for giving effect to it.'[315]

The Assembly recommended that Libya should be constituted 'an independent and sovereign State . . . not later than 1 January 1952';[316] that Italian Somaliland 'shall be an independent sovereign State . . . at the end of ten years from the date of the approval of a Trusteeship Agreement by the General Assembly', that, in the meantime, the territory 'be placed under the International Trusteeship System with Italy as the Administering Authority';[317] and that Eritrea's disposition should await a report of a Commission, appointed to take into account:

(a) The wishes and welfare of the inhabitants of Eritrea, including the views of the various racial, religious and political groups of the provinces of the territory and the capacity of the people for self-government;
(b) The interests of peace and security in East Africa; [and]
(c) The rights and claims of Ethiopia based on geographical, historical, ethnic or economic reasons, including in particular Ethiopia's legitimate need for adequate access to the sea.[318]

Although there was considerable debate over the disposition of particular territories, it was not suggested that the exercise by the Assembly of the power of effective decision was beyond power. Expenses incurred in carrying out the recommendations were treated as expenses of the Organization charged on the general fund.[319] On the other hand, Annex XI made it clear that the technical power of disposition remained with the four 'Administering Powers': the United Nations recommendation only bound them by virtue of their prior agreement. In fact resolution 289A (IV) was duly executed according to

[313] Whiteman, 3 *Digest* 4–32; Ydit, *Internationalized Territories*, 68–71; Jessup, *Birth of Nations*, 211–54.
[314] Whiteman, 3 *Digest* 6–14.
[315] 49 UNTS 214.
[316] GA res 289A (IV), 21 November 1949, Pt A (49–0:9).
[317] Ibid, Pt B (48–7:3).
[318] Ibid, Pt C (47–5:6). Res. 289A (IV), 21 Nov. 1947, was passed as a whole by 48–1 (Ethiopia): 9.
[319] Ibid, Pt D, para. 2.

its terms by the Administering Powers and the United Nations working in concert.[320]

### *(iii) Functions pursuant to the Mandate and Trusteeship systems*

The functions assumed by United Nations organs with respect to the dispositive aspects of the Mandate and Trusteeship systems are discussed in Chapter 13. One important case of asserted dispositive power—that of Palestine in 1947 to 1948—has been examined in Chapter 9.

### *(iv) Other cases*

#### (a) West Irian

Although Indonesia had been granted independence by the Netherlands in 1949, West New Guinea (West Irian) remained under Dutch administration, and its status and disposition became the subject of a lengthy dispute between the two States. In 1962 it was agreed that, subject to the consent of the General Assembly, 'the Netherlands [would] transfer administration of the territory to a United Nations Temporary Executive Authority established by and under the jurisdiction of the Secretary-General', which would in turn 'transfer the administration to Indonesia in accordance with Article XII.'[321] The United Nations Administrator was to have full authority 'to administer the territory for the period of the UNTEA administration in accordance with the terms of the present agreement.'[322] The United Nations flag was to be flown, alongside the Netherlands flag until 31 December 1962, thereafter alongside the Indonesian flag (Art VI). Security forces were to be provided, in addition to local police (Art VIII). The United Nations Administrator was instructed to replace senior Dutch officials by non-Indonesian officials as soon as was possible and was empowered in general terms to legislate for the territory (Art IX), to issue travel documents, and, after 1 January 1963, to transfer authority to the

[320] A UN Commissioner for Libya was appointed; a constitution drawn up; boundaries delimited; and economic and financial arrangements made. Libya became independent on 24 Dec 1951: GA res 515 (VI), 1 Feb 1952 (53–9:0). See Pelt, *Libyan Independence and the United Nations*. Italian Somaliland was placed under a ten-year trusteeship, approved on 2 Dec 1950: GA Res 442 (V) (44–6:0). Ethiopia argued that the agreement was improperly concluded in that, as a 'State directly concerned' under Art 79, Ethiopia had not been consulted: A/C.4/L. 102, rejected 34–6:7: *GAOR* 5th sess 4th Ctee, 176th mtg. Eritrea was eventually federated as an 'autonomous unit . . . under the sovereignty of the Ethiopian Crown': GA res 390 (V), 2 December 1950 (45–5:6); GA res 617 (VII), 17 December 1952 (51–0:5). Further on Eritrea see Chapter 9.

[321] 437 UNTS 273, Art II. See Czerapowicz, *International Territorial Authority: Leticia and West New Guinea*; Bowett, *United Nations Forces*, 255–61.

[322] Article V. Cf *Aide-Mémoire* concerning the Modalities of the Transfer of Authority over West New Guinea: 537 UNTS 310.

Government of Indonesia. All the costs of the administration were to be met by Indonesia and the Netherlands jointly: the two governments were also to furnish consular protection for inhabitants of the territory. General Assembly approval of the delegation of authority to the Secretary General was given,[323] and the Temporary Executive Authority took over responsibility for the territory on 1 October 1962. Control was eventually and without disturbances handed over to Indonesia after 1 May 1963. Although other aspects of the West Irian controversy raise serious questions, no one suggested that United Nations participation in the transfer of authority was *ultra vires*.

**(b) Namibia**

The earlier history of the South West Africa mandate is dealt with in Chapter 13. Its winding up involved a Transition Assistance Group (UNTAG) established by the Security Council.[324] UNTAG operated in conjunction with South African administrators in Namibia during a transitional phase from 1 April 1989 to 21 March 1990.[325] The revocation of the League Mandate to South Africa and events leading to the independence of Namibia are discussed in Chapter 13.

**(c) Eastern Slavonia, Baranja and Western Sirmium**

Several regions of north-eastern Croatia contain local majorities of ethnic Serbs, certain groups of whom sought to separate from Croatia after its declaration of independence from Yugoslavia in 1991. Interethnic violence, including bombardment of the town of Vukovar and serious human rights violations against Croat civilians, was followed by a period of Serb administration, under the auspices of a putative Republika Srpska Krajina. This entity was never recognized internationally, while Croatia was explicitly understood to encompass the Serb-administered area.[326] The government of Croatia by means of a military offensive in May 1995 recovered the area. A large number of Serbs fled. Concerned that hostilities would begin anew, the United States and the United Nations urged the parties to negotiate.[327]

A Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium was signed on 12 November 1995 by the Government of Croatia and local Serb representatives in the presence of the United States ambassador to Croatia and a United Nations mediator.[328] The Basic Agreement requested the

[323] GA res 1752 (XVII), 21 Sept 1962 (88–1 (Senegal):14).

[324] SC res 624, 16 February 1989. See Settlement Proposal of the Contact Group, 10 Apr 1978, S/12636.

[325] See Kreilkamp (2003) 35 *NYUJILP* 619, 623–6; Gordon (1995) 28 *Cornell ILJ* 301, 341–2; (1990) 94 *RGDIP* 801.

[326] E.g., SC res 1023, 22 Nov 1995.

[327] See *Human Rights Watch Reports, Croatia*, vol 11(3) (1999).

[328] S/1995/951, annex ('Erdut Agreement').

Security Council to establish a Transitional Administration for the region.[329] The Security Council, acting under Chapter VII, established the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES).[330] The object of transitional administration was to reintegrate the territory into Croatia while safeguarding the rights of Serbs who constituted local majorities. UNTAES included a military and a civil component, under a Transitional Administrator; it was to oversee demilitarization of the territory, as well as policing, public services and resettlement of refugees. The costs of UNTAES were costs of the Organization, to be borne by Member States in accordance with Article 17(2) of the Charter.[331] The mandate of the Transitional Administration came to a close on 15 January 1998, when administration of the region was handed over to Croatia.[332]

**(d) Kosovo**

Under the Yugoslav constitution of 1974 Kosovo was a self-administering province of Serbia.[333] Approximately 90 per cent of the inhabitants are ethnic Albanians ('Kosovars'); most of the remainder are ethnic Serbs. Self-rule in Kosovo was curtailed in 1989 by action of the Serbian Government, leading to local unrest. A Kosovo Liberation Army (KLA) began attacking federal security forces in 1997; in February 1998, the FRY began a military campaign to reaffirm control in the province. A small OSCE mission had functioned in Kosovo under a Memorandum of Understanding with the FRY of 28 October 1992, but the FRY declined to renew this in 1993.[334] Violence in Kosovo continued through 1998.

The Security Council in resolution 1160 of 31 March 1998 expressed its support for an 'enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration' and called upon the government of Yugoslavia to enter into 'a meaningful dialogue on political status issues'.[335] Talks between Kosovars and the FRY eventually began at Rambouillet on 6 February 1999 with a view to formulating a political settlement. However, the FRY rejected provisions for NATO peacekeeping and eventually withdrew from the talks. The Rambouillet Accords on 18 March 1999, signed by Kosovar representatives but not by the FRY, provided

[329] Basic Agreement, para 2. [330] SC res 1037, 15 Jan 1996.

[331] GA rsns 50/481, 11 Apr 1996; 50/242, 7 June 1996; 51/153, 16 Dec 1996.

[332] See Report of the Secretary-General on the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sermium, 22 Jan 1998, S/1998/59.

[333] Vickers, *The Status of Kosovo in Socialist Yugoslavia*; Kokott in Tomuschat (ed), *Kosovo and the International Community*, 1, 2–6. [334] SC res 855, 9 Aug 1993.

[335] SC res 1160, 31 March 1998, paras 4, 5.

for the establishment in Kosovo of institutions of self-government and a separate constitution.[336] Following the FRY's rejection of Rambouillet, a campaign of intimidation led to major refugee flows and some deaths. The OSCE Verification Mission evacuated Kosovo on 20 March 1999. NATO began a bombing campaign against the FRY on 24 March 1999.[337]

On 6 May 1999 the Contact Group States and Canada, Italy, and Japan (G-8) adopted a set of principles on a political solution for Kosovo.[338] The Security Council identified these as a precondition for resolving the humanitarian crisis in the territory.[339] Among the principles were:

> Deployment in Kosovo of effective international civil and security presences, endorsed and adopted by the United Nations, capable of guaranteeing the achievement of the common objectives;
>
> Establishment of an interim administration for Kosovo to be decided by the Security Council of the United Nations to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo; . . .
>
> A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region.

Noting that the Federal Republic of Yugoslavia had not complied with requirements set out in past resolutions, the Security Council determined 'to resolve the grave humanitarian situation in Kosovo.'[340] While '[r]eaffirming . . . the sovereignty and territorial integrity of the Federal Republic of Yugoslavia', the Security Council also reaffirmed that Kosovo should have 'substantial autonomy and meaningful self-administration'. Resolution 1244 established under UN auspices international military and civil apparatuses to govern Kosovo.

NATO military operations came to a close on 9 June 1999 when NATO and the FRY concluded an agreement on military-technical matters.[341] The international military apparatus—KFOR—deployed on 12 June 1999 and FRY forces withdrew from Kosovo.[342] The civil apparatus—the United Nations

[336] S/1999/648.

[337] For the debate about the legality of the Kosovo campaign see Grant (1999) 28 *Georgia JICL* 9, 16–21; Tavernier, in Tomuschat (ed), *Kosovo and the International Community*, 157.

[338] S/1999/516, annex. [339] SC res 1239, 14 May 1999, para 5.

[340] See SC res 1244, 10 June 1999; and cf SC rsns 1160, 31 March 1998; 1199, 23 Sept 1998; 1203, 24 Oct 1998; 1239, 14 May 1999.

[341] Military Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, signed at Kumanovo, FYROM, 9 June 1999, 38 ILM (1999) 1217, S/1999/672, annex.

[342] (1999) 38 ILM 1217, S/1999/672, annex.

Interim Administration Mission in Kosovo (UNMIK)—in its first enactment, stated, 'All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.'[343] In 2001, a Constitutional Framework for Provisional Self-Government was adopted. Under the Constitutional Framework, a Kosovo Assembly has certain powers but the head of UNMIK continues to exercise extensive authority, including over the budget, monetary policy, customs, external relations, the Provisional Institutions of Self-Government (which he may dissolve) and non-national judges (whom he appoints).[344] The costs of UNMIK are expenses of the Organization for purposes of Article 17(2) of the Charter.[345]

It has been said that it was not clear whether the FRY was coerced into consenting to the arrangements promulgated under Security Council resolution 1244,[346] given the existence of a threat of force against the FRY for non-compliance with the collective decision of the Contact Group and Security Council.[347] To the extent that the measures were authorized under Chapter VII of the Charter, these issues are irrelevant: in the context of a lawful use of force, consent is a mode by which affected States accept an outcome and is not necessarily the result of a negotiated arrangement. But the use of force itself in Kosovo was not covered by any Chapter VII resolution and remains controversial. The FRY, for its part, protested that there was no basis for the threat of force by NATO to compel the FRY to accept political terms that may turn out to have involved the severance of a province.[348] But on 3 June 1999 the FRY entered into an Agreement on Political Principles with representatives of the Russian Federation and European Union,[349] and this, along with the Military-Technical Agreement, established at least the form of consent.[350]

Independent of the question of consent (but the more serious given that consent was for a time absent) is the question of UN authority to establish an interim administration, possessing extensive territorial competence but not based on the trusteeship provisions of the Charter.[351] The authority of the

[343] UNMIK/REG/1999/1, 25 July 1999, S/1999/987, 14.

[344] Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, 15 May 2001. That UNMIK issues travel documents to Kosovo residents was said to have no implications for the international status of the territory: *HL Deb*, vol 610, WA 139–40, 8 March 2000, (2000) 71 *BY* 556.

[345] GA res 53/241, 28 July 1999; 54/245A, 23 Dec1999; 54/245B, 21 July 2000. Cf *Report of the Secretary-General on the financing of the UNMIK*, A/53/238/Add. 1. The UN administration in Kosovo has been extensively analyzed: e.g., Garcia (2000) 104 *RGDIP* 61; Stahn (2001) 61 *ZaöRV* 105.

[346] E.g., Milano (2003) 14 *EJIL* 999, 1001.

[347] Decaux in Tomuschat, *Kosovo*, 43, 48–51.

[348] S/1999/107.

[349] S/1999/649.

[350] Orakhelashvili (2003) 43 *Va JIL* 485, 518–23.

[351] See Brown (2005) 80 *Chicago-Kent LR* 235, 256–8.

Security Council to undertake 'measures not involving the use of armed force' has been said to be very broad.[352] Implied powers of the Organization under Chapter VII also have been referred to.[353] According to the NATO Secretary-General, the FRY had 'obligations to the international community, including those established by the United Nations Security Council, the Organization for Security and Cooperation in Europe, the European Union, the North Atlantic Treaty Organization and the Contact Group.'[354] But it is one thing for a State to have multilateral obligations and another for the United Nations to administer its territory in a situation where (whatever may be said about territorial integrity) the issue of secession following ethnic cleansing is very much on the agenda.[355] If Security Council authority extends so far, the legitimacy of the Kosovo action remains an open question.

**(e) East Timor**

East Timor had been a Portuguese possession since the sixteenth century.[356] The General Assembly in 1961 declared it a non-self-governing territory under the administration of Portugal.[357] Portugal relinquished control of East Timor in 1975 amid internal conflict, and without making any proper arrangements for the territory, which lacked most normal facilities. Indonesia, of which the western side of Timor had been part since the independence of that State from the Netherlands in 1949, occupied and annexed East Timor shortly after Portuguese evacuation. The Security Council and General Assembly called on Indonesia to withdraw from East Timor,[358] but this only became a reality after a change of regime in Indonesia and following the complete failure of

[352] Bothe and Marauhn in Tomuschat, *Kosovo*, 217, 232: '[Article 41 is] by no means limited to the type of value deprivations expressly enumerated in the Article. It allows the establishment of institutions and procedures designed to facilitate the return to a situation of peace.' See also *Prosecutor v Tadic (jurisdiction)*, Case No IT-94–1-AR72, (1995) 35 ILM 32, esp 44–45 (paras 34–6); Ruffert (2001) 50 *ICLQ* 613, 620–1; Matheson (2001) 95 *AJ* 76, 83.

[353] Ruffert (2001) 50 *ICLQ* 613, 620–1; Schrijver, (2001) 95 *ASIL Proc* 251, 260. Bothe and Marauhn in Tomuschat, *Kosovo*, 234–5 suggest that UNMIK is a form of trusteeship arising from Chapter VII and thus free of the constraints surrounding trusteeship under Chapters XII and XIII. But the question—which, as will be seen, Chapters XII and XIII in their different ways settled—is: trusteeship in whose interests?

[354] Letter of 30 January 1999, S/1999/107, appendix.

[355] But cf Brown (2005) 80 *Chicago-Kent LR* 235, 251–2.

[356] Villiers in Newitt (ed), *The First Portuguese Colonial Empire*, 37, 57–61.

[357] GA res 1542, 15 Dec 1960.

[358] SC rsns 384, 22 Dec 1975; 389, 22 Apr 1976; GA rsns 3485 (XXX), 12 Dec 1975; 31/53, 1 Dec 1976; 32/34, 28 Nov 1977; 33/39, 13 Dec 1978; 34/40, 21 Nov 1979; 35/27, 11 Nov 1980; 36/50, 24 Nov 1981; 37/30, 23 Nov 1982. The ICJ reviewed the UN practice in the *East Timor Case*, ICJ Rep 1995 p 90, 96–7, paras 14–16. See also Lumb (1981) 7 *Aust YBIL* 72; Clark, Catholic Institute for International Relations & International Platform of Jurists for East Timor, *International Law and the Question of East Timor*, 65; Grant (2000) 33 *Vanderbilt JTL* 273, 298–9. See further Ramos-Horta, *FUNU: The Unfinished Saga of East Timor*; Gunn, *East Timor and the UN*; Fox and

Indonesia, in its turn, to establish a normal and popularly accepted administration (as distinct from a military fiefdom)[359] in the territory.[360]

On 5 May 1999 Indonesia and Portugal agreed that a 'popular consultation' would be carried out to ascertain the wishes of the people of East Timor.[361] The Security Council welcomed the agreement,[362] and established a United Nations Mission in East Timor (UNAMET).[363] On 30 August 1999, in an act of conspicuous bravery, the East Timorese voted to reject the framework for autonomy within Indonesia proposed by the terms of the 5 May agreement.[364] Violence erupted immediately and militias and Indonesian military and police forces caused the displacement of a substantial part of the East Timorese population.[365] Invoking Chapter VII, the Security Council authorized establishment of a multinational force to restore order in East Timor.[366] The International Force in East Timor (INTERFET) began to deploy on 20 September under Australian command.[367]

Security Council resolution 1272, 25 October 1999, based on Chapter VII, authorized the establishment of a United Nations Transitional Administration in East Timor (UNTAET), which (as with UNMIK in Kosovo) had a comprehensive mandate to administer the territory. UNTAET soon after established a National Consultative Council as a mechanism for transition to self-government.[368] Reflecting its plenary authority, the Transitional Administration exercised legislative and executive powers and administered the

Soares (eds), *Out of the Ashes*: *Destruction and Reconstruction of East Timor*; Martin, *Self-determination in East Timor*; Marker, *East Timor: A Memoir for the Negotiations for Independence*.

[359] On Indonesian conduct in East Timor, see Nettheim, in Dunn (ed), *International Law and the Question of East Timor*, 181; Machover, ibid, 205.

[360] Only Australia extended formal ('*de jure*') recognition to the Indonesian military takeover: it escaped censure in proceedings brought by Portugal on technical grounds. *Case concerning East Timor*, ICJ Rep 1995 p 90.

[361] Agreement between the Republic of Indonesia and the Portuguese Republic on the question of East Timor, A/53/951, S/1999/513, 5 May 1999. Through popular consultation, the people of East Timor would confirm or reject a 'Constitutional Framework for a Special Autonomy for East Timor', which, if confirmed, would constitute the territory a 'Special Autonomous Region of East Timor' (SARET).

[362] SC res 1236, 7 May 1999.

[363] SC res 1246, 11 June 1999. For details of UNAMET, see *Question of East Timor: Report of the Secretary-General*, S/1999/595.

[364] Of registered voters, 98.6% participated; 78.5% of those voting rejected autonomy. *Question of East Timor: Progress report of the Secretary-General*, GA 54th sess, A/54/654, 13 Dec 1999, paras 30, 31.

[365] See Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *East Timor: Working Paper*, 22 June 2000, A/AC.109/2000/12, paras 13–15.

[366] SC res 1264, 12 Sept 1999.

[367] *East Timor: Working Paper*, para 17. See also Kelly, McCormack, Muggleton and Oswald (2001) 83 *IRRC* 101.

[368] Reg 1999/2, 2 Dec 1999; see *Report of the Secretary-General on the United Nations Transitional Administration in East Timor*, S/2000/53, 26 Jan 2000, paras 4–5.

judiciary, which was reconstructed with substantial international assistance.[369] UNTAET represented East Timor in foreign relations, for example concluding an agreement with Australia to provide for the continuation of the Timor Gap Treaty concluded with Indonesia in 1989.[370] Expenses of UNTAET were expenses of the Organization.[371]

The General Assembly on 27 September 2002 admitted East Timor as a Member State under the title Democratic Republic of Timor-Leste.[372]

### (f) Iraq

In March to April 2003, the United States, United Kingdom and certain other States, acting under a questionable interpretation of various Security Council resolutions,[373] forcibly removed the government of Iraq and its civil and military apparatuses. The problem was thus presented of restoring public order and establishing a new government in a framework of foreign occupation. The solution was not straightforward. The Security Council would not legitimize the original attacks, which it had declined to authorize. But no institution remained intact in Iraq with authority to consent to a general disposition of Iraqi affairs; and under the Hague Regulations on Land Warfare and the Fourth Geneva Convention, the occupying powers were constrained in the restructuring or reform they could undertake in an occupied territory. Security Council resolution 1483 of 22 May 2003 made reference specifically to the Hague Regulations and Geneva Convention and noted their applicability to the occupying powers in Iraq.[374] But the same resolution, however, called on the occupying powers to establish 'conditions in which the Iraqi people can freely determine their own political future' (para 4); 'establish national and local institutions for representative governance'; and 'encourag[e] international efforts to promote legal and judicial reform'

[369] See Strohmeyer (2001) 95 *AJ* 46; Linton (2001) 25 *MULR* 122, 133–40.

[370] Exchange of Notes constituting an Agreement between Australia and UNTAET concerning the continued Operation of the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesia Province of East Timor and Northern Australia, 10 February 2000, *Australian Treaty Series* 9 (2000). Pending independence of East Timor, the Agreement substituted UNTAET for Indonesia and continued the regime established under the 1989 treaty (*Australian Treaty Series* 9 (1991); 29 ILM 469).

[371] GA res 53/240, 29 June 1999.

[372] SC res 1414, 23 May 2002; GA res 57/3, 27 Sept 2002.

[373] Positing a basis for the invasion see *HL Deb*, 17 March 2003, WA col 3. Implying a different, humanitarian, argument, *HC Deb*, 25 Feb 2003, col 130 (statement of the Prime Minister). For yet a third argument based on preemption see Taft and Buchwald (2003) 97 *AJ* 557. Independent views include Lowe (2003) 52 *ICLQ* 859; Murphy (2003) 97 *AJIL* 419, Kritsiotis (2003) 15 *EJIL* 233; Sands, *Lawless World*. See also *Campaign for Nuclear Disarmament v Prime Minister and Secretaries of States* [2002] EWHC 2777; *Doe v Bush*, 322 F 3rd 109 (1st Cir, 2003).

[374] SC res 1483, 22 May 2003, para 5.

(para 8).[375] These responsibilities would be difficult to satisfy if the general obligations of an occupying power were observed.[376] The special objectives set out in resolution 1483 could only be reconciled with the general regime of occupation by reference to the powers of the Security Council acting under Chapter VII; in addition, only through that means could the absence of any formal consent by the Iraqi people be addressed.

According to Judge Fitzmaurice, even under Chapter VII, the Security Council may not prior to a peace settlement 'abrogate or alter territorial rights, whether of sovereignty or administration'.[377] Yet as seen in other cases reviewed here, the Security Council certainly may confer responsibilities for the disposition of territorial questions, including questions of administration, on States or groups of States. The real question in post-conflict Iraq was whether the Security Council ever exercised that authority. Under resolution 1500 of 14 August 2003, the Security Council authorized the establishment of a United Nations Assistance Mission for Iraq (UNAMI), the mandate of which might have been seen to encompass political reconstruction[378] but which in practice remained primarily a humanitarian mission. Instead a Coalition Provisional Authority, consisting of the States that had carried out the invasion, was the mechanism for administration and for the transfer of responsibilities to a transitional Iraqi government. At the end of June 2004 the Coalition Provisional Authority was dissolved[379] and its responsibilities transferred to an Interim Government of Iraq. Security Council resolution 1546 specified the timing of elections and adoption of a new constitution by a Transitional National Assembly.

**(g) Jerusalem**

Under Part III of the General Assembly's partition resolution, the City of Jerusalem was to be established 'as a *corpus separatum* under a special international regime . . . administered by the United Nations . . .'.[380] Detailed administration was to be delegated to the Trusteeship Council, which was to draw up a Statute for the City. The 'special international regime' never came into effect, for reasons described elsewhere.[381] Yet the situation of Jerusalem remains legally unresolved pending a comprehensive settlement of the Palestinian question: in 1992, the

[375] Later resolutions elaborated on the occupation regime and on the process by which the occupation was to draw to a close and a final constitutional settlement adopted. See SC resns 1500, 14 Aug 2003; 1511, 16 Oct 2003; 1546, 8 June 2004; Grant (2003) 97 *AJ* 823.

[376] Lowe (2003) 52 *ICLQ* 859. [377] ICJ Rep 1971 p 16, 294 (Judge Fitzmaurice, dissenting).

[378] Grant (2003) 97 *AJ* 823. [379] SC res 1546, 8 June 2004.

[380] GA res 181 (II), 29 Nov 1947. See also GA resns 194 (III), 11 December 1948; 303 (IV), 9 December 1949.

[381] See Bovis, *The Jerusalem Question 1917–1968*; Lauterpacht, *Jerusalem and the Holy Places*; Blum, *The Juridical Status of Jerusalem*; Cattan (1981) 10 *J Pal St* 3; Baron (1998) 8 *Touro ILR* 1. Cf

United Kingdom position was that 'Jerusalem, as a whole, is a special case and its status is yet to be determined.'[382]

*(v) Conclusion*

Significant powers of territorial administration and disposition have been delegated to United Nations organs since 1945. The record demonstrates that the difficulties with such delegations derive not from any assumed incompetence of the United Nations to exercise dispositive powers, but from the political feasibility, or desirability, of invoking them in the particular situation.

## 12.5 The notion of 'international dispositive powers'

Although this review of the practice since 1815 has demonstrated the diversity and importance of the various issues grouped here under the rubric of international dispositive powers, there seem to be no specific primary rules or powers in this area, apart from general principles of consent and the like. Indeed, the principle of consent, as it applies to States as the primary international actors, virtually ensures that this is so. But in a fundamentally decentralized society, the exercise of authority of this sort is distinctive, and is likely to continue to play an important role in particular disputes or situations. This has certainly been the case with the specific regimes considered in the following two chapters.

also *Re an Inquiry by the Ministry of Foreign Affairs* (Italy, Consiglio di Stato, 1958), 26 ILR 68; *Shtraks v Government of Israel* [1964] AC 556.

[382] Mr Douglas Hogg, Minister of State, FCO, 214 *HC Deb* col 1158, 27 November 1992. See also 560 *HL Deb* WA 87–8, 26 January 1995.

# Chapter 13

# MANDATES AND TRUST TERRITORIES


13.1 **Mandates and Trust Territories in historical perspective** 566

13.2 **Sovereignty over Mandates and Trust Territories** 568
- (1) Sovereignty and 'A' Mandates 569
- (2) Sovereignty and other mandated and trust territories 570
- (3) Legal personality of mandated and trust territories 574

13.3 **Termination of Mandates and Trusteeships** 574
- (1) Termination of Mandates 575
  - (i) During the period of the League 575
  - (ii) After the dissolution of the League 580
  - (iii) By transfer to Trusteeship 580
- (2) Termination of Trusteeships 581
- (3) Legal effects of termination 584

13.4 **Revocation of Mandates and Trusteeships** 586
- (1) Revocation of Mandates during the League period 586
- (2) Revocation of Trusteeships 590
- (3) Revocation of Mandates by United Nations Organs 591
- (4) Post-revocation action of the United Nations concerning Namibia 595

13.5 **Post-independence claims** 596
- (1) Namibia 597
- (2) Nauru 598
- (3) Trust Territory of the Pacific Islands 599

13.6 **The future of Trusteeship?** 600

## 13.1 Mandates and Trust territories in historical perspective

In the previous chapter brief reference was made to the Mandate system, established by the Principal Allied and Associated Powers in conjunction with the League of Nations under Article 22 of the Covenant. The Mandate system covered territories relinquished by the Ottoman Empire and Germany; these were divided into three classes, the 'A', 'B' and 'C' Mandates. With the decline in the League of Nations and the growth of the policy of appeasement in the 1930s, the fate of the Mandate system was questioned; indeed proposals were made for the return of former German colonies, with no apparent regard for the Covenant.[1] But these proposals were never acted on and, however precariously, the Mandate system survived. It was replaced after World War II by the International Trusteeship System, established under Chapters XII and XIII of the United Nations Charter. The new system distinguished between two classes of Trust territory, ordinary Trusteeships under the authority of the General Assembly and 'strategic Trusteeships' under the authority of the Security Council.

Despite these and other differences, the two systems had the same general aims: specifically, the encouragement of the 'well-being and development' of the peoples of the various territories, and of their 'progressive development towards self-government or independence',[2] although this second aim was only implicit in the Covenant. Both accepted the principle of the international responsibility of the administering State for carrying out these aims, 'securities for performance' being provided in the Covenant and the Charter and in the individual agreements. Both entailed a rejection of annexation of the colonial territories that had belonged to states defeated in the preceding War, and the assertion of international interest at a much earlier stage in the process towards independence than the international law of the time otherwise allowed.[3] In particular, the principle of self-determination, as the International Court has

[1] A Japanese offer to sell its Pacific Mandate back to Germany was objected to on the basis that 'German consent to such repurchase would detract from our colonial demands politically and morally.' Dispatch of German Foreign Minister to German Ambassador in Tokyo, 18 January 1938: *Documents on German Foreign Policy, 1918–1945* (1949), Doc 560. Sir Nevile Henderson, British ambassador to Germany, in March 1938 proposed British support for a revision of boundaries in Central Africa, including the mandated Tanganyika territory. According to the German report of the meeting 'in answer to a question by the Führer, Sir Nevile Henderson declared that he believed that Portugal and Belgium, and presumably France and Italy too, would in the end cooperate in the settlement'. Conversation of 3 March 1938, recorded in Memorandum of 4 March 1938: ibid, Doc 138. It appears that the German demands were a 'flanking manoeuvre' in a larger offensive for territorial aggrandizement in Central Europe, and the proposals came to nothing. See Jacobsen, *Nationalsozialistische Außenpolitik, 1933–1938*, 431.

[2] Charter, Art 76b.

[3] *Status of South West Africa Case*, ICJ Rep 1950 p 128, 131.

repeatedly reaffirmed, was made applicable to Mandates and Trust territories, which became the first distinct category of self-determination territory.[4]

There are now no territories under either the Mandate or Trusteeship systems—unless the view is taken that the post-1949 territory of Palestine is still formally mandated territory, which seems not to be the case.[5] The last ordinary Trust territory was the Australian Trusteeship for New Guinea, terminated in 1975.[6] The last mandated territory was South West Africa (Namibia): the Mandate was revoked by General Assembly resolution 2145 (XXI) in 1966, but the independence of Namibia was not achieved until 1990.[7] The one and only 'strategic Trust territory' was the Trusteeship of the Pacific Islands, the Trusteeship agreement for which was eventually declared terminated by the Security Council in 1994 following the emergence of three independent states (the Marshall Islands, the Federated States of Micronesia and Palau) and the association with the United States of a fourth entity (the Commonwealth of the Northern Marianas).[8]

The details of the various Mandates and Trust territories and of their administration are now primarily of historical importance.[9] On the other hand, they constituted a major episode in the administration of territory under international auspices, and the controversies over the termination of the Mandate for South West Africa and the Pacific Islands Trusteeship remain significant in themselves. Two claims have been brought to the International Court concerning maladministration of Trust territories—one of them successfully.[10] In addition it is sometimes suggested that the Trusteeship system could be adapted to deal with more recent cases of 'failed States' or of other territories whose administration may need some international involvement. For all these reasons, the experience of the Mandate and Trusteeship systems is of interest.

[4] *Namibia Opinion*, ICJ Rep 1971 p 6, 31; *Western Sahara Opinion*, ICJ Rep 1975 p 12, 31–3, discussed in Chapter 3.

[5] For details of Mandated and Trust Territories 1919–95, see Appendix 2, p 741. For the view that the Mandate remains in force with respect to Palestine, see Rostow (1990) 84 *AJIL* 717.

[6] See (1975) 49 *ALJ* 695–6; (1975) 79 *RGDIP* 1184; Downs, *The Australian Trusteeship of Papua New Guinea 1945–75*, 74–5, 77, 128–9, 380, 510, 549, 555–6.

[7] See Whiteman, 1 *Digest* 706–31, 13 *Digest* 756–8; Dugard, *The South West Africa/Namibia Dispute*.

[8] See SC res 956, 10 November 1994. Termination did not occur by virtue of a single resolution, but after successive resolutions of the Trusteeship Council and, finally, the Security Council relating to the different entities into which the Trust had been divided. The last entity over which the Trust remained in force was Palau.

[9] See especially Wright, *Mandates under the League of Nations*; Toussaint, *The Trusteeship System of the United Nations*; Thullen, *Problems of the Trusteeship System*; Duncan Hall, *Mandates, Dependences and Trusteeship*; Chowdhuri, *International Mandates and Trusteeship Systems*; *Véicopoulos, Traité des territoires dépendants*.

[10] *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)*, ICJ Rep 1992 p 240. By contrast, the Republic of Cameroon's claim for maladministration against the United Kingdom was held inadmissible: *Northern Cameroons Case*, ICJ Rep 1963 p 15.

Perhaps the fundamental question for both kinds of territory was the location of ultimate authority. Were these territories genuinely under international government, or were they, after all, merely disguised colonies of the administering authority? That issue was much discussed, directly in terms of the application of the concept of 'sovereignty' to Mandates and Trust Territories, indirectly in terms of such issues as revocation and termination. It continued to arise in a variety of ways and under different guises.

## 13.2 Sovereignty over Mandates and Trust Territories

Beginning almost as soon as the idea of mandated territories was put forward, there has been a long-running debate as to the existence and location of 'sovereignty' over Mandates and Trust Territories.[11] According to Quincy Wright, the debate produced 'results, the luxuriance and variety of which are almost baffling';[12] he might have said that it produced no results at all, because no consensus was reached as to exactly 'where' sovereignty over Mandates resided. Nevertheless the matter was politically important, especially for 'C' class Mandates such as South West Africa, because although the new system was instituted expressly for the purpose of avoiding annexation of defeated territories the terms of Article 22 ('integral portion of its territory') were open to interpretation.[13] When a Boundary Agreement of 22 June 1926 between South Africa and Portugal stated that 'The Government of the Union of South Africa, subject to the terms of the . . . Mandate, possesses sovereignty over the territory of South-West Africa . . .'.[14] the Permanent Mandates Commission objected, and after some debate South Africa withdrew the assertion of sovereignty.[15]

One might have thought that the significance of the sovereignty debate ended once it was established that, wherever sovereignty resided, it was not with the administering power. By 1930 this was clear enough.[16] Beyond that point the debate was quite literally baffling. The concept of 'sovereignty' was never clearly analysed; furthermore, the twin assumptions were made that sovereignty must exist 'somewhere' with respect to any territory which was not

[11] See, e.g., Brierly (1929) 10 *BY* 217; Wright, *Mandates under the League of Nations*, 90–2; Toussaint, *Trusteeship System of the UN*, 319–39; Leeper (1951) 49 *Michigan LR* 1199; Riche (1954) 58 *RGDIP* 399; Whiteman, 1 *Digest* 636–50.

[12] *Mandates under the League*, 315.

[13] Brierly said of Art 22 that it was 'so loosely worded that textual comment on it is difficult': (1929) 10 *BY* 217.

[14] 123 BFSP 590.

[15] 3 LNOJ 1189, 1390; 7 LNOJ 859; 7 LNOJ 347, 1120; 10 LNOJ 182. See Bentwich (1931) 12 *BY* 151.

[16] Wright, *Mandates under the League of Nations*, 324–7.

*terra nullius*,[17] and that, ultimately, sovereignty was indivisible, so that it must be vested in a single legal person.[18] These assumptions, characteristic of the period of high positivism, turned out not to be useful in analysing the legal institution created by the Covenant and the Mandate agreements.

The term 'sovereignty' has a variety of meanings. It can be a synonym for independence—in this context not a relevant meaning, with the possible exception of some 'A' Mandates. It can also mean (1) the power of ultimate disposition of a territory; (2) the ultimate beneficial interest in a territory or (3) the plenary power, regulated by international law, of present administration of a territory. In the case of Mandates each of these meanings pointed to a different location of sovereignty—hence the confusion.

## (1) Sovereignty and 'A' Mandates

One possible starting place was the fact that the Covenant and the Mandate agreements appeared to make certain distinctions as to different categories of territory. Thus the former Turkish mandated territories had, in the terms of Article 22

> reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.[19]

This, and particularly the phrase 'existence as independent nations', might have suggested that 'A' Mandates were intended to be States subject to 'special treaty arrangements', with their own independent governments. Only Iraq approached this degree of independence. Great Britain recognized the King of Iraq as an independent Government, and concluded a Treaty of Alliance for a fixed period,[20] at the end of which, if Iraq had not previously been admitted to the League, the Council as a whole was to decide on 'further measures to give effect to Article 22 of the Covenant'.

[17] Diena (1924) 5 *HR* 214, 241; cited Wright, *Mandates under the League of Nations*, 332.

[18] Stoyanovsky, *La Theorie Général des Mandats Internationaux*, 85–6; cited Wright, *Mandates under the League of Nations*, 329.

[19] The latter, apparently compulsory requirement, as to choice of the Mandatories, was not observed: see the Report of the King-Crane Commission, referred to by Wright, *Mandates under the League of Nations*, 45.

[20] The Treaty was for a term of 20 years from October 10, 1922: 35 LNTS 14. See also Treaty of January 13, 1926: 7 LNOJ 551. No Mandate agreement with respect to Iraq was concluded: see instead the Decision of the League Council, 27 September 1924, confirming the Treaty of Alliance: Cmd 2317.

In the cases of Lebanon and Syria under the French Mandate, again it seemed that the task of the Mandatory was not to administer the territory but to see that its administration by the 'local government' conformed with the conditions laid down in the Mandate agreement.[21] But in fact France exercised direct rule throughout the period of the Mandates. Syria and Lebanon, under Mandate governments, made Treaties of Alliance with the Mandatory Powers,[22] carried on international litigation in their own name[23] and had their own nationality.[24] But their status approximated to that of international protectorates rather than protected States.

If the consistency of this state of affairs with Article 22 was not entirely clear, it was even less so in the case of Palestine. There, in order to implement the declared recognition of 'the historical connection of the Jewish people with Palestine and the grounds for reconstituting their national home in that country',[25] the Mandatory was expressly given 'full powers of legislation and administration save as they may be limited by the terms of this mandate.'[26] As a result some writers considered that the Palestine Mandate was 'nearer the B than the A category',[27] emphasizing the special character of the Palestine Mandate.[28]

## (2) Sovereignty and other mandated and trust territories

In relation to the other mandated and (with one exception) trust territories there was no such local governmental autonomy, either according to the

[21] For the Agreement (approved by the League Council on 24 July 1922) see LN Doc C.528.m.313.1922.XI. On the status of Syria see *In re Cassèque & Cot* (French Conseil d'État, 1929) 5 ILR 30 (Post Office officials in Syria and Lebanon not subject to French administrative authority or jurisdiction); *In re Fouad Baddoura* (Brazil, Supreme Federal Tribunal, 1927) 5 ILR 32 ('Syria, being a mandated territory, was really an independent Government under the guidance of France').

[22] The Treaties of Alliance of 9 September 1936 (Syria) and 13 November 1936 (Lebanon) were suspended by the War and never came into force: Hackworth 1 *Digest* 113. See also Agreement of 20 May 1926 between Iraq, Palestine, Syria, Transjordan and Turkey for the creation of an International Office for Information on Locusts: 59 LNTS 128.

[23] See *Radio-Orient Company Case*, between the Levantine States under French Mandate and Egypt, (1940) 3 RIAA 1871. This was an arbitration under the International Telecommunications Convention, Madrid, 9 December 1932, 151 LNTS 5, Art 15.

[24] Bentwich (1926) 7 *BYIL* 97; Whiteman 1 *Digest* 664–7; *AG v Goralschwili*, 3 ILR 47 (Palestine H Ct, 1925); *The King v Ketter* [1940] 1 KB 787 (CCA); *Kletter v Dulles*, 111 F Supp 593, 598 (DC 1953) (Palestine a 'foreign State' for naturalization purposes); 20 ILR 251.

[25] Palestine Mandate, preambular para 3: LN Doc CPM 446. [26] Article 1; see also Art 4.

[27] Stoyanovsky, *The Mandate for Palestine*, 40.

[28] The Mandate for Palestine extended also over the area known as Transjordan, but Art 25 of the Mandate authorized the Mandatory, with the consent of the Council, not to apply certain of its provisions, specifically those relating to the Jewish homeland. This was achieved by a Memorandum of the British Delegate approved by the Council on September 16, 1922 (see [1922] LNOJ 1188: for the Mandate see LN Doc CPM 466, 7), and Transjordan was thereafter administered separately. By an

constituting instruments or in practice. Subject to the limitations contained in the instruments the administering authorities had plenary powers of government. As a result the various indications of sovereignty—dispositive authority, administrative power, beneficial interest—seemed to point in different directions, so that one authority concluded that: 'The totality of functions of the administering authority and the United Nations, and the ultimate interest of the beneficiaries make up the totality of sovereignty, but its incidents are distributed.'[29] Indeed the consensus view came to be that the concept of sovereignty was simply inapplicable to mandated and trust territories. As Lord McNair stated in his separate opinion in *South West Africa (Status)*:

> The Mandates System (and the 'corresponding principles' of the International Trusteeship System) is a new institution—a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other—a new species of international government, which does not fit into the old conception of sovereignty and which is alien to it. The doctrine of sovereignty has no application to the new system. Sovereignty over a Mandated Territory is in abeyance; if, and when the inhabitants of the Territory obtain recognition as an independent State . . . sovereignty will revive and vest in the new State. What matters in considering this new institution is not where sovereignty lies, but what are the rights and duties of the Mandatory in regard to the area of territory being administered by it. The answer to that question depends on the international agreements creating the system and the rules of law which they attract. Its essence is that the Mandatory acquires only a limited title to the territory entrusted to it, and that the measure of its powers is what is necessary for the purpose of carrying out the Mandate . . .[30]

Thus the establishment of a Mandate (or Trusteeship) over a territory did not constitute cession of that territory to the Mandatory.[31] The inhabitants of the territory lost their previous nationality but did not automatically gain the nationality of the Mandatory. In 'B' and 'C' Mandates they were treated as protected persons.[32] Generally speaking, the territory was not considered by

Agreement of 20 February 1928, the Emir Abdullah was recognized as the 'local government': 128 BFSP 273; Wright, *Mandates under the League of Nations*, 458. The status of Trans-Jordan was accordingly similar to that of the other 'A' Mandates, at least after 1928.

[29] O'Connell, *International Law*, vol 1, 369.

[30] ICJ Rep 1950 p 150. See also *Ffrost v Stevenson* (1937) 58 CLR 528, 549–55 (Latham CJ), 565–6 (Dixon J), 579–80 (Evatt J), 612–15 (McTiernan J); *R v Christian* (1924) SALR (AD) 101, 106 (Ross-Innes CJ).

[31] See *Status of South West Africa*, ICJ Rep 1950 p 128, 132.

[32] See Hales (1937) 23 *Grotius ST* 85, 96–111; O'Connell (1954) 39 *BY* 458; Whiteman, 1 *Digest* 667–71.

national courts as part of the territory of the administering State, but as having a special status.[33]

So far as Trust territories were concerned, the only possible exception to this analysis was the Italian Trusteeship over Somaliland, approved by the General Assembly on 2 December 1950 for a fixed term of ten years.[34] Article 24 of the Trusteeship Agreement provided that, at the conclusion of the period of ten years, 'the Territory shall become an independent sovereign State'. Article 1 of the Annexed Declaration of Constitutional Principles stated: 'The sovereignty of the Territory is vested in the people and shall be exercised by the Administering Authority on their behalf and in the manner prescribed herein by decision of the United Nations.'[35] Exactly what the 'sovereignty' referred to in Article 1 meant is unclear: Somaliland was not independent before 1960.[36] It may be that the term 'sovereign' in Article 1 expressed in strong terms the proposition that the people of the territory were entitled to independence; but it is difficult to see what further consequences followed that were not already expressed or implicit in the Charter and the Agreement. In any case the fixed term of the Somaliland Trusteeship may well serve to distinguish it from the other Trusteeships.

[33] US courts took the view that the Pacific Islands did not constitute 'sovereign' territory of the United States: *Brunell v United States*, 77 F Supp 68, 72 (SDNY 1948); 15 ILR 519 (Saipan a 'foreign country' for the purposes of the Federal Tort Claims Act); *Application of Reyes*, 140 F Supp 130, 131 (D Haw 1956) (Kwajalein foreign territory for purposes of US immigration law); *Aradnas v Hogan*, 155 F Supp 546, 547 (D Haw 1957); 24 ILR 57 (Kwajalein foreign territory for purposes of US immigration law); *Porter v United States*, 496 F 2d 583 (Ct Cl 1974), cert den 420 US 1004 (1975) (Government of the Trust Territory not a US agency); *People of Saipan v United States Department of Interior*, 356 F Supp 645 (D Haw 1973), aff'd 502 F 2d 90 (9th Cir 1974), cert den 420 US 1003 (1975); *Gale v Andrus*, 643 F 2d 826 (1980) (FOIA does not apply to Trust Territory, which is not a US government agency); *Bank of Hawaii v Balos*, 701 F Supp 744 (D Haw 1988); 84 ILR 201 (Marshall Islands a 'foreign state' for purposes of diversity jurisdiction). Although the situation was left for a time ambiguous with respect to Palau (*In re Bowoon Sangsa Co*, 720 F 2d 595 (9th Cir 1983) (Palau courts not 'foreign' until full independence); *Morgan Guaranty Trust Co v Republic of Palau*, 639 F Supp 706, 714 (SDNY 1986). 87 ILR 590 (adoption of Compact and Palau Constitution 'reactivated a sovereignty which had been dormant'), judicial determinations remained broadly consistent on the separate status of the units of the Territory.

[34] GA res 442(V) (44–6:0).

[35] 118 UNTS 225. See also *Società ABC v Fontana and Della Rocca* (Italy, Corte di Cassazione) (1954) 22 ILR 76, 77–8: 'it is clearly wrong to say that acts performed by the State which has the power of administration over a Trust Territory can be regarded as foreign in relation to its own legal system, even though they concern another subject of international law . . . The Trusteeship Administration which has been entrusted to Italy comes within the limits and scope of the Italian legal system . . .': but cf *Trafficante v Ministry of Defence* (Consiglio di Stato, 1961) 40 ILR 37.

[36] Cf the terms of GA res 289(IVA), 21 November 1949 (48–1:9): '1. That Somaliland *shall be* an independent sovereign State; 2. That this independence shall become effective at the end of ten years from the date of the approval of a Trusteeship Agreement by the General Assembly.'

The notion of 'sovereignty' then was inapplicable to the system of Mandates and Trusteeships, according to the received view. Nevertheless writers tended to be internally consistent in their approaches to the questions of sovereignty, termination and revocation—deducing, for example, the existence of a power of revocation from the location of a residual sovereignty in the League or the United Nations,[37] or conversely the impossibility of revocation from the existence of sovereignty 'subject to the Mandate' in the Mandatory.[38] Neither approach is satisfactory. The implications to be drawn from the creation and structure of the two systems are not usefully summarized one way or another by the concept of sovereignty, which, if anything, would be a conclusion from the power of revocation rather than its premiss.

It may still be asked why the concept of sovereignty was inapplicable to the two systems. Chapter XI of the Charter embodies substantive obligations on metropolitan States with respect to their 'Non-Self-Governing Territories' not notably different from the substantive obligations of the Trusteeship System, yet it is generally considered that United Nations Members retain sovereignty over their non-self-governing (colonial) territories. The novelty of the Mandate (and Trusteeship) systems was the extent of international supervision and control over the Mandatory, and in particular over the ultimate disposition of the territory. The Mandate as a whole was, as the International Court pointed out, bound up with and inseverable from a form of international control in the interests of the inhabitants of the territory.[39] The crux of the non-sovereign position of the Mandatory or Administering Authority was that it could not unilaterally determine the status of the territory. That required international action, normally exercised through the competent League or United Nations body.

On the other hand this did not mean that either the League or the United Nations were themselves sovereign over mandated or trust territories. Whether or not international organizations can be the holders of territorial sovereignty, the point of their position was supervision, not beneficial interest. The fundamental long-term goal of Mandates and Trust territories was the progression to self-government of the people of the territory. Their rights in that regard were not rights of any international organization, and as the practice showed, those rights still had to be made effective when the organization was dissolved or if it signally failed to act.

[37] E.g., Lauterpacht, *Private Law Sources and Analogies of International Law*, 198, 200–1.

[38] Lindley, *Acquisition and Government of Backward Territory in International Law*, 247–69; cf Judge Fitzmaurice, *Namibia Opinion*, ICJ Rep 1971 p 16, 267 (para 69).

[39] *Status of South West Africa*, ICJ Rep 1950 p 128, 136–8.

### (3) Legal personality of mandated and trust territories

Mandates and Trusteeships were established by a series of international agreements. It could therefore be argued that the obligations owed by Administering States in respect of the peoples of the territories were owed to the other parties to the agreements and not to the dependent people themselves. According to Quincy Wright: 'Since the 'A' mandated communities were not parties to the peace treaties they could not acquire rights from them. Thus the Permanent Mandates Commission has properly refused to consider petitions from the inhabitants of the areas based on the alleged incompatibility of the mandates with article 22 . . .'.[40] On the other hand, some Mandate agreements did seem to confer rights on the people of the territory, for example, to maintain their own schools in their own language,[41] although these provisions on the whole were confined to 'A' Mandates. Rights could also be said to have derived from the practice of the League and the United Nations. For example, there was no express right of petition allowed in the Covenant, but in practice petitions were received, through the Administering State or in some cases directly.[42]

More fundamentally, the legal personality of both mandated and trust territories can be implied from their character and from subsequent international practice. There was authority for this view even during the League period: in a Resolution of 1931 the Institute of International Law described the communities under Mandate as subjects of international law.[43] The International Court referred to their 'international status', separate and distinct from that of the Mandatory[44] and more specifically, to the 'right of the population to have the territory administered in accordance with' the Mandate, drawing the conclusion that the Mandate continued to exist despite the demise of the League of Nations.[45] Closely related is the status of mandated and trust territories as self-determination territories: self-determination must be regarded as a legal right of the peoples of these territories.

## 13.3 Termination of Mandates and Trusteeships

The basic principles of the distribution of authority over mandated and trust territories were worked out in the course of a series of episodes involving the

[40] Wright, *Mandates under the League of Nations*, 119, 458; citing *PMC* Minutes, V, 96; VIII, 47, 200.

[41] Syria and Lebanon Mandate, Art 8; Palestine Mandate, Art 15.

[42] Covenant Art 22(8); Charter Art 87(b); *South West Africa (Hearing of Petitioners)*, ICJ Rep 1956 p 23; Wright, *Mandates under the League of Nations*, 169–78; Thullen, *Problems of the Trusteeship System*, 75–81.

[43] (1932) 26 *AJIL* 87, 91, Res VI; Pélichet, *Personalité internationale distincte des collectivités sous Mandat*, 59–64.

[44] ICJ Rep 1950 p 128, 13–23.

[45] Ibid, 134–5. Judges McNair and Read were more cautious: ibid, 158, 169.

termination of mandated or trust status, or the transfer from the former to the latter.

## (1) Termination of Mandates

### *(i) During the period of the League*

Neither the Mandate agreements nor Article 22 of the Covenant made express provision for the termination of Mandates, though Article 22 did state that 'the degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by Members of the League, be explicitly defined in each case by the Council.' In the event, four Mandates—the 'A' Mandates for Iraq, Syria, Lebanon and Transjordan—were terminated by independence before the dissolution of the League in 1946. Of these, only the British Mandate for Iraq was actually terminated by agreement between the new State, the Mandatory and the Council.[46] This occurred in 1932, but it was the culmination of a longer process of emancipation. As early as 1924, a British representative to the League had said that his Government

> no longer think it practicable to adopt a mandatory form, even to regulate our obligations towards the League. The conception of a mandate is not popular among the people of Iraq. It is held to imply a form of tutelage inconsistent with the facts as they stand to-day and with the large measure of independence which the Iraq State has actually acquired. In other words, Iraq has advanced too far along the path laid down in Article 22 of the Covenant for the particular form of control contemplated in that article to be any longer appropriate.[47]

In the period 1924 to 1930, a series of agreements between Iraq and Great Britain largely prefigured formal independence.[48]

The history of the termination of the other three Mandates is of considerable interest, both in itself and as illustrating the character of the Mandate regime.

[46] LNOJ (1932), 1212, 1347; Bentwich (1930) 11 *BY* 193; Wright (1931) 25 *AJIL* 436; Tripp, *A History of Iraq*, 30–76.

[47] Lord Parmoor to the Council of the League of Nations, 19 September 1924: LNOJ (1924) 1314.

[48] The United Kingdom and Iraq on 10 October 1922 had concluded a Treaty of Alliance specifying terms of the Mandatory relationship and providing that Iraq in time would become independent: 119 BFSP 389. The Council of the League, acknowledging this transaction, on 27 September 1924 approved a Mandate in light of the British representative's description of the special status of Iraq: LNOJ (1924) 1346–7. The period for which the 1922 Treaty would remain in force was defined in an agreement of 13 January 1926: 123 BFSP 446. The Mandatory and the government in the mandated territory on 30 June 1930 concluded a further Treaty of Alliance which again made provision for the independence of Iraq: 132 BFSP 280. See Gray and Olleson (2001) 12 *Finish YBIL* 354, 394. From the treaty practice it may be inferred that even before its full independence and admission to the League in 1932, Iraq was something more than a dependency of the Mandatory. Cf USFR 1943/IV, 990 (Aide-Mémoire of the British Embassy (Washington) to the Department of State, 18 September 1943).

Turning first to the French Mandates for Syria and Lebanon, on 27 September 1941 General Catroux proclaimed the independence of Syria and on 26 November 1941 of Lebanon.[49] These proclamations notwithstanding, the French Government on the whole took the view that the Mandates remained formally in existence until terminated by the League Council, and that the continued existence of the Mandates justified continued French rights with respect to Syria and Lebanon,[50] including the right to impose a treaty of future relations and to determine the composition of local government. Transfer of governmental authority was not immediate, and, in the case of Lebanon, uncertainty over French rights under the Mandate was a contributing factor to a constitutional crisis, resolved only after the United States, United Kingdom and Arab States communicated to the French Committee of National Liberation in Algiers their view that the Mandate neither continued in force nor, after termination, gave France authority to rescind decisions taken by the Lebanese parliament.[51] The United States in November 1942 accredited a Diplomatic Agent and Consul General to Beirut and Damascus, a measure it characterized as 'limited recognition'.[52] But it withheld an unequivocal statement of recognition, pending transfer by France of governmental functions to the Lebanese and Syrian authorities. The transfer was declared by the French Committee of National Liberation in December 1943 and entered into force on 1 January 1944.[53] An exchange of notes took place in September 1944, in which the governments of Lebanon and Syria affirmed the continuation of American rights as agreed in a Convention of 1924, and the United States extended full recognition.[54] 'Limited' recognition and the delay before full recognition aside, at no stage did the United States regard the continuation of the Mandate as an obstacle to independence. Rather, the view was consistently taken that the independence of the two States, provided it was sufficiently

[49] USFR 1941/III, 786; ibid, 1941/III, 805.

[50] USFR 1941/III, 790–1, 809; ibid, 1942/IV, 616; ibid, 1943/IV, 956 ('non-recognition by most foreign States justified in itself a continuing exercise of the mandatory power'); ibid, 1944/V, 785, 811.

[51] Parliament in early November 1943 had made amendments to the constitution, striking out references to the Mandate. France on 11 November forcibly dissolved the parliament, arrested the president and cabinet, and put in place a government consisting of its own nominees. USFR 1943/IV, 1003, 1011–12. French authorities on 22 November 1943 released the Lebanese politicians from jail, permitting the president, and, later, the members of his cabinet, to resume their official functions: ibid, 1943/IV, 1040–3, 1055.

[52] USFR 1942/IV, 667, 673. See also ibid, 1943/IV, 984 n 51, 1000, 1049–50.

[53] USFR 1943/IV, 1055.

[54] *Department of State Executive Agreement Series*, No 435; 58 Stat (pt 2) 1493; *Department of State Executive Agreement Series*, No 434; 58 Stat (pt 2) 1491. The United States–France Convention of 4 April 1924, in which France guaranteed American rights in Lebanon and Syria, is at USFR 1924/I, 741.

effective, could be recognized as consistent with the object and purpose of the Mandate, notwithstanding the absence of formal termination by the League.[55] Egypt, which had recognized Syria in October 1941 and Lebanon in September 1943, expressed a similar view,[56] as did Syria.[57] The British Government attempted to mediate between the United States and France, and in the process took a somewhat equivocal stance on termination.[58] However, British action, and in particular the ultimatum of May 1945,[59] was inconsistent with the retention by France of substantial authority over Syria or Lebanon.

In the event, no formal League action was taken to terminate the Mandate, which disappeared 'with graceless reluctance'.[60] No treaty with France formally terminating the French administration was concluded. The League Assembly at its final session merely welcomed 'the termination of the mandated status of Syria, the Lebanon, and Transjordan, which have, since the last Session of the Assembly [i.e. in 1939], become independent members of the world community.'[61] Syria and Lebanon both became original members of the United Nations.

The same position was taken by both the United States and the United Kingdom when the independence of Transjordan was recognized by the

[55] USFR, 1942/IV, 647–8, 665; ibid, 1943/IV, 966, 987, 1007 ('no useful purpose would be served by an academic debate on the juridical technicalities of this complex situation. The validity of the French thesis is dubious, at best, and for practical purpose the League Mandate must be regarded as being in suspense'); ibid, 1944/V, 774, 782, 785, 795–7; ibid, 1945/VIII, 1197. The Secretary of State, in a note of 22 August 1943 to the Diplomatic Agent and Consul General at Beirut, articulated a standard for recognition based on effectiveness. Recognition of the executive in a State, the Secretary wrote, was to be deferred until '1) It is in possession of the machinery of State, administering the government with the assent of the people thereof [and] 2) It is a position to fulfill the international obligations and responsibilities incumbent upon a sovereign state under treaties and international law.'

[56] According to the Prime Minister of Egypt, the Mandate 'disappeared in fact and in law on the day when the French and British Governments recognized the independence of Syria and the Lebanon. At that time they admitted that [the] League of Nations was not functioning and that Syria and Lebanon could not await its problematical resurrection in order to ratify [the] decision of [the] French and British. If the mandate remained in force, [the] British and French had no right to declare independence and conversely by so doing they put [an] end to the mandate.' USFR 1943/IV, 1012.

[57] Ibid, 1944/V, 786.

[58] Cf ibid 1941/III, 802, with 1942/IV, 646. See also 1943/IV, 900; 1945/VIII,1041; 393 *HC Deb* col 157, 27 Oct 1943.

[59] USFR 1945/VIII, 1124.

[60] Longrigg, *Syria and Lebanon under French Mandate*, 317. Consistent with this characterization, France continued to press the view that the Mandate had some continuing vitality, arguing well after other parties had taken the issue as settled, that a treaty between the two states and France was necessary to terminate the Mandate and that such treaty should accord France a special status in Lebanon and Syria. See USFR 1944/V, 783–4.

[61] LNOJ 21st Ass (1946) Sp Supp No 194, 58. Cf the Franco-Lebanese Agreement of 24 Jan 1948; 173 UNTS 101, and the Franco-Syrian Financial Agreement of 7 Feb 1949; Rollet, 199.

conclusion of a Treaty of Alliance on 22 March 1946.[62] The separate status of Transjordan from the rest of Palestine already had been suggested by Article 25 of the Mandate, which provided that Britain, with the approval of the Council of the League, could suspend implementation of certain Mandate provisions east of the River Jordan.[63] By an Amendment to the Mandate approved in September 1922, Britain was authorized to divide the territory into two, and to limit the application of the Balfour Declaration to the area to the west, excluding Transjordan.[64] As described in the Palestine Order in Council of 1 September 1922, Transjordan consisted of 'all territory lying to the east of a line drawn from a point two miles west of the town of Aqaba on the Gulf of that name up the centre of the Wadi Araba, Dead Sea and River Jordan to its junction with the Yarmuk: hence up the centre of that river to the Syrian frontier.' Self-determination for the residents of Transjordan was achieved in stages and on the basis of the territory so delimited. The first stage was a Treaty between Great Britain and the Emir Abdullah of 20 February 1928;[65] the culmination was the Treaty of Alliance of 22 March 1946, already referred to. Although various links existed, and exist, between Jordan and the Occupied Palestinian Territory (not limited to the period 1949 to 1967 when Jordan administered the West Bank), nonetheless the effect of the separation was that issues of self-determination in respect of Palestine properly so-called, i.e. the area west of the 1922 line, had thereafter to be separately resolved. The 1994 Peace Treaty between Israel and Jordan affirmed that the western boundary of Jordan is the line laid down in 1922, but left other issues to be resolved as part of the Permanent Status Negotiations.[66]

In 1946, a British *Aide-Mémoire* stated that objections to the form by which Transjordan acceded to independence were:

> answered by the fact that (a) their intention to grant independence to Transjordan was announced at an early session of the United Nations Assembly in London, where it was not challenged by any delegate, and (b) that the final assembly of the League of Nations passed a resolution approving and welcoming this action . . . In the light of the above and of the welcome given by the United Nations Assembly in January to the announcement of His Majesty's Government's intention to recognise Transjordan as an independent

[62] Treaty of Alliance between the United Kingdom and Transjordan, with Annex and Exchange of Notes, London, 22 March 1946, 146 BFSP 461, There is no reference in the Treaty to termination of the Mandate. [63] 8 LNOJ 1007 (24 July 1922). See also Watson, *The Oslo Accords*, 18.

[64] 116 BFSP 849.

[65] Agreement between the United Kingdom and Transjordan respecting the Administration of the Latter, Jerusalem, 20 Feb 1928, 128 BFSP 273.

[66] Israel–Jordan Treaty of Peace, Avaba/Araba Crossing Point, 26 October 1994: (1995) 34 ILM 43. See generally Al Madfai, *Jordan, The United States and the Middle East Peace Process 1974–1991*.

State . . . His Majesty's Government feel that, in so far as general international approval is required for setting up Transjordan as an independent State, such approval has in fact been manifestly given.[67]

The legality of this process was challenged by Poland in the Security Council when Transjordan's application for United Nations membership was under discussion.[68] The Polish representative did not appear to argue that Transjordan could not become independent without the consent of the League Council or transfer to Trusteeship. Rather he doubted whether Transjordan had in fact attained independence, and claimed that the consent of the General Assembly was a condition precedent to any such independence. Great Britain contended that such consent had in fact been given.[69] Jordan was eventually admitted to membership in 1955.[70]

It is clear, then, that these three Mandates were effectively and validly terminated without the consent of the League Council. According to one view, the reason is to be found in the fact that 'A' Mandates, having already 'provisional independence', were subject to different procedures regarding termination.[71] But there was no textual basis for this distinction; Article 22 of the Covenant applied equally to all classes of Mandate. The better view is that approval by the Council was not a condition to valid termination of a Mandate. Termination of a Mandate involved compliance with the basic purpose of the Mandate[72] and a determination of political fact—that effective self-government existed.[73] In default of approval by the League Council, recognition by individual States and appropriate action by the General Assembly was seen as sufficient to terminate the Mandate with full legal effect. And this conclusion must be right: otherwise the dissolution of the League would have deprived the mandated people of the self-government or independence which it was the principal purpose of the Mandate system to advance.[74]

[67] USFR 1946/VII, 799–800. The US view was that 'formal termination of the mandate . . . would be generally recognized upon the admission of [Trans-Jordan] into the United Nations as a fully independent country': ibid, 798.

[68] *SCOR* 1st yr, 2nd sess Suppl No 4, 70–1 (S/133); Higgins, *Development*, 30–1.

[69] In particular by GA res 11(I), 9 Feb 1946, clause 3 (adopted unanimously), noting with approval the Mandatory's intention to grant independence to Transjordan.

[70] GA res 995(X), 14 December 1955.

[71] This was the US view in 1946: USFR 1946/VII, 797.

[72] Throughout the Syria–Lebanon conflict the US emphasized that the independence of the two States was a right recognized and guaranteed by the Mandate: cf ibid, 1943/IV, 1008.

[73] Cf Report of PMC, June 1931 (Iraq), discussed by Hales (1937) 23 *Grotius ST* 85, 117.

[74] To the same effect, Duncan Hall, *Mandates, Dependences and Trusteeship*, 265–6; Longrigg, *Syria and Lebanon under French Mandate*, 362. In the *Aegean Sea Continental Shelf* case, Judge Tarazi expressed the view that attainment of independence automatically released the Mandatory from its obligations and thus terminated the Mandate: ICJ Rep 1978 p 3, 58.

In one other case—viz, the loss by Japan of its right to administer the Pacific Islands Mandate—dispositive elements of a Mandate were altered. What was terminated there was not the Mandate but rather the authority of the Mandatory: the matter is closer to revocation than to termination and is dealt with below. Once again no League approval for the change was forthcoming.

### *(ii) After the dissolution of the League*

Only two Mandates survived the dissolution of the League without being transferred to the Trusteeship system—Palestine and South West Africa. With regard to both, the General Assembly unequivocally asserted its authority, each Mandatory having made a request as to the future disposition of the territory. General Assembly action with respect to Palestine has been referred to already: it is clear that, at the least, GA resolution 181(II) was effective to terminate the Mandate for Palestine, although its relevance for the future disposition of the territory was disputed.

The General Assembly also refused a South African request for permission to annex South West Africa.[75] Then, when it became clear that the territory would not be brought under Trusteeship, it asserted authority to carry out the supervisory functions of the Mandate. In this it was upheld by the International Court in *Status of South West Africa*. The Court unanimously held that the Mandate had survived the dissolution of the League and by twelve votes to two (Judges McNair and Read dissenting) that the supervisory functions were to be exercised by the Assembly.[76] In the light of United Nations practice, the rationale behind the Opinion, and the South African request for permission to annex, there can be little doubt that the Assembly also had the authority to terminate the Mandate. The extent of this authority will be discussed in the context of revocation.

### *(iii) By transfer to Trusteeship*

All the 'B' Mandates and all but one of the 'C' Mandates were terminated by transfer to the Trusteeship system. Yet again no League Council approval for this disposition was forthcoming, though the League Assembly did 'take note' of the new system.[77] Approval of the new arrangements was a matter for the

[75] GA res 65 (I), 14 Dec 1946 (37–0:9).

[76] ICJ Rep 1950 p 128, 136–7; 155–62 (Judge McNair); 169 (Judge Read).

[77] Assembly resolution of 17 Apr 1946: LNOJ Sp Supp No 194, 254. For the arguments concerning the rejection of the 'Chinese' draft resolution purporting to transfer supervisory functions to the UN see Judge Jessup, *South West Africa Cases (Second Phase)*, ICJ Rep 1966 p 6, 347–8; but see Judge Fitzmaurice, *Namibia Opinion*, ICJ Rep 1971 p 6, 247–9.

General Assembly acting with the Mandatory.[78] The validity of this transfer from Mandate to Trusteeship system was never challenged.[79] This emphasizes again the role of the Charter and the General Assembly in the winding-up of the old system and in the maintenance in various ways of the principles embodied in both old and new.

## (2) Termination of Trusteeships

By contrast with the various expedients adopted for League Mandates, the termination of Trusteeships was for the most part an orderly process. Each Trusteeship was terminated by agreement between the Assembly and the Administering Authority, in most cases after plebiscites under United Nations authority had been conducted.[80] In fact the only major controversy that arose in this regard concerned the last territory covered by the Trusteeship system, the Trust Territory of the Pacific Islands (TTPI). As noted already, this was the only Trust territory designated a 'strategic area' under Article 82 of the Charter, hence the term 'Strategic Trust Territory', which was sometimes used.[81]

The Trusteeship Agreement for the TTPI was approved by the Security Council in 1947, covering the former Japanese Mandate.[82] The 'strategic' designation placed it under the responsibility of the Security Council rather than the General Assembly,[83] and this created problems when the United States sought to wind up the Trusteeship. Both the Trusteeship Council and General Assembly had consistently expressed the view that the principle of

[78] Cf Charter, Arts 79, 85(1).

[79] The term 'States directly concerned' in Art 79 did, however, lead to controversy: Parry (1950) 27 *BY* 164.

[80] Whiteman, 1 *Digest* 897–911, 13 *Digest* 679–90; Toussaint, *Trusteeship System of the UN*, 125–42; Marston (1969) 18 *ICLQ* 1.

[81] The Trusteeship Council when referring to the TTPI followed the form of the UN Charter, where the term 'Strategic Trust' does not appear. The Council referred to a Trust Territory designated a 'strategic area'. See, e.g., Trusteeship Council res 2183 (LIII) of 28 May 1986 (determining that Trustee 'has satisfactorily discharged its obligation under the terms of the Trusteeship Agreement and that it is appropriate for that Agreement to be terminated'); TC res 2185 (LIV) of 26 May 1987 (regarding observer mission for plebiscite in Palau); TC Council res 2187 (S-XVIII) of 13 August 1987 (also regarding observer mission for plebiscite in Palau); TC res 2199 (LXI) of 25 May 1994 (determining that Trustee has discharged Trusteeship Agreement obligations with respect to Palau). The Security Council followed this form as well. See, e.g., SC res 21 (1947) of 2 April 1947 (Art 1) ('The Territory of the Pacific Islands, consisting of the islands formerly held by Japan . . . is hereby designated as a strategic area and placed under the Trusteeship System established in the Charter of the United Nations. The Territory of the Pacific Islands is hereinafter referred to as the Trust Territory.' In the *South West Africa Cases (Second Phase)* the Court referred, however, to 'the strategic trusteeship of the Pacific Islands', ICJ Rep 1966 p 6, 49.

[82] SC res 21 (1947), 2 April 1947. The United States ratified the Agreement on 18 July 1947: 8 UNTS 189.

[83] *Juda v United States*, 13 Cl Ct 667, 678–81 (1987).

territorial integrity applied to Trust territories, and that independence should therefore be granted to the territory as a whole.[84] Indeed the United States itself claimed to prefer a grant of independence to the TTPI as a single unit. But as in certain other contexts, territorial integrity was rather a presumption than a rule. As the US Permanent Representative wrote:

> The United States regrets that the exercise of full self-determination by the peoples of the Territory has led to the decision to divide the Territory into more than one entity. However, both the United States and the Trusteeship Council are in agreement that it is ultimately for the Micronesians themselves to decide upon their political relations with one another. To take any other position, for example, that unity should be imposed upon the people of the Trust Territory, would make a mockery of the concept of self-determination as democratically conceived.[85]

Thus the principle of the unity of the TTPI could not be sustained, given the opposition of its peoples. In referenda, plebiscites and negotiations through the 1970s and 1980s they expressed the wish to be constituted as four separate entities.[86] In February 1975 a Marianas Political Status Commission concluded with the United States a Covenant providing for the Commonwealth of the Northern Marianas in political union with and under the sovereignty of the United States and conferring United States citizenship on the inhabitants.[87] As to the areas apart from the Marianas, a meeting at Hilo, Hawaii in April 1977 resulted in Agreed Principles for Free Association,[88] which envisaged individual negotiations with different parts of the territory.[89] The people of the Marshall Islands approved a constitution on 21 December 1978, and of Palau a constitution on 9 July 1979. On 1 October 1982 the Federated States of Micronesia—an entity comprising Yap, Ponape, Truk and Kosrae—signed a

[84] Trusteeship Council, 42nd session, provisional verbatim record of the 1448th & 1449th meetings, New York, 29 August 1975 (T/PV1448, T/PV1449). The same policy was applied to South West Africa: see SC res 385, 30 January 1976, para 4; GA res 32/9/D, 4 November 1977 (regarding Walvis Bay). The Odendaal 'Homeland' scheme, whereby South Africa would have divided Namibia into purportedly independent tribal units, is described by Kaela, *The Question of Namibia*, 78–90.

[85] Letter to the President of the Trusteeship Council, 24 April 1979, quoted in Clark (1980) 21 *Harv ILJ* 1, 81.

[86] See Igarashi, *Associated Statehood in International Law*, 169–226.

[87] Covenant of the Commonwealth of the Northern Mariana Islands with the United States, 15 February 1975; approved by PL 94–241, 90 Stat 263 (1976); in force 9 January 1978. See Igarashi, *Associated Statehood*, 212–15. The separation of the Northern Marianas and their establishment as a Commonwealth is reviewed in *United States v Guerrero*, 4 F 3d 749, 751–2 (9th Cir 1993). See also Willens and Siemer, *National Security and Self-Determination: United States Policy in Micronesia* (1961–1972).

[88] Clark (1980) 21 *Harv ILJI*, 8–11; McKibben (1990) 31 *Harv ILJ* 257.

[89] Three commissions represented the three remaining segments of the TTPI: a Committee on Future Political Status and Transition representing Kosrae, Ponape, Truk and Yap (to form the Federated States of Micronesia); the Marshall Islands Political Status Commission and the Palau Political Status Commission. See (1978) 72 *AJIL* 882–3; Igarashi, *Associated Statehood*, 200–1.

Compact of Free Association with the United States reflecting the Hilo Principles. On 25 June 1983 the Marshall Islands signed a similar Compact.[90]

The United States reported these developments to the Trusteeship Council, which expressed approval but urged the three entities to move toward independence as a single unit. In particular the Soviet Union expressed the view that fragmentation of the TTPI was incompatible with the obligations of the United States under the Trusteeship Agreement, referring to the new arrangements as nothing but a 'new form of colonialism'.[91] The Trusteeship Council nonetheless determined that 'the peoples of the Northern Mariana Islands, the Marshall Islands, the Federated States of Micronesia and Palau have freely exercised their right to self-determination in plebiscites observed by the visiting missions of the Trusteeship Council' and that 'the Government of the United States, as the Administering Authority, has satisfactorily discharged its obligations under the terms of the Trusteeship Agreement.'[92] The various association agreements thereupon entered into force: the Compact of Free Association with the Marshall Islands on 21 October 1986; the Commonwealth Covenant with the Northern Mariana Islands and the Compact of Free Association with the Federated States of Micronesia both on 3 November 1986.[93] The Security Council determined in resolution 683 of 22 December 1990 that 'the applicability of the Trusteeship Agreement has terminated with respect to those entities.' The Federated States of Micronesia and the Republic of the Marshall Islands became member states of the United Nations in December 1991.[94]

These developments notwithstanding, termination of the Trusteeship Agreement did not occur simultaneously for all parts of the territory. Challenges as to the consistency of the Compact of Free Association with constitutional provisions concerning de-nuclearization of Palau delayed entry into force of the Compact of Free Association between the United States and Palau until 1994.[95] Security Council resolution 956 of 10 November 1994 determined that the United States had discharged in full its obligations with

[90] These were ratified by the US Congress on 14 January 1986: PL 99–239, 99 Stat 1770 (1986).

[91] T/PV1621, 32, quoted by Igarashi, *Associated Statehood*, 218 n 202.

[92] TC res 2183 (LIII), 28 May 1986.

[93] Proclamation 5564, 51 *FR* 40399.

[94] SC res 703, 9 August 1991; SC res 704, 9 August 1991; GA res 46/2, 20 December 1991; GA res 46/3, 20 December 1991.

[95] The Appellate Division of the Palau Supreme Court determined in September 1986 that the consent of 75% of the electorate was necessary to approve the Compact: *Gibbons v Salii*, No 8–86 (1986), cited at *Morgan Guaranty Trust v Palau*, 924 F 2d 1237, 1240 (1991); 87 ILR 590. The process of negotiation, plebiscites, and amendments to the Compact carried on for some time: Igarashi, *Associated Statehood*, 218–26. The Compact finally entered into force on 1 October 1994: Proclamation 6726, 59 *FR* 49777.

respect to Palau under the Trusteeship Agreement. Palau was admitted to the United Nations in December 1994.[96]

At various stages during this process it was unclear whether the Security Council (under threat of the veto) would agree formally to terminate the 1947 Agreement. Since the Hilo Principles reflected international law standards on free association, and since there was no prospect of the Territory achieving independence as a whole, even the Council eventually had no alternative but to approve these negotiated arrangements.

### (3) Legal effects of termination

In the *Northern Cameroons* case,[97] the Republic of Cameroon (formerly the French Trust Territory of the Cameroons) alleged that the United Kingdom had failed to lead the peoples of Northern Cameroons to self-government according to Article 76(b) of the Charter; and in particular that the administrative union of the Northern Cameroons with Nigeria before independence was in breach of the Trusteeship Agreement.[98] It argued that the administrative union had induced the population of the Northern Cameroons area to vote for union with Nigeria rather than Cameroon. The Court held the application inadmissible on the basis that

> the proper limits of its judicial function do not permit it to entertain the claims submitted to it . . . [in the Application of which it has been seized], with a view to a decision having the authority of *res judicata* between the Republic of Cameroon and the United Kingdom. Any judgment which the Court might pronounce would be without object.[99]

The reason why the Court could not pronounce a judgment 'capable of effective application' was that the General Assembly in approving resolution 1608 (XV) had disposed of all the legal issues—at least, those relating to the basic trusteeship obligations as distinct from individual rights of United Nations Members, such as for example to equality of treatment. The effect was that 'no question of actual legal rights [was] involved'.[100]

> It was . . . [not to this Court but] to the General Assembly of the United Nations that the Republic of Cameroon directed the argument and the plea for a declaration that the plebiscite was null and void. In paragraphs numbered 2 and 3 of resolution 1608(XV) the General Assembly rejected the Cameroon plea. Whatever the motivation of the

[96] SC res 963, 29 November 1994; GA res 49/63, 15 December 1994.

[97] *Northern Cameroons Case*, ICJ Rep 1963 p 15.

[98] A similar argument had been rejected by the General Assembly: *GAOR* 15th Sess, Supp No 16A; Doc A/PV 994, 77 (64–23:10).

[99] *Northern Cameroons Case*, ICJ Rep 1963 p 15, 38.

[100] Ibid, 37.

General Assembly in reaching the conclusions contained in those paragraphs, whether or not it was acting wholly on the political plane and without the Court finding it necessary to consider here whether or not the General Assembly based its decision on a correct interpretation of the Trusteeship Agreement, there is no doubt . . . that the resolution had definitive legal effect . . .[101]

Three basic issues were involved at this stage of the case: first, whether the Republic of Cameroons had any legal rights in the due administration of the British Cameroons under the Trusteeship; second, whether any such rights survived the termination of the Trusteeship; and third, whether even if such rights existed and survived, the Court ought in the circumstances to adjudicate upon them. Although the *dispositif* appears to be phrased in terms of the third alternative, it is clear that the decision is based on the second. Even if legal rights in the general administration of the Trusteeship existed prior to April 1961, termination of the Trusteeship 'had definitive legal effect' as regards any such rights. As to the first point, the majority expressed no clear view. As to the third point, it is again unclear what the majority would have done if it had held that the Cameroon had subsisting legal rights in the Trusteeship Agreement. The difficulty was that any judgment potentially affected a State not a party to the proceedings before the Court, raising the *Monetary Gold* principle, i.e. the principle that the Court lacks jurisdiction where the legal interests of a State not party to the proceedings 'would not only be affected by a decision, but would form the very subject-matter of the decision.'[102] But the case was actually dismissed on grounds of mootness, on the basis that an authoritative decision had already been made.[103]

Thus in determining a Trusteeship Agreement the General Assembly resolution has a more than recommendatory effect: it is one of those matters over which the Assembly possesses executive authority. It may be asked how this is so, given the incapacity of the Assembly in most areas to create or modify the legal position of States. The answer seems to be that the Assembly's function is a determinative one—that it is designated by the Charter to decide particular matters of political fact, applying principles of self-determination

[101] Ibid, 32; Judge Wellington Koo, ibid, 57. Judge Fitzmaurice's opinion is on different grounds: if individual States had rights in the system, no General Assembly resolution could determine them (ibid, 120). But they have no such rights (ibid, 108 ff).

[102] *Monetary Gold Removed from Rome in 1943*, ICJ Rep 1954 p 32, 33; 20 ILR 441.

[103] That GA res 1608 (XV) had definitive legal effect is not to deny that the Court was seised of a legal issue—the propriety of the administrative union of the Northern Cameroons province with Nigeria. But that legal issue was 'remote from reality' and could have, at the time of judgment, no legal consequences. Hence the inadmissibility. For a municipal analogy see *Buck v AG* [1965] Ch 745 (CA); 42 ILR 11.

implicit in the Trusteeship instruments. It is necessary that in these matters there be some finality. The General Assembly, exercising these functions, puts an effective end to the Trusteeship. The territory is then incorporated in or associated with another State ('self-government') or becomes independent—in either case a new situation has arisen, the legality of which cannot be open to question so far as third States are concerned.

On the other hand, the termination of mandated or trusteeship status does not necessarily determine legal disputes relating to the administration of the territory that are distinct from the issue of final political status. The practice in this regard is reviewed below.

## 13.4 Revocation of Mandates and Trusteeships

More controversial in its day was the question whether the competent international organ—the League Council or the General Assembly—could act against an administering authority which was flouting its authority. Again, however, the developing practice sustained the affirmative conclusion.

### (1) Revocation of Mandates during the League period

It is hardly surprising that the question of revocation was not much discussed at the time of the establishment of the Mandate system.[104] It cannot, however, be assumed that because the matter was not dealt with revocation was legally impossible.[105] Considering the basic notions of 'mandate' and 'trust' it seems more likely that revocation was implicit in the system: otherwise a Mandatory guilty of flagrant violation of the whole purpose of the Mandate would go unchecked. In the words of the Privy Council in a somewhat different context

> certain legal incidents attach *de jure* to the relationship which is constituted by the grant of authority on the one hand . . . and the exercise of that authority by the recipient of it on the other according to his mandate. It is not that this arises out of some unexpressed stipulation: it is annexed to the relationship.[106]

[104] But it was envisaged in Smuts' original proposal, *The League of Nations—A Practical Suggestion*, reprinted in Miller, *The Drafting of the Covenant*, vol II, 32: 'in case of any flagrant and prolonged abuse of this trust the population concerned should be able to appeal for redress to the League, who should in a proper case assert its authority to the full, even to the extent of removing the mandate, and entrusting it to some other state, if necessary.'

[105] The arguments against revocability of Mandates are set out in Judge Fitzmaurice's dissenting opinion in the *Namibia Case*, ICJ Rep 1971 p 16, 264–79. See also Slonim, *South West Africa and the UN*.

[106] *In re Southern Rhodesia* [1919] AC 211, 214: the quotation in the text is preceded by the passage: 'in the present case . . . their Lordships do not propose to deal with the question referred to them under any terms of art peculiar to municipal law. They desire to take a broader view . . .'.

On this view, revocation was 'annexed to the relationship' and was a legal possibility under the Mandate system. There was respectable authority during the League period in favour of the existence of a power of revocation for fundamental breach, exercisable by the League Council, although the power was never exercised.[107] In the *Namibia Advisory* Opinion the International Court had little difficulty on this point.[108]

Against such a conclusion several objections were made. First, it was argued that any power of revocation would inhere in the Principal Allied and Associated Powers in whose favour Germany and Turkey renounced title over their colonial possessions.[109] But again this argument assumes that the power of disposition of territory is a corollary of title and that the post-war treaties, in rejecting annexation for mandated territories, nonetheless introduced it by the back door. As Judge Jessup said in dissent in the *South West Africa Cases (Second Phase)*:

> the argument that the Principal Allied and Associated Powers had any such residual or reversionary rights is devoid of merit . . . It needs no elaborate demonstration to show that Article 119 of the Treaty of Versailles did not involve a cession of territory to the Allies; the idea of a cession which would have meant even a momentary or technical lodgement of sovereignty over the former German colonies was wholly at variance with the agreed settlement of this colonial problem . . . The Allies acquired the right to allot the mandates and thereafter became *functi officio*. The mandatories were mandatories on behalf of the League and not of the Powers.[110]

Secondly, the fact that it was for the Council rather than the five Powers to exercise the power of revocation gave rise to a problem of voting procedure. The normal voting procedure in the Council was unanimity, and non-Council members, parties to disputes before the Council, were entitled to attend and vote. It was argued that as a consequence the Council could never have revoked a Mandate without the consent of the Mandatory. But this ignored a number of possibilities. The Mandatory could have been expelled from the League under Article 16(4), by vote of the Council less the State concerned, upon which the Mandatory's title to vote would disappear. Violation of Article 22

[107] Lauterpacht, *Private Law Sources and Analogies of International Law*, 200–1; Hales (1937) 23 *Grotius ST* 85, 120–2; Wright, *Mandates under the League of Nations*, 520–2; Dugard (1968) 62 *AJIL* 78. Cf also Lauterpacht, 3 *Collected Papers* 29–84, 70–76 (1977).

[108] *Namibia Opinion*, ICJ Rep 1971 p 16, 48–9 (Majority Opinion); 131 (Judge Petrèn), 146 (Judge Onyeama), 210–16 (Judge de Castro), 275–8 (Judge Fitzmaurice). On the doctrine of implied powers see Falk, *Reviving the World Court*, 129.

[109] Judges Spender and Fitzmaurice, joint diss op, *South West Africa Cases (First Phase)*, ICJ Rep 1962 p 319, 482; cf Written Statement of the USA, *Pleadings, Status of South West Africa Case*, ICJ Pleadings 1966, 137–9.

[110] ICJ Rep 1966 p 6, 421–2: cf *R v Christian* [1924] SALR (AD) 101, 106 (Ross-Innes CJ).

could have provided grounds for expulsion.[111] Alternatively, it was argued by Judge Lauterpacht in the *Voting Procedure* case that a 'constitutional convention' had grown up during the existence of the League such that 'the opposing vote of the Mandatory State could not in all circumstances adversely affect the required unanimity of the Council'.[112] Support for this view was found in *Interpretation of the Treaty of Lausanne*, where the Court applied the *nemo judex* principle to hold parties to a dispute unable to exercise their veto in the Council.[113] That too was a case in which the Council was designated to exercise a 'referred' function affecting dispositively the rights of States. Whichever position is taken, it follows that unilateral revocation of a Mandate by the League Council was a legal possibility, unlikely as it may have been in practice.

Thirdly, there is the question whether independent judicial determination of the fundamental breach of the Mandate was a condition precedent to revocation by the political organ.[114] Though in the normal case such a determination would have been desirable in the interests of fairness, there are several considerations which suggest that it was not required. The material breach might have been so flagrant that judicial determination was superfluous. Immediate international action might have been necessary to avoid damage to the interests the Mandate was designated to protect—for example, in a case of genocide of the people of a mandated territory. More fundamentally however, we need to analyse the process of revocation. In exercising its 'executive' or 'dispositive' functions the competent organ was rather in the position of a referee than a holder of 'residual sovereignty'. In revoking a Mandate or Trusteeship, the political organ is declaring that, as a result of acts contrary to its fundamental obligations, the Mandatory is no longer entitled to exercise its governmental functions. Just as the Mandate is an international status impressed on territory, so the administrative authority of the Mandatory is a limited political status which can be avoided by acts fundamentally contrary to the purposes for which the status exists. While the Mandatory complies with its obligations, the Mandate is irrevocable—but it cannot be accepted that a Mandatory remains entitled to act, however fundamentally it has violated its position of trust.

On this basis, the League Council's function would have been not so much to deprive the Mandatory of its status as to spell out the legal results of the Mandatory's own act. When the General Assembly revoked the Mandate for

[111] Oppenheim (8th edn), vol I, 383 n 2. [112] ICJ Rep 1955 p 67, 98–106, esp 105–6.

[113] PCIJ ser B no 12 (1925), 32. The Treaty of Lausanne, Art 3(2) provided for the Council to determine a boundary in dispute between Turkey and Iraq: but cf Judge Klaestad, ICJ Rep 1955 p 67, 85 ff. See also Lauterpacht, *Development*, 161.

[114] See Dugard (1968) 62 *AJIL* 78, 79–81. See also Judge Dillard, ICJ Rep 1971 p 12, 167–8; *contra* Judge Fitzmaurice, ibid, 299–301.

South West Africa, the resolution declared that South African violation of the Mandate amounted to a disavowal of the Mandate, and decided that the Mandate 'is therefore terminated, and that henceforth South West Africa comes under the direct responsibility of the United Nations.'[115] There was precedent for adopting a declaratory mode. The Japanese Mandate for the Pacific Islands was, according to some views, revoked by virtue of Japanese violation of the demilitarized status of the Mandate, and this despite any authoritative League finding on the matter. The matter was argued before the Security Council by US Representative Austin in the following terms:

> The United States Government does not consider that there is any obstacle to the placing of these islands under trusteeship in accordance with the Charter as soon as the Security Council approves the draft agreement. As a result of the war, Japan has ceased to exercise, or to be entitled to exercise, any authority in these islands . . . In utter disregard of the mandate, Japan, contrary to the law of nations, used the territories for aggressive warfare against the US and other Members of the United Nations. Japan, by her criminal acts of aggression, forfeited the right and capacity to be the mandatory Power over these islands. The termination of Japan's status as the Mandatory power over the islands has been frequently reaffirmed: in the Cairo Declaration of 1943, subsequently reaffirmed in the Potsdam Declaration and in the instrument of surrender accepted by the powers responsible for Japan's defeat . . . In the above circumstances, it is the view of my Government that the conclusion of a trusteeship agreement pursuant to the Charter, for the former Japanese mandated islands clearly can take effect at this time, and does not depend upon, and need not await, the general peace settlement with Japan.[116]

Although some other delegations expressed their reservations about this argument,[117] the Security Council proceeded to approve the Trusteeship Agreement. The islands were arguably in the unusual position of being in each of the three categories of territory to which the Trusteeship System applied: apart from Article 77(1)(c), which may have been intended to deal with this question,[118] it may be that the dispositive authority involved in the new

[115] GA res 2145 (XXI), 27 Oct 1966 (114–2:3).

[116] *SCOR* 133rd mtg, 26 Feb 1947, 413: Whiteman, 1 *Digest* 772.

[117] *SCOR* 2nd yr, 116th mtg, 7 Mar 1947, 464 (UK). The US view is challenged by Toussaint, *Trusteeship System of the UN*, 87–92, and Marston (1969) 18 *ICLQ* 1, 29, both on the assumption that the traditional rules of disposition of State territory apply to Trusteeships. But the islands under Japanese sovereignty occupied by the US were treated in a different way. The Trusteeship Agreement over the Islands merely stated 'Whereas Japan, as a result of the Second World War, has ceased to exercise any authority in these islands . . .': 8 UNTS 189, 190. In the Peace Treaty of 1951, Japan accepted 'the action of the UN Security Council extending the trusteeship system to the Pacific Islands formerly under mandate to Japan': 136 UNTS 48, Art 2(d).

[118] Article 77(1)(c) refers to 'administration': it is at least arguable that this was intended to override the principle *nemo dat quod non habet*: Parry, (1950) 27 *BY* 164, 166–7; Toussaint, *Trusteeship System of the UN*, 87–92.

appointment was that of the Security Council as a whole, pursuant to the fundamental breach of its obligations by Japan.[119]

## (2) Revocation of Trusteeships

Revocation has never been an issue in relation to any of the ordinary Trusteeships, all of which have been terminated in the normal way by agreement between the General Assembly and the Administering Authority.[120] There can be, however, little doubt that revocation was a legal possibility: the argument about revocation of Mandates apply *a fortiori* to Trusteeships.[121]

Once again, however, the Trusteeship of the Pacific Islands, administered by the United States, was a special case. The United States, as permitted by Article 82 of the Charter, elected to designate the former Japanese Mandated Islands in their entirety a 'strategic area', thereby giving it a veto in its capacity as permanent member of the Security Council over decisions affecting it as the Administering Authority. Since the Charter explicitly gives permanent members of the Council a veto over all but procedural matters, the *nemo judex* principle invoked by the Permanent Court in *Interpretation of the Treaty of Lausanne* was overridden, effectively excluding revocation.

In fact the United States in negotiating the terms of the Trusteeship Agreement renounced the use of the veto and adopted the equally effective method of refusing to accept the Trusteeship on any other than the terms proposed by it.[122] Article 15 of the Trusteeship Agreement reads: 'The terms of the present agreement shall not be altered amended or terminated without the consent of the administering authority.'[123] The debate on Article 15 suffered

[119] On the Pacific Islands Mandate 1944–7, see Russell, *History of the Charter*, 573–89; Gilchrist (1944) 22 *For Aff* 635; James and Emerson, *American Pacific Dependencies*, ch 8.

[120] Charter, Art 85. Cf Opinion of Legal Counsel concerning the termination of the Trusteeship Agreement for the Territory of New Guinea, T/11757, 18 Oct 1974, paras 1–2.

[121] No proposals were made to the San Francisco Conference with respect to termination or revocation of Trusteeships, although both Ecuador and Venezuela proposed at the Conference that the Assembly might declare independence under specified conditions: 10 *UNCIO* 655. Egypt subsequently proposed the inclusion of specific termination and revocation provisions in the Charter: after considerable debate this proposal was dropped: ibid, 547–8. Instead, the delegates of the UK and the US in a Joint Statement (Annex C to the Report of the Rapporteur of Committee II/4, 20 June 1945) stated in part that if a State was expelled or withdrew from the UN, 'and did not voluntarily consent to the transfer of the Trust to another authority, the resulting situation could only be judged by the General Assembly and the Security Council on its merits in the light of all the circumstances prevailing at the time. It is impossible to make provision in advance for such a situation.' (ibid, 620–1). This statement was not adopted as an expression of the views of the Committee, but it was approved by France and Egypt: ibid, 601–2.

[122] The debate is in Whiteman, 1 *Digest* 834–8.

[123] 8 UNTS 189, 198. A USSR amendment to read: 'The terms of the present agreement may be altered or amended, and the term of its validity discontinued by the decision of the Security Council' was defeated (8–1:2): *SCOR* 124th mtg, 2 Apr 1947, 679.

from a confusion between the terms of the agreement and its term of validity, two different things. But Article 15 is unclear and one is required to assume that if the 'terms' of an agreement were terminated, the 'term' of the Trusteeship itself would also be brought to an end. As there may be a further distinction between trusteeship status and the agreement regulating that status, this is not an inevitable assumption, though undoubtedly the intended one. But in proposing and insisting on Article 15, the United States delegate offered an interpretation of Chapter XII which was inconsistent with the subsequent United States position before the Court in *Namibia*:

> . . . the whole theory of the Trusteeship System is based on the fact that there must be, in any case, at least two parties to any trusteeship agreement. It would be an astonishing interpretation of the Charter to assume that the function of determining the terms of the agreement should be given exclusively to that party which, under the Charter, has only the function of approval. An amendment leaving the terms of an agreement and the power of termination to the Security Council alone is a violation of the spirit of the Charter and of the theory of agreement . . . [124]

This assumes that the Charter intended Trusteeships to be permanent and irrevocable, no matter how egregious the behaviour of the administering power. If so there would be hardly any distinction between the position of administering power and the position of a territorial sovereign: it would then be a characteristic of the former, as of the latter, that violation of agreements with respect to the territory did not impair in any way the continued rights of the State concerned over the territory. However, in the context of Trusteeships over areas designated as strategic, the argument was more acceptable, resulting in the replacement of one veto by another. This was the only Trusteeship Agreement containing a termination provision, and the United States argument should be restricted to the special circumstances of the TTPI.

### (3) Revocation of Mandates by United Nations organs

By resolution 2145 (XXI), the General Assembly declared the Mandate for South West Africa revoked. After the failure of negotiations between the United Nations and South Africa, the Security Council referred the matter to the International Court. The Court held by thirteen votes to two (Judges Fitzmaurice and Gros dissenting) that the Mandate had been validly revoked.[125] This should be seen as a continuation of the quite extensive history of United Nations involvement in Mandates and their termination, reviewed

[124] Ibid, 670. [125] ICJ Rep 1971 p 16.

here. Charter authority to wind up the system whether by transfer to Trusteeship or otherwise was consistently asserted, to the point of withdrawing a territory from the authority of the administering State in the case of a fundamental breach.

In supporting the legality of revocation, the Majority Opinion relied strongly on the treaty character of the Mandates institution:

> In examining this action of the General Assembly it is appropriate to have regard to the general principles of international law regulating termination of a treaty relationship on account of breach. For even if the mandate is viewed as having the character of an institution . . . it depends on those international agreements which created the system and regulated its application . . . By stressing that South Africa 'has, in fact, disavowed the Mandate', the General Assembly declared in fact that it had repudiated it. The resolution in question is therefore to be viewed as the exercise of the right to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship . . .[126]

Whatever its validity might have been during the existence of the League, the difficulty with this argument is that the United Nations was not the contractual successor of the League in respect of Mandates *qua* treaties. It was on the ground of status, not contract, that the Court in 1950 held the General Assembly entitled to exercise supervisory powers.[127] It is true that in subsequent opinions, notably the *Hearings of Petitioners* case,[128] the Court tended to treat the Assembly as if it were a universal successor. But the point was forcibly made by Judge Fitzmaurice:

> There is no doubt a genuine difficulty here, inasmuch as a regime like that of the mandates system seems to have a foot both in the institutional and the contractual field. But it is necessary to adhere to at least a minimum of consistency. If, on the basis of contractual principles, fundamental breaches justify unilateral revocation, then equally it is the case that contractual principles require that a new party to a contract cannot be imposed on an existing one without the latter's consent (novation). Since in the present case one of the alleged fundamental breaches is precisely the evident non-acceptance of this new party, and of any duty of accountability to it (such acceptance being, *ex hypothesi*, on contractual principles, *not* obligatory), a total inconsistency is revealed as lying at the root of the whole Opinion of the Court in one of its most essential aspects.[129]

[126] Ibid, 46–7. For criticism see also Schwarzenberger, *International Law*, vol 3, 168, 176–7.

[127] ICJ Rep 1950 p 128, 141–2 (Majority Opinion); 153–5 (Judge McNair).

[128] ICJ Rep 1956 p 23. The point is not clear: in any case, assuming that the Majority Opinion (apart from Judge Winiarski) did adopt the wider view, there was still a majority of 7–6 in favour of the 'status' view. See especially the Separate Opinion of Judge Lauterpacht, ibid, 36.

[129] ICJ Rep 1971 p 12, 267. See also Chiu (1965) 14 *ICLQ* 83, 103–6; cf *Barcelona Traction (Preliminary Objections)*, ICJ Rep 1964 p 6, 38–9.

The question then is on what grounds the exercise by the General Assembly of supervision and revocation functions can be justified. In 1950 the Court based its holding on the essential nature of supervision in the Mandate system and on the inseverability of the Mandatory's legal position from the existence and exercise of these powers of supervision: 'To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified.'[130] This suggests that the exercise of Mandate functions by the United Nations found its legal basis in the principle of estoppel or preclusion. South Africa had applied to the United Nations for permission to annex the Mandate. Its continued possession of South West Africa (as well as certain admissions it had made as to the basis of its continued authority there)[131] at the same time affirmed the Mandate and recognized the need for supervision by the United Nations. In these circumstances South Africa could not deny the continuance of the Mandate or the United Nations powers of supervision.[132] After all, if supervision was to be carried out, it had to be by the United Nations:

> It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions. These general considerations are confirmed by Art.80 paragraph 1 of the Charter . . . [133]

There was no doubt a progressive element in the Court's 1950 ruling as to supervision, but justifiably so. The operation, as Judge Lauterpacht pointed out, was akin to the *cy-près* doctrine in the English law of trusts: 'in order to render effective a general charitable intention in face of the impossibility of applying it according to the literal language of its author.'[134] The legitimacy of this view is supported by a number of considerations.

First, a trustee is essentially a person with limited title, one who is precluded from denying the rights of the beneficiary. Such an application of 'equitable' principles in favour of the beneficiary is entirely consistent with the nature of the Mandate institution.[135]

[130] ICJ Rep 1950 p 128, 133. This assumes that South Africa had no other legal title to administer the territory: it is clear that this is so. See, e.g., Judge Jessup diss, *South West Africa Cases (Second Phase)*, ICJ Rep 1966 p 6, 418.

[131] Dugard (1968) 62 *AJIL* 78, 99–100, 102–3, 115: cf Slonim (1975) 69 *AJIL* 640.

[132] ICJ Rep 1950 p 128, 135–7. [133] Ibid, 136.

[134] *Hearing of Petitioners*, ICJ Rep 1956 p 23, 48; Lauterpacht, *Development*, 279; Judge de Castro, *Namibia Opinion*, ICJ Rep 1971 p 16, 198–9.

[135] Note, however, the differing opinions of the majority and Judge McNair as to the relevance of municipal law analogies in the interpretation of the Mandates system: *Status of South West Africa*, ICJ Rep 1950 p 128, 132, 147–8.

Secondly, the Mandate was a territorial institution terminable only by consent while it is being executed according to its terms, but one which could be set aside for fundamental breach on the Mandatory's part. Revocation was thus essentially declaratory, though like other forms of termination, it had 'definitive legal effect'. There is nothing historically or constitutionally inappropriate in the General Assembly's exercising such a role: as has been seen, dispositive rights in this area have consistently been claimed and exercised.

Thirdly, the restriction, expressed in the 1950 Opinion and subsequently reaffirmed, that the General Assembly could not exceed the 'degree of supervision' exercised by the Council over Mandates is not relevant, though no doubt correct in the context of normal supervision. There is a distinction between the functions of supervision and termination. The former relate to the continuing exercise of the Mandate: they are expressed in the Mandate agreement and are defined and limited by it. The latter, by contrast, are left to be inferred from the structure of the Mandate system and general principles of law.

If the Mandate survived, so too did the various modes of termination. A limited status in the interests of a people did not become interminable, against their wishes, because of a failure of international organization. The Court's reservation as to 'degree of supervision' would have required adjustment in cases where the Mandatory was in breach of its obligations: this is clear, for example, from the *Voting Procedure* Opinion.[136] *A fortiori* where the Mandatory has repudiated or otherwise fundamentally breached the Mandate itself,[137] and where what was at issue was not supervision but termination.

A final argument against revocation by the Assembly was made by Judge Fitzmaurice in his powerful dissent in the *Namibia* case. After establishing that General Assembly power could not properly be based on treaty succession, he continued:

> If, in order to escape this dilemma . . . a shift is made into the international institutional field, what is at once apparent is that the entities involved are not private persons or corporate entities but sovereign States. Where a sovereign State is concerned, and where also it is not merely a question of pronouncing on the legal position, but of ousting the State from an administrative role which it is physically in the exercise of, it is not possible to rely on any theory of implied or inherent powers. It would be necessary that these should have been given concrete expression in whatever are the

[136] ICJ Rep 1956 p 23, 31–2. See also Judge Winiarski, ibid, 33; Judge Lauterpacht, ibid, 36.

[137] The Assembly treated both South Africa's rejection of the Mandate, and its application of the doctrine of *apartheid* to the territory, as fundamental breaches of the Mandate. That the former is so is clear: for argument as to the latter, see Judges Tanaka and Jessup, *South West Africa Cases (Second Phase)*, ICJ Rep 1966 p 6, 290, 426; *contra*, Judge ad hoc Van Wyk, ibid, 139–215. And cf [1967] *BPIL* 18.

governing instruments. If it is really desired or intended, in the case of a sovereign State accepting a mission in the nature of a mandate, to make the assignment revocable upon the unilateral pronouncement of another entity, irrespective of the will of the State concerned, it would be essential to make express provision for the exercise of such a power.[138]

There are two elements to this argument. First, it is said that revocability must be expressed in the instruments and cannot be implied from the institution of the Mandate. But his view has already been rejected. In particular, it is incongruous to insist that the power of revocation must be expressed in the constituent documents when, with only one exception, those documents make no mention whatever of powers of termination. If termination powers are to be implied (as they must be), why not powers of revocation? More subtly, Judge Fitzmaurice's argument is a variant of the *Lotus* presumption; that is, the presumption against limitations upon State sovereignty. But to rely upon that presumption is to beg the question. The presumption clearly does not apply to acts performed on the territory of other States, and its application by the Permanent Court to acts on the high seas was controversial. The crucial point, which Judge Fitzmaurice assumes, is whether a mandated territory is to be treated as if it were the territory of the Mandatory, or of the local population under tutelage, for the purposes of revocation for fundamental breach. Yet again we see that the main argument against revocation is a deduction from that sovereignty which the Mandate system was designed to replace.

## (4) Post-revocation action of the United Nations concerning Namibia

State practice before and after the *Namibia* case confirmed the authority of the United Nations to act—an authority eventually recognized by South Africa itself. The General Assembly established the United Nations Council for Namibia as the 'legal Administering Authority' of Namibia, pending independence.[139] In December 1973 it recognized the South West African People's Organization (SWAPO) as the 'authentic representative of the Namibian people', referring at the same time to the 'international Territory of Namibia'.[140] SWAPO was granted observer status in the General Assembly in 1976.[141] South Africa

[138] ICJ Rep 1971 p 12, 267–8.

[139] GA res 2248 (S-V), 19 May 1967. See also GA res S-9/2, 3 May 1978 (Declaration on Namibia); GA res 33/182(C), 21 December 1978. It is, however, not clear how much legal effect the acts of the Council had: cf *S v Carracelas & Others (2)* 1992 NR 329, 331.

[140] GA res 3111 (XVIII), 12 December 1973, paras 2, 3.

[141] GA res 31/152 of 20 December 1976.

eventually entered into negotiations with SWAPO, under the mediation of a contact group of five western States.[142] The Contact Group in April 1978 put forward a Settlement Proposal, calling for a UN Transitional Assistance Group (UNTAG) to oversee elections for a constituent assembly.[143] Despite persistent armed conflict in the region in 1988 a series of agreements laid down Principles for a Peaceful Settlement in Southwestern Africa.[144] Eventually, elections under UNTAG supervision took place,[145] and on 9 February 1990 the Constituent Assembly adopted a Constitution. Namibia became independent on 21 March 1990 and was admitted to the United Nations on 23 April 1990.[146]

## 13.5 Post-independence claims

In accordance with the *Northern Cameroons* principle, discussed above, the achievement of self-determination by territories under Mandate or Trusteeship was treated as finally resolving the question of status and associated issues of sovereignty over the territory as a whole.[147] On the other hand, it did not necessarily resolve questions regarding the obligations of the former administering authority to the territory, including issues of disposal of natural resources. As Reisman notes:

violations of treaty obligations by a protecting state are procedurally different from violations between states in legal and political parity and negotiating at arm's length. The protected state or state under protectorate has, by definition, a restricted if not completely suspended competence to operate at the international level and hence is

[142] The Contact Group is discussed by Jabri, *Mediating Conflict: Decision-making and Western Intervention in Namibia*, 58–87. See also Soni (1991) 29 *Col JTL* 563, 583–95; Richardson (1984) 78 *AJIL* 76, 78–88.

[143] *Settlement Proposal of the Contact Group*, 10 April 1978. S/12636, reprinted and discussed in United Nations Institute for Namibia, *Namibia: A Direct United Nations Responsibility*, 351–5. See also SC res 431, 27 July 1978; S/12827; SC res 435, 29 September 1978.

[144] S/20412, 23 January 1989, Annex, ¶K; 28 ILM (1989) 950. S/20566, Annex, ¶1 (Protocol of Geneva Between the Governments of the People's Republic of Angola, the Republic of Cuba and the Republic of South Africa, 5 August 1988); 28 ILM (1989) 951; S/20325, Annex, ¶2 (Protocol of Brazzaville, 13 December 1988), *SCOR*, 43rd year, Suppl for October, November and December 1988.

[145] Weiland and Braham (eds), *The Namibia Peace Process: Implications and Lessons for the Future*, 141–62; Cliffe *et al*, *The Transition to Independence in Namibia*; Shain and Berat in Shain and Linz (eds), *Between States: Interim Governments and Democratic Transitions*, 66–9.

[146] SC res 652, 17 April 1990; GA res S-18/1, 23 April 1990.

[147] The position of marginal boundary disputes affecting Mandates and Trust territories is to be resolved on normal principles of *uti possidetis*, bearing in mind however the incapacity of the administering authority unilaterally to alter those boundaries. See *Kasikili/Sedudu Island (Namibia/Botswana)*, ICJ Rep 1999 p 1045.

unable to protect its interests against violations by the erstwhile protector. Thus, it should be no surprise that international decision has suspended the operation of laches for failure to prosecute violations of interest, when the party that failed to protect its own rights was in a subordinate position and was unable to operate in its own name at the international level.[148]

Whether or not this is true for the various forms of protectorate, it is much more likely to be true for Mandates and Trust territories, where treaty obligations—albeit of a general character—were expressly assumed with respect to the people of the territory.

Once more, however, it has been argued that these obligations were illusory in character or were political or non-justiciable; in effect, that they were mere directives to the administering power, insubstantial glosses upon its authority. That argument was at least implicitly supported by the 'statutory majority' of the Court in the *Second South West Africa* cases,[149] and expressly by Judge Fitzmaurice in his separate opinion in the *Northern Cameroons* case.[150] Once more, such arguments, which would have greatly reduced the accountability of the administering power, have not been accepted.[151] In the *Phosphate Lands* case, Australia argued strenuously for the inadmissibility of a claim brought by Nauru post-independence alleging a pre-independence breach of Trusteeship, but it did not argue that the trusteeship obligation was 'political' or non-justiciable, or that Nauru as an independent State lacked standing to claim for wrongs allegedly done to the people of Nauru before independence.[152]

Several examples of post-independence claims affecting Mandate or Trust Territories may be mentioned.

## (1) Namibia

Decree No 1 of the UN Council for Namibia stated:

No person or entity, whether a body corporate or unincorporated, may search for, prospect for, explore for, take, extract, mine, process, refine, use, sell, export, or

[148] Reisman (1989) 10 *Mich JIL* 231, 233, citing *Cayuga Indian Claims* (1926) 20 *AJ* 574, 575.

[149] *South West Africa Cases (Preliminary Objections)*, ICJ Rep 1962 p 319; *(Second Phase)*, ICJ Rep 1966 p 6.

[150] ICJ Rep 1963 p 15, 97.

[151] See Crawford in *Jennings Essays*, 585. In its commentary to the Articles on Responsibility of States for Internationally Wrongful Acts (2001), the ILC noted that Art 22 of the League Covenant and the various Mandates were provisions in the general interest, such that the other League Members were entitled to invoke the responsibility of the Mandatory; in this respect, it noted, ILC Art 48 was a 'deliberate departure' from the decision of the Court in *Second South West Africa*. See commentary to Art 48, para (7) and n 766, reprinted in Crawford, *Selected Essays*, 278.

[152] *Certain Phosphate Lands in Nauru*, ICJ Rep 1992 p 240.

distribute any natural resource, whether animal or mineral, situated or found to be situated within the territorial limits of Namibia.[153]

Permits or licences issued by South Africa or by its administration in Namibia were declared to be 'null, void and of no force or effect'; '[a]ny person, entity or corporation which contravenes the present decree in respect of Namibia may be held liable in damages by the future Government of an independent Namibia.'[154] Similar declarations were made by the General Assembly.[155] Proceedings to give effect to the Decree were commenced in the Netherlands but were withdrawn.[156]

By contrast, the newly independent Namibia negotiated with South Africa a settlement of its claim to Walvis Bay, which had been subject to changing administrative arrangements over the period of colonization and Mandate.[157]

### (2) Nauru

Nauru was a former German colony granted as a Mandate to the United Kingdom, Australia and New Zealand jointly, and subsequently transferred to the Trusteeship system. A plan of revolving administration was not implemented, and Australia administered Nauru from 1920 until the termination of the Trusteeship in 1968, with the exception of a period under Japanese occupation.[158] After 1920, Nauruan phosphate was extensively mined by the British Phosphate Commissioners, an intergovernmental partnership, on terms which made no provision for rehabilitation of the worked-out lands and which provided only very limited royalties to the indigenous landowners. As part of the agreement on the basis of which Nauru became independent in 1968, control

[153] Decree No 1 of the United Nations Council for Namibia, 27 Sept 1974, para 1.

[154] Ibid, paras 2, 6.

[155] See, e.g., GA res 35/227/I, 6 March 1981; GA res 43/29, 22 Nov 1988.

[156] Report of the United Nations Commissioner for Namibia, A/AC.131/322, paras 1, 12, and see Schrijver, *Sovereignty over Natural Resources*, 151–2.

[157] See Berat, *Walvis Bay: Decolonization and International Law*, 12–14; Dugard (1991) 85 *AJ* 751. Great Britain annexed Walvis Bay in 1878 and attached it to the Cape Colony in 1884. South Africa was regarded as having title at the time of Union in 1910, and the Republic of South Africa continued to claim title after 1961. From 1922 to 1977, however, Walvis Bay was administered as part of the mandated territory of South West Africa. The General Assembly during the years leading to the independence of Namibia admonished South Africa to treat Walvis Bay and its associated islands as part of the territorial unit of the Mandate: e.g., GA res 43/45, 22 Nov 1988, referring to earlier resolutions. After independence, Walvis Bay and associated islands were first placed under a Joint Administrative Authority (Agreement on the Joint Administration of Walvis Bay and the Off-Shore Islands, 30 Oct/9 Nov 1992, (1993) 32 ILM 1152), and then retroceded to Namibia: Republic of South Africa–Republic of Namibia, Agreement with respect to Walvis Bay and the off-shore Islands, Art 4, 28 February 1994. See also Transfer of Walvis Bay to Namibia Act 1993 (SA).

[158] Weeramantry, *Nauru: Environmental Damage under International Trusteeship*, 8–10.

over phosphate mining was transferred to Nauru. The partner Governments argued that this agreement and/or the General Assembly's decision to terminate the Trusteeship, had the effect of terminating any earlier claims by Nauru arising from alleged breach of the Trusteeship Agreement of 1947.

In 1989 Nauru commenced proceedings before the International Court against Australia alone, claiming the costs of rehabilitation of lands worked out during the period of the Mandate and Trusteeship. In 1992, the Court rejected a series of technical objections to the admissibility of the claim: the most relevant for present purposes was the argument that termination of the Trusteeship Agreement necessarily terminated any prior claim for its breach. The Court noted that

> when, on the recommendation of the Trusteeship Council, the General Assembly terminated the Trusteeship over Nauru in agreement with the Administering Authority, everyone was aware of subsisting differences of opinion between the Nauru Local Government Council and the Administering Authority with regard to rehabilitation of the phosphate lands worked out before 1 July 1967. Accordingly, though General Assembly resolution 2347 (XXII) [terminating the Trusteeship Agreement] did not expressly reserve any rights which Nauru might have had in that regard, the Court cannot view that resolution as giving a discharge to the Administering Authority with respect to such rights. In the opinion of the Court, the rights Nauru might have had in connection with rehabilitation of the lands remained unaffected. Regard being had to the particular circumstances of the case, Australia's third objection must in consequence be rejected.[159]

The Nauruan rehabilitation claim having been held admissible was subsequently settled on a without prejudice basis by a substantial series of instalment payments, to which the other partner governments later agreed to contribute.[160] Article 3 of the Settlement Agreement provides that fulfilment of its terms discharges any obligations arising out of the Trusteeship or Mandate.

## (3) Trust Territory of the Pacific Islands

The *Nauru* case is so far the only pre-independence reparation claim brought to an international court. Other trusteeship claims have been pursued domestically. In a series of cases before United States courts, TTPI inhabitants sought to challenge the legality of nuclear tests and resultant dumping and contamination.

[159] *Certain Phosphate Lands in Nauru (Nauru v Australia)*, ICJ Rep 1992 p 240, 251, 253 (paras 23, 30).

[160] Australia–Republic of Nauru, Settlement of the Case in the International Court of Justice Concerning Certain Phosphate Lands in Nauru, 10 August 1993, (1993) 32 ILM 1471.

These claims failed on grounds of lack of standing.[161] The Compact of Free Association, entered into in 1986 between the United States and the Republic of the Marshall Islands and the Federated States of Micronesia, addressed the settlement of claims arising out of nuclear tests conducted in the Trust Territory.[162] Under the Compact the United States specifically accepted 'the responsibility for compensation owing to citizens of the Marshall Islands, or the Federated States of Micronesia . . . for loss or damage to property and person of the citizens of the Marshall Islands, or the Federated States of Micronesia, resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946 and August 18, 1958.'[163] Questions remained, however, as to the sufficiency of funds appropriated for compensation, and parties from the former Trust Territory have sought bases for further claims.[164]

## 13.6 The future of Trusteeship?

From time to time, proposals have been made for Trusteeships under Charter Article 77(1)(c) ('territories voluntarily placed under the system by States responsible for their administration'). However, no such new Trusteeships have been conferred, and the Trusteeship System is defunct. This has led to a range of proposals, from the repeal of Chapter XII and XIII of the Charter, on the one hand, to its extension to cope with so-called 'failed States', or with the restructuring of States after major conflict, on the other. Arrangements of this kind—for example, for Cambodia,[165] Bosnia and Herzegovina[166] and East Timor[167]—have

[161] *Pauling v McElroy*, 164 F Supp 390 (DC 1958), aff'd 278 F 2d 252, cert den 364 US 835 (1960).

[162] Compact of Free Association, Pub L No 99–239, 99 Stat 1770 (1986), §§103(g), 177; 48 USC §1681.

[163] The United States Court of Appeal, in light of these provisions, determined that it lacked jurisdiction over a claim for damages resulting from nuclear tests at Bikini Atoll: *Juda v United States*, 13 Cl Ct 667 (1987). See also *Antolok v United States*, 873 F 2d 369, 385 (DC Cir 1989). A Bikini Resettlement Trust Fund was established to compensate Marshallese claimants: Pub L No 100–466, and a Marshall Islands Nuclear Claims Tribunal was established in 1988 to 'render final determination upon all claims past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based on, arise out of, or are in any way related to the Nuclear Testing Program'. See http://www.nuclearclaimstribunal.com/hist.htm.

[164] *Status of Nuclear Claims and Relations and Resettlement in the Marshall Islands*: Hearings before the House Committee on Resources, 106th Cong (1999).

[165] Agreement on a Comprehensive Political Settlement of the Conflict in Cambodia, 23 October 1991: (1992) 31 ILM 183; SC res 668, 20 September 1990; Ratner (1993) 87 *AJ* 1.

[166] General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995: (1996) 35 ILM 75; SC res 1031, 15 December 1995.

[167] SC res 1264, 15 September 1999. See generally Matheson (2001) 95 *AJ* 76.

so far been ad hoc in character. And although the idea of Trusteeship continues to have some resonance,[168] there is a major legal difficulty: the Charter does not contemplate that a United Nations Member State could be brought under Trusteeship. According to Article 78, the Trusteeship system 'shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.' This prohibition would appear to apply not only to the whole territory of Member States but to parts of their territory, thus excluding situations such as Kosovo. With the expansion of United Nations membership to cover virtually the whole world, the scope for further Trusteeships has disappeared.

Other forms of Trusteeship, encompassing broad subjects of international concern, have also been proposed, but with no greater prospects. The 1994 session of the Trusteeship Council coincided with the independence and admission to the United Nations of Palau, the last Trust Territory.[169] The Trusteeship Council now holds only one, purely formal meeting each year. The Secretary-General has recommended the repeal of Chapters XII and XIII,[170] but in response Malta sought a review of the role of the Trusteeship Council, on the basis that it might be assigned new responsibilities, including environmental stewardship and management of international common areas such as outer space and the seabed beneath international waters.[171] Governmental comments were sought; relatively few were received. Of these, some supported Malta, more supported the Secretary-General's proposal for repeal.[172] It is likely that only the difficulty of Charter amendment under Article 108 has so far prevented this occurring.

[168] See, e.g., Blain (2003) 17 *Int Rel* 59; Blain (2003) 368 *The Round Table* 67.

[169] *Report of the Trusteeship Council to the Security Council on the Trust Territory of the Pacific Islands*, UN Doc S/1994/1400, Spec Supp 1.

[170] *Report of the Secretary-General on the work of the Organization*, 2 September 1994, *GAOR*, Suppl 1 (A/49/1), para 46; *Report of the Secretary-General on the work of the Organization*, 22 August 1995 (A/50/1), para 69.

[171] A/50/142 (16 June 1995).

[172] *Review of the Role of the Trusteeship Council: Report of the Secretary General*, 1 August 1996, A/50/1011.

# Chapter 14

# NON-SELF-GOVERNING TERRITORIES: THE LAW AND PRACTICE OF DECOLONIZATION


**14.1 Introduction** 603

**14.2 The development in practice of Chapter XI of the Charter** 606
(1) The definition of 'non-self-governing territories' 606
(2) Competence to determine whether a territory falls under Chapter XI 607
(3) The scope of Chapter XI in practice 608
(4) Possible extension of Chapter XI beyond colonial territories 610

**14.3 The international status of non-self-governing territories** 613
(1) Sovereignty and non-self-governing territories 613
(2) The use of force and non-self-governing territories 616
(3) The legal personality of dependent peoples 617
(4) Standards for assessing the wishes of a dependent people 620

**14.4 Termination of non-self-governing status: the forms of self-government** 621
(1) Termination of non-self-governing status: criteria for self-government 621
(2) Determination of cessation of non-self-governing status 621
(3) The forms of self-government 623
(i) Independence 623
(ii) Incorporation in another State 623
(iii) Association 625
(4) Remaining non-self-governing territories 634
(5) Claims by third States against non-self-governing territories 637

> It is for the people to determine the destiny of the territory and not the territory the destiny of the people.
>
> Judge Dillard, sep op, *Western Sahara Case*
> 1975 ICJ Rep p 12, 122

## 14.1 Introduction

Before 1945 there was very little general international concern with colonial issues, and still less with the progress of colonized peoples to self-government. The Mandate and Trusteeship systems provided for progressive development towards independence or self-government of certain colonial territories, but their ambit was restricted, and has remained so.

However, at the San Francisco Conference more extensive provision for colonial territories was made, in the form of Chapter XI of the Charter, entitled 'Declaration Regarding Non-Self-Governing Territories'.[1] Chapter XI, which contains only Articles 73 and 74, is an attempt to apply somewhat similar ideas to those embodied in Article 22 of the Covenant to a far broader category of territory. The focus here will be on the dispositive aspects of Chapter XI, and on the extensive practice pursuant to Chapter XI. The status of that practice was historically controversial, but most UN Members took an extensive view of Chapter XI, and in general these views prevailed. Indeed, it has been largely through the medium of Chapter XI that Members have extended and elaborated the operation of the principle of self-determination.

In accordance with Article 73:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories . . .

Article 73 then sets out five specific undertakings relating to (1) the development of the peoples concerned, (2) progress towards self-government, (3) the furtherance of international peace and security, (4) economic development, and (5) the regular transmission of certain information to the Secretary-General. An important development in the practice pursuant to Article 73

[1] See GA res 9 (I), 9 Feb 1946; for the *travaux préparatoires*, Russell and Muther, *A History of the United Nations Charter*, 813–24.

was the Declaration on the Granting of Independence to Colonial Countries and Peoples,[2] which, like certain other Assembly Declarations, has achieved in practice a quasi-constitutional status.[3] Clause 7 of the Declaration places it on a par with the Universal Declaration of Human Rights and the Charter itself. The Colonial Declaration addresses all 'Trust and Non-Self-Governing Territories' and 'all other territories which have not yet attained independence' (c 5), so that it derives in part from Chapters XI and XII, and in part from the customary law right of self-determination. It provides, *inter alia*, that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation . . .
3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.
4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence; and the integrity of their national territory shall be respected.
5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories . . . to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence or freedom.
6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter . . .

United Nations practice under Chapter XI, and the Colonial Declaration as an integral part of that practice, have been explicitly approved by the International Court. In the *Namibia* case the Court stated that:

the concepts embodied in Article 22 of the Covenant . . . were not static, but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust'.

[2] Often referred to as the Colonial Declaration: GA res 1514 (XV), 14 Dec 1960 (89–0: 9) (Australia, Belgium, Dominican Republic, France, Portugal, South Africa, Spain, UK and USA abstaining).

[3] For practice pursuant to the Declaration see *UN Repertory*, Supp III, vol 3, paras 302–48. Also Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, 163; Fastenrath in Simma, *The Charter of the United Nations* (2nd edn), 1089.

The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law.[4]

This is equally true of Article 73 of the Charter, based as it is on Article 22 of the Covenant; and the Court explicitly affirmed the applicability of self-determination to non-self-governing territories under the Charter. In the *Western Sahara* Case, after referring to this passage, the Majority Opinion reaffirmed '[t]he validity of the principle of self-determination'.[5] In its view, Spain, as an administering power, 'has not objected, and could not validly object, to the General Assembly's exercise of its powers to deal with the decolonization of a non-self-governing territory . . .'[6] Thus the 'right of [the Spanish Sahara] population to self-determination' was 'a basic assumption of the questions put to the Court'.[7] The Court's reply to those questions, equally, was based upon 'existing rules of international law'.[8] On the other hand, the Court stated, 'the right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized.'[9] In view of the fact that all but a few non-self-governing territories have achieved self-government in some form or other, the exercise of this 'procedural discretion' by the General Assembly in respect to the remaining territories (most of them small and relatively non-viable) has assumed considerable importance—it was the issue before the Court in the *Western Sahara* case.[10] Before considering these specific problems of application, a brief account of the development of Chapter XI in practice since 1945 is in order.[11]

[4] ICJ Rep 1971 p 16, 31; 49 ILR 2, 21. [5] ICJ Rep 1975 p 12, 31–3.

[6] Ibid, 33. The Court referred to GA res 1514 (XV) as providing 'the basis for the process of decolonization which has resulted since 1960 in the creation of many States which are today Members of the United Nations': ibid, 32. [7] Ibid, 36.

[8] Ibid, 36. [9] Ibid, 30, 37. [10] Ibid, 36.

[11] The best study, of an extensive literature, is still Rigo Sureda, *The Evolution of the Right of Self-Determination*. See also Sud, *The United Nations and Non-Self-Governing Territories*; Ahmad, *The United Nations and the Colonies*; El-Ayouty, *The United Nations and Decolonization*; Rajan, *The United Nations and Domestic Jurisdiction* (2nd edn), 133–222; Barbier, *Le Comité de décolonization des Nations-Unies*; Nawaz (1962) 2 *Indian YIA* 3; van Asbeck (1947) 71 *HR* 345. See also Orentlicher (1998) 23 *Yale ILJ* 1; Aldrich and Connell, *The Last Colonies*.

## 14.2 The development in practice of Chapter XI of the Charter

### (1) The definition of 'non-self-governing territories'

Like Article 22 of the Covenant, Article 73 of the Charter is imprecisely worded. It refers to 'territories whose peoples have not yet attained a full measure of self-government', and holds 'Members of the United Nations which have or assume responsibilities for the administration of' such territories to the obligations set out. The meaning of these terms is not self-evident, and left much to be resolved by subsequent practice. Article 74 distinguishes between 'the territories to which this Chapter applies' and 'their [*sc* Member States'] metropolitan areas', which suggests that Chapter XI applies only to defined 'territories' whose 'peoples' as a whole are not 'fully self-governing'. This excludes from Chapter XI the problem of minorities not inhabiting a clearly defined territory. Member States are bound in their behaviour towards national, religious and ethnic minorities not by Chapter XI but by the more general human rights provisions of Chapter IX.

The basic difficulty remains: how is one to distinguish between 'territories' that are, and those that are not, part of the metropolitan State, although the peoples of both may be equally 'non-self-governing' in fact?[12] The question itself assumes that a territory falls outside the ambit of Chapter XI if it is 'metropolitan', no matter what the wishes, situation or status of the people concerned. But 'metropolitan' is no clearer a term than 'non-self-governing', and it is not clear that the two are mutually exclusive. Article 74 contrasts two kinds of territories defined in rather different ways. The term 'metropolitan' is presumably a reference to the history of the area concerned as part of a State and to its geographical contiguity with the rest of the State. But while a separate area of land such as an island might be considered 'metropolitan' because it had been part of a State for as long as the State had existed, 'territory' as such can neither be self-governing or non-self-governing: only people or groups can govern and be governed. In other words the term 'non-self-governing' appears to refer not to history or geography, but to the status of (relative) subordination or freedom of the people of a territory, i.e. the people whose territory it is. Uninhabited islands, even if acquired by traditional colonial powers on the other side of the world, have never been treated as Chapter XI territories in their own right. Thus it would seem quite possible that 'metropolitan areas'

[12] For a review of practice see especially Christakis, *Le droit à l'autodétermination en dehors des situations de decolonisation*.

could be at the same time 'non-self-governing'. Or, if the antithesis between the two is to be seen as stipulated by Article 74, a territory might cease to be 'metropolitan' when it becomes 'non-self governing', whatever its history.[13]

The usual and more restrictive view is that Chapter XI was intended to apply only to 'territories, known as colonies at the time of the passing of the Charter'.[14] In particular, according to Principle IV of resolution 1541 (XV): *'Prima facie* there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.' Thereafter, according to Principle V:

> Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be *inter alia*, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73e of the Charter.

Given these restrictive criteria, the question has been to determine which territories come within the ambit of Chapter XI.

## (2) Competence to determine whether a territory falls under Chapter XI

In the early sessions of the Assembly, Administering States expressed a view that it was within the domestic jurisdiction of the administering State concerned to decide whether a given territory was non-self-governing for purposes of Chapter XI.[15] They argued that Chapter XI, as a 'Declaration', represented merely a statement by administering powers of their colonial policy rather than a binding legal obligation.[16] That argument, not surprisingly, did not gain

[13] This was the contention of Belgium in 1952 (the so-called 'Belgian Thesis'): 'It cannot . . . be maintained that "colonies" are the only territories envisaged in ch XI. Colonies are not the only territories whose people are not completely self-governing, and the word 'colonies' does not appear anywhere in ch XI. To maintain that it is only colonies that are intended is therefore to limit arbitrarily the number of States bound by ch XI and to discriminate to the disadvantage of many peoples which are not yet completely self-governing.' Cited in Whiteman, 13 *Digest* 697–8. See also Belgian Government Information Centre, New York, 1953.

[14] GA res 1541 (XV), Annex: *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73e of the Charter of the* Principle I (99–221); Nawaz (1962) 11 *Indian YIA* 3, 13. But Art 73 expressly refers to after-acquired territories: it would be strange if only the characteristics of colonies in 1945 were to be relevant in such cases.

[15] See, e.g., A/64/Add 1, 125; A/AC 100/1, 43; UN Rep Vol IV, 68; Kelsen *Law of the United Nations*, 557. Cf Higgins, *Development*, 83–7, 110–13; Rajan, *UN and Domestic Jurisdiction*, 194–212.

[16] French delegate, *GAOR*, 1st sess Part 2, 4th ctee, pt 3, 27.

widespread acceptance: the Charter is a treaty and the terms of Article 73 '*prima facie* connote legal obligation'.[17] It was implausible from the beginning that the applicability of Chapter XI could be a matter of domestic jurisdiction, and the issue came to be accepted as at least within the concurrent competence of the Assembly.[18] In practice, the extent of Chapter XI has been determined by the United Nations acting in conjunction with the administering State, but the possibility was reserved of unilateral determination by the General Assembly. Given the evolutionary nature of Chapter XI, the presumption in favour of the validity of concerted Assembly action is strong.[19]

### (3) The scope of Chapter XI in practice

In the beginning, the scope of Chapter XI was determined by the replies of States to a letter from the Secretary-General requesting information about non-self-governing territories.[20] As a result, about seventy-two[21] territories under eight different administering States were listed in resolution 66 (I)[22] as territories with regard to which information under Article 73e had been or would be submitted. This voluntary method was not likely to achieve the consistent or comprehensive application of Chapter XI, but the only objections to the enumeration of territories in resolution 66 (I) were made by States with claims to sovereignty over certain of them (Guatemala over British Honduras; Panama over the Panama Canal Zone; and Argentina over the Falkland (Malvinas) Islands).[23]

In 1955, after the admission of Spain and Portugal to United Nations membership, the issue of their colonial territories was raised. They refused to bring their colonial territories within the reporting system of Chapter XI: in response,

[17] Waldock (1962-II) 106 *HR* 1, 28–34; Oppenheim (8th edn, 1955), vol I, 240.

[18] Cf GA res 334 (IV), para 1 (30–12:10); GA res 1467 (XIV), para 1 (54–5:15); Higgins, *Development*, 112–13.

[19] Cf *Expenses Opinion*, ICJ Rep 1962 p 151, 168.

[20] A/74, 29 June 1946; authorized by GA res 9 (I), 9 February 1946.

[21] The UN's standard study refers to 72 territories (see *The United Nations and Decolonization* (2001) (http://www.un.org/Depts/dpi/decolonization/brochure/UN/page1.html)). The exact number depends whether the 'High Commission Territories of the Western Pacific' (Gilbert and Ellice Islands Colony; the British Solomon Islands Protectorate and the Pitcairn Islands) are treated as a single territory; in practice they were treated as separate, thus bringing to 74 the territories listed in res 66 (I). This was the US view: A/915/Add.1, 22 Aug 1949. The UK itself, for purposes of internal reporting, treated them separately. See Colonial Office, *Colonial Reports*, 'Gilbert & Ellice Islands' (1948, 1949); 'British Solomon Islands' (1948, 1949–50); Neill, *Pitcairn Island: General Administrative Report*, Colonial No 155. See also Pacific Order in Council 1893, s 6(1) (referring to 'Pacific dependencies', in the plural).

[22] 13 Dec 1946 (27–7:13).

[23] See 1946–7 *UNYB*, 210; *GAOR*, 1st sess, 2nd part, Fourth Committee, 20th meeting, 113 (Panamanian statement of 14 Nov 1946).

the General Assembly moved to specify criteria for non-self-governing territories, which it did in resolution 1541 (XV). In accordance with those criteria it went on to determine that particular territories fell within Chapter XI.[24] Spain eventually agreed to comply with Assembly recommendations,[25] but Portugal refused and the Assembly itself designated nine Portuguese territories as non-self-governing.[26]

In 1962, with the impending secession of Southern Rhodesia, the Assembly also declared it to be a non-self-governing territory.[27] The British contention was that, since Southern Rhodesia was a 'self-governing colony' in British constitutional law, it did not have the status of a 'Non-Self-Governing Territory' under the Charter and that any United Nations declaration to the contrary was *ultra vires*.[28] This was consistent with British practice since 1945, insofar as the UK had not transmitted information with respect to Southern Rhodesia under Article 73(e). This view was rejected by the General Assembly. But in 1965 the British Government itself, by the Southern Rhodesia Act, claimed 'responsibilities for the administration' of Southern Rhodesia: thus, whatever the position may have been at an earlier stage, the status of Southern Rhodesia as non-self-governing was clear enough by 1965.[29]

At various times the General Assembly took action with reference to resolution 1541 (XV) in connection with a number of further territories, including French territories in Africa and the Pacific;[30] most recently New Caledonia,

[24] GA res 1542 (XV), 15 Dec 1960, para 1 (Portuguese territories); para 5 (Spanish territories).

[25] Spanish statement to the Committee on Information from Non-Self-Governing Territories, 7 November 1960: A/C.4/SR.1038, paras 20–8 (Mr Aznar, Spain). In May 1961, the participation of Spain in the work of the Committee was welcomed; and the Spanish representative told the Committee that 'Spain had nothing to hide with regard to the Territories it administered': A/AC.35/SR.238, 17 May 1961, 4 (Mr Rasgotra, India); A/AC.35/SR.239, 18 May 1961, 3 (Mr De Pinies, Spain). Spain tabled detailed information concerning Fernando Poo, Rio Muni, and (Western) Sahara: A/4785, Annex V, paras 37 ff; A/5078/Add.3.

[26] GA res 1542 (XV), 15 Dec 1960, para 1 (68–6:17). See *UN Repertory*, Supp III, vol 3, Art 73, paras 105–29; Wohlgemuth, *IntConc* No 545 (Nov 1963). For the Portuguese position see A/C.4/SR.1036, paras 34–61 (Mr Nogueira, Portugal). The Portuguese arguments were set out in Nogueira, *The UN and Portugal: A Study of Anticolonialism*. See also Galvão Teles and Canelas de Castro (1996) 34 *AdV* 3, 11.

[27] GA res 1747 (XVI), 28 June 1962 (73–1:27, Portugal and UK np.).

[28] *GAOR*, 17th sess, 4th ctee, 360th mtg, A/C.4/SR 1360, 11 ff. Internally, the UK regarded it as 'constitutionally inappropriate' to transmit information about self-governing territories: Cmnd 8035 (1950), para 79. See also Cmnd 2807 (1965). Southern Rhodesia acquired responsible government under a limited franchise in 1923: Southern Rhodesia Constitution Letters Patent of 1 Sept 1923, attached to Southern Rhodesia (Annexation) Order in Council 1923 (UK). See also Southern Rhodesia (Constitution) Act 1961 (UK).

[29] The declaration in the Southern Rhodesia Constitution Order 1965 (UK) that the UDI constitution was illegal reinforced the point.

[30] GA res 2069 (XX), 16 Dec 1965 (Condominium of New Hebrides); GA res 2228 (XXI), 20 December 1966 (French Somaliland); GA res 3161 (XXVIII), 14 Dec 1973 (Comoros).

which, by resolution 41/41A in 1986 was designated as non-self-governing.[31] To provide an institutional locus for decolonization matters after the Colonial Declaration, the Assembly in 1961 established a Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, first with seventeen members, and, from 1962 with twenty-four.[32]

The Committee of Twenty-Four (as it came to be called) not only added territories to the list; it also declined to delete others. Certain territories no longer reported on by Administering States continued to be considered by the Committee: these included the Comoro Archipelago,[33] the French Territory of the Afars and Isaas (formerly French Somaliland, now Djibouti),[34] and the West Indies Associated States (until the disaggregation of that entity in the early 1980s). In addition, Puerto Rico, which was removed from the General Assembly list of Non-Self-Governing Territories in 1953,[35] has continued to be considered by the Committee of Twenty-four, fifty years after its 'de-listing'.[36]

A complete list of Chapter XI territories and their eventual political status is set out in Appendix 3 (pp. 746–56).

## (4) Possible extension of Chapter XI beyond colonial territories

I have already discussed whether Chapter XI is limited to territories of the colonial type, or whether the term 'non-self-governing' should be read in some

[31] GA res 41/41A, 2 Dec 1986 (New Caledonia).

[32] GA res 1654 (XVI), 27 Nov 1961.

[33] In a referendum on 22 December 1974, the inhabitants of the four islands voted overwhelmingly (94%) for independence. On one island (Mayotte), there was however a majority in favour of continued association with France. In negotiations for independence, attempts were made to secure separate self-determination, or at least substantial constitutional guarantees, for the inhabitants of Mayotte. The local government rejected these attempts and on 6 July 1975 unilaterally declared their independence. This was accepted (with respect to the three main islands) by France on 9 July 1975, and the Comoro Islands were recognized thereafter by a number of other States, and admitted to the UN on 12 November 1975. See (1975) 80 *RGDIP* 793; Ostheimer, *The Politics of the Western Indian Ocean Islands*, 73–101; and on the decision of the French Constitutional Court, Ruzié (1976) 103 *JDI* 392, Favoreu [1976] *Rev Droit Public* 557. The General Assembly rejected continued French occupation of Mayotte as a violation of the 'national unity of the Comorian State . . .': GA res 31/4 (XXXI), 21 Oct 1976 (102–1:28). See also GA res 32/7, 1 Nov 1977 (121–0: 17, France np); GA resns 34/69, 6 Dec 1979; 35/43, 28 Nov 1980; 36/105, 10 Dec 1981; 37/65, 3 Dec 1982; 38/13, 21 Nov 1983; 39/48, 11 Dec 1984; 40/62, 9 Dec 1985; 41/30, 3 Nov 1986; 42/17, 11 Nov 1987; 43/14, 26 Oct 1988; 44/9, 18 Oct 1989; 45/11, 1 Nov 1990; 46/9, 16 Oct 1991; 47/9, 27 Oct 1992; 48/56, 13 Dec 1993; 49/18, 28 Nov 1994. See further Aldrich and Connell, *The Last Colonies*, 228–32, 262.

[34] Djibouti was admitted to the United Nations in 1977: GA res 32/1, 20 Sept 1977.

[35] On constitutional arrangements between Puerto Rico and the United States and discussions concerning the cessation of transmission of information under Art 73e, see Igarashi, *Associated Statehood in International Law*, 44–62.

[36] On Puerto Rico see Committee of Twenty-four res A/AC.109/2000/24, 12 July 2000; A/55/23, paras 30–9.

wider sense. United Nations practice, with one possible exception, has so far followed the narrower view, with the primary emphasis on geographical separation (the so-called 'salt-water' theory of colonization). But the action taken over Southern Rhodesia shows the possibility of a wider application. The General Assembly was not prepared to accept that the degree of internal autonomy possessed by Southern Rhodesia in British constitutional law before 1965 prevented it from being non-self-governing. Substantially, the reason was that the Smith regime's effective control in Rhodesia was, in Fawcett's words: 'based upon a systematic denial in its territory of certain civil and political rights, including in particular the right of every citizen to participate in the government of his country, directly or through representatives elected by regular, equal and secret suffrage.'[37] There are several possible interpretations of the Assembly action in this case. It may be that, irrespective of the racial composition or democratic nature of the local government, Rhodesia always had been 'non-self-governing', and that Britain's failure to report on it was either a failure to apply Article 73e, acquiesced in by the Assembly, or else an assertion tacitly accepted that 'constitutional considerations' prevented the transmission of information, under the proviso to Article 73e. Alternatively it may be that Southern Rhodesia would not have been considered 'non-self-governing' but for the element of denial of human rights on a racial basis: in other words, as a territory it may have been self-governing (in the sense of governed from within), but its people as a whole were not involved in its government. Comparison with the various resolutions establishing criteria for self-governing support this suggestion.

If the focus is to be on the status of the people of the territory rather than of the territory as such (as a piece of 'real estate', so to speak), then interesting possibilities arise. For example, the people of South Africa under *apartheid* were not 'self-governing' in the sense stipulated. The Government of South Africa had 'responsibilities for the administration of territory' (viz South Africa itself) 'whose peoples have not yet attained a full measure of self-government'. The reason why South Africa could not be treated as non-self-governing was not so much the dichotomy in Article 74 between metropolitan and non-self-governing territories as the implied distinction in Article 73 between 'Members of the United Nations' and non-self-governing territories. This would bring Chapter XI into line with Chapter XII: Article 78 excludes from administration under the trusteeship system 'territories which have become Members of the United Nations'. Thus from the point of view of Chapters XI

[37] (1965–6) 41 *BY* 103, 112.

and XII, the Charter arguably excludes formal recolonization of Member States. The position might, however, be different if the territory concerned is not part of a Member State. For example Southern Rhodesia after UDI, even if its statehood had been conceded, might still have been treated by the United Nations as 'non-self-governing' until either it fulfilled the conditions laid down in resolution 742(VIII) or was admitted to United Nations membership. The situation could arise in which a United Nations Member did have 'responsibilities' (for example, at the invitation of a puppet government) for the administration of the territory of a recognized State, or if there was a protectorate or 'special' treaty arrangement between two States, especially where the arrangement served the purpose of widespread denial of human rights in the subject State. Such situations may well be, in practice, equivalent to those of colonial type, and (at least where the 'subject' State is not a United Nations Member) the argument that Article 73 applies only to colonies and not to States need not prevail.

But the fact is that such cases have not so far been treated, even potentially, as coming within the ambit of Chapter XI,[38] nor have cases in which foreign intervention has occurred in other States, whether under claim of humanitarian intervention (Kosovo, 1999) or otherwise (Iraq, 2003), leading to a situation of territorial dependency. Although practice with respect to non-self-governing territories did become more expansive after 1960, developing from a system of voluntary designation to one in which the General Assembly would make its own findings, it did so only with respect to physically separate territories seen to be in a colonial situation. Whatever the formal possibilities, it is highly unlikely that Chapter XI practice might evolve to embrace non-colonial situations, however analogous.[39] Thus as Reisman notes:

> Compared to the relatively limitless character of self-determination, decolonization is finite in several senses. First, it addresses only those political arrangements that are deemed 'colonial'. Obviously, this is a very selective characterization; human history has been marked by the movement of peoples with a small margin of superiority in organization or in welfare (or both) to areas where the inhabitants were subordinated, expelled or exterminated. Decolonization is also more limited prospectively. Claims for self-determination may continue indefinitely; but when the current category of colonizers has been extinguished, the process of decolonization will end. Indeed, there are only a few patches on the globe which have yet to be decolonized.[40]

[38] Cf Fischer [1974] *AFDI* 201 (Sikkim).
[39] On Kosovo see Grant (1999) 28 *Georgia JICL* 9. See also Quane (1998) 47 *ICLQ* 537, 558–62.
[40] Reisman (1983) 93 *Yale LJ* 287, 305.

## 14.3 The international status of non-self-governing territories

### (1) Sovereignty and non-self-governing territories

Article 73 applies to United Nations Members 'which have or assume responsibilities for the administration of territories' which are non-self-governing. Clearly the phrase 'responsibilities for the administration of' includes colonies, i.e., separate territories under the sovereignty of an administering Power. Equally, it is not limited to colonies in the strict sense: protectorates and other forms of colonial administration have also been included among the territories reported on. On this basis, it would appear that Chapter XI is not directly concerned with the question of sovereignty as such, but rather with the future development of the territory and people concerned. Nonetheless, it is sometimes asserted that administering States are *ipso facto* not sovereign with respect to their Chapter XI territories, i.e. that the effect of colonial self-determination is to displace sovereignty rather than to qualify its exercise.[41]

The view of administering Powers, on the other hand, was expressed for example by the United States delegate to the Fourth Committee in 1947:

> It was realized then [*sc* in 1945], and it remains true now, that in many non-self-governing territories sovereignty or jurisdiction vests in the administering states; and nothing was written into the Charter to change this fundamental fact. On the other hand, there are other non-self-governing territories—trust territories—where supervision lies in the hands of the United Nations: and in such territories the United Nations can and should hold the administering power to strict accountability. Chapter XI of the Charter deals with the former; Chapters XII and XIII with the latter . . . Chapters XII and XIII materially alter the status of non-self-governing territories coming within their scope. Chapter XI does not. No effort should be made to blur this distinction.[42]

The view that sovereignty over a non-self-governing territory remains with the administering State can be accepted only with reservations. That State has accepted far-reaching obligations with respect to such territories, obligations not substantially different from those that were accepted by States administering

[41] Bedjaoui, *ILC Ybk* 1975/I, 49; Calogeropoulos-Stratis, *Le Droit des peuples à disposer d'eux-mêmes*, 113; Judge Ammoun, *Western Sahara Case*, ICJ Rep 1975 p 12, 31–2. Rigo Sureda, *Evolution*, 353 comments that: 'The idea of trust not being acceptable, the presence of the metropolis in its colonies has gradually been considered illegal unless confirmed by an act of self-determination. This seems to indicate that, within the context of colonialism, self-determination has become a peremptory norm of International Law whereby a state's title to a territory having colonial status is void.' But see his more cautious formulation, ibid, 223.

[42] Mr Sayre (USA), *GAOR*, 4th ctee, 37th mtg, 6 Oct 1947, 42–3, cited by Noguiera, *The United Nations and Portugal*, 147.

Trust Territories under Chapter XII. It is true that the Charter contemplates a greater measure of international supervision of trust territories, but even with respect to supervision the two regimes tended to be conflated by subsequent Assembly action. Nonetheless, certain distinctions remained, at least in theory: for example, the plea of domestic jurisdiction was in principle irrelevant to Trust Territories, but was capable of applying to Chapter XI territories, however little that plea may have prevailed in practice.[43] Administering States have more freedom with respect to termination of Non-Self-Governing status than with respect to termination of Trusteeship. And the General Assembly has never claimed or exercised a power to revoke or declare forfeited a State's title to administer a Non-Self-Governing territory: the most it has done is to call upon States to terminate such status by granting independence.[44]

The question of sovereignty over Non-Self-Governing Territories was raised in the *Right of Passage* case.[45] This concerned the Portuguese-controlled enclaves of Dadra and Nagar-Aveli, attached administratively to the larger territory of Daman but separated from it by Indian territory. Portugal had been accorded certain rights of passage between the two enclaves and Daman, both under British rule and by the Indian Government after independence in 1947, though the extent of this customary right was disputed.[46] After local insurrections had broken out in the two territories, India refused Portuguese military and civilian personnel the right of passage over the territories, with the result that the insurrections ran unchecked, leading eventually to Indian annexation of the territory with local support but no formal UN involvement. Portugal's complaint as to India's refusal of passage was rejected by the Court, formally by nine votes to six, but in substance (since four of the six votes were procedural dissents in India's favour) by thirteen votes to two (Judges Spender and Fernandes ad hoc dissenting). On the other hand, the Court rejected (13–2) the Fifth Preliminary Objection of India that the claim was one within India's domestic jurisdiction, and held (by 11–4) that Portugal had, in 1954, a right of passage over the intervening territory, subject to the regulation and control of India, in respect of private persons, civil officials, and goods in general. In the course of doing so the Court clearly accepted that Portugal had sovereignty over its enclaves: 'Portuguese sovereignty over the villages was recognized by

[43] Cf Nawaz, *The UN and Domestic Jurisdiction*, 214–22; Higgins, *Development*, 110–18.

[44] See Jennings, *Acquisition of Territory*, 78–87.

[45] ICJ Rep 1960 p 6, 39.

[46] The Court held by 8–7 that Portugal did not have any right of passage in respect of armed forces, armed police, and arms and ammunition, and by 11–4 that it did have such a right with respect to private persons, civil officials, and goods in general. Cf Krenz, *International Enclaves and Rights of Passage*.

the British in fact and by implication and was subsequently tacitly recognized by India. As a consequence the villages comprised in the Maratha grant acquired the character of Portuguese enclaves within Indian territory.'[47] Portuguese sovereignty over the enclaves in 1954 was denied only by three judges, and by one of these only on an interpretation of the original grant (Judge Badawi).[48] Judge Kojevnikov thought that 'Portugal did not possess, and does not possess, any sovereign rights over Dadra and Nagar-Aveli'[49] but gave no reasons. Judge Moreno-Quintana was more explicit:

> When it became independent, India made no fundamental change in the established system. We must not forget that India, as the territorial successor, was not acquiring the territory for the first time, but was recovering an independence lost long since . . . To support the Portuguese claim in this case, which implies survival of the colonial system, without categorical and conclusive proof is to fly in the face of the United Nations Charter . . . My conclusion is that there never existed a Portuguese right of passage between its coastal possession of Daman and the enclaves of Dadra and Nagar-Aveli . . .[50]

Even this approach involved not so much a denial of title as a use of self-determination to shift the burden of proof. Nevertheless if Portuguese sovereignty over its enclaves had been unquestioned, so too was its right of access to them: Judge Moreno-Quintana's approach is therefore capable of having important practical effects in the colonial context, without being a denial of title as such.

The view that Chapter XI does not affect territorial title was affirmed in the *Western Sahara* case, where the Court held that the request, relating to the future status of a non-self-governing territory, did not relate to 'existing territorial rights or sovereignty over territory',[51] and has been assumed in later decisions.[52] On the other hand, to the extent that sovereignty implies the unfettered right to control or to dispose of the territory in question, the obligation in Article 73b, and the associated principle of self-determination, substantially limit the sovereignty of an Administering State.

[47] ICJ Rep 1960 p 6, 39. Cf ibid, 48–9 (Judge Basdevant), 65–6 (Judge Wellington Koo), 99 (Judge Spender), 123–4 (Judge ad hoc Fernandes).

[48] The Treaty of Poona of 1779 and decrees of the Maratha princes in 1783 and 1785 granting Portugal rights over the territory seemed to confer only certain revenue rights: however, the majority held, subsequent British acquiescence converted this situation into one of sovereignty. Cf Judge Badawi: ICJ Rep 1960 p 6, 51 ('a factual situation *sui generis* having well-defined limits').

[49] Ibid, 52. [50] Ibid, p 6, 95, 96. [51] ICJ Rep 1975 p 12, 28.

[52] See, e.g., *Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ Rep 1999 p 1045; *Land and Maritime Boundaries Between Cameroon and Nigeria*, ICJ Rep 1998 p 275. For comment, see Kohen (2000) 43 *GYIL* 253.

### (2) The use of force and non-self-governing territories

The relation between the principle of self-determination and the Charter prohibition on the use of force in international relations has been discussed already. Modern practice establishes a distinct connection between the two, such that, even where a particular use of force is unlawful, its effects in terms of the status of territory may nonetheless be recognized, provided that they are consistent with the principle of self-determination in its application to the territory in question.

The issue arose, at least indirectly, in the *Right of Passage* case. There the question of the status of the enclaves after the insurrection was in issue, for if Portugal had remained sovereign—as it would appear to have done according to ordinary rules of acquisition of territory—then its right of access to the enclaves would presumably have continued to exist as well. The majority judgment side-stepped the issue completely by considering the problem of sovereignty and the right of passage only as at December 1954, i.e. before the insurrection. India was held not to be responsible because its refusal of access was an exercise of the power to regulate transit.[53] The Court thus failed, as President Klaestad pointed out, fully to address the dispute.[54] Only two majority judges did consider the point, apart from the two dissentients.[55] Judge Spiropoulos stated:

> It is a fact that after the departure of the Portuguese authorities, the population of the enclaves set up a new autonomous authority based upon the will of the population. Since the right of passage assumes the continuance of the administration of the enclaves by the Portuguese, the establishment of a new power in the enclaves must be regarded as having *ipso facto* put an end to the right of passage.[56]

Apart from the more direct effects on statehood discussed in Chapter 3, it may be that the sovereignty of an administering State in a Chapter XI territory is more readily displaced, even in the case of annexation by the use of force, provided that the principle of self-determination is not itself violated.[57] However, as the International Court emphasized in the *Western Sahara* case, that the application of 'the right of self-determination . . . Require[s] . . . a free and genuine expression of the will of the peoples concerned.'[58] and any use of force to alter the status of such a territory—except possibly where self-determination is

[53] ICJ Rep 1960 p 6, 44–5.
[54] Ibid, 47.
[55] Ibid, 115 (Judge Spender); 125 (Judge ad hoc Fernandes).
[56] Ibid, 53. Cf Judge Armand-Ugon: ibid, 87.
[57] Cf Brownlie, *Principles*, 577–80; Jennings, *Acquisition of Territory*, 85–6.
[58] ICJ Rep 1975 p 12, 32; see also ibid, 121–2 (Judge Dillard).

forcibly denied by the administering Power—is in principle unlawful under the Charter and under general international law.

This principle was strongly reflected in United Nations practice after Indonesia forcibly annexed East Timor, a Non-Self-Governing Territory under the administration of Portugal. Following Portugal's withdrawal from the mainland and the subsequent Indonesian invasion in 1975, Indonesia claimed to have coordinated an act of self-determination on the part of the East Timorese people.[59] But that claim was rejected by East Timorese representatives and by many States, and although the Indonesian claim to sovereignty was formally recognized by at least one State (Australia) and informally tolerated by others, its administration was never legitimized. Correspondingly, Portugal remained as Administering Power for United Nations purposes despite its precipitate withdrawal,[60] and the territory remained on the list of Non-Self-Governing Territories. On this basis Portugal challenged Australia's refusal to recognize it as Administering Power in the *Case Concerning East Timor*, but the Court held that the challenge was inadmissible because it necessarily implicated the asserted rights of Indonesia in respect of East Timor.[61] Following internal changes in Indonesia, a plebiscite was held under United Nations auspices; when the East Timorese people overwhelmingly (78.5 per cent) rejected a regime of 'special autonomy' within Indonesia, Indonesia withdrew, amidst much violence and destruction. There followed a period of United Nations administration (1999–2002), leading to the independence of East Timor, and its admission to the United Nations, on 27 September 2002.[62]

## (3) The legal personality of dependent peoples

The Friendly Relations Declaration (1975) states, *inter alia*:

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it;

[59] See Krieger (ed), *East Timor and the International Community*, 44–52; see also E/CN.4/1996/56 (1996).

[60] SC res 384, 22 December 1975; SC res 389, 22 April 1976; GA res 3485, 12 December 1975; GA res 31/53, 1 December 1976; GA res 32/34, 28 November 1977; GA res 33/39, 13 December 1978; GA res 34/40, 21 November 1979; GA res 35/27, 11 November 1980; GA res 36/50, 24 November 1981; GA res 37/30, 23 November 1982. Subsequent resolutions were not pressed for want of a 2/3 majority.

[61] The Court concluded that a merits decision would require it to determine the rights of Indonesia, a State not party to the proceedings: ICJ Rep 1995 p 90, 105–6. For criticism see Chinkin (1996) 45 *ICLQ* 712; cf Crawford in Alston (ed), *People's Rights*, 7, 34–6.

[62] GA res 55/3, 27 Sept 2002, A/57/258 (Security Council recommendation on admission of the Democratic Republic of Timor-Leste). For the Security Council intervention leading to East Timorese independence see Chapter 12.

and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter.

It seems clear from this and other formulations of the principle of self-determination[63] that where the principle applies, it does so as a right of the people concerned; it is not a matter simply of rights and obligations as between existing States. Another State may well be interested in the result of an act of self-determination, in that it may stand to gain or regain territory. But to treat self-determination as a right of that State would be to deny the reality of the alternative options open to the people concerned.[64]

It is true that in certain cases this clear distinction between the right of a dependent people to choose its own political future and the contingent interest of a neighbouring State in the exercise of that right has been confused or conflated. In particular, the General Assembly has treated certain territories not as self-determination units but as enclaves of a claimant State, with the result that, in the latter case, the only acceptable future status has been the surrender of the territory to the claimant State. This practice, which is examined in more detail below, has been applied only in certain special cases, and it does not call in question the International Court's conclusion as to the right of colonial self-determination and the special status of a non-self-governing or trust territory.

It may thus be concluded that the people of a Chapter XI territory enjoy a separate legal status, and with it a measure of legal personality. In certain contexts, especially where self-determination is being questioned or forcibly denied, there has been a certain practice of allowing separate representation of colonial territories—at any rate in Africa and the Middle East. Certain movements have been recognized by the Organization of African Unity (OAU) or the General Assembly itself as effective representatives of the people concerned

[63] Colonial Declaration, para 2: 'all peoples have the right to self-determination'.

[64] In the *Northern Cameroons Case*, ICJ Reports 1963 p 15, the question of the legal interest of the Republic of Cameroon in the results of an exercise of self-determination by the Northern Cameroons province was in issue. The majority side-stepped the point by holding that the matter had been already settled by the Assembly. Nevertheless, the Court referred to 'the indisputable fact that if the result of the plebiscite in the Northern Cameroons had not favoured joining the Federation of Nigeria, it would have favoured joining the Republic of Cameroon': ibid, 28. It is unclear whether this meant that the Republic of Cameroon had a legal interest in the matter, or was intended merely as a demonstration of the reason for a conferral of general standing in the jurisdiction clause (Art 19) of the Trusteeship Agreement. Judges Spender (ibid, 95–6), Fitzmaurice (ibid, 109–11), Morelli (ibid, 137–8) held that the Cameroons had no personal legal interest: as did Judge Wellington Koo (ibid, 46). Judges Badawi and Bustamante and Judge ad hoc Beb a Don dissenting thought that the Republic of Cameroons did have a special interest: ibid, 152, 163, 193.

and have been given observer status and certain privileges in that regard.[65] This was true, for example, for the former Portuguese territories in Africa,[66] and it remains true for the Palestine Liberation Organization (Palestine) and Polisario (Western Sahara).[67] However, the General Assembly has tended to defer to regional organizations, producing an inconstant and partial practice.[68] For example, no organization or individual was formally recognized as representative of the people of occupied East Timor because, among other reasons, no competent regional organization existed.[69]

[65] In the case of the General Assembly, decisions of regional organizations were in practice a necessary predicate. Shaw identifies 'a screening process . . . excluding in practice secessionist movements.' 5 *Liverpool LR* 23. The OAU in 1963 set guidelines for the recognition of liberation movements: Talmon, *Recognition*, 30 n 48, citing Ginther (1982) 32 *ÖZöRV* 131, 140–5; Červenka, *The Unfinished Quest for Unity*, 46–50. The Fourth Committee in 1972 first provided for representation of national liberation movements before UN organs: Shaw 5 *Liverpool LR* 22–3. On national liberation movements generally, see Dugard, *Recognition and the United Nations*, 123–4; Cassese, *Self-Determination*, 166–9; Roth, *Governmental Illegitimacy in International Law*, 227–34; Suy in Kreijen *et al* (eds), *State, Sovereignty, and International Governance*, 373, 380–2. On the use of force by national liberation movements, see Cassese, *Self-Determination*, 150–5; Wilson, *International Law and the Use of Force by National Liberation Movements*.

[66] The national liberation movements of the Portuguese colonies in Africa were affirmed by the General Assembly to be the 'authentic representatives of the true aspirations of the peoples of those Territories.' GA res 2918 (XXVII), 14 November 1972. The PAIGC was recognized by the General Assembly as the government of Guinea-Bissau, prior to the final evacuation by Portugal of the territory: GA res 3061 (XXVIII), 2 Nov 1973. The 'Government of the Angolan Republic in Exile' (GRAE) was recognized by the OAU in 1963: Talmon, *Recognition*, 303–4. On the emergence of the national liberation movements in Angola and Mozambique—MPLA, FNLA, UNITA and FRELIMO—see Cooper, *Africa Since 1940*, 139–44. See also Bothe (1977) 37 *ZaöRV* 572; de Quadros (1987) 10 *Enc PIL* 93.

[67] GA res 3237, 22 Nov 1974, conferred observer status on the PLO. Shaw distinguishes this from the case of the African liberation movements, in that the PLO was invited to participate in all proceedings, not only those related directly to its own interests: 5 *Liverpool LR* 24. Controversially, the PLO later was invited to participate in Security Council proceedings related to Israeli air raids on Lebanese territory: ibid, 25–6. See also Kassim (1980) 9 *Denver JILP* 1; Travers (1976) 17 *Harv ILJ* 561.

[68] E.g., by designating in some cases two or more liberation groups as representative of a single territory, the OAU in effect encouraged centrifugal tendencies: Roth, *Governmental Illegitimacy*, 233. The General Assembly provided for consultation with the OAU in determining the representativeness of liberation movements in Africa (res 2918 (XXVII), 14 Nov 1972) and with the Arab League for movements in the Near East, at least as regarded the Conference on International Humanitarian Law (res 3102 (XXVIII), 11 Dec 1973). On GA res 3102, see Cassese, *Self-Determination*, 169. A decision by the Third UN Conference on the Law of the Sea similarly deferred to OAU and Arab League decisions concerning national liberation movements: Shaw, 5 *Liverpool LR* 26, citing A/Conf.62/SR.38. For the practice of the Economic Commission for Africa see Wilson, *National Liberation Movements*, 117–23. See further Marcum in Shain (ed), *Governments-in-Exile in Contemporary World Politics*, 42; Roth, *Governmental Illegitimacy*, 227–8; Wilson, *National Liberation Movements*, 117–19.

[69] Fretilin, the liberation movement in East Timor, was invited to make presentations to committees of the General Assembly, in particular to the Fourth Committee and the Committee of 24, but was declined observer status: Shaw, 5 *Liverpool LR* 24, 32. Even when a competent regional organization did exist, national liberation groups were sometimes declined access to organization processes on political grounds: e.g., the Eritrean People's Liberation Front (EPLF): ibid, 32.

### (4) Standards for assessing the wishes of a dependent people

Though the people of a non-self-governing territory have the right to determine the future status of the territory, practice has not developed very specific standards for ascertaining their wishes. Plebiscites showing a local majority within one segment of a territory to favour a disposition other than that favoured by the majority of the whole of the territory have not always been permitted to justify a rupture of the integrity of the 'territory' as a whole (e.g., Mayotte and Aruba). Questions have also been raised about purported acts of self-determination in which the Administering Power has not involved the relevant UN organs.[70] In the *Western Sahara* case the International Court acknowledged that 'in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory', either because they 'did not constitute a "people" entitled to self-determination' or because such consultation was 'totally unnecessary, in view of special circumstances'.[71]

Where a plebiscite is held, evidently it should take place on the basis of full information made available to the people concerned. The Principles annexed to General Assembly resolution 1541 provide that, when the inhabitants of Non-Self-Governing Territories undertake an act of self-determination, they should do so on the basis of full information as to the choices available. Principle VII states that the voluntary choice of the people should be 'expressed through informed and democratic processes.' Principle IX, concerning the option of integrating with another territory, calls for the people of the territory to act 'with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes.' Administering States have repeatedly been urged to ensure that full information is made available so that the electorate may 'evaluate properly the available options for self-determination'.[72]

[70] E.g., the 1976 'act of self-determination' in East Timor: Budiardjo and Liong, *The War Against East Timor*, 96. There have been criticisms of the adequacy of the consultation held in West New Guinea (West Irian), with United Nations involvement, in the form of a UN Temporary Executive Authority (UNTEA). UNTEA under an agreement of 15 August 1962 served as intermediary between the Netherlands and Indonesia in the transfer of control over the territory. The agreement was approved in GA res 1752 (XVII), 21 Sept 1962 and, as provided by its terms, an 'act of free choice' was carried out in 1969. The Assembly acknowledged the 'act of free choice' by which the population elected to integrate with Indonesia. GA res 2504 (XXIV), 19 Nov 1969.

[71] ICJ Rep 1975 p 12, 33 (para 59).

[72] See, e.g., A/AC.109/2002/14, 7 May 2002, para 53 (Turks & Caicos Islands). See also GA res 56/73, 10 Dec 2001, para 2; GA res 55/145, 8 Dec 2000, para 2.

## 14.4 Termination of non-self-governing status: the forms of self-government

### (1) Termination of non-self-governing status: criteria for self-government

A territory ceases to be 'non-self-governing' when it has achieved self-government, or rather, in the terms of Article 73, 'full' self-government. The question is which political statuses will be regarded as satisfying this requirement. In view of the omission of the term 'independence' from Article 73,[73] it is clear that other possibilities were contemplated, and despite the emphasis in the Colonial Declaration on independence as the primary form of self-government, the Assembly has fairly consistently allowed three alternatives:

A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:

(a) Emergence as a sovereign independent State;
(b) Free association with an independent State; or
(c) Integration with an independent State.[74]

In general terms therefore, there can be no doubt about what is meant by 'full-self-government'. It has sometimes been argued, however, that the attainment of a certain standard of material, social and educational progress in a given territory is a prerequisite to 'self-government' in terms of Article 73 in addition to more formal indicia of governmental authority or internal control. The obligations of the Administering State to 'promote the well being of the inhabitants', and the specific obligations in Article 73a and 73c, are certainly capable of this interpretation: nevertheless a majority of the General Assembly has generally taken the view that, while material and political progress is a correlative of political independence, it is not a pre-condition; that the two should be promoted together, and that ultimately political self-determination is the basis of the enjoyment of other rights.

### (2) Determination of cessation of non-self-governing status

Although it has sometimes been suggested that United Nations authorization is necessary before the reporting obligation concerning a former non-self-governing territory ceases, this cannot be correct.[75] The matter is not one within domestic jurisdiction of Administering States, on the other hand, since

[73] On the controversy at San Francisco about inclusion of 'independence' in Ch XI, see Russell and Muther, *History of the UN Charter*, 815; 10 *UNCIO*, 677–8.

[74] GA res 1541 (XV), Annex, Principle VI; cited in the *Western Sahara Case*, ICJ Rep 1975 p 12, 32.

[75] Cf Higgins, *Development*, 111.

it relates to fulfilment of their legal obligations under Chapter XI. The position was stated by the General Assembly to be as follows:

> Chapter XI of the Charter embodies the concept of Non-Self-Governing Territories in a dynamic state of evolution and progress towards a 'full measure of self-government'. As soon as the territory and its peoples attain a full measure of self-government, the obligation ceases. Until this comes about, the obligation to transmit information under Article 73e continues.[76]

This is the natural interpretation of Chapter XI, which, in contrast to the Trusteeship System under Chapters XII and XIII, provides for no termination functions to be exercised by United Nations organs. On the other hand, the General Assembly has stated that 'in the absence of a decision by the General Assembly itself that a Non-Self-Governing Territory has attained a full measure of self-government in terms of Chapter XI of the Charter, the administering Power concerned should continue to transmit information under Article 73e of the Charter with respect to that Territory.'[77] United Nations supervision or surveillance of any act of self-determination is clearly desirable to ensure the freedom of choice so made, and has been normal under Chapter XI.[78] Where the relevant mode of self-determination is independence, admission to the United Nations constitutes probably unchallengeable evidence that a territory has ceased to be non-self-governing. More specific powers with respect to decolonization have also been delegated to United Nations organs, for example with respect to East Timor.[79]

A distinct problem which has arisen under Chapter XI is that of territories claimed by Administering States to be 'self-governing' or 'independent' while still being treated as non-self-governing by the General Assembly. This has occurred both in cases of claimed independence[80] and free association. The case of the French Territory of Afars and Isaas was somewhat similar, but France did not submit information after 1947.[81]

The position then is that non-self-governing status ceases automatically upon the achievement of full self-government: whether full self-government

[76] GA res 1541 (XV), Annex, Principle II. Cf the terms of the 1970 Friendly Relations Declaration: 'such separate and distinct status under the Charter shall exist until the people of the colony or self-governing territory have exercised their right of self-determination in accordance with the Charter . . .' (GA res 2625 (XXV), Annex).

[77] GA res 57/131, 11 Dec 2002, para 1; GA res 56/65, 10 Dec 2001, para 2; GA res 55/137, 8 Dec 2000, para 2.

[78] *UN Repertory*, Supp III, vol 3, 92–9; Johnson, *Self-Determination within the Community of Nations*.

[79] On West Irian see Dallier (1973) 27 *RJPIC* 41. Generally see Chapter 12.

[80] E.g. Oman: *UN Repertory* Supp III, No 3, 56–9; Higgins, *Development*, 18. For Brunei (which was never considered in the context of Chapter XI), see Chapter 7.

[81] *UN Repertory* Supp III, No 3, 33–4, 56; UNITAR Study, *Small States and Territories*, 103–4; Rigo Sureda, *Evolution*, 64–7, 71–2, 203–12; Umozurike, *Self-determination*, 226–35; Rabier and Angrand (1975) 49 *RJPIC* 473. Questions with respect to the Territory of Afars and Isaas were

has in fact been achieved is to be decided by the Administering State and the General Assembly together, either specifically or by some such unequivocal act as admission to United Nations membership.

## (3) The forms of self-government

The three methods of self-government referred to in principle VI of GA resolution 1541 (XV) will be referred to in turn.

### *(i) Independence*

No specific problems arise in the case of territories choosing independence, unless the territory concerned is small. In the terms of the Colonial Declaration and in practice, independence has been the central and most usual form of self-government.[82]

### *(ii) Incorporation in another State*

Principle VIII of the Annex to resolution 1541 (XV) provides for integration 'on the basis of complete equality' with an independent State as a method of self-government. Principle IX requires the integrating territory to have attained 'an advanced stage of self-government with free political institutions'. Incorporation with the metropolitan State has occurred in a number of cases, either with[83] or without[84] express United Nations approval. For example,

resolved following a referendum of 8 May 1977, in which the people of the territory chose independence, and subsequent admission to the UN as Djibouti: GA res 32/1, 20 Sept 1977. Both neighbouring states had seemed inclined to pursue integration: see Spencer, *Ethiopia at Bay*, 332–3; Oberlé and Hugo, *Histoire de Djibouti*, 8 (noting a 'veritable offer of cession' in 1966 by de Gaulle). The government of Somalia, on ethnic grounds, suggested integration as an option for the territory, referring to the Issas as northernmost of the Somali tribes: ibid, 38. According to Brownlie, Somalia insisted on self-determination for the territory and saw integration as a possible though not a necessary result. Brownlie, *African Boundaries*, 774.

[82] Of approximately 100 Ch XI territories in the period 1945–2003 which attained final status, 70 achieved joint or separate independence. This includes 8 (Grenada, Dominica, Saint Lucia, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Antigua and Barbuda, Surinam and Singapore) that had a previous status of self-government. It also includes Algeria, on which France did not transmit information, and Zanzibar, which formed Tanzania with the former Trust Territory of Tanganyika. Seven territories were integrated with the metropolitan State; 7 with other States. 4 remain Associated States (Puerto Rico, Northern Marianas, Cook Islands & Niue). Sixteen are still listed by the UN as Non-Self-Governing Territories. See further Appendix 3.

[83] Greenland (1953), Surinam (1954; independent 1975), Netherlands Antilles (1954), Alaska and Hawaii (1959); Cocos (Keeling) Islands (1984). With respect to the Cocos Islands, see GA res 39/30, 5 Dec 1984 (accepting integration); Aldrich and Connell, *The Last Colonies*, 255. Craven offers a critical view on the plebiscite affirming the integration of Hawaii into the United States. Craven, 'Continuity of the Hawaiian Kingdom' (2002) (http:// www.hawaiiankingdom.org/pdf/ Continuity_Hawn_Kingdom.pdf). Cf *Larsen v Hawaiian Kingdom* (2001) 119 ILR 566.

[84] French Polynesia, New Caledonia, French Guiana, Reunion, Guadeloupe and Martinique (1947). New Caledonia since 1999, however, has had a special constitutional status in connection with projected movement toward an act of self-determination.

Singapore, Sabah and Sarawak were incorporated in the Federation of Malaysia with United Nations approval.[85] Such incorporation, as a result of an act of self-determination, remains a practical option of self-government, although claims to incorporation in the metropolitan State tend to be regarded by the General Assembly with some suspicion.

An alternative basis for integration arises as a result of claims by third States to Chapter XI territories. So far, seven territories have been integrated with other States on grounds of national unity rather than self-determination, although in some cases regard was had to the wishes of the inhabitants, at least to some degree. The territories in question were Goa and dependencies, and French Establishments in India, both assimilated into Indian territory; Ifni (Morocco); São João Batista de Ajudá (Benin, then called Dahomey); the Panama Canal Zone (Panama); and Hong Kong and Macao (China).[86] A number of other territories (Falkland Islands (Malvinas), Gibraltar, Western Sahara) or former territories (Belize) are subject to third State claims that have not yet been resolved. These claims raise special problems and are dealt with separately below.

Whether a territory is integrated in the former metropolitan State or a third State, the basic assumption underlying Principle IX is that the people of the territory concerned should thereafter be treated on a basis of equality as citizens of the integrating State, i.e. that they should be beneficiaries of self-government as citizens of that State. This can be difficult to achieve where the people concerned are a very small fraction of the population.[87] As a minimum, they must be accorded full citizenship rights and freedom of movement,[88] although the need to limit numbers and to protect the environment of small island territories may justify internal restrictions on freedom of inwards movement.[89]

[85] For the processes by which Singapore, Sarawak and North Borneo (Sabah) acceded to Malaysia see Manila Accord, 31 July 1963, 550 UNTS 343; Report of the Secretary-General, 14 September 1963, [1963] *UNYB* 41–4. For the consequences in terms of the Philippine claim to Sabah see *Case concerning Sipadan and Ligitan, Philippines' Request for Intervention*, judgment of 23 October 2001, Judge Kooijmans (sep op), para 16; Judge ad hoc Franck (sep op), paras 9–18.

[86] Walvis Bay (Namibia) and West Irian (Indonesia) are also possible examples.

[87] The people of the Cocos (Keeling) Islands, following their integration with Australia, are organized as a shire council within Western Australia, and Western Australian law applies to the Islands. But for constitutional reasons (the Islands not being part of the State of Western Australia) they vote in federal elections as part of the Northern Territory electorate: see Aldrich and Connell, *The Last Colonies*, 255.

[88] Such equality has been extended to citizens of all overseas territories under British administration, with the exception of the Sovereign Base Areas of Akrotiri and Dhekelia (Cyprus): British Overseas Territories Act 2002 (UK), ss 3(1), 3(2), 4.

[89] On the application of human rights standards in this context see, e.g., *Lovelace v Canada*, Comm No R.6/24, UN Doc A/36/40, 166; 68 ILR 17; *Kaefer and Procacci v France (Joined Cases C-100/89 and C-101/89)* [1990-I] ECR 4647; *Matthews v UK*, ECHR 24833/94, 18 February 1999; 123 ILR 1.

In some cases, colonial territories have been integrated within a State on certain terms, e.g., guaranteeing a measure of autonomy or self-government to the people of the integrating territory.[90] Difficulties may subsequently arise if these terms are not respected or are changed without consultation with the people. For example the former Italian colony of Eritrea was integrated with Ethiopia in 1952 as 'an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown'.[91] But in 1962 this arrangement was unilaterally abrogated by Emperor Haile Selassie. During the thirty-year conflict that ensued, there was virtually no international recognition of the Eritrean position, or of its source in the violation of the terms of federation. Rather, Ethiopian sovereignty was seen as unconditional for as long as it lasted.[92]

### *(iii) Association*

Association, sometimes referred to as 'free association', is a form of self-government developed in United Nations practice under which the associated entity has a special status short of independence, with certain functions (including international representation and defence) carried out by another State, usually the former colonial power.[93] The requirements for association as a form of self-government are formulated as follows by resolution 1541(XV):

*Principle VII*

(a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes.

(b) The associated territory should have the right to determine the internal constitution without outside interference, in accordance with due constitutional processes

[90] Finnish sovereignty over the Åland Islands was confirmed but the Islands were guaranteed local autonomy under arrangements that have been respected and have worked well for 80 years: see Protocol 2 on the Åland Islands to the 1994 Treaty of Accession, 37 OJEC C241L; Hannikainen and Horn, *Autonomy and Demilitarisation in International Law*, ch 7.

[91] GA res 617 (VII), 17 December 1952; *The United Nations and the Independence of Eritrea,* 21–13, 152–3.

[92] See also Gayim, *The Eritrean Question*, 364–94; Cassese, *Self-determination*, 218–22; Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflicts*, 124–30. For Eritrean independence in 1993 see Chapter 9.

[93] Cf earlier development of the concept of association in GA resns 567 (VI), 648 (VII), and 742 (VIII).

> and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.

Association represents one of the more significant possibilities of self-government communities (especially island communities) that are too small to be economically and politically viable standing alone. But its status as a coequal form of self-government for Chapter XI territories has not gone unchallenged, and controversies relating to Puerto Rico and to the West Indies Associated States suggest the need for a more detailed analysis of the concept of association than is provided by Principle VII.

**(a) Association arrangements in practice since 1952**

The first formal instance of 'free association' was the case of Puerto Rico in 1952.[94] In that case the arrangement involved a compromise between a desire for local self-government and perceived economic exigencies.[95] 'Commonwealth status' as it was termed in English,[96] was granted in 1952 pursuant to an Act of Congress[97] and was approved by referendum. The arrangement, stated to be 'in the nature of a compact', is contained in large part in the Puerto Rican Federal Relations Act 1950 as amended.[98] A federal appeals court elaborated upon this status in the following terms:

> [I]n 1952, Puerto Rico ceased being a territory of the United States subject to the plenary powers of the Congress as provided in the Federal Constitution. The authority exercised by the federal government emanated thereafter from the compact itself. Under the compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally, and the government of Puerto Rico is no longer a federal government agency exercising delegated power.[99]

Puerto Rican citizens have automatic United States citizenship, and enjoy some, though not all, of the protections afforded by the United States Constitution.[100] Acts of Congress apply to Puerto Rico unless they are for some reason locally inapplicable.[101] The local government has considerable, but by no means

[94] Reisman, *Puerto Rico and the International Process*; Cabranez (1967) 16 *ICLQ* 531; Hector (1973) *6 NYUJIL* 115; Symposium (1973), 67 *PAS* 1; Igarashi, *Associated Statehood*, 44–62; Lapidoth, *Autonomy* (1997) 130–43.

[95] Cf Rousseau (1974) 78 *RGDIP* 1182.

[96] Ibid, 1185. Puerto Rico under the compact was described in Spanish as *Estado Libre Asociado*—'Free Associated State'. The difference between the English and Spanish has been described as 'symptomatic of the disagreements over the precise meaning and effect of Puerto Rico's political status.' Declet (2001) 28 *Syracuse JILC* 19, 35.

[97] Text in Reisman, *Puerto Rico,* 124.

[98] Ibid, 126.

[99] *United States v Quinones*, 58 F 2d 40, 42 (1st Cir 1985).

[100] Reisman, *Puerto Rico*, 35–9. But cf Cabranes (1978) 127 *U Penn LR* 391.

[101] *United States v Vargas*, 370 F Supp 908 (1974); *Caribtan Corp v OSHRC*, 493 F 2d 1064 (1974); *Hodgson v UESP*, 371 F Supp 56 (1974).

complete, internal autonomy, but only vestigial international competence.[102] This arrangement was approved by the United Nations in 1953,[103] and the United States ceased transmitting information under Article 73e.

In some respects, the Puerto Rican association arrangements provided an unsatisfactory model. There was little or no participation in international affairs, and limited countervailing participation in metropolitan affairs.[104] Internal autonomy was restricted, especially in legislative and judicial matters.[105] As a result, the Committee of Twenty-four moved in 1972 to reinstate Puerto Rico on the list of territories subject to its consideration, and on 30 August 1973 proclaimed 'the inalienable right of the Puerto Rican people to self-determination'.[106] In 2000, the Committee reiterated its concern that despite 'diverse initiatives' the process of decolonization in Puerto Rico had yet to be set in motion.[107]

On the other hand Puerto Rico has been regarded by the United States since 1952 as entitled to opt for a different status—either complete independence[108] or integration with the United States; and the Puerto Rican electorate has repeatedly declined either of these options. The position was reaffirmed, for example, by a United States–Puerto Rican Commission on the Status of Puerto Rico, which reported in August 1966, *inter alia*, that:

1. The policy governing the relationship between the United States and Puerto Rico is and should continue to be based on the principles of mutual consent and self-determination . . .

4. All three status alternatives—the Commonwealth, Statehood, and Independence —are within the power of the people of Puerto Rico and the Congress to establish under the Constitution.

[102] See Laughlin, *The Law of United States Territories and Affiliated Jurisdictions*, 339–74.

[103] GA res 748 (VIII), 27 Nov 1953 (26–16: 18).

[104] Puerto Rico elects to Congress one Commissioner who does not have a floor vote but does vote in committee, where most legislation is actually dealt with. Its citizens may vote in the party primaries but they do not choose electors in Presidential elections. This parallels the situation in the three remaining US Chapter XI territories: American Samoa, Guam and the US Virgin Islands. See A/AC.109/2002/12, 14 May 2002, paras 4–8; A/AC.109/2002/8, 23 April 2002, paras 4–7; A/AC/109/2002/4, para 8. This became controversial in 2000: see *Igartúa de la Rosa* v *United States*, 107 F Supp 2d 140, 113 F Supp 2d 228 (DPR 2000), reversed 229 F 3d 80 (1st Cir 2000).

[105] See, e.g., *Harris v Rosario*, 446 US 651 (1980) (confirming that Congress continues to exercise authority over Puerto Rico as territory 'belonging to the United States' for purposes of the Territorial Clause, Art IV(3)); *Rodriguez v Popular Democratic Party*, 457 US 1 (1982) (confirming that Congress delegates powers of administration to the Commonwealth of Puerto Rico sufficient for it to function as 'an autonomous political entity' with respect to internal affairs and administration but subject to further decision by Congress).

[106] Reisman, *Puerto Rico*, 184–6.

[107] Committee of Twenty-four resolution A/AC.109/2000/24, 12 July 2000.

[108] Cf President Eisenhower (1953) 29 *DSB* 841; Whiteman, 1 *Digest* 400; Reisman, *Puerto Rico*, 43–5.

5. As a form of political status, each alternative confers equal dignity and equality of status.[109]

In 1967 the present arrangement was reaffirmed in a further referendum. A non-binding 1993 referendum again affirmed Commonwealth status (as against independence or incorporation into the United States as the 51st State).[110] Another vote was taken in December 1998, and again the 'status quo' option prevailed narrowly over US Statehood; there was virtually no support for independence.[111] But although any deficiencies in the terms of association have been repeatedly ratified by the people of Puerto Rico,[112] it has remained the view of the Committee of Twenty-four that Puerto Rico has yet to engage in a definitive act of self-determination. Indeed, this view seems to be shared by the relevant Congressional committee, the ranking members of which reported in 1999 that:

The 1998 vote was an important effort by the local government to advance a process of self-determination leading to resolution of the political status of Puerto Rico. However, the plebiscite was inconclusive because the results do not constitute a clear expression of the will of the United States citizens of Puerto Rico regarding their ultimate political status. Congress should establish by federal statute a structured process of self-determination through which the ultimate political status of Puerto Rico can be resolved based on the constitutionally valid status options that Congress is willing to consider.[113]

In the case of certain other non-self-governing territories remaining under United States administration, an approximation to associated status has been at least partly achieved: these are the Northern Mariana Islands (in which a Commonwealth Covenant entered into force in 1978)[114] and Guam.[115]

[109] Cabranez (1967) 16 *ICLQ* 531, 536–9. The Report was required under Pub L 88–271, Feb 20, 1964, 78 Stat 17, as amended by Pub L 89–84, July 24, 1965, 79 Stat 261.

[110] Http://freedomhouse.org/survey99/relterr/puerto.html (visited 25 July 2003); US House Committee on Resources, Report 105–31 (Background statement for HR 856, 12 June 1997), para 10.

[111] Http://eleccionespuertorico.org/1998/summary.html (visited 25 July 2003).

[112] Cf Reisman, *Puerto Rico*, 44–50.

[113] Committee on Resources, *Report: Results of the 1998 Puerto Rico Plebiscite*, 106th Cong 1st Sess, 19 Nov 1999.

[114] See Igarashi, *Associated Statehood*, 212–15. See also Willens and Siemer, *An Honorable Accord: The Covenant Between the Northern Mariana Islands and the United States*.

[115] Seventy-three per cent of Guamanians voting in a referendum in 1982 elected to pursue commonwealth status. The Guam Commission on Self-Determination completed in May 1986 a draft Commonwealth Act, the main provisions of which were accepted by referendum on 8 August 1987: A/AC.109/1192, paras 19–37, and for a summary see A/AC.109/2001/4. The Commission on Self-Determination negotiated with the US Government from 1989 to 1997, with a view to implementing the Act, but without resolution: A/AC.109/2000/6, paras 19–22; A/AC.109/1192,

The other major model of an association relationship is that of the Cook Islands. There, association was chosen by means of an election under United Nations surveillance;[116] the arrangement came into effect on 4 August 1965. The terms of association are contained in the Cook Islands Constitution Act 1964 as amended.[117] The Islands have full internal self-government.[118] Although the head of State of the Cook Islands is the Queen in right of New Zealand,[119] and executive power is accordingly vested in her,[120] that power is exercised on the advice of a local Executive Council.[121] New Zealand retains responsibilities for the external affairs and defence of the Cook Islands, but those responsibilities are to be discharged after consultation by the Prime Minister of New Zealand with the Premier of the Cook Islands.[122] Legislation of the New Zealand Parliament does not extend to the Islands as part of its law unless requested and consented to by the Government of the Islands.[123] The Legislative Assembly has the power to amend the Constitution upon compliance with certain special manner and form provisions:[124] such amendment procedures could be used to declare the Islands fully independent.

In 1965 the General Assembly, with some hesitation, approved this arrangement as giving the people of the Islands 'control of their internal affairs and of their future', resolved that 'since the Cook Islands have attained full internal self-government, the transmission of information in respect of the Cook Islands under Article 73e of the Charter of the United Nations is no longer necessary'; but at the same time reaffirmed 'the responsibility of the United Nations, under General Assembly resolution 1514(XV), to assist the people of the Cook Islands in the eventual achievement of full independence, if they so wish, at a future date.'[125] These two operative paragraphs of resolution 2064(XX) were the product of a compromise between Members who considered that the association arrangement was itself a definitive act of self-determination and others who regarded it as merely an interim—and not very satisfactory—accommodation.[126] The arrangement has, however, proved

paras 19–37; A/AC/109/2018, paras 74–83. An impediment seems to have been that the Act did not recognize the plenary competence of the US Congress over Guamanian affairs: A/AC.109/2002/8, para 13. Guam remains an organized, unincorporated territory of the United States. See Fine (1997) 11 *Georgetown Immigration LJ* 630; Lansing and Hipolito (1998) 5 *Asian-Pac Am LJ* 1; Rogers, *Destiny's Landfall: A History of Guam*; van Dyke, di Amore-Siah and Berkley-Coats (1996) 18 *U Hawaii LR* 623; Quan (2002) 3 *Asian-Pac L & Pol'y J* 3.

[116] GA res 2005 (XIX), 18 February 1965; A/5962, 20 August 1965.

[117] Act No 69 of 1964; as amended by Act No 2 of 1965.

[118] Act No 69 of 1964, s 3. [119] Constitution, s 2. [120] Ibid, s 12.

[121] Ibid, ss 4, 7. [122] Act, s 5. [123] Constitution, s 46. [124] Ibid, s 41.

[125] GA res 2064 (XX), 16 December 1965 (78–0:29), paras 5, 6. See Allen (1966) 560 *Int Conc* 40–9. [126] See also Kilbride (1965) 1 *NZULR* 571; Stone (1966) *J Pac H* 168.

durable and acceptable to the Islanders; in any event the apparent distinction insisted on in the 1965 debates is not an exact one, since New Zealand itself has explicitly accepted the right of the Cook Islands to choose independence. Moreover, the political development of the relationship between the Cook Islands and New Zealand has evolved considerably, to the point where for most purposes the Cook Islands can be considered as independent. Thus in a Joint Centenary Declaration of 11 June 2001, the two Prime Ministers declared that:

1. In the conduct of its foreign affairs, the Cook Islands interacts with the international community as a sovereign and independent State. Responsibility at international law rests with the Cook Islands in terms of its actions and the exercise of its international rights and fulfilment of its international obligations.
2. Any action taken by New Zealand in respect of its constitutional responsibilities for the foreign affairs of the Cook Islands will be taken on the delegated authority, and as an agent or facilitator at the specific request of, the Cook Islands. Section 5 of the Cook Islands Constitution Act 1964 thus records a responsibility to assist the Cook Islands and not a qualification of Cook Islands' Statehood.[127]

Consistently with this development, organs of the Cook Islands are treated in New Zealand courts as entitled to foreign State immunity.[128]

The cause of associated statehood suffered a reverse with the refusal of the United Nations to approve arrangements made between the United Kingdom and certain Caribbean islands under the West Indies Act 1967 (UK). These arrangements, by British description 'a new type of relationship . . . something between that of a colony and that of a totally independent State',[129] were merely noted in resolution 2257(XXII):[130] subsequently the United Kingdom ceased reporting. But GA resolution 2422 (XXIII): 'Strongly regrett[ed] the . . . decision of that [*sc*. the U.K.] Government to cease transmitting information on Antigua, Dominica, Grenada, St. Kitts-Nevis-Anguilla and St. Lucia . . .'.[131]

By resolution 2701 (XXV) the Assembly

Consider[ed] that, in the absence of a decision by the General Assembly itself that the Territories of Antigua, Dominica, Grenada, St. Kitts-Nevis-Anguilla, St. Lucia and

[127] Cited by Quentin-Baxter, *The Laws of New Zealand*, para 29; for further detail see ibid, paras 33–41.

[128] *KPMG Peat Marwick v Davison* (1996) 104 ILR 526 (NZCA); see, e.g., ibid, 565 (Richardson J) describing the Cook Islands as 'an independent State under the constitutional arrangements contained in the Cook Islands Constitution Act 1964 (which although a New Zealand statute applies to the Cook Islands only and not to New Zealand (Section 2)).'

[129] Evan Luard, Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, 954 *HC Debs* cols 1080–1, 21 July 1978.

[130] GA res 2357 (XXII), 19 Dec 1967 (86–0: 27).

[131] GA res 2422 (XXIII), 18 Dec 1968 (87–4; 16), para 3.

St. Vincent have attained a full measure of self-government in terms of Chapter XI of the Charter, the Government of the United Kingdom . . . should continue to transmit information under Article 73C of the Charter with respect to those territories . . .[132]

The problem in this case, apart from certain failures of consultation and communication, was that the West Indies Act 1967 left the United Kingdom a substantial degree of power to intervene in local affairs, so that the division of authority between defence and foreign affairs on the one hand, and internal matters on the other was not adhered to.[133] The question was eventually settled not through amendment of the original plan of associated status, but through the independence and UN membership of six of the constituent territories of the proposed Associated State.[134] Anguilla, having seceded from the arrangements under the 1967 Act, remains a non-self-governing territory.[135]

The earlier cases of association might lead to the conclusion that it is a merely transitional status, tending towards eventual integration (Puerto Rico) or independence (Cook Islands, the entities formerly associated under the West Indies Act 1967). This would be inaccurate and unfortunate. Rather the record suggests that association can maintain popular and political support and constitute a stable form of self-government, especially for very small territories, in the long term. This seems to be true of other association arrangements, for example for the small New Zealand territory of Niue in 1974,[136]

[132] GA res 2701 (XXV), 14 Dec 1970 (86–2: 18). On the 1967 Act see Broderick (1968) 17 *ICLQ* 368; Fawcett [1967] *ASCL* 709; Spackman, *Constitutional Development in the West Indies 1922–1968*, 375–413, 533–41; Leibowitz, *Colonial Emancipation in the Pacific and the Caribbean*; Phillips, *Freedom in the Caribbean*, 78–93.

[133] Under the 1967 Act the UK Government's responsibilities included 'any matter which in the opinion of Her Majesty's Government in the United Kingdom is a matter relating to defence (whether of an associated state or of the United Kingdom, or of any other territory for whose government Her Majesty's Government in the United Kingdom are wholly or partly responsible) or to external affairs.' (s 2(I)(a). See also ss 3(2); 7(2).)

[134] Orders in council terminating the association arrangements were made and these States became UN Members as follows: Grenada, GA res 3204 (XXIX), 17 Sept 1974; Dominica, GA res 33/107, 18 Dec 1978; Saint Lucia, GA res 34/1, 18 Sept 1979; Saint Vincent and the Grenadines, GA res 35/1, 16 Sept 1980; Antigua and Barbuda, GA res 36/26, 11 Nov 1981; and Saint Christopher and Nevis, GA res 38/1, 23 Sept 1983. See also Davies, *Legal Status*, 310–15.

[135] 'The Anguilla Act 1980 formalised the dependency status of Anguilla which had prevailed, de facto, since 1967 but Her Majesty's Government had not relinquished sovereignty in the intervening period.' 2 *HC Debs*, WA, cols 203–4, 6 Apr 1981. On Anguilla see Fawcett [1968] *ASCL* 785–8; Cmnd 4510 (1970); Brisk, *The Dilemma of a Ministate: Anguilla*; Simmonds (1972) 21 *ICLQ*, 151; Davies, *Legal Status,* 18–24, 309–15.

[136] See the Niue Constitution Act 1974, *NZ Statutes* 1974/2, 1068. GA res 3155 (XXVIII), 14 December 1973 (128–0:0) approved a proposed 'act of self-determination' and appointed a special mission to observe it. GA res 3285 (XXIX), 13 December 1974 (adopted without vote) recognized that Niue had achieved self-government in free association with New Zealand and approved cessation of transmission of information under Art 73e.

and for three entities created from the former US Trust Territory of the Pacific Islands in the 1980s and 1990s.[137] In a number of the remaining Chapter XI territories, consideration is being given to association as a basis for self-government and thus for the completion of the Chapter XI process. For example, it is a possible option under the lengthy schedule for a referendum on final status for New Caledonia,[138] and it has been said to be the preferred option for Tokelau.[139]

**(b) The international legal status of associated States**

It is sometimes asserted that associated States lack international status in view of metropolitan responsibilities for foreign affairs, defence, etc.[140] It is of course not possible to establish a priori rules: like international protectorates, to which they bear a certain resemblance, the status of particular Associated States depends on the specific instruments and arrangements made, and on their implementation, which vary from case to case. Nonetheless, association is a distinct status developed in United Nations practice, under which full self-government takes the following basic form.[141]

First, the association arrangement is freely accepted by the inhabitants of the territory.

Secondly, the terms of association are clearly set down in a form binding on the parties.

Thirdly, the associated territory has substantial powers of internal self-government.

[137] Palau, the Republic of the Marshall Islands and the Federated States of Micronesia are described as 'Associated States' with UN membership. The Commonwealth of the Northern Mariana Islands associated with the United States on terms comparable to those for Puerto Rico. The Cocos (Keeling) Islands were considered for association with Australia, and that option was made available in a UN-observed referendum on 6 April 1984. The Cocos Islanders opted for integration. Australian House of Representatives, 9 May 1984, 2148 (statement reporting 229 votes for integration, 21 votes for free association, 9 votes for independence). See also Australian Senate, Standing Committee on Foreign Affairs and Defence, *United Nations Involvement with Australia's Territories*, 99–104; Tahmindjis (1985) 1 *QITLJ* 186.

[138] The Nouméa Accord, 5 May 1998, A/AC/109/2114, para 21 & annex, para 5 and attached 'Policy Document, s 5 provides for a vote of the populations concerned in the period 2013–18, leading to 'the transfer of sovereign powers to New Caledonia, its access to the international status of full responsibility and the organization of citizenship by nationality'. Although independence is one option under this formula, it is not the only one. Following approval of the Accord by referendum, amendments to the French Constitution established a new constitution for New Caledonia (Arts 76, 77). See GA res 56/70, 10 Dec 2001, para 8; GA res 57/136, 11 Dec 2002, para 8. See Chappell (1999) 72 *Pacific Aff* 373; Goesel-LeBihan (1998) 44 *AFDI* 24.

[139] The islands were declared a protectorate of Great Britain in 1889 and were transferred to New Zealand administration in 1925. See the Tokelau Islands Act 1948 (NZ). The Ulu-o-Tokelau, highest indigenous official, indicated on 30 July 1994 'a strong preference for a future status of free association with New Zealand': see GA res 49/47, 9 Dec 1994, para 3; GA res 50/38B, Section X (Tokelau), 6 Dec 1995, para 2; A/AC.109/2001/SR.7, 28 June 2001; A/AC.109/2002/6, para 45.

[140] Broderick (1968) 17 *ICLQ* 368, 402.

[141] Cf Reisman, *Puerto Rico*, 48–50.

Fourthly, the reserved powers of the 'metropolitan' State do not involve substantial discretions to intervene in the reserved or internal affairs of the Associated State.

Fifthly, there is a procedure for termination of the association which is at least as easily available to the Associated State as to the government of the metropolitan State, and which can be regarded as a continued expression of the right to self-determination of the people of the Associated State.

On this basis, it is untenable to suggest that Associated States lack all international status. Relations between the metropolitan State and an Associated State are not within the domestic jurisdiction of the former.[142] The association arrangements are binding under the municipal law of both parties.[143] Further, given that association arrangements are accepted in practice as satisfying the principle of self-determination, and are accepted on the basis of undertakings and arrangements to which the metropolitan State is committed, in principle those arrangements are also binding under international law.[144] For all these reasons, it is evident that under association arrangements accepted by the United Nations as fulfilling the requirements of self-government under Chapter XI, the Associated State acquires substantial international personality, which may in some cases approximate to statehood under the flexible criteria discussed in Part I above.

Thus there has been an increasing willingness to admit Associated States to international organizations, either as full members or as observers. For example, Niue has been admitted to a number of regional organizations,[145] to the Food and Agricultural Organization, UNESCO, WHO, WMO, and to Intelsat as a nonsignatory user. The Cook Islands participate in an even more extensive way.[146] Puerto Rico and the Northern Mariana Commonwealth likewise engage in multilateral processes.[147]

[142] Cf Fawcett [1968] *ASCL* 786–7.

[143] *US v Valentine*, 288 F Supp 957, 981 (1968) (Puerto Rico).

[144] Cf Reisman, *Puerto Rico*, 44–5

[145] Viz, the African, Caribbean, and Pacific Group of States (ACP), and an associate Member to the Economic and Social Commission for Asia and the Pacific (ESCAP), the South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA), the Pacific Community (PC) and the Pacific Island Forum (PIF).

[146] Viz, ACP, ADB, ESCAP (associate Member), FAO, ICAO, ICFTU, IFAD, IFRCS (associate Member), Intelsat (nonsignatory user), IOC, OPCW, SPARTECA, PC, PIF, UNESCO, WHO, WMO.

[147] The Commonwealth of the Northern Mariana Islands belongs to ESCAP (associate Member), Interpol (subbureau) and the Pacific Community. Puerto Rico belongs to Caricom (Caribbean Community and Common Market), ICFTU (International Confederation of Free Trade Unions), Interpol (subbureau), IOC, WCL, WFTU and WHO (associate Member).

## (4) Remaining non-self-governing territories

As a result of the processes described above, there are now only sixteen remaining Chapter XI territories—leaving aside the possibility, already discussed, that other unlisted territories should be so considered.

**Table 5. Remaining non-self-governing territories**[148]

| Territory | Population (estimated as of July 2005) | Area (sq kms) | GDP ($US) |
|---|---|---|---|
| American Samoa | 62,297 | 197 | 500 million (2000 est) |
| Anguilla | 12,827 | 96 | 112 million (2002 est) |
| Bermuda | 63,849 | 53 | 2.33 billion (2003 est) |
| British Virgin Islands | 21,573 | 151 | 2.498 billion (2004 est) |
| Cayman Islands | 47,375 | 259 | 1.391 billion (2004 est) |
| Falkland Islands | 2,661 | 16,076 | 75 million (2002 est) |
| Gibraltar | 26,544 | 7 | 769 million (2000 est) |
| Guam | 165,575 | 545 | 3.2 billion (2000 est) |
| Montserrat | 4,799 | 102 | 29 million (2002 est) |
| New Caledonia | 232,410 | 18,736 | 3.158 billion (2003 est) |
| Pitcairn | 48 | 47 | N/A |
| St. Helena | 5,110 | 410 | 18 million (1998 est) |
| Tokelau | 1,413 | 10 | 1.5 million (1993 est) |
| Turks and Caicos Islands | 19,608 | 497 | 216 million (2002 est) |
| United States Virgin Islands | 111,699 | 352 | 2.5 billion (2002 est) |
| Western Sahara | 428,839 | 266,000 | N/A |

Each of the remaining non-self-governing territories belong to at least one multilateral organization, illustrating the greater willingness on the part of administering powers and third States to treat with these entities at least for some purposes as international legal persons. These territories also have entered into agreements or memoranda of understanding with neighbouring States.[149]

[148] Area, population, and GDP estimates from Gazetteer and CIA World Factbook. See also http://www.un.org/Depts/dpi/decolonization/trust3.htm (visited 26 July 2003).

[149] For example, American Samoa has entered with Samoa and Tonga into Memoranda of Understanding concerning mutual economic cooperation and trade missions to States of the Pacific region: A/AC.109/2002/12, para 43.

**Table 6. Membership of non-self-governing territories in international organizations**

| Territory | Organizations |
|---|---|
| American Samoa | ESCAP (associate), Interpol (sub-bureau), IOC, PC |
| Anguilla | Caricom (associate), CDB, Interpol (sub-bureau), OECS (associate), ECLAC (associate) |
| Bermuda | Caricom (observer), CCC, ICFTU, Interpol (sub-bureau), IOC |
| British Virgin Islands | Caricom (associate), CDB, ECLAC (associate), ICCAT, ILO (associate), Interpol (sub-bureau), IOC, OECS (associate), UNESCO (associate) |
| Cayman Islands | Caricom (observer), CDB, Interpol (sub-bureau), IOC, UNESCO (associate) |
| Falkland Islands | ICFTU |
| Gibraltar | Interpol (sub-bureau) |
| Guam | ESCAP (associate), Interpol (sub-bureau), IOC, PC |
| Montserrat | Caricom, CDB, ECLAC (associate), ICFTU, Interpol (sub-bureau), OECS, WCL |
| New Caledonia | ESCAP (associate), FZ, ICFTU, PC, WFTU, WMO, PIF (observer) |
| Pitcairn | PC |
| St. Helena | ICFTU |
| Tokelau | PC, WHO (associate), UNESCO (associate) |
| Turks and Caicos Islands | Caricom (associate), CDB, Interpol (sub-bureau) |
| United States Virgin Islands | ECLAC (associate), Interpol (sub-bureau), IOC |
| Western Sahara | African Union (as Saharawi Arab Democratic Republic)[150] |

In a number of these territories, popular consultations have taken place that have rejected some option of self-governing status (independence or integration), and have in effect opted for the colonial status quo. Some writers have referred, in consequence, to a 'fourth option,' which apparently would add to the three options under Principle VI of resolution 1541 (XV), analysed above.[151] In

[150] The OAU had debated seating the SADR as a member state since the proclamation of the establishment of that entity on 26 February 1976. Discussions had already been underway concerning the seating of Polisario, though no decision had been reached by the time of the proclamation. See Talmon, *Recognition*, 186–7.

[151] Ofuatey-Kodjoe in Schachter and Joyner, (eds) *United Nations Legal Order*, vol 1, 349, 377; Tomasa (1998) 5 *Asian LJ* 247, 250.

terms of the Friendly Relations Declaration, this 'fourth option' involves 'the emergence into any other political status freely determined by a people'.[152] In a similar context the United Kingdom and the United States—between them responsible for fourteen of the sixteen remaining territories—have asserted that the Committee of Twenty-four is wrongly insisting on 'a single and narrow standard for decolonization.'[153] According to this view, the standards hitherto applied under resolutions 1514(XV) and 1541(XV) are too narrow to accommodate the territories now in the process of decolonization.[154] Representatives of some of the territories concerned have put forward what they saw as a fourth, *sui generis* option: 'negotiation with respect to an individualized arrangement mutually agreed by territory and administering power'.[155]

Clearly it is inappropriate to force small communities into a rigid set of choices that do not reflect or respond to their needs and wishes. But to assume that the existing law of decolonization does this is mistaken. There is a wide range of choice—particularly in the case of association, which can cover a spectrum of possibilities from virtual independence to virtual integration. The peoples concerned may be encouraged—and have a right—to be free. But there are different forms of freedom.[156]

It may, however, be useful to speak of a 'fourth option' in another sense. Plebiscites in a number of Chapter XI territories have shown that the inhabitants wish to retain their existing dependent status. This has been so in Bermuda,[157] the Virgin Islands[158] and American Samoa.[159] Such expression of preference do 'not present a serious problem since if . . . the group ends up still [dependent] . . . it will be able to choose again.'[160] The 'fourth option' could describe a phase in the process of self-determination in which the people have

[152] GA res 2625 (XXV) of 25 Oct 1970.

[153] A/AC.109/2002/8, Spec Comm Working Paper, 23 Apr 2002, para 94, citing A/56/PV.82, GA 82nd mtg, 10 Dec 2001.

[154] A/C.4/55/SR.3, 25 Sept 2000, paras 52–54.

[155] Leader of the Cayman Islands Government, Letter to the Editor, *Cayman Net News*, Issue 412, 27 May 2003 (http://www.caymannetnews.com/Archive, visited 26 July 2003).

[156] In the words of the Chair of the Committee of Twenty-Four (referring to the Cayman Islands), 'Within the free association option, the Territory could negotiate the degree of autonomy it wanted.': Press Release, GA/COL/3086, Special Committee on Decolonization, 12 June 2003.

[157] By referendum in Bermuda in 1995, 73.6% of those voting rejected independence. A/AC.109/2002/15, 22 May 2002, para 2.

[158] In a referendum in 1993 in the US Virgin Islands, 80.3% of those voting elected to retain the existing status of the territory as an 'organized, unincorporated Territory of the United States.' A/AC.109/2002/4, 27 March 2002, paras 5–6.

[159] The locally elected Lieutenant Governor of American Samoa indicated in 1993 to the Special Committee that his constituents preferred to remain a 'Territory of the United States': A/AC.109/1159, paras 25–31. The situation in 2002 was reported as unchanged. A/AC.109/2002/12, 14 May 2002, para 47.

[160] Ofuatey-Kodjoe in Schachter and Joyner (eds), *UN Legal Order*, 377.

duly expressed their wish to retain their existing status and in which the territory consequently remains subject to Chapter XI. The fourth option would amount, in this light, to a popular ratification of governing arrangements and, thus, a partial fulfilment of self-determination. At the same time, it would not end their right, flowing from Chapter XI, to elect a change in status.

## (5) Claims by third States against non-self-governing territories

A persistent and troublesome aspect of United Nations practice in the context of Chapter XI is the problem of claims made to Non-Self-Governing Territories (or former territories) by third States on grounds such as national reunification, or because the territory concerned is considered to belong to the claiming State under the rules relating to the acquisition of territory or on some other ground. For example, it has been said that certain territories are mere 'colonial enclaves'[161] created by colonizers on the territory of a surrounding State and having no legitimate separate identity. In such cases, it is said, the principle of self-determination has no application, or is relevant only so far as the modalities of transfer of the territory are concerned. In decolonization practice, various territories have been transferred to the claiming State rather than being treated as self-determination units: by far the best known case was Hong Kong, but there have been a number of others.[162] Of the remaining sixteen Chapter XI territories, two, the Falkland Islands (Malvinas) and Gibraltar, arguably fall into this category.[163] A number of other territorial claims to the whole or substantial parts of States that were former Chapter XI territories have been put forward on the basis of the principle of 'territorial integrity', without regard to the potential or even the previous exercise of self-determination by the people concerned. In the former category, the Western Sahara (claimed by Morocco),[164] in the latter, Belize (claimed by Guatemala)[165] have been most

[161] Cf Rigo Sureda, *Evolution*, 214–19; Franck and Hoffman (1976) 8 *NYUJILP* 331.

[162] Viz, Macao, Ifni, São João Batista di Ajudá and the French and Portuguese enclaves in India. Walvis Bay and the Panama Canal Zone may also be included in this category.

[163] For a survey of these claims see Mathy (1974) 10 *Rbdi* 167, (1975) 11 *Rbdi* 129; Barbier, *Le Comité* 564–87; Pomerance, *Self-Determination in Law and Practice*, 19–21.

[164] See Rigo Sureda, *Evolution,* 72–4, 212–15; Jacquier (1974) 78 *RGDIP* 683; Rezette, *The Western Sahara and the Frontiers of Morocco*; Barbier (1976) 30 *RJPJC* 67; Levy (1976) 2 *Brooklyn JIL* 289; Franck and Hoffman (1976) 8 *NYUJILP* 331; Trout, *Morocco's Saharan Frontiers*; Damis, *Conflict in Northwest Africa: The Western Sahara Dispute*; Zoubir and Volman, *International Dimensions of the Western Sahara Conflict*; Cassese, *Self-determination*, 86–8; Lehtinen in Kivimäki and Laakso (eds), *Agents, Motives and Instruments: An Atlas of African Conflicts*, 168.

[165] Belize was subject to a claim of revindication by Guatemala, in particular after 1939. See *HC Debs*, vol 959, wa, cols 231–2, 29 Nov 1978. GA res 3432 (XXX), 8 December 1975 (110–9:16) unequivocally asserted Belize's right to self-determination. Prior to the independence of Belize, the

troublesome. By contrast, certain claims were rather for voluntary union post-independence than for involuntary return, and did not present problems so far as the principle of self-determination was concerned.[166]

The conflict in United Nations practice, which is thus apparent, has its roots in the Colonial Declaration itself. Article 2 provides that 'All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development . . .' Article 6 of the Declaration on the other hand states that 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter . . .'. It has been argued that, at least in the case of fragments of territory claimed by a contiguous State, Article 6 takes priority over Article 2, so that the only option for decolonization of the territory is its transfer to the claimant State. The argument is expressed in the following terms, for example, by Rigo Sureda:

> This attitude of the General Assembly towards colonial enclaves contrasts with the stand taken . . . on small colonial territories which are not enclaves but islands, to which it recognizes a fully-fledged right of self-determination, while in the case of enclaves it appears to deny this right to the present population of the enclave and favours a delimitation of the subject of self-determination based on the assumption that the territory concerned is already part of the state surrounding it.[167]

UK signed Heads of Agreement with Guatemala by which the two States undertook to 'recognise the independent State of Belize as an integral part of Central America, and respect its sovereignty and territorial integrity in accordance with its existing and traditional frontiers.' It was further provided that '[t]he controversy between the United Kingdom and Guatemala over the territory of Belize shall therefore be honourably and finally terminated.' Heads of Agreement between UK and Guatemala, 11 March 1981, paras 1, 16; (1981) 52 *BY* 380. After admission of Belize to the UN (GA res 36/3, 25 Sept 1981), Guatemala nonetheless made a substantial claim for territorial adjustment against the new State. A 'facilitation process' was initiated in 2000 with the support of the OAS (OAS Perm Council res 780 (1257/00), 1 Dec 2000). On 17 September 2002 Guatemala and Belize presented proposals for a final settlement, to be approved at a future date through referenda. See OAS Perm Council res 836 (1353/03), 12 Feb 2003. Formally the settlement requires ratification by Guatemala, a prospect by no means certain. (An earlier problem of municipal Guatemalan procedure, relating to congressional ratification, was addressed by the Constitutional Court: *El Caso de Belice* (1993, Corte de Constitucionalidad) 100 ILR 305). Mexico, too, noted a historic claim with respect to Belize but pledged in 1978 not to pursue it, provided Belize were allowed to exercise its right of self-determination. 942 *HC Debs* Wa, cols 236–7, 18 Jan 1978. See further Bloomfield, *The British Honduras—Guatemala Dispute*; Humphreys, *The Diplomatic History of British Honduras 1638–1907*; Wadell (1951) 55 *AJIL* 459; Blay (1986) 18 *IL & Pol* 458; Lauterpacht, Schwebel and Rosenne, *Legal Opinion on Guatemala's territorial claim to Belize* (Den Bosch, the Netherlands, 2002).

[166] E.g., Somalia's claim to French Somaliland: see Rigo Sureda, *Evolution*, 71–2. French Somaliland became independent as Djibouti in June 1977 and was admitted to the UN without opposition: GA res 32/1, 20 Sept 1977; (1978) 82 *RGDIP* 254.

[167] Rigo Sureda, *Evolution*, 176–7.

This was in issue in the *Western Sahara* case. The territory formerly known as Spanish Sahara has been claimed on historical grounds by Morocco and Mauritania. The General Assembly asked the Court to determine what were the legal ties, if any, between the Saharan territory and Morocco, on one hand, and the 'Mauritanian entity', on the other hand, at the time of Spanish colonization (1884).[168] Before the Court, Algeria, Morocco and Mauritania each adopted distinct positions on the relation between Articles 2 and 6 of the Colonial Declaration:

> Morocco has expressed the view that the General Assembly has not finally settled the principles and techniques to be followed, being free to choose from a wide range of solutions in the light of two basic principles: that of self-determination indicated in paragraph 2 of resolution 1514 (XV), and the principles of the national unity and territorial integrity of countries, enunciated in paragraph 6 of the same resolution . . .
>
> Mauretania maintains that the principle of self-determination cannot be dissociated from that of respect for national unity and territorial integrity; that the General Assembly examines each question in the context of the situations to be regulated; in several instances, it has been induced to give priority to territorial integrity, particularly in situations where the territory has been created by a colonizing Power to the detriment of a State or country to which the territory belonged . . .
>
> Algeria states that the self-determination of peoples is the fundamental principle governing decolonization, enshrined in Articles 1 and 55 of the Charter and in General Assembly resolution 1514 (XV); that, through successive resolutions which recommend that the population should be consulted as to its own future, the General Assembly has recognized the right of the people of Western Sahara to exercise free and genuine self-determination; and that the application of self-determination in the framework of such consultation has been accepted by the administering Power and supported by regional institutions and international conferences, as well as endorsed by the countries of the area.[169]

After carefully examining the historical material, the Court concluded that, although 'legal ties' did exist between the Western Sahara and the two claimant entities before colonization, these were not of such a character as to affect the exercise by the Western Sahara of its right to self-determination,[170] which

[168] GA res 3292 (XXIX), 13 Dec 1974 (87–0: 43). [169] ICJ Rep 1975 p 12, 29–30.

[170] On the issue of the 'legal ties' the Court (14–2, Judges Ruda and de Castro dissenting in the case of Morocco; 15–1, Judge de Castro dissenting in the case of Mauritania) was itself divided. Judges Ammoun and Forster regarded the ties as particularly substantial, amounting virtually to territorial sovereignty. Judges Gros, Ignacio-Pinto, Dillard and Petrèn regarded any ties that existed as insubstantial; indeed in Judge Gros's view they were not legal but sociological: ibid, 75 and cf the capital analysis of Judge Dillard, ibid, 119, 125–6. On this point these judges agreed with Judges de Castro and Ruda in dissent. The Majority Opinion—to the effect that legal ties of personal allegiance existed

required 'a free and genuine expression of the will of the peoples concerned'.[171] It did not therefore need to deal with the 'colonial enclave' problem, although certain inferences can be drawn from the Opinion.

Three judges were more explicit. Judge Dillard expressed the firm view that self-determination remains in all cases the 'cardinal principle', which cannot be overridden by territorial claims of third States.[172] Judge Singh appeared to take the view that only dismemberment of a pre-colonial State by the colonizer would justify reintegration rather than self-determination.[173] Judge Petrèn, on the other hand, thought that the principle of 'territorial integrity' in United Nations practice was to coordinate self-determination and that the precise legal relation between them remained undeveloped: the position was thus *de lege ferenda*.[174] The difficulties with this view, are considerable: since the question bears on the relation between an avowed general principle of law (self-determination) and a possible exception to it (the territorial integrity rule), it is necessary that the exception be capable of enunciation at least in reasonably precise terms—otherwise the exception would destroy the rule. Morocco's assertion that in decolonization questions the Assembly has the option of choosing either 'self-determination' or 'territorial integrity' reduces both to procedural policies or processes, and thus denatures self-determination as a legal right.[175] The Opinion expressly avoided this position: in the Court's view, self-determination is the fundamental principle, and the existence of claims such as those of Morocco or Mauritania was relevant only in that it might influence the Assembly in the exercise of its 'discretion with respect to the forms and procedures by which that right [*sc* self-determination] is to be realized'.[176]

The issue arose indirectly when the Philippines sought to intervene in a dispute between Malaysia and Indonesia over two small islands off the coast of Borneo. Malaysia claimed the islands as having been part of British North Borneo before they formed the State of Sabah, part of the Federation of Malaysia, after an election monitored by the United Nations.[177] The Philippines did not claim the two disputed islands but it did assert that the treaties and grants relevant to Malaysia's claim to the islands were also central to its claim to large parts of Sabah, a claim based on a 'cession' to it in 1962 by

but that these, not being equivalent to sovereignty, could not affect the application of the principle of self-determination to the territory—was a rather awkward compromise between mutually inconsistent positions. See Okere (1979) 28 *ICLQ* 296.

[171] ICJ Rep 1975, 21, 36. [172] Ibid, 120 n 1. [173] Ibid, 12, 79–81.

[174] Ibid, 79–80, 112. [175] Cf Umozurike, *Self-determination*, 86–7, 183.

[176] ICJ Rep 1975, p 12, 36.

[177] Pursuant to the Manila Accord (1963). See the Secretary-General's Report of 14 September 1963, [1963] *UNYB* 43.

the private law heirs of the Sultan of Sulu, from whom the British North Borneo Company had first acquired the colony in 1878.[178] The Court rejected the Philippines' request to intervene on other grounds, but Judge ad hoc Franck rejected its request on the more fundamental basis that no historic claim to title could prevail over the exercise of the right to self-determination.

> [I]n light of the clear exercise by the people of North Borneo of their right to self-determination, it cannot matter whether this Court . . . sustains or not the Philippines claim to historic title. Modern international law does not recognize the survival of a right of sovereignty based solely on historic title; not, in any event, after an exercise of self-determination conducted in accordance with the requisites of international law, the bona fides of which has achieved international recognition by the political organs of the United Nations.[179]

Part of the problem in dealing with these cases is that many third State claims—including the Guatemalan claim to Belize and the Philippines' claim to Sabah—are extraordinarily weak in their own terms, quite apart from any supervening act of self-determination by the people of the territory in question.[180] United Nations support for self-determination in cases such as Belize or Sabah may simply have been a function of a collective judgment—not legally authoritative but highly persuasive—that the claim in question lacked plausibility. In other cases, e.g., Western Sahara, it could not be said that Morocco's claim lacked plausibility, but after full examination the Court rejected the claim and held, consequentially, that the principle of self-determination must prevail. There would have been no point in the Court's detailed treatment of the Moroccan claim in that case if no third State claim could ever prevail over the right to self-determination.

Put rather summarily, it is suggested that the legal position is as follows:

(1) First it is necessary to distinguish between a claim to a particular territory as such and a dispute about its boundaries. As a matter of general principle, Chapter XI refers to existing territories within their established boundaries.[181] If uncertainties exist as to the location of these boundaries, they are to

[178] See *GAOR*, 1177th mtg, 27 Nov 1962, 874–7; *Philippine Claim to North Borneo, Volume I* (Manila, 1963).

[179] Judgment of 23 October 2001, separate opinion, para 15. The Court eventually awarded the two islands to Malaysia: Ligitan and Sipadan, Judgment of 17 December 2002.

[180] Thus Judge Kooijmans rejected the Philippines' request on the simple basis that it had 'failed to make its claim sufficiently plausible by not providing answers to highly pertinent questions which were put during the oral proceedings': Judgment of 23 October 2001, separate opinion, para 16. Generally on irredentist claims, see Chazan (ed), *Irredentism and International Politics*; Musgrave, *Self-Determination and National Minorities*, 211–38.

[181] Higgins, *Development*, 104; Rigo Sureda, *Evolution*, 216–17.

be resolved in the ordinary way, without reference to issues of self-determination.

(2) As concerns claims which are not merely boundary claims but which concern all or substantially all of a colonial territory, Chapter XI does not displace the sovereignty of an administering authority with respect to its colonial territory, although it affects the exercise of that sovereignty. By parity of reasoning, where the territorial sovereign is not the administering authority its sovereignty is not displaced by Chapter XI. Thus in those special cases where some third State clearly retained sovereignty over a Chapter XI territory, it retains that sovereignty, and with it, presumptively, the right to retrocession of the territory under whatever treaty or arrangement is relevant. This was the case with Kowloon[182] and the Panama Canal Zone,[183] both 'leased' territories.

[182] Kowloon was leased to Britain for 99 years by a Convention of 9 June 1898: 90 BFSP 17; *In re Wong Hon* [1959] *HKLR* 601, 27 ILR 49. In 1972 the Committee of Twenty Four recommended that Hong Kong and Macau and their dependencies (including Kowloon) be excluded from the list of Chapter XI Territories, and thereafter the Committee ceased to consider information on these two territories. Hong Kong was returned to China on 1 July 1997, pursuant to the UK-China Joint Declaration on the Question of Hong Kong, 19 December 1984, 23 ILM 1366. For comment see Ress (1986) 46 *ZaöRV* 647; Domes and Shaw, *Hong Kong: A Chinese and International Concern*; Shi (1997) 10 *Leiden JIL* 491; Mushkat, *One Country, Two International Legal Personalities*; Fiss (1998) 10 *CJTL* 493. For the status of Hong Kong after reunification in 1997 see Chapter 5.

[183] The Isthmian Canal Convention of 18 November 1903, 33 Stat 2234, TS 431, established the Panama Canal Zone as a territorial unit of ten miles' breadth along the length of the route of the canal and provided for the US presence, an arrangement the US Supreme Court once characterized as conferring 'sovereignty' over the Zone on the US, though the Court did not explain what it understood 'sovereignty' in this context to mean: *O'Connor v United States*, 479 US 27, 28 (1986) (Scalia J). The Panama Canal Treaty of 7 September 1977, TIAS 10030, provided for reversion of the Zone to Panama. See also 1280 UNTS 3. The Treaty entered into force on 1 October 1979, at which point Panama resumed control of the Canal Zone. As provided in Art III (3), the Canal itself remained under US control through a mixed Panama Canal Commission until 31 December 1989. See Note (1978) 92 *HLR* 524; Major, *Prize Possession: The United States Government and the Panama Canal, 1903–1979*. Guantanamo Bay, a further 'leased' territory, presents distinct questions and has not been considered a Chapter XI territory. The United States took hold the territory after the independence of Cuba: see the Agreement for Coaling and Naval Stations, 23 Feb 1903, Art III, TS 418; 193 CTS 314. Under a further Agreement, the leasehold was to continue '[u]ntil the two contracting parties agree to the modification or abrogation of the stipulations': Treaty of Relations, 29 May 1934, Art III, TS 866. For the US interpretation, see [1979] *US Digest* 794–5. Sovereignty over Guantanamo Bay has been addressed in connection with the controversy concerning suspected terrorists detained there by the US armed forces. The question presented has been whether, in view of the territorial status of the leasehold, US constitutional protections, especially the *habeas corpus* provisions of Art 1, s 9 and the 'due process' clause of the Fifth Amendment, extend to Guantanamo detainees. Precedent concerning camps for Haitian refugees at Guantanamo Bay suggests the applicability of US law to the leasehold. See *Haitian Centers Council* v *McNary*, 969 F 2d 1326, 1342 (2d Cir 1992), *vacated as moot sub nom Sale v Haitian Centers Council*, 509 US 918 (1993). The US Court for Berlin in 1979 dealt with a case concerning Polish nationals who had hijacked a plane to West Berlin and took the view that an argument by the US government that, owing to absence there of US sovereignty, constitutional protections do not reach persons in West Berlin was without merit. *United States v Tiede*, 86 FRD 227, 242–60 (US Ct for Berlin, 1979). But see *Al Odah v United States*, 321 F 3d 1134, 1142–4 (DC Cir, 2003).

Subject to the special character of Spain's rights under the Treaty of Utrecht of 1713, it is also arguably the case with Gibraltar.[184] In such cases self-determination may affect the modalities of and the arrangements for self-government after retrocession; but it does not apparently defeat the prior claim.

(3) In the cases just mentioned, the rights of the third State in question were clearly established by the terms of the grant, and were accepted by the

[184] By Art X of the Treaty of Utrecht, 13 July 1713: 28 *CTS* 325 Spain ceded to Great Britain 'the full and entire propriety of the town and castle of Gibraltar'. Although this has been interpreted to involve a cession of sovereignty, it is not clear from Art X that this was so. The 'propriety' was yielded 'without any territorial jurisdiction', and in the case of any grant, sale or alienation by Great Britain, Spain was entitled to first preference. The General Assembly has called upon Great Britain, to negotiate a transfer of Gibraltar to Spain: see, e.g., GA res 2429 (XXIII), 18 Dec 1968 (67–18: 34): and cf GA res 3286 (XXIX), 18 Dec 1974, despite the repeatedly expressed wishes of the Gibraltarians in favour of the status quo. For a summary of the Spanish position, see A/55/497, Annex I, 23–5;A/56/PV.49, 12 Nov 2001. The British position is that Gibraltar is a self-determination territory which, so long as the Gibraltarians desire it, may properly remain under British administration, but that the rights of Spain under the Treaty of Utrecht remain valid. Thus a grant of plenary independence to Gibraltar would violate Art 10 of the Treaty of Utrecht: A/AC.109/PV 543, cited Rigo Sureda, *Evolution*, 283. Rigo Sureda contests this on the basis that a grant of independence does not constitute a violation of a preemption clause; in any event, Art 73 of the Charter would prevail over the Treaty of Utrecht in case of conflict. Thus, only the 'colonial enclave' rule justifies the Assembly's position on Gibraltar ibid, 193–8, 285–8. See also Fawcett (1967) 43 *Int Aff* 236; [1966] *BPIL* 84. The Gibraltar Constitution of 1969 stated in its preamble that 'Her Majesty's government will never enter into arrangements under which the people of Gibraltar would pass under the sovereignty of another state against their freely and democratically expressed wishes.' Gibraltar has been subject of a number of discussions between the UK and Spain. See (1980) 51 *BY* 441. The Brussels Declaration of 27 November 1984, (1985) 56 *BY* 391 has remained a point of reference: para 1(c), stipulates: 'the establishment of a negotiating process aimed at overcoming all the differences between them over Gibraltar and at promoting cooperation on a mutually beneficial basis . . . Both sides accept that the issue of sovereignty will be discussed in that process. The British government will fully maintain its commitment to honour the wishes of the people of Gibraltar as set out in the preamble of the 1969 Constitution.' Successive Chief Ministers of Gibraltar have issued statements on the future of the territory to the Committee of 24 and to the Fourth Committee. See, e.g., Caruana, 10 October 2001, A/C.4/56/SR.5; 3 October 2002, A/C.4/57/SR.5. Talks in 2001–2 between Spain and the UK addressed Gibraltar without reaching a final settlement as to status. A/AC.109/2002/11, paras 48–50. The Spanish position was set out in an open letter of the Minister of Foreign Affairs of 26 March 2002, stating that 'Spain's historical claim, which is fully justified, concerns sovereignty over the territory and is—and intends to be—perfectly compatible with the interests of the Gibraltarians as free citizens in a democratic system.' Quoted at A/AC.109/2002/11, para 47; A/AC.109/2003/3, para 48. The UK Foreign Secretary in the House of Commons stated on 5 February 2002 that there were four aspects to the UK approach: (1) preserving the 'unique way of life' of the territory; (2) movement toward greater internal self-government; (3) achieving 'practical benefits through cooperation;' and (4) 'putting the long-running dispute about sovereignty to rest'. A/AC.109/2002/11, para 41. The General Assembly and the parties themselves have recalled the Brussels Declaration of 1984 as a framework for discussions concerning the territory. GA res 55/427, 8 December 2000; 56/421, 10 December 2001; Spain-UK Foreign Ministers' Joint Communiqué of 27 September 2002, A/AC.109/2003/3, para 54. See Levie, *The Status of Gibraltar*; Gozney, *Gibraltar and the EC*; Lincoln (1994) 18 *Fordham ILJ* 285; Bossano (1995) 18 *Fordham ILJ* 1641; Cassese, 206–14.

administering State. They qualified the status of the territory *ab initio*, as it were. But any third State claim must be clearly established to have this effect, and (depending on the circumstances and the time-scales involved) there is a high likelihood of the extinction of pre-colonial claims by lapse of time or acquiesence.[185]

(4) In the *Western Sahara* case the International Court denied that anything less than a valid claim to territorial sovereignty could qualify the right to self-determination of the people of a Chapter XI territory. A claim based on affiliation with a non-State entity (the 'Mauritanian entity') could not have this effect, nor could the legal links between Western Sahara and the State of Morocco, those links not amounting to ties of sovereignty:

> . . . the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. *Thus* the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory.[186]

(5) The principle of the intertemporal law requires that the legal effect of transactions be determined by the law in force at the time of the transaction.[187] A cognate principle in the field of territorial sovereignty is the *uti possidetis* principle, according to which the extent of a given territory is determined by its boundaries at the time of acquisition or (as the case may be) independence.[188]

[185] The Falklands (Malvinas) is the remaining Chapter XI territory which is claimed on this basis. See GA res 3160 (XXVIII), 14 Dec 1973; GA res 39/6, 1 Nov 1984; GA res 42/19, 17 Nov 1987; GA res 43/25, 17 Nov 1988. See also *Evolution*, Rigo Sureda, 80–2; Cohen [1972] *AFDI* 235; Metford (1968) 44 *Int Aff* 463; Goebel, *The Struggle for the Falkland Islands*; Waldock (1948) 25 *BY* 311; Reisman (1983) 93 *Yale LJ* 287; Grieg (1983) 8 *Austral YIL* 20; Franck (1983) 77 *AJ* 109. The matter is unresolved.

[186] ICJ Rep 1975 p 12, 68 (para 162, emphasis added). See also ibid, 56–7 (para 129), 64 (para 150).

[187] *Island of Palmas* (1928) 2 RIAA 829, 845 ('[a] judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled'); 4 ILR 3, 103, 108, 110, 111, 113, 114, 418, 479, 482, 487, 492.

[188] On the *uti possidetis* principle see *Conference on Yugoslavia, Arbitration Commission*, Opinion 2, para 1, 11 January 1992, 92 ILR 167; *Laguna del Desierto* (Chile–Argentina), Judgment of 21 October 1994, Galindo Pohl (dis op), para 14, 113 ILR 1, 84; *Eritrea-Yemen Arbitration*, Phase I Award, 9 October 1998, paras 96–100; *Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Rep 2002, Judge ad hoc Mbaye (sep op), paras 14–19. See also Bayefsky (ed), *Self-Determination in International Law*; Klabbers and Lefeber in Brölman, Lefeber and Zieck (eds), *Peoples and Minorities in International Law*, 37; Sorel and Mehdi (1994) 40 *AFDI* 11; Nesi, *L'uti possidetis iuris nel diritto internazionale*; Ratner (1996) 90 *AJIL* 590; Shaw (1996) 67 *BY* 75; Musgrave, *Self-Determination and National Minorities*; Sánchez Rodríguez (1997) 263 *HR* 149; Brownlie in Freestone, Subedi and Davidson (eds), *Contemporary Issues in International Law*, 185; Lalonde, *Determining Boundaries in a Conflicted World*.

Claims based on ethnic identity or on some real or asserted territorial integrity at some earlier date are excluded: there is no principle of reversion to some earlier and superseded territorial formation.[189]

(6) On the other hand there is a principle of territorial integrity in relation to Chapter XI territories themselves. Administering States are not at liberty to divide up or dismember those territories in violation of self-determination. Territories formed by such dismemberment are not self-determination units, but are subject to the principle of territorial integrity. For example the General Assembly applied this principle to the case of Mayotte, an island that continued under French administration after the independence, as a single federal republic, of the other islands in the archipelago to which it belonged geographically.[190] The Assembly reaffirmed 'the sovereignty of the . . . Comoros over the island of Mayotte' in resolutions through its forty-ninth session (1994).[191] Thereafter in successive decisions it deferred consideration of but kept as an agenda item 'Comorian island of Mayotte'.[192] Other international organizations, including the OIC and OAU, adopted similar resolutions.[193] The Comoros Government rejected the separation of Mayotte, protesting, for example, a French decision in 1994 to establish a visa regime for Comorians travelling from the republic to Mayotte.[194] France, as reflected in recent municipal enactments, has moved further to integrate Mayotte into the French State.[195] The situation was by no means simplified by uncertainty over the cohesion of the Comoros federation

[189] For the rejection of reversion in the context of territorial claims see *Eritrea-Yemen Arbitration*, Phase I Award, 9 October 1998, paras 114–44, 145–99, 441–50, esp para 125.

[190] (1975) 21 *AFDI* 992, 1066–70 (with extracts of French Foreign Ministry communiqués arguing that separation of Mayotte resulted from a combination of the expressed desires of the Comorians themselves; historical developments; and geography).

[191] See the series from GA res 31/4, 21 Oct 1976 to GA res 49/151, 23 Dec 1994. Prior to independence, the Assembly already had stressed territorial integrity as a governing principle in the decolonization process with respect to the islands (GA resns 3161 (XXVIII), 14 December 1973; 3291 (XXIX), 13 December 1974), and the resolution admitting the Comoros to the UN reiterated the point: GA res 3385 (XXX), 12 November 1975. See Aldrich and Connell, *The Last Colonies*, 228–32; Mahamoud, *Mayotte: le contentieux entre la France et les Comores*; Newitt, *The Comoro Islands*.

[192] E.g., GA decns 50/475, 23 Dec 1995; 56/454 of 21 Dec 2001.

[193] See, e.g., res 38/30-P *on the Comorian Island of Mayotte* (30th Islamic Conference of Foreign Ministers (ICFM) (Tehran)), 28–30 May 2003. The OAU, by CM/res 496 (XXVII), 24 June–3 July 1976, established an Ad Hoc Committee of Seven on the Comorian Island of Mayotte. Further OAU resolutions reiterated the commitment of the Organization to a unitary Comorian State: e.g., AHG/res 255, 8–10 July 1996 (XXXII). See also Proceedings of the 12th Ministerial Conference of Non-aligned States, 4–8 April 1997 (New Delhi), ch 2, para 132.

[194] See A/50/68; [1995] *UNYB* 413.

[195] See *Statut de Mayotte*, Loi no 2001–616, 11 July 2001 (changing status of Mayotte from a *Collectivité Territoriale* to a *Collectivité Départementale*); Loi constitutionnelle no 2003–276, 28 March 2003 (bringing Mayotte within the scope of the French Constitution).

itself,[196] with an attempt from 1997 onward by the inhabitants of Anjouan—another island of the archipelago—to separate from the Comoros and resume an association with France.[197] The separatists in Anjouan made reference to Mayotte as a precedent.[198] Further examples might be the British Indian Ocean Territory[199] and the separate zones of administration that had earlier comprised Morocco.[200] This is the only satisfactory explanation of the West Irian case, if indeed there is such an explanation.[201]

(7) Apart from these specific and exceptional cases, claims to a Chapter XI territory on ethnic or strategic grounds are generally excluded—with the possible exception of 'colonial enclaves'.[202] But if there exists a further exception to the fundamental principle of self-determination, in the shape of 'colonial enclaves', international practice supports its application only in the most limited circumstances: that is, to minute territories which approximate to

[196] See GA res 53/1F, 1 Dec 1998 (noting institutional instability as resulting in suspension of certain international assistance activities). The purported separation of Anjouan was followed by a coup d'état and subsequent difficulties in the implementation of a 'Union of Comoros' as proposed in an agreement reached on 23 April 1999: [1999] *UNYB* 189; [2000] *UNYB* 856.

[197] On 3 August 1997 Anjouan (with a smaller island, Mohéli) proclaimed independence and re-attachment to France. Republican authorities failed in an attempt to force adherence to the central government, while France the maintenance of the territorial integrity of the Comorian State as constituted before the Anjouan independence proclamation: (1997) 101 *RGDIP* 1029–30. To the same effect, see *EU Bull*, 7/8-1997, 13 August 1997.

[198] See (1998) 102 *RGDIP* 463.

[199] Rigo Sureda, *Evolution*, 199–202; Allen, *Int Conc* No. 560 (1966). UK ministers preparing the separation of the BIOT foresaw objections respecting territorial integrity: *Regina (Bancoult) v Foreign Secretary* [2001] QB 1067, 1080; 123 ILR 555, 562.

[200] Before its full independence in 1956, Morocco had been under three geographically distinct administrations—a French protectorate over the largest segment of its territory, a Spanish protectorate in the north (the 'Riff'), and an International Zone consisting of the city of Tangier. See Quane (1998) 47 *ICLQ* 537, 552 n 73.

[201] When Indonesia achieved independence in 1950, West New Guinea, which had been for administrative purposes part of the Netherlands Indies remained under Dutch control. In 1962 the territory was transferred to Indonesia. GA res 1752 (XVII), 21 Sept 1962 (88–1 (Senegal): 14) approved the arrangement for the transfer, by the medium of a United Nations Temporary Executive Authority (UNTEA). In 1969 an 'act of free choice' was held: the decision in favour of continued Indonesian sovereignty was noted by GA res 2504 (XXIV), 19 Nov 1969 (84–0: 30). See generally Rigo Sureda, *Evolution*, 70–1, 77–8, 143–51, 228–33; Taylor, *Indonesian Independence and the UN*, 235–9, 440–6; Bone, *The Dynamics of the Western New Guinea (Irian Barat) Problem*; Henderson, West New Guinea; Pomerance, *Self-Determination*, 32–5; Franck, *Nation against Nation*, 81–2; Osborne, *Indonesia's Secret War*; Blay (1986) 18 *IL & Pol* 441, 450–455; Durch in Durch (ed), *The Evolution of UN Peacekeeping*, 285, 295–6; Cassese, *Self-Determination*, 82–6; Suter, *East Timor, West Papua/Irian and Indonesia*; Human Rights Watch, *Indonesia, Human Rights and Pro-independence Actions in Irian Jaya*. Cassese describes the handover as 'a substantive betrayal of the principle of self-determination': *Self-determination*, 84.

[202] The Court in *Western Sahara* by inference approved the Assembly's treatment of Ifni as a colonial enclave: ICJ Rep 1975 p 12, 34, 35 (para 63).

'enclaves' of the claimant State,[203] which are ethnically and economically parasitic upon or derivative of that State, and which cannot constitute separate territorial units. Such a category could not include larger, relatively more viable territories such as the WesternSahara[204] or East Timor. To such territories, as the International Court has affirmed, the principle of self-determination applies as of right.

[203] Robinson (1959) 49 *Annals of the Association of American Geographers* 283.

[204] A 'Declaration of Principles' of 14 Nov 1975 between Spain, Morocco and Mauritania proposed a joint administration of the two latter States, pending an expression of 'views of the Sahara population': 14 ILM 1512–13. The General Assembly, by res 3458 (XXX), Part A (88—0: 41), reaffirmed the 'right of the people of the Spanish Sahara to self-determination'; but by res 3458 (XXX), Part B (56–42:34) 'took note' of the tripartite agreement and requested the interim administration to ensure that the population was able to exercise its right of self-determination 'through free consultations'. A form of consultation was carried out; and Morocco and Mauritania, by agreement of 14 April 1976, purported to partition the territory, despite armed resistance by a portion of the population, with Algerian assistance. See Franck (1976) 70 *AJIL* 694. But in 1979, Mauritania withdrew from the conflict: Peace Treaty Between the Polisario Front and the Islamic Republic of Mauritania, Algiers, 5 Aug 1979; (1980) 84 *RGDIP* 402. Although Morocco accepts that there has to be some form of plebiscite, it disputes in detail and at length the constituency for that exercise and the choices which should be available. See Framework Agreement on the Status of Western Sahara, S/2001/613, Annex I, and for commentary, Cassese, *Self-determination*, 214–18; Wilson, *International Law and the Use of Force*, 113–16.

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# PART IV

# ISSUES OF COMMENCEMENT, CONTINUITY AND EXTINCTION

The processes of decolonization outlined in the preceding chapters having virtually run their course by the late 1980s, one might have expected a situation of relative stability in State creation. That did not happen; rather the focus changed largely to situations of dissolution of existing metropolitan States. Of the twenty-five States created in the period after 1990, only three (Namibia, Palau, Timor-Leste) were the product of acknowledged processes of decolonization; most (twenty) resulted from the break-up (or -down) of States, notably in Central and Eastern Europe.[1]

This trend in turn has placed increasing emphasis on issues of State succession outside the colonial context, and has given rise to unusual disputes about whether and when new States have been created or old ones extinguished. The distinction between State continuity and State extinction—not at all a new one, of course—has been tested in new ways.

In this part, three broad issues are discussed: first, the temporal or transitional aspects of State creation, which are of particular significance in contested cases of secession or dissolution (Chapter 15); secondly, the notion of State continuity, the obverse of the concept of succession (Chapter 16), and finally the questions associated with State extinction, temporary or permanent (Chapter 17).

[1] The remaining two (Andorra, Eritrea) were *sui generis*. See Appendix 1.

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# Chapter 15

# THE COMMENCEMENT OF STATES


**15.1 The problem of commencement** 651
(1) Problems of commencement in national courts 652
(2) Problems of commencement at the international level 653
(3) 'Illegal entities' and problems of commencement 657
**15.2 States *in statu nascendi*** 658
**15.3 New States and the acquisition of territorial sovereignty** 664
(1) The acquisition of statehood as a 'mode of acquisition, of territory 664
(2) Claims to the entire territory of a new State 665


## 15.1 The problem of commencement

Determining the date of the commencement of a new State may be difficult. The creation of a new State is usually a process, especially where statehood is contested. In Kelsen's words:

> Le processus ainsi caracterisé de l'activité d'un nouvel ordre, de l'efficacité du pouvoir étatique, ne peut naturellement se produire en un seul instant. Il demandera un certain temps, surtout si le nouvel ordre prétend à valoir sur un territoire assez étendu; et peut-être sera-t-il terminé plus tôt à l'égard d'une partie du territoire qu'à l'égard d'une autre. Dès lors, on ne pourra indiquer le moment de la naissance d'un État nouveau comme de celle d'un home, par un jour déterminé. Cette indication ne sera possible qu'en tenant compte des circonstances de fait; on indiquera, éventuellement le moment le processus a soumenée et celui ou il s'est achevé.[1]

But determining with precision the date of commencement may be necessary, both in international and municipal forums.[2] The problem has two aspects: the

[1] Kelsen (1929) 4 *RDI* 613, 616.

[2] For a list of commencement dates for all existing States, see Appendix I. There may have been a gap, sometimes a considerable gap, between proclamation of independence and recognition, in which case the former date is taken as convenient and as more likely to correspond with the perception of the

precise application of the criteria of statehood to particular factual situations at the relevant period, and the application of various rules or presumptions which may attribute personality, at least in certain respects, to entities in the process of becoming States. The latter qualify the general principle that the attributes of statehood await the definitive constitution of the State. In practice, especially in secessionary situations, considerations of continuity and effectiveness may render the qualifications—at least retrospectively—more important than the general principle.

## (1) Problems of commencement in national courts

Where national courts apply international law directly in order to determine matters of territorial or governmental status no special problem arises. On the other hand where they defer to executive recognition policies (as in common law countries), effective *de facto* entities may be denied status for lengthy periods of time. It is established in Anglo-American jurisprudence that, as a general rule:

> . . . when a government which originates in revolution or revolt is recognized by the political department as the *de jure* government of the country in which it is established, such recognition is retrospective in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence.[3]

Although something of a hallowed formula this is thoroughly misleading. In the first place, it is a rule of internal law only, devised in order to mitigate the problems caused by judicial deference to executive recognition policy.[4] It is not, as the Supreme Court implied in *Oetjen v Central Leather Co*, a result of the application of 'principles of international law'—or if so, only in the most indirect sense.[5] Nor does recognition 'validate' governmental or State acts in

community of the State. For very long-established States—China, France, Japan, Iran—the date is 'covered in the patina of history . . . told with verbs whose tense is that of the deepest past' (Mann, *The Magic Mountain* (Wood trans, 1995) xi); in such cases the State is prior to the State system and even the very conception of statehood as now understood. The principal concern is with those comparatively recent cases where the date of commencement is difficult to pinpoint and is or may be contested on legal grounds for the purpose of attributing rights and responsibilities.

[3] *Oetjen v Central Leather Co*, 246 US 297 (1918), citing *dicta* in *Williams v Bruffy*, 96 US 176 (1877) and *Underhill v Hernandez*, 168 US 250 (1897). The leading British authority is *Luther v Sagor* [1921] 3 KB 432; see also *Lazard Bros v Midland Bank Ltd* [1933] AC 289, 297; *Bank of Ethiopia v National Bank of England & Liguori* (1937) 53 TLR 751. See also Whiteman, 2 *Digest* 728–45; Chen, *Recognition*, 172–86; Lauterpacht, *Recognition*, 59–60; Jones (1935) 16 *BY* 42; Nisot (1943) 21 *Can BR* 627.

[4] de Visscher, *Théories et réalités* (4th rev edn), 262–3.

[5] Oppenheim (8th edn), vol I, 150 ('a rule . . . of convenience rather than principle'); (9th edn), vol I, 161; *contra* Chen, *Recognition*, 177–9.

the sense of curing any illegalities involved: it is a rule of attribution rather than of validation.[6] The phrase 'commencement of its existence' is also obscure.[7] In the absence of executive pronouncement courts have tended to relate 'commencement' back to the earliest date at which the entity in question was formed as a recognizable political entity, even though it may not have been definitively established for international purposes at that time.[8] This is perfectly proper, but it is not the same thing as relating commencement of a State or government only to the time of its establishment as such. Finally, the 'retroactivity' rule is only a presumption: it will not apply where the executive act of recognition is intended to have only prospective effect;[9] nor will it apply to invalidate transactions entered into by the previously recognized State or government with third parties,[10] or to bring within the competence of the newly recognized entity acts or events which were outside its effective control when they occurred.[11]

## (2) Problems of commencement at the international level

In an international forum, where national recognition policies provide evidence of but are not conclusive as to the status of particular entities, problems of commencement require the application of the general criteria of statehood to particular factual situations.[12] These situations can be complex: the task is nonetheless, in principle, suitable for judicial determination by any body in possession of the facts.[13] It is thus generally said that 'on the international plane

[6] Jessup, *A Modern Law of Nations*, 66–7.

[7] *Princess Paley Olga v Weisz* [1929]1 KB 718, 728–9 (Sankey LJ).

[8] Chen, *Recognition*, 179–82, concludes that 'the more reasonable solution would be to reckon the commencement of the existence of a power from the moment it is possessed of a political organization such as would qualify it for recognition as a belligerent community in a civil war.' Cf the dispute between British and American courts as to the commencement of the North American Confederation: Weis, *Nationality & Statelessness in International Law*, 151–2; Chen, *Recognition*, 172–3 and cases there cited. Something like Chen's solution was adopted by the German Constitutional Court, in connection with the Taliban government in Afghanistan: *Afghan Citizens Case*, 2 BvR 260/98, 2 BvR 1353/98 (judgment of 10 August 2000). Cf 103 BverwGE 254, 258 (1997), holding that Somaliland did not meet the relevant threshold of effectiveness.

[9] *Boguslawski v Gdynia-Ameryka Linie* [1953] AC 11.

[10] *Civil Air Transport Inc v Central Air Transport Corp* [1953] AC 70(PC). Cf *Guaranty Trust Co of NY v US*, 304 US 126 (1938); *Lehigh Valley RR Co v State of Russia*, 21 F 2d 396 (1927).

[11] *The Jupiter (No 3)* [1927] P 122, 250; *Boguslawski v Gdyia Ameryka Linie* [1953] AC 11, 28–9 (Lord Porter). Cf, however, *US v Pink* 315 US 203 (1942), criticized by Lauterpacht, *Recognition*, 60 n 2.

[12] This is equally true in a municipal forum where for whatever reason there is no binding determination on the point: cf the detailed examination by Hill J of whether Odessa was within the territorial sovereignty of the RFSFR in the period preceding April 1919: *The Jupiter (No 3)* [1927] P 122; 3 ILR 136.

[13] Chen, *Recognition*, 41, 176–7. Cf the discussion by Vallat, *ILC Ybk* 1974/II(1), 29–30; Verhoeven, *Reconnaissance*, 683–5.

there is no rule of retroactivity.'[14] This is true if it means that in international law recognition is effective as such only when accorded. It is equally true if it means that an entity which clearly qualifies as a State at a particular time will not retrospectively lose that status through subsequent extinction, merger or other change. On the other hand, an entity whose status is doubtful at a particular time may, if it becomes definitively established or generally recognized as a State, be regarded as having been a State also at the earlier time: in such cases subsequent events are capable of giving form to a state of affairs which would otherwise have been equivocal. There is thus in international practice at least an element of retroactivity, not in any recognition accorded to a new State but in terms of its legal status while it is in the process of establishing itself.[15]

As always, much depends on the particular claim and the context. A court might treat a claim to change of nationality[16] more strictly than a claim of responsibility,[17] or a claim to particular State property under the control of the entity in question. But at some level entities that aspire to statehood will be judged by the standards of States. For example, in the Eritrea/Ethiopia Claims Commission, issues arose as to the possible denationalisation of Ethiopians of Eritrean ethnicity who voted in the Eritrean independence referendum.[18] Eritrea argued, *inter alia*, that since Eritrea did not come into existence as a State until 1993 and since these persons may have been opposed to independence,

[14] Brownlie, *Principles* (2nd edn), 98; (6th edn), 92. He adds: 'When a state makes a late acceptance of the existence of a state then, in the field of the basic rights and duties of existence, this recognition *ex hypothesi* cannot be "retroactive" because in a special sense it is superfluous. In the sphere of optional relations and voluntary obligation it may or may not be, since the area is one of discretion.'

[15] Cf the decision of a US–Venezuelan Arbitral Tribunal in the case of *Jacob Idler v Venezuela* (1885). The question was whether Venezuela was separately liable upon a contract made with the claimant after the promulgation of the constitution of 1819 which provided for the union of Venezuela and New Grenada as Colombia. The majority held that: 'The act of . . . 1819, while in its phraseology declaring Colombia then formed, was intended and understood to be, and from want of authority in the Venezuela Congress could be no more than, a proposition (with tentative provisions) of union . . . which was duly accepted by *both* provinces July 12, 1821, and the union consummated. Before this latter date, by whatever laws governed and in whatever name acting, each province preserved its legal autonomy and contractual powers. We are not saying that for certain purposes, or even generally, Colombia's existence might not be held to relate back. But we do say that for the purpose or with the result of defeating contracts with either province made before the consummated union of 1821, the political extinction of such province will not be held to relate back also.' Moore, *IA* IV, 3491, 3527–8, 3542–4. See also De Grummond (1954) 34 *Hisp Amer Hist Rev* 131.

[16] Cf the dispute between the British and American Commissioners under the Jay Treaty in the case of *Andrew Allen* (1799); Moore, *Int Adj (NS)* III, 238.

[17] In the *Reparations* case the request for an opinion referred to 'the responsible *de jure* or *de facto* government'; ICJ Rep 1949 p 180. This was in context of claims against Israel for acts committed by Jewish terrorists in September 1948, when Israel was still establishing itself as a State and before its admission to the UN. The Court did not advert to the possibility that Israel was not therefore responsible.

[18] For the arrangements for the referendum (held with Ethiopian cooperation) see *The United Nations and the Independence of Eritrea* (UN Blue Book 12, 1996) 19–31. On Eritrean independence see Chapter 9.

an election for an as-yet undetermined nationality could not be assumed. The Commission held that the persons concerned acquired Eritrean nationality in 1991, but that they retained Ethiopian nationality as well on the basis of estoppel. It said:

> . . . the Commission is not, on the one hand, persuaded by Eritrea's argument that registration as an Eritrean national in order to participate in the 1993 Referendum was without important legal consequences. The governing entity issuing those cards was not yet formally recognized as independent or as a member of the United Nations, but it exercised effective and independent control over a defined territory and a permanent population and carried on effective and substantial relations with the external world, particularly in economic matters. In all these respects, it reflected the characteristics of a State in international law.
>
> On the other hand, neither is the Commission persuaded by Ethiopia's argument that the continued issuance of Ethiopian passports and other official documents was not evidence of continued Ethiopian nationality. Passports in particular contain the issuing State's formal representation to other States that the bearer is its national. The decision to issue such a document, intended to be presented to and relied upon by friendly foreign States, is an internationally significant act, not a casual courtesy . . . [N]ationality is ultimately a legal status. Taking into account the unusual transitional circumstances associated with the creation of the new State of Eritrea and both Parties' conduct before and after the 1993 Referendum, the Commission concludes that those who qualified to participate in the Referendum in fact acquired dual nationality. They became citizens of the new State of Eritrea pursuant to Eritrea's Proclamation No. 21/1992, but at the same time, Ethiopia continued to regard them as its own nationals.[19]

Special considerations may apply in connection with non-self-governing territories and territories formerly under trusteeship[20] or mandate.[21]

[19] Eritrea–Ethiopia Claims Commission, Partial Award, *Civilian Claims (Eritrea's Claims 15, 16, 23 & 27–32)*, 17 December 2004, 44 ILM 601, 610–11 (paras 48–9, 51).

[20] A number of cases arose after sections of the Trust Territory of the Pacific Islands had become largely self-governing; had established a process leading to associated status or independence but were as yet still subject to the trusteeship agreement—i.e., not in possession of plenary competence over their own affairs. Palau was not a 'foreign State' for purposes of sovereign immunity: *Morgan Guaranty Trust v Republic of Palau*, 924 F 2d 1237 (Miner CJ) (2nd Cir 1991). The Northern Mariana Islands were not outside US jurisdiction for purposes of subpoena power under the US tax code: *US ex rel Richards v De Leon Guerrero*, 4 F 3d 749 (Goodwin CJ) (9th Cir 1993); or workers' compensation law: *Saipan Stevedore v Office of Workers' Compensation Programs*, 133 F 3d 717 (Thomas CJ) (9th Cir 1998). But, in an earlier dispute concerning the Freedom of Information Act, it was said that '[w]e will not assume that the United States' laws apply holus-bolus to a separate and distinct territorial government that is striving toward self-government under the stewardship of this nation. To do so would be to ignore entirely the purpose and limitations of the Trusteeship Agreement': *Gale v Andrus*, 643 F 2d 826, 934, 96 ILR 21 (MacKinnon CJ) (DC Cir, 1980).

[21] A problem of commencement arose in connection with Namibia, but the definitive establishment of Namibia as an independent State in March 1990 took place before a judicial decision on the matter. The United Nations Council for Namibia, organ in which the General Assembly had vested

One reason for the element of retroactivity is to be found in the rather conservative (not to say dilatory) operation of the rules relating to acquisition of statehood by secession, which were discussed in Chapter 9. Where an entity which has enjoyed effective control of territory for a period of time is acknowledged as a State there is little point in denying the entity's own characterization of its acts since its establishment, especially in view of the well established rule that a seceding State will be held internationally responsible for acts performed by it in the process of its formation.[22]

In the application of these general considerations, international tribunals have thus tended, in much the same way as municipal tribunals if for somewhat different reasons, to date the commencement of the State in question from the earliest date at which it could be said to have been effectively in control of its territory.[23] Exceptions have related on the whole not to the competence of the new State with respect to that territory but to matters such as the adhesion of

authority to govern the territory, had brought legal proceedings in the Netherlands against corporations alleged to have been carrying out activities in Namibia in contravention of a prohibition on actions tending to recognize the South African presence. The corporations, in their statement of defence, argued: 'The Council [for Namibia] cannot be considered to be the government of a state because the state of Namibia has never existed. The fact that there is no question of a sovereign state "Namibia" is also acknowledged by the Council itself in the writ of summons where the right of self-determination is invoked. Nor does Namibia meet the cumulative requirements which are essential for the existence of a state, viz. the people of a state, the territory of a state and the power of a state. Clearly, any form of an effective exercise of power by an independent government within Namibia is lacking. Also, so far the Council has not . . . exercised any effective authority within Namibia.' Defence submission reprinted in Implementation of Decree No 1 for the protection of the natural resources in Namibia. Institution of legal proceedings in the domestic courts of states (Report of the United Nations Commissioner for Namibia), A/AC.131/322, ¶18. The Government of the Netherlands, itself a defendant in the action, however seemed to admit the authority of the Council and the binding character of Decree No 1: 'Given the Council's task to protect Namibian resources and its decision to do so, inter alia, through legal action, one would have expected the Council to concentrate on real infringements of Decree No 1 that are actually taking place.' *Letter from the Permanent Mission of the Netherlands to the United Nations addressed to the Secretary-General*, A/42/414, 23 July 1987. See Arts (1989) 2 *Leiden JIL* 194.

[22] Chen, *Recognition*, 179–81.

[23] Mixed arbitral tribunals consistently held that the various States formed after World War I had come into existence prior to the relevant peace treaties: see, e.g., *Deutsche Continental Gas-Gesellschaft v Polish State* (1920) 5 ILR 11; *Germany v Reparations Commission (13th Question)* (1924) 1 UNRIAA 429, 524–5; *Poznanski v Lentz & Hirschfeld* (1925) 4 *Rep MAT* 353, and the cases cited under 'Beginning of State Existence' in ILR vols 1–6. According to the Rules of the Paris Peace Conference (Protocol I of the Preliminary Peace Conference, 18 January 1919, Annex II) 'States in process of formation' were accorded the same status as 'Neutral Powers', but less status than 'belligerent Powers with special interests', with respect to representation at the Conference. Poland and Czechoslovakia were however placed in the latter category. Cf Miller, *My Diary of the Conference at Paris*, 331–4. Compare the stricter rule adopted in the case of transfer of territory between existing States: *Ottoman Public Debt Arbitration* (1925) 1 UNRIAA 529, 554–5. Cf also Marek, *Identity and Continuity*, 203, 212–13.

minorities in geographically or historically separate territories,[24] or relations of belligerency vis-à-vis non-recognizing States.[25]

## (3) 'Illegal entities' and problems of commencement

A distinct problem arises in the case of an internationally illegal administration of territory that continues in existence either pursuant to an international settlement or to general (prescriptive) recognition. In such cases, is the commencement of the resulting entity (whether a State or a territorial administration) to be regarded as retroactive to the date of its assuming *de facto* control? For example, if the Rhodesian question had been settled by the continuation of Rhodesia under a reformed administration, would the statehood of the resulting entity have been regarded as retroactive to 1965? There is little or no practice on this point, and explicit provision is likely to be made in the agreements embodying the settlement.[26] A distinction might be drawn between continuance of an entity pursuant to a positive international settlement of the dispute, and the continuance of an unlawful entity or administration where the unlawfulness has been cured by general recognition. In the former case, there would be no retroactivity unless specifically provided for: in the latter case, it may be that retroactivity would be presumed.[27] In any event, the acts of the unlawful administration would presumably retain whatever limited validity they had prior to the settlement or recognition.[28]

[24] In the *Åland Islands* case, the International Commission of Jurists advised that, before May 1918, 'the conditions required for the formation of a Sovereign State did not exist', and that, at that time, the population of the islands preferred a different status. In their view 'The fact that Finland was eventually reconstituted as an independent State is not sufficient to efface the conditions which gave rise to the aspiration of the Åland Islanders and to cause these conditions to be regarded as if they had never arisen . . .' Thus '. . . even with reference to a *de facto* situation, it should be possible to invoke, if not the actual principle of non-retrospective action . . . at any rate the primary reason on which it rests, which is dictated by justice and equity.' LNOJ Sp Supp No 3 (October 1920), 6, 10, 12. The Commission of Rapporteurs relied on the separate legal identity of Finland before 1914 to refute this argument.

[25] In the *Polish Upper Silesia* case the Permanent Court held that 'Poland, as it was becoming constituted in the Russian territories occupied by the Central Powers, was undoubtedly not at war with Germany', and, not being recognized as a belligerent by Germany, was not therefore a party at the armistice: PCIJ ser A no 7 (1926), 27–9.

[26] Manchukuo and the puppet States in Europe (about which see Chapter 2) were regarded as mere agents of the belligerent occupants. The expelled sovereigns were given an extensive discretion to regulate the consequences of the acts of those administrations upon re-occupation. Cf Art 31 of the Italian Peace Treaty, 10 February 1947, 49 UNTS 126 (Albania).

[27] Recognition by the UK and the US of the 'puppet' Lublin government of Poland, pursuant to the Yalta Agreement, was expressly prospective in effect: this was so because the Polish Provisional Government was intended to be a 'new' government. Cf Yalta Declaration (1945), 12 *DSB* 215; *Gdyina Ameryka Linie v Boguslawski* [1953] AC 11.

[28] For a review of modern practice in this regard see Ronen, 'Legal Aspects of Transition from Unlawful Regimes in International Law' (PhD thesis, Cambridge, 2005).

## 15.2 States *in statu nascendi*

The difficulties of precise application of the general criteria of statehood to the commencement of States are mitigated by a number of rules attributing legal competence to entities in the process of formation, so as to enable them to bind the State once definitively formed on the basis that *nasciturus pro jam nato habetur*.[29]

(1) As noted in Chapter 16, in some situations a new State may be said to be the continuation of an entity which possessed international personality before independence. International protectorates such as Morocco and Tunisia are examples. The British Dominions after 1926, and (on the view generally accepted) India after 1947, were continuations of pre-independence legal persons. Legal rights and obligations of those entities (e.g., separate membership of international organizations) continued: these were cases of continuity, not succession. Whether such a relation can be established by an entity possessing no international but only internal constitutional status is more doubtful.[30] Also controversial was the claim made by the Israeli courts in the *Eichmann* case that there was a sufficient degree of continuity between the Palestine Mandate (or the Jewish nation under the mandate) and Israel to justify the exercise of jurisdiction by the latter over anti-Jewish crimes committed during World War II—the more so since Israel did not accept continuity with Mandated Palestine for other purposes.[31]

(2) It is well established that legal rights and liabilities of successful insurgent governments continue to bind the State so formed.[32] This may be an incident of the continuity of legal personality of the belligerent and the new State.

[29] Brownlie, *Principles* (2nd edn), 82; (6th edn), 77.

[30] In the *Åland Islands* case the Commission of Rapporteurs regarded independent Finland as the legal continuation of the pre-1914 Duchy of Finland under Russian control. The view of the Commission of Jurists that Finland in 1918 was 'a new political phenomenon and not . . . a mere continuation of a previously existing political entity' is to be preferred: cf LNOJ Sp Supp No 3, 9, about which see Chapter 2.

[31] (1961) 36 ILR 5, 52–3 (District Court); on appeal, (1962) 36 ILR 277, 304 (Supreme Court); and see Chapter 9.

[32] 'It is settled that a new State is responsible for acts of insurgent governments which ultimately succeed in establishing themselves in power as the government': Silvanie, *Responsibililty of States for Acts of Unsuccessful Insurgent Governments* (1939), 1; de Beus, *The Jurisprudence of the General Claims Commission* . . . (1938), 108–9; Ralston, *International Arbitral Law and Procedure*, 232–3; Chen, *Recognition*, 326–7; and see *Bolivar Ry Co Claim* (1903) 9 UNRIAA 445; *Dix Claim*, ibid, 119. The rule was applied to seceding governments in a series of cases under the US–Mexico Arbitration Convention of 11 April 1839: see Moore, *IA* IV, 3426–32; Silvanie (1939) 33 *AJ* 78, 89–90. However, contracts made before the formation of a provisional government and not subsequently ratified by it were held not binding: *Zander Claim* (1851), Moore, *IA* IV, 3432–3. See also *Fogarty v O'Donague* [1926] IR 531, 3 ILR 98; and cf *Irish Free State v Guaranty Safe Deposit Co*, 215 NY Supp 255, 3 ILR 100 (1927).

Recognition of belligerency appears however to be regarded as irrelevant. The rule was affirmed as one of attribution by the ILC in Article 10 of the Articles on Responsibility of States for Internationally Wrongful Acts, which provides:

*Conduct of an insurrectional or other movement*

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

In its commentary to Article 10 the ILC stated:

(6) Where the insurrectional or other movement succeeds in establishing a new State, either in part of the territory of the pre-existing State or in a territory which was previously under its administration, the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity between the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment, and this represents the accepted rule.[33]

(3) More difficult is the problem of pre-independence treaties or agreements, which are often made by the government of a territory about to be granted independence by the metropolitan State. For example, the Government of the Congo concluded a Treaty of Friendship with Belgium on 29 June 1960, a day before independence.[34] The question arose during the ILC's work on succession as to the legal status of such devolution agreements, which, as the Special Rapporteur pointed out, were frequently concluded at the time of, or even just before, the grant of independence to a former colony.[35] The text as agreed

[33] Commentary to Art 10, para 6, reprinted in Crawford, *Selected Essays*, 117–18. For earlier ILC discussion of this rule see Crawford, *First Report* (A/CN.4/490/Add 5, 22 July 1998), paras 263–80; *ILC Ybk* 1975/1,62–71, 217–18. Cf (1977) 16 ILM 1253.

[34] 164 BFSP 645. The US, by contrast, refused to conclude a similar treaty with the Philippines until the actual day of independence: see USFR 1946/VIII, 890–7, 937–9.

[35] *ILC Ybk* 1969/II, 54 ff; ibid, 1972/I, 50, 56, 58.

avoided the issue of the validity of such agreements, providing instead that their conclusion could not in itself effect a novation of the predecessor State's obligations or rights. In other words the matter remained subject to the substantive provisions of the Articles, and this rule was retained in the 1978 Convention on State Succession, Article 8, which provides:

1. The obligations or rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State towards other States parties to those treaties by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations or rights shall devolve upon the successor State.

2. Notwithstanding the conclusion of such an agreement, the effects of a succession of States on treaties which, at the date of that succession of States, were in force in respect of the territory in question are governed by the present Convention.[36]

During the discussion differing views were expressed as to the validity of agreements of this type. On the one hand Ago was inclined to the view that:

> . . . all agreements for the devolution of rights and obligations were international agreements, even though one of the parties might be an insurgent movement or an emergent State represented by a provisional government . . . In his opinion, the international character of such an agreement would be unaffected even if the metropolitan power had described it as an instrument of internal public law.[37]

At the other extreme Yasseen,[38] Bedjaoui[39] and Ushakov[40] expressed strong doubts as to the validity of such agreements.

In the context of agreements made immediately before independence, a compromise between the two positions may be suggested. The analogy of agreements concluded during minority might suggest the possibility for the new State to disavow pre-independence agreements within a reasonable time after independence; in the absence of disavowal these agreements would be treated as affirmed. Suggestions along these lines were made by both Ustor[41] and Bartos.[42] This view would satisfy both the principle of continuity of treaty

[36] Vienna Convention on State Succession in Respect of Treaties, 23 August 1978, 1946 UNTS 3; 17 ILM 1488.

[37] *ILC Ybk* 1972/I, 55, para 35; cf 52, paras 71–2.

[38] Ibid 53, para 10.

[39] Ibid 53–4, paras 20–2.

[40] Ibid 51–2, para 53; 52, para 70: 'an agreement concluded between a metropolitan State and a former dependent territory was not binding on the predecessor State and the successor State.'

[41] Ibid 52, para 5: 'Article [7] . . . was based on the assumption that a devolution agreement, even if concluded under special and unequal circumstances, could be subsequently approved by the new State, which might regard it as valid because it had a special interest in so doing.'

[42] See his working paper: *ILC Ybk* 1963/II, 293, 297; cf ibid, 1972/I, 52–3.

obligations, and the need to allow new States some opportunity to scrutinize agreements which may not have been freely entered into.[43]

(4) The capacity of entities *in statu nascendi* to acquire rights under treaties was considered in the *Polish Upper Silesia* case, where the Permanent Court held that Poland was not a party to, and could not rely upon, the Armistice Agreement with Germany or the Protocol of Spa. The State of Poland was not, in its view, a World War I belligerent; and the status of the Polish National Committee, recognized by the Allies but not by Germany, was insufficient to enable it to be regarded as a belligerent.[44] Lord Finlay dissented on this point: in his view:

> It was common knowledge that if the Allies succeeded, the independence of Poland would be one of the terms of peace. All Parties to the Armistice must have contracted with this present to their minds, and it must have been intended that Poland, whose army had been fighting on the side of the Allies as an autonomous army, should be bound by the terms of the Armistice, and, when she came into existence as a recognized State, have the benefit of them. This would be a *jus quaesitum*, a right acquired for the new State as soon as it should come into existence . . . In my view the Allied States made the Armistice on behalf of Poland, which was about to become a State, as well as on their own behalf.[45]

This attractive argument was not adopted by the Court. However, the law relating to treaties and third States is now better settled.[46] The question is one of intention and there would appear to be no reason why contracting States should not confer rights upon an entity in the process of being or yet to be created; upon acceptance in writing, these rights or obligations would bind the new State. The difference between Lord Finlay and the majority in the *Polish Upper Silesia* case may have been one of evidence rather than principle.[47]

(5) If a *nasciturus* State can have rights conferred upon it by treaty, can it acquire rights by operation of law, for example under the law of State responsibility? In particular, can it claim for wrongs committed prior to its commencement, although affecting its interests. In the *Northern Cameroons* case it was argued, *inter alia*, that, since the relevant acts complained of by the Republic of Cameroon occurred before its independence or admission to the United

[43] Cf the discussion of the issue in relation to State succession and matters other than treaties: *ILC Ybk* 1968/II, 103 (Bedjaoui); ibid, 1973/I, 158, para 56 (Bedjaoui), 195, para 12 (Ushakov), 197, para 30 (Kearney).

[44] PCIJ ser A no 7 (1926), 27–8. For the arguments, see PCIJ ser C no 11, 126–30, 175–6.

[45] PCIJ ser A no 7, 84: cf Schwarzenberger, *International Law*, vol I, 132–4.

[46] Vienna Convention on the Law of Treaties, Arts 34–7.

[47] Cf PCIJ ser A no 7, 29: '*in case of doubt*, no rights can be deduced . . . in favour of third States' (emphasis added).

Nations, these could not constitute international wrongs vis-à-vis the Republic. The Court made no reference to the problem, since it dismissed the claim on other grounds. The point was, however, dealt with by several of the judges. Judge Bustamante (dissenting) argued that the Republic of Cameroon might:

> demand the investigation of facts *prior* to its political emancipation, seeing that an undeniable link of dependence, a sort of successive solidarity, exists between the actual situation on the date of the Application and the events which previously played their part in bringing about that situation during the period of the trusteeship. It is difficult to think of the whole process of the Administering State's conduct during the trusteeship as being divided into watertight or non-communicating compartments. A certain parallel may be found, in this connection, in the field of private law if one recalls the case of an infant who, on achieving full age, seeks to examine his guardian's acts of administration during his minority.[48]

On the other hand, Judge Fitzmaurice was firmly of the view that:

> since the Applicant State did not exist as such at the date of these acts or events, these could not have constituted, in relation to it, an international wrong, nor have caused it an international injury. An act which did not, in relation to the party complaining of it, constitute a wrong at the time it took place, obviously cannot *ex post facto* become one. Similarly, such acts or events could not in themselves have constituted, or retroactively have become, violations of the Trust *in relation to the Applicant State*, since the Trust confers rights only on Members of the United Nations, and the Applicant State was not then one, nor even, over most of the relevant period, in existence as a State and separate international *persona*.[49]

The issue arose again in the *Bosnian Genocide* case. There many of the breaches of the Genocide Convention alleged by Bosnia—breaches which in its view were committed 'against the People and State of Bosnia and Herzegovina'— occurred before or around the time of the latter's independence, which the Court accepted was 6 March 1992. Yugoslavia (as it then was)[50] argued that the Genocide Convention could not apply to events prior to its coming into force as between the two parties, or even prior to its recognition of Bosnia and Herzegovina as a result of the Dayton Agreement of 1995. The Court brushed aside the temporal objection:

> . . . Yugoslavia, basing its contention on the principle of the non-retroactivity of legal acts, has indeed asserted as a subsidiary argument that, even though the Court

[48] ICJ Rep 1963 p 15, 169–70. Judge Wellington Koo (ibid, 47) merely stated that 'no differentiation . . . among Members on the basis of their respective dates of admission is provided for in the Charter or justifiable in principle and practice.'

[49] Ibid, 129.

[50] Or, alternatively, was not. For the Court's later tergiversation on the status of Yugoslavia (Serbia & Montenegro) see Chapter 17.

might have jurisdiction on the basis of the Convention, it could only deal with events subsequent to the different dates on which the Convention might have become applicable as between the Parties. In this regard, the Court will confine itself to the observation that the Genocide Convention—and in particular Article IX—does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, and nor did the Parties themselves make any reservation to that end, either to the Convention or on the occasion of the signature of the Dayton-Paris Agreement. The Court thus finds that it has jurisdiction in this case to give effect to the Genocide Convention with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia-Herzegovina. This finding is, moreover, in accordance with the object and purpose of the Convention as defined by the Court in 1951 . . .[51]

Since the conflict in Bosnia-Herzegovina predated Bosnian independence, the Court may be taken to have affirmed the irrelevance of temporal jurisdiction with respect to obligations such as those reflected in the Genocide Convention, obligations *erga omnes*. With respect to such obligations, at least, the date the Applicant State became independent appears to be irrelevant.[52]

(6) The situation has been summarized as follows:

States not infrequently first appear as independent belligerent entities under a political authority which may be called, and function effectively as, a provisional government . . . [O]nce statehood is firmly established, it is justifiable, both legally and practically, to assume the retroactive validation of the legal order during a period prior to general recognition . . . when some degree of effective government existed . . . [T]he principle of effectiveness dictates acceptance, for some legal purposes at least, of continuity before and after statehood is firmly established.'[53]

This validation of acts of entities in the process of formation is based on, and limited by, the principle of effectiveness. Transactions entered into by a provisional government bind the State, but transactions with individuals who have not yet established a *de facto* regime require subsequent ratification. Where the *nasciturus* State possesses a distinct capacity, international rights and duties

[51] *Application of the Genocide Convention (Preliminary Objections)*, ICJ Rep 1996 p 595, 617 (para 34).

[52] However, under the ILC Articles, Art 48 a new State relying on a breach of an obligation *erga omnes* could not claim damages in its own right for harm caused prior to its own establishment: it would (by definition) not be an injured State: it could however claim reparation 'in the interest . . . of the beneficiaries of the obligation breached': Art 48(2)(b). See commentary, paras (10)–(12), reprinted in Crawford, *Selected Essays*, 278–9. The position is different where the State represents an injured people protected by international law: cf *Certain Phosphate Lands in Nauru*, ICJ Rep 1992 p 240.

[53] Brownlie, *Principles* (2nd edn), 82; (6th edn), 77.

may be acquired: where it is still effectively submerged in another State, some specific stipulation in its favour is required.

## 15.3 New States and the acquisition of territorial sovereignty

The problem of the relation between acquisition of statehood and acquisition of territorial sovereignty has been discussed already. The problem has two aspects: theoretical, in that it is necessary to reconcile the rules relating to acquisition of statehood (which necessarily involves acquisition of some territory)[54] with the traditional 'modes of acquisition of territory', which do not include the acquisition of territory by new States; and practical, in that it is sometimes necessary to deal with claims to the whole territory of a new State which claims would, if acceded to, result in the extinction of the State.

### (1) The acquisition of statehood as a 'mode of acquisition' of territory

Traditional international law distinguished, perhaps not very helpfully, five modes of acquisition of territory, which were derived from the Roman law rules relating to transfer of land *inter vivos*.[55] It is clear that the acquisition of territory by a new State does not fit into this pattern. As Jennings pointed out:

> In transfers between existing States the law . . . has been inspired chiefly by the seductive private law analogy of transfers of ownership in land. But where a new State arises the law has looked chiefly to the emergence of the new subject rather than the incidental transfer of territory; it has looked to the sovereign, rather than the territorial, element of territorial sovereignty.[56]

Locating the acquisition of territorial sovereignty by a new State within the traditional scheme has proved troublesome, especially to adherents of the

[54] The proposition that statehood necessarily involves territorial sovereignty is generally accepted, and since there has been no clear case where this was not so, the assumption has been accepted for the purposes of this study. In theory, however, why should not an entity set up for a certain fixed period of time on territory granted for that purpose by another State and which remained under the residual sovereignty of the grantor, be nonetheless, for the period of its separate existence, a State? The situations under discussion involve conflicting or disputed claims to sovereignty over particular territory: here the conflict is to be settled primarily by the application of the criteria for statehood, and only secondarily by the rules relating to territorial disputes between States.

[55] Cf Oppenheim (8th edn), vol I, 545–6; (9th edn), vol I, 678–9; Kelsen, *Principles* (1952), 207 ff; Shoenborn (1929) 30 *HR* 85.

[56] Jennings, *Acquisition of Territory*, 8.

declaratory theory of recognition.[57] It is, however, a false problem. Under international law any entity which qualifies as a State is entitled to the control and government of its territory (subject to boundary disputes and the like).[58] It is also entitled to protection against the aggression from other States, and disputes or claims against it must be settled peacefully and with its consent. There is thus a primary regime associated with statehood, which logically and in practice takes priority over the rules relating to transfer of territory between existing States. If it is necessary to categorize acquisition of territory by new States as a distinct 'mode' of acquisition,[59] still the rules applicable are those relating to acquisition of statehood. This point was clearly made in a consultation by Basdevant, Jèze, and Politis on the creation of Czechoslovakia.[60] The view that Czechoslovakia was created piecemeal by the 'cession' of particular parcels of territory in the post-war treaties[61] in their view 'contredit le principe fondamental incontestable et incontesté selon lequel l'état existe dès que ses éléments constitutif sont réunis.'[62] This view proceeded, they stated:

> de la prétention de traîter comme une cession territoriale la formation d'un État nouveau sur des térritoires que se sont détachés de trois États. Or, ce sont là deux situations nettement différentes, et les régles applicables à la première ne peuvent être transportées a la seconde . . . Il faut ici tenir compte de ce principe qu'un État existe dès que ses éléments constitutifs sont réunis et du fait que la Tchécoslovaquie a existé et agi comme un état dès le 28 octobre 1918. Les divers traités qui la visent constantent l'existence de l'État tchécoslovaque comme un fait déjà accompli.[63]

## (2) Claims to the entire territory of a new State

This view of the primacy of the rules relating to the acquisition of statehood may be tested by examining situations where the entire territory of a new State

[57] Cf Starke (1965–6) 41 *BY* 411 where it is suggested that such acquisition is a mode *sui generis* involving succession by dependent peoples as subjects of international law.

[58] See *El Caso de Belice* (1993, Corte de Consitucionalidad) 100 ILR 305, 310–12, 329, in which the constitutional court of Guatemala accepted the position of the Guatemalan government that recognition of the statehood of Belize did not entail recognition of all Belize territorial claims nor did it foreclose claims by Guatemala to certain rights over Belize territory.

[59] Jennings, *Acquisition of Territory*, 11–12.

[60] The *consultation* was one of three such opinions requested by the Czechoslovak Government and annexed to the Request: PCIJ ser C no 68, 29. The case was not proceeded with.

[61] A portion of Silesia detached by Art 83 of the Treaty of Versailles; Bohemia, Prague and Moravia by Art 54 of the Treaty of Saint-Germain; and Slovakia and Subcarpathian Ruthenia by Art 49 of the Treaty of Trianon.

[62] PCIJ ser C no 68, 58–9.

[63] Ibid, 51–3. This is not to say that the term 'cession' is inappropriate in such contexts: positive territorial disposition by the former sovereign may regulate aspects or incidents of, as well as confirming or recognising, the transfer. But see Marek, *Identity and Continuity*, 229 citing Kelsen (1929) 4 *RDI* 632, 635, both of whom assume a single fixed meaning of the term 'cession'.

has been claimed. The view has consistently been taken in such cases that the entity in question continued to exist as a State despite such claims (e.g., Kuwait, Mauritania, Bahrain and Belize). Even assuming a valid territorial claim prior to the creation of the new State, the latter's claim to statehood is in and of itself a secession from that territorial claim. In such a case, the continued existence of the new State as an effective territorial entity, and the protection afforded by Chapter VII of the Charter, combine to defeat the previous territorial claim. Jennings' conclusion is inevitable:

> if the new State . . . is established with the disputed territory as its sole territory, and its Statehood is recognized, it would seem that another claim to sovereignty over the territory *is* defeated. In short it is only where there is room for doubt or ambiguity in the definition of the new State's territory that a claim against the territory will survive. A sufficient number of recognitions of the new State clearly implying recognition of its title to the disputed territory would presumably destroy the claim.[64]

[64] *Acquisition of Territory*, 38 (his emphasis).

# Chapter 16

# PROBLEMS OF IDENTITY, CONTINUITY AND REVERSION


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|---|---|---|
| **16.1** | **Identity and continuity of States: general considerations** | 667 |
| **16.2** | **Some applications of the concept of continuity** | 672 |
| | (1) Territorial changes | 673 |
| | (2) Changes in population | 678 |
| | (3) Changes in government | 678 |
| | (4) Changes in international status | 680 |
| | (5) Belligerent occupation | 688 |
| | (6) Continuity and illegal annexation | 689 |
| | (7) Identity without continuity | 690 |
| | (8) Multiple changes and State continuity: the case of Poland after 1945 | 692 |
| **16.3** | **Reversion to sovereignty** | 695 |
| | (1) Rights of reversion by treaty | 696 |
| | (2) Reversion of territorial enclaves | 696 |
| | (3) *Postliminium* | 696 |
| | (4) Reversion to sovereignty | 697 |


## 16.1 Identity and continuity of States: general considerations

Like the communities they encapsulate, States are not static. Yet we assume continuity of our States even as their governments, constitutions, territories and populations change. International law is based on this assumption. It embodies a fundamental distinction between State continuity and State succession:[1] that is to say, between cases where the 'same' State can be said to

[1] On the fundamental character of the distinction see Stern (1996) 262 *HR* 9, 39–52; Crawford, *Selected Essays*, 243, 264–7. See also Bühler, *State Succession*, 7–8.

continue to exist despite sometimes drastic changes in its government, its territory or its people and cases where one State has replaced another with respect to a certain territory and people. The law of State succession is predicated on this distinction. It must then be possible to distinguish cases of continuity from cases of succession, even though in some situations the distinction may seem arbitrary, or may depend not on the substance of a particular transition but on the way in which it was carried out—for example, the unification of Italy through the house of Sardinia or of Germany through the expansion of the FRG.

The notion of 'State continuity' has been criticized as misleading, over-general and as giving an impression of objectivity where none exists.[2] It is true that in marginal cases the notion of continuity involves distinct subjective elements. In many instances the claim to continuity made by the State concerned will be determinative; other States will be content to defer to the position taken.[3] But the notion of continuity is well established and, given the State/government distinction, is even logically required. Moreover, many relations in other areas of international law depend on the will of the actors, international law providing a mode of expression for underlying claims and perceptions.

Three further points may be made in defence of the concept of continuity, despite its sometimes artificial character. The first is that it preserves legal relations despite changes in the subjects of those relations, and it does so to a much greater degree than the law of State succession, which is often marked by discontinuity, in fact if not in law.[4] After all what is claimed, even in doubtful cases, is a *general* continuity, which avoids any need to deal with issues of succession. The second is that issues of identity often have strong salience for the people concerned, who see in the State as an entity the object of their allegiance. This helps to explain at the same time the significance of the concept and the element of subjectivity involved in claims that one State is 'the same' as an earlier entity that may have suffered changes, reversals or even temporary suppression. The third point is that from a legal point of view the issue of continuity only arises when the question concerns *particular* legal relations, when what is in dispute is not the existence of a State at a given time but its identity with a State at another time. Under modern international law many rules are general in their application; all States are obligors and/or beneficiaries on a

[2] Brownlie, *Principles* (6th edn) 80–2; Schachter (1993) 33 *Va JIL* 252, 254–5.

[3] Cf Müllerson (1993) 42 *ICLQ* 473, 477; Stern (1996) 262 *HR* 9, 82–6; Czaplinski (1993) 26 *RBDI* 374, 391–2.

[4] On the modern law of State succession and its tribulations see Crawford, in *Collected Essays*, 243; Müllerson (1993) 42 *ICLQ* 473; Beemelmans (1997) 15 *Boston UILJ* 71.

continuing basis. For example, the prohibition on the use of force in international relations, or the right to navigate on the high seas, apply continuously to all States. So far as such rules are concerned the question whether an entity is or is not a State may arise but not the question which State it is. The 'Federal Republic of Yugoslavia' (FRY) in 1999 still claimed identity with the former Socialist Federal Republic of Yugoslavia (SFRY). This claim was not generally recognized, but the FRY was a State notwithstanding. Indeed that was never in dispute.

Thus it is one thing to say that entity A is a State at a particular time and another to determine that entity $A^1$ at some other time is the 'same' State. But allowing some latitude to the sense of allegiance of the community in question and the views of other concerned States, one would have thought that reasonable solutions to problems of identity could be found by reference to the basic criteria of statehood as affecting the entity in question at the relevant times.[5] That is to say, a State is the 'same' if it involves what may be regarded as the same independent territorial and governmental unit at relevant times. What matters is principally the historical continuity of the community the State embodies, notwithstanding changes in its population, territory or system of government.

A different approach is adopted in Marek's leading study.[6] She defines identity by reference to the legal obligations of the State in question rather than by reference to the criteria for statehood. In her terms 'the identity of a State' is 'the identity of its international rights and obligations, before and after the event which called that identity in question, and solely on the basis of the customary norm "*pacta sunt servanda*".'[7] Where a State is identical in the sense defined it is by definition continuous as between the two occasions referred to. State continuity is merely 'the dynamic predicate of State identity'.[8] Thus it is impossible, in Marek's view, for a State to disappear definitively and then reappear as the 'same' State. The extinction of a State entails a succession and puts an end to any possible identity or continuity.[9] It would follow that Poland before 1795 cannot be regarded as the same State as Poland after 1918; Syria after 1961 as the same Syria that existed prior to its union with Egypt in 1958. If Austria was extinguished as a State by the *Anschluss*, the reappearance of Austria after 1946

[5] Cf Craven 9 *EJIL* 142, 147; Talari (1996) 7 *Finnish YBIL* 134, 144–5.

[6] Marek, *Identity and Continuity*, 68–76.

[7] That is, excluding rights and obligations devolved by virtue of the rules of State succession: Marek, *Identity and Continuity*, 14.

[8] Marek, *Identity and Continuity,* 5–6.

[9] Marek, *Identity and Continuity,* 7–9; cf her reference to the impossibility of a 'miraculous resurrection' of a once-extinct State: ibid, 581.

or 1955 will necessarily have involved the creation of a new State in the same territory, whatever Austrians may like to think of their history.[10]

To the view that State identity means identity of legal rights and obligations several objections may be made. In the first place the existence of a State seems to be distinct from its legal relations, and certainly from its treaties. It is the State that enters into legal relations, even if some of these relations may come to seem vital or defining.[11] This is not to say that the State is some meta-legal 'thing': as a legal person it is in a sense the sum of its rights, obligations, powers and immunities. But the claim that the rights of entity A are the same as those of entity $A^1$ two weeks, two years or two centuries later may not be self-evident and is certainly not self-explanatory. The rights are better referred to the entity than the entity to the rights.

Marek herself accepts that in a dynamic legal system identity and continuity can only be relative.[12] That being so it seems as meaningful to say that the customary rights of two entities are the same if the entities are, relatively, the same as vice versa. To say that a particular entity is 'the same' (given that other entities may have equal rights) is to say that its rights exist with respect to, or are attributed to, the same State. Particular rights, obligations and powers, in terms of the creation of States, are not criteria for but consequences of statehood.

We should accordingly see continuity, identity and extinction as depending on these basic criteria, applied in a context of claim and recognition. Marek is critical of recognition as a criterion of identity,[13] but her criteria for continuity are at least as consistent with this view; and in practice the recognition of claims to continuity or discontinuity plays a major role, even though the position taken by particular States is not constitutive. Thus it was the general refusal of third States, and not only the other former Yugoslav republics, to accept the FRY's claim to continuity with the SFRY that prevailed and determined whether corresponding rights and duties were the same or not.

Moreover, this approach avoids two problems raised by Marek's analysis. First, because in each case the same rights and obligations exist it is impossible on her view to distinguish cases of State continuity from cases of (postulated) universal succession, unless one excludes a priori the category of succession.[14] But this is circular: the question of succession only arises after problems of

[10] This is the unargued assumption behind Clute's study, *The International Legal Status of Austria 1938–1955*. Cf Roesler, *Der Anschluβ von Staaten in der modernen Geschichte*, 71–6.

[11] Cf Koskenniemi (1994) 88 *PAS* 22, 153–4.

[12] Marek, *Identity and Continuity*, 4–5. Cf Dörr, *Die Inkorporations als Tatbestand der Staatensukzession*, 134–5.

[13] Marek, *Identity and Continuity*, 129, 216.

[14] Ibid, 9–14.

continuity and extinction have been resolved.[15] Secondly, it is reasonable to postulate two types of State identity: the case of non-extinction despite change of circumstances, and the case of rebirth after suppression, at least if the suppression has not lasted for a very long time—e.g., Syria after 1961. Marek's view excludes the second alternative without any justification.

For these reasons we should treat the determination of identity and continuity as dependent on the basic criteria for statehood. A State may be said to continue as such so long as an identified polity exists with respect to a significant part of a given territory and people.[16] Its constitutional system need not be the same, as long as it is independent and proclaims its continuity.[17] In applying these criteria questions of claim, recognition and acquiescence are important; in matters of identity the view of the State or States concerned, though not necessarily decisive, will be highly influential.[18] A State may be said to be the 'same' State (with the consequence that the same legal rules, including conventional rules, continue to apply) where it is continuous in the sense defined, or where, after temporary suppression, an entity with substantially the same constituent features is re-established and its claim to continuity is accepted.[19] In the latter case, because of the doubts inevitably raised by State suppression, recognition by other States will be of particular importance.

These problems were not much studied in the period after 1950, but changes in the political contours of central Europe in the 1990s led to a great increase in practice concerning identity and continuity. This might have given the material necessary to clarify the field, having regard also to the Vienna Conventions on State Succession of 1978[20] and 1983.[21] And yet, though

[15] On the difficulty of distinguishing identity from universal succession see Hummer and Singer (2000) 38 *AdV* 298, 301.

[16] What might be termed 'le noyau irréductible de l'État.' Stern (1996) 262 *HR* 9, 80. Cf Bühler, *State Succession*, 15.

[17] Cf the importance attached to undertakings by the Russian Federation to accept responsibility for the international obligations of the USSR: 203 *HC Debs*, WA, cols 193–4, 5 February 1992.

[18] More than one State may be concerned in a given case. Rejection of the claim by the Federal Republic of Yugoslavia to continuity with the SFRY must be seen in light of several factors, including objections of Slovenia, Croatia and Bosnia and Herzegovina: Beemelmans (1997) 15 *Boston UILJ* 71, 77–8.

[19] Marek, *Identity and Continuity*, 21 rejects this view on the basis that 'territorial changes have no effect on the identity of States: it is not territory which determines that identity.' But this does not refute the proposition that extensive territorial change may be one of several criteria for discontinuity: cf ibid, 23–4.

[20] Vienna Convention on Succession of States in respect of Treaties, 23 August 1978, 1946 UNTS 3; 17 ILM 1488 (in force 6 November 1996). See Treviranus (1979) 39 *ZaöVR* 259; O'Connell (1979) 39 *ZaöRV* 725; Sinclair, in *Essays in Honour of Erik Castrén*, 149; Zemanek in *Ius Humanitis. Festchrift Alfred Verdross*, 719; Bello (1980) 23 *GYBIL* 296; Crawford, in *Selected Essays*, 243.

[21] Vienna Convention on Succession of States in respect of State Property, Archives and Debts, 17 April 1983, 20 ILM 306 (not yet in force). See Geidel, Heintze and Poeggel (1979) 24 *Deutsche*

hardly unexamined,[22] the matter has resisted comprehensive treatment. According to Jennings and Watts:

> no general rule can be laid down concerning all the cases in which a succession occurs, and each needs to be examined separately. That examination naturally reflects the historical circumstances of the time, and the major preoccupations of the leading members of the international community in the situations which at the time most frequently give rise to cases of succession. Furthermore, state practice in much of this area has been variable, often dependent on the very special circumstances of particular cases, and based on ad hoc agreements which may not necessarily reflect a view as to the position in customary international law. It must also be noted that many of the decisions of national courts involving questions of succession turn on provisions of the relevant municipal law rather than on international law.[23]

This was said about the law of State succession but the same is true about the prior concepts of State identity and continuity. In the context of this study it is not possible to deal with the issues comprehensively, but a number of aspects of the problem are related to themes taken up in earlier chapters and should be mentioned.

## 16.2 Some applications of the concept of continuity

Where a State retains substantially the same territory and the same structure or system of government over a period of time there is clearly no change in personality. This 'central' case establishes that the problem of continuity, like that of statehood itself, cannot be settled by application of a constitutive theory of recognition.[24] In clear cases, at least, issues of identity and continuity will be opposable *erga omnes*. The other view would involve the proposition that a State could evade treaty obligations by alleging on insubstantial grounds a change of personality, or that others could deny its rights by

*Außenpolitik* 70; Monnier (1984) 30 *AFDI* 221; Kirsch, Le Bouthillier, *Selected Papers in International Law*, 49.

[22] See Gruber, *Le droit international de la succession d'États*; Oeter (1991) 51 *ZaöRV* 349; Torres Bernárdez in Bedjaoui (ed), *International Law: Achievements and Prospects*, 381; Vagts (1993) 33 *Va JIL* 230; Müllerson in Stein (ed), *Dissolution, continuation et succession en Europe de l'Est*, 17; Shaw (1994) 5 *Finnish YBIL* 67; Hague Academy of International Law, *La succession d'états: la codification à l'épreuve des faits*; Craven (1998) 9 *EJIL* 142; Watts in Götz (ed), *Liber amicorum Günther Jaenicke*, 397; Klabbers, Koskenniemi, Ribbelink and Zimmermann (eds), *State Practice Regarding State Succession and Issues of Recognition*; Mrak (ed) *Succession of States*.

[23] *Oppenheim's International Law* (9th edn), vol I, 210.

[24] Cf, however, Marek, *Identity and Continuity,* 4.

refusing to recognize its continued existence as a given State.[25] Neither position is acceptable.

Problems do, however, arise where the constitutive elements of statehood undergo substantial change.

## (1) Territorial changes

It is established that acquisition or loss of territory does not in itself affect the continuity of the State.[26] This may be so even where the territory acquired or lost is substantially greater in area than the original or remaining State territory. The presumption of continuity is particularly strong where the constitutional system of the State prior to acquisition or loss continues in force.[27]

This was the case with respect to unification of Germany in 1990. Though Article 146 of the Constitution of the Federal Republic of Germany envisaged the merger of the two German States into a single new State—a process that would have involved the extinction of both the FRG and the GDR—Article 23 was invoked, with its provision for the accession of the territory of East Germany as new *Länder* of the Federal Republic.[28] Accordingly Brandenburg,

[25] See *Questech v Ministry of National Defence of the Islamic Republic of Iran* (1985) 9 Iran–US CTR 107, 142 (Holtzman, sep op): 'it is a recognized principle of law that a State cannot avoid its obligations by a change of government or "political conditions". Otherwise, in a democratic republic a country could simply vote to repudiate its contracts.' See also Williamson and Osborne (1993) 33 *Virg JIL* 261, 273.

[26] Marek, *Identity and Continuity,* 15–24. For the evolution of what became Art 15 of the Vienna Convention on State Succession with respect to Treaties 1978, 1946 UNTS 3 (the 'moving treaty frontiers' rule) cf Waldock, *ILC Ybk* 1969/II, 52–4; and the debates, ibid, 1972/I, 43–50, 152–4, 156–8, 182, 276. Article 15 provides: 'When part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State: (a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States; and (b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.' The rule is paralleled in Arts 16, 27 and 37 of the 1983 Convention; and in the *Restatement (Third)*, §210(2). See Vagts (1993) 33 *Virg JIL* 275, 288; Beato (1994) 9 *Am UJIL & P* 525, 544. On divergences between the *Restatement* and the Convention, see Williams (1994) 23 *Denver JILP* 1, 9.

[27] This is probably the justification for the view that the Kingdom of Italy was created in the period 1848–70 by the enlargement of, and was thus identical with, Sardinia-Piedmont: Marek, *Identity and Continuity,* 191–8; Dörr, *Die Inkorporations*, 251–4; Romano (1912) 6 *Rdi* 345; *Costa v Military Service Commission of Genoa* (1939) 9 ILR 26; *Gastaldi v Lepage Hemery* (1929) 5 ILR 69. The Sardinian Constitution remained in force throughout the *Risorgimento*. But see Anzilotti (1912) 6 *Rdi* 1. The absorption by the *Norddeutscher Bund* of the southern German States was seen as similar. Frowein (1992) 86 *AJ* 152, 157; Dörr, *Die Inkorporations,* 265–71. Cf also the Secretariat opinion on the continued UN membership of Malaya as Malaysia, stressing that federation was achieved by the admission into Malaya of Singapore, Sabah and Sarawak: [1963] *UNJY* 161.

[28] Respecting the difference between fusion or merger and absorption, see Dörr, *Die Inkorporations*, 132–77.

Mecklenburg-Western Pomerania, Saxony-Anhalt, Saxony and Thuringia along with *Land* Berlin constituted from the former Allied sectors of the capital became part of the FRG, and the 1949 West German Constitution, with minor amendments, was from 3 October 1990 in force for the whole of the territory of Germany.[29]

The establishment of German unity was not a fusion of two states in which they came to an end and a new subject of international law was created. Instead, it was the voluntary accession of one state, which had given up its identity as a subject of international law, to another state, which retained its identity as a subject of international law.[30]

The situation was thus one both of continuity of one Germany and extinction of the other.[31] In an affidavit in connection with litigation in a UK court, a legal advisor of the German embassy in London stated:

As a matter of German constitutional law, the German Democratic Republic acceded to and, became part of, the Federal Republic of Germany on 3 October 1990. The Federal Republic of Germany as it exists following that accession on 3 October 1990 is the continuation of the Federal Republic of Germany that existed before the accession.

[29] See Frowein (1991) 51 *ZaöVR* 333, 336–7; Schricke (1990) 36 *AFDI* 47, 57–60; Oeter (1991) 51 *ZaöVR* 349, 351, and see further Chapter 12. Applying the 'moving treaty boundaries' principle, the Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity of 31 August 1990, 30 ILM 457, Art 11, extended most West German treaties to the new Länder, and the FRG negotiated the termination of virtually all GDR treaties: Papenfuβ (1998) 92 *AJ* 469; Dornbusch, *Das Schicksal der völkerrechtlichen Verträge der DDR nach der Herstellung der Einheit Deutschlands*; Papenfuβ, *Die Behandlung der völkerrechtlichen Verträge der DDR im Zuge der herstellung der Einheit Deutschlands*; Lee, *The Law of State Succession in the Post-Decolonisation Period with Special Reference to Germany and the Former Soviet Union* (PhD, Cantab, 1998) 79–148.

[30] Papanfuβ (1998) 92 *AJ* 469, 487. Cf Beemelmans (1997) 15 *Boston UILJ* 71, 98: 'The words adhesion, absorption, and incorporation mean that one State disappears and is absorbed by another State which continues its own existence, and is identical with itself as a subject of international law although its territory and population are now enlarged'; Oeter (1991) 51 *ZaöRV* 349, 382: 'If one state accedes *in toto* to another state, its entire territory and population is absorbed by that state, and the legal personality of the former holder of territorial sovereignty is extinguished completely. Not only do all the attributes of sovereignty and all public authority pass over to the new sovereign, but also all assets and liabilities of the state extinguished'; Frowein (1991) 51 *ZaöRV* 333; Bretton (1991) 95 *RGDIP* 671, 685.

[31] A similar situation may arise without consent of the State being absorbed. Though the status of Vietnam before its unification and admission to the United Nations was controversial, on what seems to be the prevalent view North and South Vietnam had been two States, and the former absorbed the latter. On this view, North Vietnam continued as 'Vietnam' and South Vietnam became extinct. See Oeter (1991) 51 *ZaöRV* 349, 358 n 33; Bühler, *State Succession*, 69–97; Dörr, *Die Inkorporations*, 390–9; Bokor-Szegö (1983) 25 *Acta Juridica Academiae Scientiarum Hungaricae* 351, 358–60. The non-application of Art 31 of the 1978 Vienna Convention is consistent with the extinction hypothesis. Papenfuβ (1998) 92 *AJ* 469, 473.

Conversely, the former German Democratic Republic ceased to exist on 3 October 1990 after its absorption into the Federal Republic of Germany.[32]

As a matter of German constitutional law it might have been otherwise if use had been made of Article 146 of the Basic Law, which had provided for the merger of the two German States into a new legal entity.

The position clearly taken by the FRG and by its courts[33] was acknowledged by third States. For example, the Legal Advisor to the British Foreign Office stated in an affidavit in the same proceedings:

> [T]he United Kingdom recognises the Federal Republic of Germany that exists today as the continuation of the Federal Republic of Germany that existed prior to 3 October 1990 and that the Federal Republic of Germany remains the same international person as it was before 3 October 1990.[34]

The presumption of continuity despite territorial change is dramatically illustrated by the case of 'imperial' States,[35] though the record is not uniform. The Dual Monarchy of Austria and Hungary raised doubts and there was no consensus in judicial or treaty practice as to the fate of the continued personality of its two constituents.[36] But the United Kingdom has remained the same

[32] Affidavit of Dr Wolfgang Trautwein (German Embassy, London), paras 5, 12, reprinted (1997) 68 *BY* 525, 526. See also Cable of 29 Sept 1990 from DDR Ministry for Disarmament and Defence to Member States of Warsaw Pact, quoted in Papenfuβ, 479 n 68: '[U]pon the accession of the German Democratic Republic to the Federal Republic of Germany with effect from 3 October 1990, all international treaties previously concluded by the Ministry for National Defence of the GDR are terminated. Upon accession by the German Democratic Republic to the Federal Republic of Germany the GDR ceases to exist as a subject of international law.' On the winding up of the treaties of the former DDR, see Beemelmans (1997) 15 *Boston UILJ* 71, 104–7; Lee, *Law of State Succession*, 85–101.

[33] The Federal Constitutional Court affirmed in BVerfGE 92, 277 that the jurisdiction of the FRG extends to the territory of the former GDR through the latter's accession to the FRG. In BVerfGE 84, 133, 147 the Court confirmed that as of 3 October 1990 the GDR ceased to exist.

[34] See Affidavit of MC Wood, 24 February 1995, para 5, reprinted (1997) 68 *BY* 520, 522.

[35] Cf Gentili's argument for the continuity of the Roman Empire: *On the Law of War* (1612), vol I, §23: 'an empire does not come to an end if it survives even in some tiny part . . . [A] slight degree of preservation keeps up preservation.'

[36] The Treaties of Saint-Germain and Trianon assumed continuity of Austria and Hungary with the two kingdoms of the Dual Monarchy. But Marek, *Identity and Continuity*, 199–236 denies that either Austria or Hungary before 1918 possessed separate international status and thus denies the possibility of continuity. The same view was taken by Commissioner Parker, *Administrative Decision No 1* (Tripartite Claims Commission, 1927) 6 RIAA 203, 209–10; and by the Austrian courts: e.g., *Railway Pension (Austria) Case* (1923) 2 ILR 65. See also Udina, *L'estinzione del Impero Austro-Ungarico nel diritto internazionale* (2nd edn), 15–37. The continuity thesis was upheld by Arbitrator Beichmann in *Reparations Commission v German Government* (1924) 1 RIAA 431, 440–1; and by courts in other States: e.g. *In re Ungarische Kriegsproduckten AG* (1920) 1 AD 72. See also *Répertoire suisse* III, 1291–2, 1337–52.

State since at least 1707,[37] despite the acquisition and loss of not one but two Empires: indeed its continuity was never questioned. Turkey was also regarded as a continuation of the Ottoman Empire after 1918,[38] and the USSR, the political dissolution of which was attended by the independence of former constituent republics containing a significant part of the Soviet territory and people, continued the legal personality of the old RFSFR (and for that matter Tsarist Russia) after 1990.

The situation with respect to the USSR/Russian Federation merits some discussion. The devolutionary instruments through which ten of the Soviet

[37] Although Scots date the birth of the United Kingdom to the Act of Union of 1707, it seems the English do not. Dicey and Rait, *Thoughts on the Union between England and Scotland*, 152 referred to 'the new Parliament and State of Great Britain', but when Dicey was writing alone he reverted to Englishness: in his *Introduction to the Study of the Law of the Constitution* (8th edn) he refers throughout to the English constitution, and treats it as continuous since the Norman Conquest. Parry and Hopkins, *Index of British Treaties 1101–1968*, vol II, 18 give the Treaty of Alliance with Portugal, 16 June 1373, 1 BSP 462 as the oldest British treaty: it was concluded with England, and according to the Index no treaty between Scotland and a third State survives (although there were many, e.g., with France, the Pope, Sweden, Norway and Denmark). Indeed King James VI of Scotland (King James I of England) seems to have been of the same view, after his accession to the English throne. In his speech to the Houses of Parliament on 31 March 1607, James argued that the common law of England would govern the 'general Vnion' of England and Scotland, and that the particular privileges and prerogatives of Scotland could be recognised by that law in the same way as were 'particular customs in particular Shires': King James VI and I, *Political Writings* (ed Somerville), 162. McNair, *The Law of Treaties*, 40 states that upon the Union 'England and Scotland ceased to exist as international persons and become the unitary State of Great Britain'. This was followed in *Lord Gray's Motion* (Comm Privileges) [2002] 1 AC 124, 130–1; 124 ILR 577, 581–2, in which Lord Nicholls said, '[I]n 1706 England and Scotland were two distinct states. England was ruled by Anne as Queen of England, and Scotland was ruled by Anne as Queen of Scotland. Each state had its own Parliament. On 1 May 1707 the two states were united into one state by the name of Great Britain. The new state had a single monarch, in the person of Queen Anne, and a single Parliament.' See also Lord Hope: '[T]he states or kingdoms of Scotland and England ceased to exist on 1 May 1707.' [2002] 1 AC 124, 137–8, 124 ILR 577, 590. Generally on the status of the Union and its constituent parts see Galloway, *The Union of England and Scotland 1603–1608*; Levack, *The Formation of the British State*; Scott, *Andrew Fletcher and the Treaty of Union*; MacCormick, *Questioning Sovereignty*, chs 4, 12. On the other hand Scots and English unite in seeing the union with Ireland (previously a colony) by the Act of 1801 as a case of accretion, without international consequences. Politically, this has been described as 'the logical conclusion of a process of consolidation of the British state, which had begun with the incorporation of Wales in 1534 and continued with the Scottish Act of Union of 1707': Whelan in Keogh and Whelan (eds), *Acts of Union*, 13. And see generally, Bolton, *Passing of the Irish Act of Union*; Smyth in Smyth (ed), *Revolution, Counter-Revolution and Union*, 146. The Act of Union of 1536, by which Wales would return 24 members to the English Parliament, has been described in similar terms: a 'logical conclusion to the process of unification begun by Edward I', Smith (1980–1) 10 *Welsh History* R 127, 154—a process well advanced by 1284, when England adopted the Statute of Wales, ibid, 127–8. On the earlier expansions, see *Mabo v Queensland (No 2)*, (1992) 107 ALR 1, 34–6; 112 ILR 457, 496–98, discussing *The Case of Tanistry* (1608) Davis 27; 80 ER 516 and *Witrong & Blany* (1674) 3 Keb 401, 402; 84 ER 789, 789 (Wales).

[38] *Ottoman Debt Arbitration* (Arbitrator Borel, 1925) 3 ILR 42; *Roselius & Co v Karsten & Turkish Republic* (1926) 3 ILR 35.

republics became independent States seemed to exclude continuity, positing that the USSR had come to an end and that this extinction, uncontroversial politically, extended to the juridical realm. The Minsk Agreement provided that 'the Union of Soviet Socialist Republics as a subject of international law and a geopolitical reality no longer exists';[39] the Alma Ata Agreement that, 'with the establishment of the Commonwealth of Independent States, the [USSR] ceases to exist.'[40] A number of writers regarded this as determinative and rejected the thesis of continuity between the USSR and Russian Federation.[41] On 24 December 1991, however, the Russian Permanent Representative transmitted to the United Nations Secretary-General a letter from the president of the Russian Federation, stating, *inter alia*:

[T]he membership of the Union of Soviet Socialist Republics in the United Nations, including the Security Council and all other organs and organizations of the United Nations system is being continued by the Russian Federation (RSFSR) with the support of the countries of the Commonwealth of Independent States. In this connection, I request that the name 'Russian Federation' should be used in the United Nations in place of the name ['USSR']. The Russian Federation maintains full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations, including the financial obligations.[42]

The governments of the newly independent republics all accepted the Russian position, and no third State objected.[43] The preponderance of Russia within the USSR, in territory and other respects, was a further ground for treating Russia as a continuation of, rather than successor to, the politically defunct imperial State. Thus the apparent extinction of a political system was made to coincide with legal continuity. According to Shaw,

[D]espite the approach taken in December 1991 CIS documentation proclaiming the end of the USSR in terms which in law would suggest dissolution or dismemberment of that entity thus logically precluding continuity, it is clear from all the circumstances

[39] Minsk Protocol (Russian Federation, Ukraine, Belarus), 13 Dec 1991, A/46/771, 31 ILM 143, 3.

[40] Alma Ata Protocol (Russian Federation, Ukraine, Belarus, Moldova, Azerbaijan, Armenia, Kazakhstan, Tajikistan, Kyrgyzstan, Turkmenistan, Uzbekistan), Letter dated 27 Dec 1991 from the Permanent Representative of Belarus to the United Nations addressed to the Secretary-General, A/47/60, S/23329, 8 Jan 1992, 6; 31 ILM 148, 149.

[41] See, e.g., Blum (1992) 3 *EJIL* 354; Seiffert (1992) 38 *Osteuroparecht* 86; Schweisfurth (1992) 52 *ZaöRV* 636; Beemelmans (1997) 15 *Boston UILJ* 71, 81.

[42] UN Doc 1991/RUSSIA, Appendix, 24 Dec 1991 31 ILM 138.

[43] See, e.g., Statement of Assistant Under-Secretary of State, FCO, Parliamentary Papers, 1991–2, Paper 21-II, 197, 15 Jan 1992, (1992) 63 *BY* 652: '[I]t was not necessary to reaccredit [the UK ambassador to Russia], he just became the continuous representative of the continuum State, namely, Russia.'

that this was an essentially political statement not taken by either the parties themselves or by third States as constituting a proclamation of dissolution preventing claims by Russia of continuity. On the contrary, Russia's continuity was asserted and supported by all parties.[44]

In consequence Russia continued to occupy the permanent seat of the USSR in the Security Council and became the residual holder of the property (including military property) and financial obligations of the USSR.[45]

## (2) Changes in population

Changes in population are concomitants of territorial changes (in the absence of a transfer of populations), and the same considerations apply.

## (3) Changes in government

It has long been established that in the case of an 'internal revolution, merely altering the municipal constitution and form of government, the State remains the same; it neither loses any of its rights, nor is discharged from any of its obligations.'[46] Despite the question-begging character of this and other formulations, the rule that the overthrow of a governmental system does not

[44] (1994) 5 *Finnish YBIL* 34, 49–50. But see Blum (1992) 3 *EJIL* 354, 360: 'This claim of the Russian Federation—made some three days (and possibly sixteen days) after the dissolution of the Soviet Union—that it was '*continuing*' the legal existence and hence the UN membership of the latter, must thus be considered—irrespective of its obvious *political* merits—as being seriously flawed from the legal point of view' (emphasis in original).

[45] See Declaration of 23 Dec 1991 of the European Communities: 'the international rights and obligations of the former USSR, including those under the United Nations Charter, will continue to be exercised by Russia. [The Communities] welcome the Russian Government's acceptance of these commitments and responsibilities and in this capacity will continue their dealings with Russia, taking into account the modification of her constitutional status.' *EC Bull* 12, 121 (1991). While this formulation leaves open the possibility that Russia was a new State succeeding to all the rights and obligations of an extinct USSR, the view is widespread that the USSR simply continued as the Russian Federation without creation of a new State out of the core of the old Soviet empire. See also Antonowicz (1991–2) 19 *Polish YBIL* 716; Bothe and Schmidt (1992) 96 *RGDIP* 811,; Czaplinksi (1993) 26 *RBDI* 374; Dörr, *Die Inkorporation als Tatbestand der Staatensukzession*, 168–9; Koskenniemi and Lehto (1992) 38 *AFDI*183; Müllerson (1993) 42 *ICLQ* 473; Oeter [1995] *German YBIL* 79; Klabbers *et al*, *Pilot Project*, 22–5, 52–6, 98–100, 124–36; Bühler, *State Succession*, 151–70; Scharf (1995) 28 *Cornell LJ* 29, 30–1. In terms of treaty practice the continuity of the Russian Federation has been consistently observed, unlike that of Ukraine and Belarus which have acceded to treaties to which they were (before 1990) evidently already parties. See for example the New York Convention 1958 (10 June 1958), 330 UNTS 3: both the Ukraine (Ukrainian Soviet Socialist Republic) and Belarus (Byelorussian Soviet Socialist Republic) were represented at the Conference and included as Parties to the Convention.

[46] Wheaton, *Elements* (8th edn), vol I, §22, citing Grotius, *De Jure Belli ac Pacis*, vol II, ch 9, §8; Pufendorf, *De Jure naturae et gentium libri octo*, vol VIII, ch 12, §§1–3.

affect the continuity of the State in which it occurs has been consistently applied to the innumerable revolutions, *coups d'état* and the like in the nineteenth and twentieth centuries.[47] Although it was sometimes argued that 'socialist revolutions', which resulted in a changed class-structure of the State, brought about a fundamental discontinuity in relations,[48] it is not clear whether this claim was directed to the notion of legal continuity of the State or was a claim to a more liberal regime of succession of revolutionary governments. In any event after initial hesitation it was established that the RSFSR (later the Soviet Union) was a continuation of Imperial Russia notwithstanding the October revolution.[49] In its turn the People's Republic of China never asserted discontinuity.[50] Claims by and against Iran following the Islamic revolution of 1979 involved similar considerations: Iran continued as a State notwithstanding major changes in its internal constitution and international alignment.[51] Such an approach was consistent with earlier practice[52] and is firmly established.[53] Likewise continuity is not affected by alterations in a municipal constitution according to its

[47] Marek, *Identity and Continuity*, 24–73 and works cited. Cf also *State v Dosso* (Pakistan SC, 1958) 27 ILR 22 (Muhammad Munir CJ); *Questech v Ministry of National Defence of the Islamic Republic of Iran* (1984) 9 Iran–US CTR 107.

[48] Tunkin, *Theory of International Law* (2nd edn, Butler, trans) 3; Hazard (1985) 23 *Col JTL* 251, 252–4. Cf *Land Registry of Waldsassen v Towns of Eger (Cheb) and Waldsassen* (Bavarian SC, 1965) 44 ILR 50, 57; Bokor-Szegö (1983) 25 *Acta Juridica Academiae Scientiarum Hungaricae* 351, 354–5.

[49] See *Agency of Canadian Car and Foundry Co Ltd v American Can Co*, 253 F 152 (1918), affd 258 F 363 (1919); *Russian Government v Lehigh Valley Railroad Co*, 293 F 133 (1919), affd 21 F 2d 396 (1927). British courts assumed continuity without argument (3 ILR 35) until *Lazard Bros v Midland Bank Ltd* [1933] AC 289, 297, 307–8 (Lord Wright). See also *Russian Roubles (Attempted Counterfeiting) Case* (Japan SC, 1919) 1 ILR 31; *Golovitschiner v Dori* (Cairo Civil Tr, 1923) 2 ILR 53; *Lowinsky v Receiver in Bankruptcy* (Amsterdam DC, 1932) 6 ILR 40; *Banque de L'Union Parisienne v Jaudon* (Paris CA, 1933) 7 ILR 78; *Weber v USSR* (Amsterdam CA, 1942) 11 ILR 140. Cf also *In re petition of S* (1957) 24 ILR 52. See also Marek, *Identity and Continuity,* 34–8; Taracouzio, *The Soviet Union and International Law*, 21; Grzybowski, *Soviet Public International Law,* 92–5; O'Connell, *State Succession*, vol I, 19–21; Müllerson (1993) 42 *ICLQ* 473, 476; *Restatement (Third)*, §208, Reporters' Note 2 (1987) 101.

[50] Grzybowski, *Soviet Public International Law*, 94; Talari (1996) 7 *Finnish YBIL* 134, 145–6; Hsiung in Cohen, *China's Practice of International Law* , 14, 36.

[51] See USA–Islamic Republic of Iran, Claims Settlement Declaration, 19 Jan 1981, 20 ILM 230 (1981) and related Undertakings, 20 ILM 229, para 2 (reciting the 'intention [of Iran] to pay all its debts and those of its controlled institutions').

[52] *The Sapphire v Napoleon III*, 78 US 164, 168 (1871): 'The reigning Emperor, or National Assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights.'

[53] Similarly radical political change is not a basis for pleading fundamental change of circumstances in relation to treaties of the ancien régime: cf *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Rep 1997 p 7, 35 (paras 39–40). See Müllerson in Stern (ed), *Dissolution, Continuation, and Succession in Eastern Europe*, 5, 11, 23–4.

own amendment provisions; or by a change in the name of the State[54]; or by non-recognition of the new government following a coup or revolution.[55]

## (4) Changes in international status

The possibility of continuity of personality between entities with varying degrees of personality or capacity has been referred to already. Although Marek denied this possibility on a priori grounds, it is established in practice that, for example, international protectorates or protected States continue the legal personality of the pre-protectorate State.[56] The position of mandated and trust territories were more doubtful: it would seem that there was no continuity, except possibly in the case of 'A' Mandates.[57] Where there are substantial changes in the entity concerned, continuity might depend upon recognition (as in the case of India after 1947).[58] Where the change results from external

[54] It is generally assumed that it is for each State freely to decide on its name and that changes of name have no relevance to the continuity of the State, though they may give a clue as to its self-perception (e.g., Libyan Arab Jamahiriya, Islamic Republic of Iran, United States of America). When James VI of Scotland proposed on his accession to the throne of England to change the name of his kingdom to 'Great Britain', this was opposed in the English Parliament on the ground that 'the alteration of the name of the Kingdom doth inevitably and infallibly draw on the erection of a new kingdom or state, and a dissolution of the old' (cited by Dicey and Rait, *Thoughts on the Union between England and Scotland*, 121), and the judges advised '[t]hat the name cannot be altered now without Prejudice to the State', in particular as affecting the continuity of all pending legal processes: Bindoff (1945) 60 *Eng Hist R* 192, 195, citing 2 *House of Lords J* 1578–1614, 287–8 (30 April 1604); and see *Co Inst* IV, 347; Levack, *The Formation of the British State,* 38–9. James went ahead and changed the name to Great Britain by proclamation of 20 October 1604, but this did not endure and the name was only lawfully adopted by the respective Acts of Union 1707. Modern examples of name changes include: Malaya/Malaysia (1963); United Republic of Tanganyika and Zanzibar/Tanzania (1964); Congo-Leopoldville/Zaïre/Democratic Republic of Congo (1971, 1997); Ceylon/Sri Lanka (1972); Dahomey/Benin (1975); Kingdom of Cambodia/Khmer Republic/Democratic Kampuchea/Cambodia (1970, 1979, 1990); Upper Volta/Burkina Faso (1984); Burma/Myanmar (1989); Byelorussia/Belarus (1991); Western Samoa/Samoa (1997); Federal Republic of Yugoslavia/Serbia and Montenegro (2003). See, e.g., Stern (1996) 262 *HR* 9, 74–6; Blum (1992) 3 *EJIL* 354, 357. The most significant modern controversy about naming concerns Macedonia, whose name was thought to imply a territorial claim: see GA res 47/225, 8 April 1993, respecting provisional reference to Macedonia as the Former Yugoslav Republic of Macedonia (FYROM) 'pending settlement of the difference that has arisen over the name of the State'; Wood (1997) 1 *Max-Planck YB UN Law* 231, 236–41; Craven (1995) 16 *Austral YIL* 199. See generally Appendix 1.

[55] *Tinoco Arbitration* (1924) 18 *AJ* 147.

[56] *Identity and Continuity*, 187. See further Chapter 7.

[57] *Shehadeh v Commissioner of Prisons* (1947) 14 ILR 42. Israel for most purposes denied continuity with Palestine, as to which see Chapter 9.

[58] Britain and, after some debate, the UN, took the view that India was a continuation of British India and so retained UN membership; whereas Pakistan was a new State that had to be admitted under Art 4. The equation of India with British India was questionable. See O'Connell, *State Succession,* vol II, 127–30, 184–7, 277–88; Poulose, *Succession in International Law*, 11–30; Schachter (1948) 25 *BY* 91, 103–9; Aufricht (1962) 11 *ICLQ* 154, 155–6; Bühler, *State Succession*, 42–50.

imposition (in particular of a puppet entity), continuity is not to be presumed; such an entity lacks any international status other than as agent of the belligerent.

A much more complex case was that of Germany after 1945. As was demonstrated in Chapter 10, Germany as a State was not extinguished by *debellatio* following the unconditional surrender of German forces in April 1945 but was placed under quadripartite government. Subsequently the FRG and GDR emerged and by 1973 both were generally recognized as States, including by the four Powers. In 1990 the GDR was absorbed into the FRG as was Berlin; the remaining quadripartite powers were terminated. This was said to constitute the 'final settlement' of the German question, even though various war-related issues of restitution and compensation remain open.[59] The episode, central to the Cold War in Europe, gave rise to difficult questions of identity and continuity both in the period before and after 1990.[60]

As to the former period, the GDR never claimed identity with pre-1945 Germany: it claimed to be and was recognised as a new State. By contrast the FRG has often been regarded as wholly[61] or partly[62] identical with 'Germany as a whole', i.e. pre-1945 Germany, a claim that was not universally recognized and was difficult to reconcile with continued quadripartite control over the old State. The position of the three western Powers was stated in the New York Declaration of 18 September 1950 as follows:

> Pending the reunification of Germany, the three Governments consider the Government of the Federal Republic of Germany as the only German Government freely and legitimately constituted and therefore entitled to speak for Germany as the representative of the German people in international affairs.[63]

On the status of India before 1947, see Poulose (1970) 44 *BY* 202; Sunderam (1931) 7 *GST* 35; Mahatra, *India and the Commonwealth 1885–1924*; Verhoeven, *Reconnaissance* 16–18; Scharf (1995) 28 *Cornell LJ* 29, 33–6.

[59] Cf *Case concerning Certain Property (Liechtenstein v Germany) (Preliminary Objections)*, judgment of 10 February 2005.

[60] In addition to works cited in Chapters 10 and 12, see Oeter (1991) 51 *ZaöRV* 349, 350; Kolb (1990) 23 *Zeitschrift für Rechtspolitik* 274; Hailbronner (1991) 2 *EJIL* 18, 20–5; Piotrowicz and Blay, *The Unification of Germany*.

[61] *Simon v Taylor* [1975] 2 Lloyds Rep 38; Mann, *Studies in International Law*, 680, 704; Frowein (1992) 86 *AJ* 152, 157–9; *Concordat (Germany) Case* (1957) 24 ILR 592.

[62] Decision of the Federal Constitutional Court of 31 July 1973, 78 ILR 149, 161–2 (referring to its earlier jurisprudence); cf Koenig [1973] *AFDI* 147; Lewald (1982) 32 *Özf öR* 159, 171; *In re Dirks' Patent* (1957) 30 ILR 54. But cf Treaty on the Basis of Inter-German Relations, 21 December 1972: 12 ILM 16, Art 4.

[63] Cited by the Federal Constitutional Court in the *Single German Nationality (Teso) Case* (1987) 91 ILR 211, 228.

That this was a statement about representation and not State identity was, however, made clear in an unpublished Interpretative Minute in which the three Powers stated that the Declaration:

> was based on the premise that the German State continues to exist; that the formula recognized the provisional character of the Federal Republic by stating that this status was recognised 'pending the peaceful reunification of Germany'; and that it did not therefore constitute recognition of the Government of the Federal Republic as the *de jure* Government of all Germany.[64]

In 1950 it was accurate to describe the FRG as 'provisional'. But there was nothing provisional about the two German States admitted to the United Nations in 1973, yet the underlying situation referred to in the 1950 Declaration did not change.

Moreover, the FRG's earlier claim to continuity was not made in unequivocal terms. First, there was the unfortunate notion of 'partial identity' (*Teilidentität*),[65] a term used by the Federal Constitutional Court in 1973 but avoided in subsequent judgments.[66] Furthermore, the FRG before 1990 denied that the boundary agreements concluded by the two German States were opposable to Germany as a whole, a proposition which may have been defensible so far as GDR agreements were concerned[67] (since the GDR did not purport to act on behalf of Germany as a whole and its treaty partners arguably took the risk that on reunification some further revision of boundaries might have been called for) but difficult to justify so far as FRG treaties were concerned, if the FRG was identical with pre-1945 Germany.[68]

[64] *Single German Nationality (Teso) Case* (1987) 91 ILR 211, 228.

[65] The Federal Constitutional Court sought to explain the 'partial continuity' thesis by arguing that the FRG continued the legal personality of pre-1945 Germany with respect to part only of its territory (Decision of 31 July 1973, 78 ILR 149, 161–2). Whatever the position under the constitutional law of the FRG, as an international law matter this makes no sense. The United Kingdom as an international legal person is not partially identical with the United Kingdom as it was in 1850 or 1910, despite vast changes in its territorial extent: it is the same State. Moreover the 'Germany as a whole' over which the Four Powers retained residual competence did not exclude any part of pre-1945 Germany.

[66] See esp *Single German Nationality (Teso) Case*, (BVerfGE 77, 135) (1987) 91 ILR 211, holding that the conferral of nationality by the GDR was in principle effective within the FRG legal order to confer German nationality.

[67] In particular, Poland–GDR, Agreement concerning the demarcation of the established and existing Polish–German State frontier, Gorlitz/Zgorzelec, 6 July 1950, 319 UNTS 103. The GDR also concluded a series of maritime boundary agreements with adjacent or opposite States: Poland, 29 October 1968, 768 UNTS 253; Sweden, 22 June 1978, 1147 UNTS 193; Denmark, 14 September 1988, 1547 UNTS 291, and again Poland, 22 May 1989, 1547 UNTS 277.

[68] Although the four Powers reserved rights with respect to Germany as a whole, they made no attempt to oversee the FRG's boundary agreements with other States (e.g., Belgium–FRG, Treaty regarding rectification of the Belgian–German frontier and the settlement of various problems

Adduced as evidence for identity was action taken by the FRG with respect to pre-1945 German treaties[69] and other legal relations, in particular the debts incurred by and wrongs attributable to the German *Reich*.[70] But while claims to identity for specific purposes may be accepted by consent or acquiescence there are difficulties with the claim to general continuity in this period.[71] The creation of a State under a new constitutional regime on part only of German territory could hardly have established a relation of continuity opposable to third States, and the USSR's recognition of the FRG was evidently not intended to have that effect.

In the period from 1952 to 1990, the term 'Germany as a whole' was equivalent to responsibility for the final settlement. Once the FRG and GDR had emerged as separate States, the various transactions by which the four Powers had accepted the territorial and administrative status quo in Germany might seem to have approximated a 'final settlement' but they did not do so entirely. The political shifts of 1989 made possible a return to joint action by the four Powers and to the final exercise of their rights and responsibilities (described in Chapter 12). That these retained some practical meaning was demonstrated in 1990 in the process leading to German unification.

That left the matter of Berlin. Although German authorities (including the Federal Constitutional Court in some of its judgments) seemed to take a different approach,[72] the better view is that the territory of Greater Berlin

concerning the two countries, Brussels, 24 September 1956, 314 UNTS 233; Netherlands–FRG, General Treaty for the settlement of frontier questions and other problems outstanding between the two countries, The Hague, 8 April 1960, 508 UNTS 20; FRG–Czechoslovakia, Treaty on mutual relations, Prague, 11 December 1973, 951 UNTS 365), and it is inconceivable that these were not definitive agreements binding on any successor or continuator State. They were confirmed in Art 1 of the Treaty on the Final Settlement, which nonetheless stated that the borders were 'definitive from the date on which the present Treaty enters into force'.

[69] E.g., British–German Extradition Treaty, 14 May 1872, 62 BFSP 5; 'reapplied' to British–West German relations by a Treaty of 23 February 1960, 358 UNTS 39. Cf O'Connell, *State Succession*, vol II, 81–7.

[70] E.g., Israel–FRG, Agreement, 10 December 1952, 162 UNTS 206, 272; Belgium–FRG, Convention for the settlement of Belgian claims arising out of the annuities provided for in the German–Belgian Agreement of 13 July 1929, Bonn, 23 December 1952, 186 UNTS 72; Agreement between the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany concerning Compensation for United Kingdom Nationals who were Victims of Nationalist-Socialist Measures of Protection, 9 June 1964, UKTS No 42 (1964); [1964] *BPIL* 120 (acceptance of liability for damage done to UK nationals by Germany pre-1945).

[71] The Three Power Declaration of 18 September 1950 that the Federal Republic was alone 'entitled to speak for Germany as the representative of the German people' is not necessarily a claim to identity with pre-1945 Germany as such. Cf Mann, *Studies in International Law*, 683; Kunz (1955) 49 *AJ* 68, 74–5.

[72] See notably the Federal Constitutional Court's judgment of 21 May 1957, in which the Court claimed that Berlin was part of the territory of the FRG, although Allied authority meant that sovereignty could only be exercised subject to considerable restrictions (7 *Collection of Decisions of the*

which was in 1949 part of an undivided Germany under quadripartite government did not become part of either German State between 1955 and 1990. It was not part of the FRG because of an express reservation in the grant of authority to that State, subsequently affirmed in terms binding the FRG. It had always been extra-territorial to the GDR and the USSR lacked the authority to transfer it to the GDR except with the consent of the other three Powers, which consent was never given. Pursuant to the agreements of 1971 to 1972 Berlin retained a separate status, even though it was administratively assimilated in part to the FRG and in part to the GDR.[73] The four Powers retained supreme authority with respect to Berlin, which was referred to as 'another independent governmental authority and territory'.[74]

The German *Reich* survived the creation of the two German States because the four Powers, in their capacity as the Government of Germany, retained governmental and territorial authority over German territory which was not part of any other State and retained their independence with respect to that territory. In the events which happened, neither East Germany nor West Germany was identical with the *Reich*. Only Berlin remained exclusively and unequivocally the territory of the pre-1945 Germany.[75] The submissions of the United Kingdom in the *Vearncombe* case were consistent with this view:

As regards the construction and use of the [firing] range at Gatow Airfield these acts of the British Military Government are, like those of the Allied Kommandatura, attributable under international law, to Germany. All acts of Allied authority in Berlin, whether joint (for example of the Allied Kommandatura) or individual (for example, of a sector Commandant), are attributable, under international law, not to the United Kingdom, France, the United States or the Soviet Union, but to Germany as a whole which continues to exist as a State under international law.[76]

*Federal Constitutional Court* 1). While successive governments of the FRG maintained this position most practical problems were addressed in the agreements of 1971–2. These notably clarified that laws passed by the FRG's legislature had to be incorporated into Berlin law by means of Berlin regional statutes, which the Allies could veto.

[73] See esp Hendry and Wood, *The Legal Status of Berlin*.

[74] *Hartje v Yugoslav Military Mission* (1954) 21 ILR 116, 119, cited in Chapter 10.

[75] Cf the equivocal conclusions of Schiedermair [1973] *AFDI* 171; see also Klein (1980) 31 *Außenpolitik* 394, 398–9; Piotrowicz and Blay, *Unification of Germany*, 7, 20: '[E]ven if there were two new German states, there was still an old one lurking in the background. Even if the USSR adopted the view that Germany no longer existed, the right to bring Germany's existence to an end was one held by the four Powers to be exercised jointly . . .'. See also Ress, in *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, vol 71, 199–228.

[76] *Vearncombe, Herbst, Clemens, Spielhagen v UK and Federal Republic of Germany*, decision of 18 January 1989, 59 DR 186. The Commission stated that 'there is, in principle, from a legal point of view, no reason why acts of the British authorities in Berlin should not entail the liability of the [UK] under the Convention' but held the application inadmissible nonetheless: 'As regards the situation in Berlin (West)

To summarize, the quadripartite government of Germany retained functional and territorial powers with respect to 'Germany as a whole' and Berlin. It is to these powers, traceable directly to the assumption of supreme authority over Germany in 1945, that we must look in order to find a body of legal relations formally continuous with pre-1945 Germany.

As to the post-1990 period, the termination of four Power competences under the Treaty on the Final Settlement with Respect to Germany meant the end of the special status of Berlin as well as of quadripartite authority as the government of 'Germany as a whole'.[77] What is crucial in the first place, then,

the Commission considers that the effect of the Crown Proceedings Act and the Allied Kommandatura Law No 7 is that of delimiting the very content of any right that may normally arise under British or German law; the United Kingdom cannot be held responsible for acts or omissions of the British military forces in Berlin. In these circumstances the Commission considers that the regulations in question do not confer an immunity from liability in respect of action of certain and distinct groups of persons and do not limit jurisdiction of civil courts with regard to certain classes of civil action but exclude generally any possible claim against the United Kingdom related to acts of their military forces in Berlin which cause damage or nuisance to persons living in that city. The applicants, therefore, cannot invoke a substantive right to have the United Kingdom Military Government prevented from constructing and/or using the shooting range . . . The fact that the specific remedy sought after by the applicants was not enforceable in the courts is therefore not equivalent to depriving them of the right of access to a court.' (ibid, 197–8). See European Commission of Human Rights; *Vearncombe* case; Decision of 18 January 1999; Submission of the Parties; (1989) 49 *ZaöRV* 512; Mann (1990) 39 *ICLQ* 669. The difficulty in attributing responsibility to the United Kingdom was that the British Military Government in Berlin claimed not to be a UK but a German government. Cf *Trawnik v Lennox* [1985] 1 WLR 532, 550 (Foreign Office certificate identifying British commandant as 'part of the Government of a foreign state'); Crawford (1985) 56 *BY* 311; Fruth (1987) 15 *Demokratie u Recht* 243. In a range of cases the ECHR never quite endorsed this view, but neither did it ever exercise jurisdiction over the UK, France or the FRG in respect of acts or omissions of the four Powers. See, e.g., *Ilse Hess v UK*, European Commission of Human Rights, 28 May 1975, 2 *Decisions and Reports* 72 (UK not separately responsible for acts of Four Powers in control of Spandau Prison) (and for the German analogue, *Rudolf Hess* case, No 2 BvR 419/80, BverfG, (1980) 90 ILR 387); Case of *Prince Hans-Adam II of Liechtenstein v Germany (Application No 42527/98)*, 12 July 2001 (ECHR), [2001] 8 ECHR 1, 26 (para 55): 'when negotiating the terms of the Settlement Convention and the related agreements, the Federal Republic of Germany was not negotiating a transfer of competences or the restriction of sovereignty in matters of jurisdiction which it already possessed. On the contrary, it was negotiating for the transfer to itself of sovereign authority and for the termination of the Occupation Regime . . .' See also the decision of the Grand Chamber, *Admissibility of Applications 71916/01, 71917/01 and 10260/02 von Maltzan & ors v Germany*, ECHR, 2 March 2005: 'That occupation of Germany was not an "ordinary" war-time occupation, but an occupation *sui generis*, following a war and an unconditional capitulation, which conferred powers of "sovereignty" on the occupying forces. That special regime was generally recognised by the international community' (para 80). The Court denied that the FRG succeeded to responsibility for conduct of the GDR or the USSR with respect to GDR nationals before 1990 which did not involve any continuing wrongful act (para 81).

[77] Treaty on the Final Settlement with Respect to Germany, Moscow, 12 Sept 1990, 1696 UNTS 123. Article 5 of the Agreement on the Settlement of Certain Matters Relating to Berlin, 25 Sept 1990 (FRG–France–US–UK), 30 ILM 445, provided for extinction, as against the three western powers, of any claims arising out of acts or omissions of the powers in their capacity as the government of Berlin (West). The FRG, under Art 5, assumed responsibility for claims made by individuals in the same connection.

is what the competent authorities, the FRG and the four Powers, intended to achieve by the Treaty. Formally the Treaty was negotiated by six States but ratified by only five; it was signed by the GDR but the GDR ceased to exist before the entry into force of the Treaty on 15 March 1991. Indeed this was specifically envisaged by the Treaty, Article 8(1) of which provided that: 'The present Treaty is subject to ratification or acceptance as soon as possible. On the German side it will be ratified by the united Germany. The Treaty will therefore apply to the united Germany.' Substantively both the Unification Treaty of 31 August 1990[78] and the Treaty on the Final Settlement made it clear that the GDR would cease to exist on unification, with its territory being incorporated into the FRG pursuant to Article 23 of the Basic Law. It was clearly intended that the FRG would remain the same State as it was before 1990, i.e. that no new State was being created. As the Government of the FRG stated in a Note to the United Nations Secretary-General of 17 December 1990:

> As a consequence of the accession of the German Democratic Republic to the Federal Republic of Germany, the former German Democratic Republic has ceased to exist as of 3rd October 1990, whereas the Federal Republic of Germany continues to exist as an identical subject of international law . . .[79]

The position taken by Germany, other States and the relevant international organizations was expressed for example in an affidavit to a British court in 1995:

> since 3 October 1990, the Federal Republic of Germany has used the designation 'Germany' as a shortened version of its name for international purposes . . . and it is this designation that the Federal Republic of Germany generally uses at the United Nations and in the European Community . . . However . . . no new State was created on 3 October 1990: the Federal Republic of Germany simply continued to exist albeit enlarged by the absorption of the additional provinces.[80]

The issue there was the continuity of Germany's participation in the European Convention on Extradition (ratified by the FRG in 1976) after 1990. It was not necessary to consider the further question of the continuity of pre-1945 Germany with 'the united Germany' to which the Treaty on the Final Settlement referred.

[78] Treaty on the Establishment of German Unity, 31 August 1990, 2 BGBl 889; 30 ILM 457. See esp Arts 1, 11, 12. According to Art 45, the Unification Treaty is to 'remain valid as federal law after the accession has taken effect'.

[79] Reprinted in (1993) 53 *ZaöRV* 1095.

[80] Affidavit of Dr WFH Trautwein, Head, Legal and Consular Department, German Embassy in London, reproduced in (1997) 68 *BY* 525, 529. See also Affidavit of MC Wood, 24 February 1995, ibid, 521.

As to that final question concerning the final settlement, there are factors pointing a number of ways. First, neither the Unification Treaty nor the Treaty on the Final Settlement used the term 'reunification' or made any express claim to legal continuity of the united Germany with pre-1945 Germany, and this was evidently deliberate.[81] The nearest approach is the reference in the preamble to the Unification Treaty to 'the continuity of German history', a phrase in itself equivocal and as a description of German history since 1867 (or since 1517, for that matter) somewhat optimistic. Secondly, it is understood that no new claim to formal continuity with the German *Reich* was made by the Government of Germany after 1990, although the phrase 'the continuity of history' was repeated. On the other hand (and thirdly), the FRG had from the 1950s assiduously assumed and taken care of the liabilities of the *Reich*, including liability for the Holocaust—an action of great moral significance.[82]

In its 1987 decision in the *Teso* case the Federal Constitutional Court relied on the principle of self-determination of the German people as a whole as a basis for its claim to identity with the German *Reich*. It said in part:

> The German people are the bearers of the right of self-determination within the meaning of universal customary international law. It does not represent an improper connection, failing to satisfy the requirements of international law, if the legal form and structure of the German people as bearers of the right of self-determination is preserved, through the operation of legal rules on nationality enacted by the Federal Republic of Germany, until such time as the German people will be enabled to freely exercise this right.[83]

But there was no referendum within the FRG on unification, let alone 'reunification', a term not used in the agreements of 1990. The people of the GDR approved unification through a free election of representatives, but the eventual terms of unification to which those representatives agreed did not specify the identity of the FRG with the *Reich*. The Parliament of the FRG approved and

[81] The initial bilateral Treaty on union—the Treaty Establishing a Monetary, Economic and Social Union, Bonn, 18 May 1990, 29 ILM 1108, likewise referred to 'the unity of Germany' and to 'the establishment of national unity'. By contrast the New York Declaration of 18 September 1950 referred to 'the *reunification* of Germany' (emphasis added).

[82] Israel–FRG, Agreement, 10 September 1952, 162 UNTS 205, based on the FRG's acceptance of responsibility for 'criminal acts . . . perpetrated against the Jewish people during the National-Socialist régime of terror'; Art 1 provided for the payment of DM 3 bn by instalments over 10 years; in an accompanying Exchange of Letters, 10 September 1952, it was agreed that 'The State of Israel will advance no further claims against the Federal Republic of Germany arising out of or in connection with losses which have resulted from National-Socialist persecution.' Further compensation is provided for in the Protocol between FRG and the Conference on Jewish Material Claims against Germany, ibid, 270, likewise 'settling the liabilities of the German Reich'.

[83] (1987) 91 ILR 211, 231.

gave faithful effect to the Unification Treaty and the Treaty on the Final Settlement, which as we have seen were equivocal on this point (though not on many others). It would have been as much an exercise of self-determination by the German people in 1990 to assert discontinuity with the *Reich* of 1945 as continuity; what they may be taken to have affirmed is the arrangements made for unification, such as they were.

In the end it is unclear what happened to the German *Reich*. The FRG would no doubt have been entitled after 1990 to assert continuity with it, and perhaps must be deemed to have done so through its conduct in assuming, eventually, most of the liabilities of all German authorities, pre- and post-1945.[84] It also asserted continuity through the decisions of the Federal Constitutional Court, made by reference to a view of the legal situation, which, though contestable before 1990, was opposable to all States thereafter. If so, the better view may be that the final settlement of 1990 did not involve the extinction of any State but a tacit merger of the *Reich* in the FRG, and that Germany was both united and reunited.[85]

### (5) Belligerent occupation

It is well established that belligerent occupation does not affect the continuity of the State. Governments-in-exile have frequently been recognized as governments of an enemy-occupied State during the course of the conflict and pending its outcome.[86] Where a government-in-exile has undoubted continuity to the pre-occupation government of the State and has been accepted as such by the competent international organizations, in particular the Security Council, its status may well be opposable to third States at large: this was the case in Kuwait in 1990 to 1991.[87] In the absence of constitutional continuity of the government-in-exile with the pre-occupation government of the State, recognition may not be opposable to third States.[88] An occupation government

[84] E.g., UK–FRG–France–USA, Exchange of Notes, 27/8 September 1990, 1656 UNTS 29. Cf the matters excluded from the scope of the Agreement on German external debts, London, 27 February 1953, 333 UNTS 4, Art 5.

[85] But for the view that pre-1945 Germany ceased to exist in 1991 when the four plus two Treaty came into force see Piotrowicz and Blay, *Unification of German*, 39–41.

[86] Marek, *Identity and Continuity*, 73–125; Talmon, *Recognition of Governments*, 117–206.

[87] SC res 662, 9 Aug 1990, para 2 called upon 'all States, international organizations and specialized agencies not to recognize [the] annexation [of Kuwait], and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation.' Consistent with this was the continued accreditation of Kuwaiti diplomatic missions in some 100 States: Talmon, *Recognition of Governments*, 161–2 (respecting the Kuwaiti Government-in-exile at Taif, Saudi Arabia).

[88] The Polish Government-in-exile after 1939 was constitutionally continuous with the pre-1939 government. However, constitutional continuity did not avail against an effective government recognized

whose status is regulated within the framework of Chapter VII of the Charter presents a distinct case; absent a competing government-in-exile, it may possess general status as an entity authorised to act on behalf of the State, even though it is not an indigenous government and has not been elected or otherwise chosen by the people of the State. This is apparently true of Iraq under the Coalition Provisional Authority and Governing Council.[89] In any event, the continuity of a State under belligerent occupation remains until the peace settlement.

## (6) Continuity and illegal annexation

State practice in the period since 1930 has established, not without initial uncertainty, the proposition that annexation of the territory of a State as a result of the illegal use of force does not bring about the extinction of the State. No question arose as to the identity of Kuwait, before and after its illegal annexation in 1990 to 1991. Kuwait, however, presented the core case of the phenomenon, the period of annexation having been brief and its illegality underscored by Security Council resolutions.

The proposition that illegal annexation does not effect extinction is reinforced if it is accepted that Estonia, Latvia and Lithuania (as admitted to the United Nations in 1991)[90] were the same States as those annexed by the USSR in 1940.[91] The extent of continuity between the pre-1940 Baltic States and 're-emergent' States in the 1990s is however not certain since all or nearly all manifestations of the Baltic States disappeared[92] and their submergence was

by the Allies at Potsdam. Cf Lauterpacht, *Recognition*, 353n; Talmon, *Recognition of Governments*, 115–16. See further Marek, *Identity and Continuity*, 86–101; Whiteman, 1 *Digest* 921–30; Flory, *Le Statut International des Gouvernements Réfugiés et le cas de la France Libre 1939–1945*; Oppenheimer (1942) 36 *AJ* 568.

[89] Grant (2003) 97 *AJIL* 823.

[90] Estonia, SC res 709, 12 Sept 1991, GA res 46/4, 17 Sept 1991; Latvia, SC res 710, 12 Sept 1991, GA res 46/5, 17 Sept 1991; Lithuania, SA res 711, 12 Sept 1991, GA res 46/6, 17 Sept 1991. See Kherad (1992) 96 *RGDIP* 843, 867–71; Bühler, *State Succession*, 177–9.

[91] Cf the position of the European Communities: 'The Community and its member States warmly welcomes the restoration of the sovereignty and independence of the Baltic States which they lost in 1940. They have consistently regarded the democratically elected parliaments and governments of these states as the legitimate representatives of the Baltic peoples.' Declaration at the Brussels EC Extraordinary Ministerial Meeting, 27 Aug 1991, in (1991) 62 *BY* 558.

[92] Koskenniemi (1994) 88 *PAS* 22, 93: 'Despite the wide acceptance of the Baltic claims to continue the statehood of the pre-1940 republics, very few legal relationships of the period actually survived.' See also Lehto (1993) 4 *Finn YBIL* 194, 214–17, positing that the 'doctrine of *desuetude*' led to the termination of most or all pre-1940 treaties. For transitional property questions see *Re Jaakson & Roos* (1990) 85 ILR 53 (English High Court, Millett J).

widely if tacitly accepted.[93] But what can be recognized can be de-recognized if circumstances change, and other States were generally content to accept the Baltic States' self-evaluation as continuators of the pre-1940 entities, subject to receiving suitable assurances on specific issues.[94]

## (7) Identity without continuity

The case of Syria demonstrates the possibility that a State, which has for a time been voluntarily suppressed or extinguished, may be re-established on the same or substantially the same territory and be regarded as for relevant purposes the same entity as before. Syria's United Nations membership revived upon its separation from the United Arab Republic in 1961, without the need for readmission.[95] The South African Republic also seems to have been regarded as the same State before and after a period of extinction (1877–81).[96] However, where State existence is terminated either by consent of the entities concerned (as with the United Arab Republic) or validly in accordance with international law at the time (as with the South African Republic), any subsequent assertion of 'identity' takes on fictional overtones.[97] This is especially so where (as with

[93] The Baltic governments took the view that Estonia, Latvia and Lithuania were not parties by virtue of treaty succession to any treaties entering into force under Soviet rule: ST/LEG/SER.E/14, 9 nn 12, 16, 18; Stern, 244–6. As to the selective application of this approach, see Bokor-Szegö in Mrak (ed), *Succession of States*, 95, 99–101.

[94] Czaplinski (1993) 26 *Revue belge de droit international* 374, 387.

[95] Young (1962) 56 *AJ* 482. See Chapter 11. Scharf contrasts the revival of Syrian membership with the admission of Pakistan and with the view on admission procedures earlier expressed by the Sixth Committee: Scharf (1995) 28 *Cornell ILJ* 29, 37; cf Bühler, *State Succession*, 50–61; Ribbelink (1995) 26 *NYIL* 139, 154–6; Shaw, (1994) 5 *Finn YBIL* 34, 69.

[96] An entity called the South African Republic existed during the periods 1852–77 and 1881–1900. Article X of the Pretoria Convention, 3 August 1881, 72 BFSP 900 and Arts X, VIII of the London Convention, 27 February 1884, 75 BFSP 5 clearly treat it as the same State during both periods.

[97] Cf the exchanges of recognition in 1996 between the FRY, on the one hand, and Croatia and Macedonia on the other. The preambles to the new constitutions of Croatia and Macedonia contained assertions of continuity to earlier entities, in the latter case to the early 20th century Republic of Kruševo, an Ottoman dependency. The FRY accepted these assertions of continuity; in return, Croatia and Macedonia stated that the FRY was related to the State established by the Congress of Berlin in 1878. See Agreement on the Regulation of Relations and Promotion of Cooperation between the Republic of Macedonia and the Federal Republic of Yugoslavia, 8 Apr 1996, S/1996/291, Annex, 17 Apr 1996, 35 ILM 1246, 1248, Art 4:'In the light of the fact that Serbia and Montenegro had existed as independent States before the creation of Yugoslavia, and in view of the fact that Yugoslavia continued the international legal personality of these States, the Republic of Macedonia respects the state continuity of the Federal Republic of Yugoslavia . . . [and] the Federal Republic of Yugoslavia respects the state continuity of the Republic of Macedonia.' Agreement on Normalization of Relations between the Federal Republic of Yugoslavia and the Republic of Croatia, 23 Aug 1996, A/51/318, S/1996/706, Annex, 29 Aug 1996, 35 ILM 1219, 1221 (1996), Art 5: 'Proceeding from the historical fact that Serbia and Montenegro existed as independent States before the creation of

Poland from 1795 to 1918[98] and the Czech State from 1620 to 1918)[99] the period of extinction lasts for a century or more.[100]

Identity is more tenable in the case of States illegally but effectively annexed: in such situations, the formal legal identity of the State may be preserved over a period of time by the relevant legal rules and any corresponding obligations of non-recognition. This was the case with Ethiopia, Austria and Czechoslovakia, even though third States extended substantial *de facto* recognition of extinction.[101] Illegal annexation should be treated as a case of continuity without extinction, though the other view may seem politically more realistic where the annexed State is not represented by any government-in-exile or insurgent movement. With the Baltic States, given the length of time involved, third States substantially accommodated the change in effective control.[102] A clearer case involves displacement by force of a government from its territory for a shorter period, during which no State recognizes the changed circumstances

Yugoslavia, and bearing in mind the fact that Yugoslavia has continued the international legal personality of these States, the Republic of Croatia notes the existence of the State continuity of the Federal Republic of Yugoslavia. Proceeding from the historical fact of the existence of the various forms of statal organization of Croatia in the past, the Federal Republic of Yugoslavia notes the existence of the continuity of the Croatian statehood.'

See Sahovic (1996) 42 *AFDI* 228, 231–2, who suggests that the mutual acceptance of continuity was crafted so as to produce few legal consequences; for example, the agreements segregated issues of state succession from the statements concerning continuity.

[98] Identity was claimed by Polish courts: *Republic v Felsenstadt* (1922) 1 ILR 33; *Republic v Weisholc* (1919) 1 ILR 472; *Republic v Pantol* (1922) 1 ILR 35 but was not recognized by other States. See Dörr, *Inkorporation*, 204–5.

[99] Malenovsky (1993) 39 *RGDIP* 305, 311–12, respecting the thesis of identity between the Kingdom of Bohemia and Moravia and the Czechoslovak State established in October 1918: 'dès lors l'affirmation de sa continuité au bout de trois siècles de rupture ne dépassait pas les limites d'une fiction juridique.' Parties seeking establishment of a Ukrainian State during World War I found the historic links more tenuous still: Mark (1984) 33 *Zeitschrift für Ostforschung* 196, 205–7.

[100] Consent by the entity to measures resulting in loss of its international personality will also impact on any claim to revival. In *Reference re Newfoundland Continental Shelf* the Supreme Court of Canada was sceptical of a claim by Newfoundland that its pre-1934 status as a Dominion with extensive powers respecting international relations revived in 1949: [1984] 1 SCR 86, 110–11 (paras 47–50).

[101] Cf Benvenisti, *The International Law of Occupation*, 74–5 (respecting Ethiopia).

[102] See, e.g., Statement of Parliamentary Under-Secretary of State, FCO, 581 *HL Deb* col 1187, 21 July 1997: '[T]he United Kingdom Government never recognised *de jure* the annexation of the Baltic states in 1940, although *de facto* they were a part of the Soviet Union from 1940 until 1991.' See Bothe and Schmidt (1992) 96 *RGDIP* 811, 822–3; Cassese, *Self-determination*, 258–65; Grant (2001) 1 *Baltic YBIL* 23, 73–83. Yet several writers have taken the view that identity under these circumstances is nonetheless legally attenuated: Koskenniemi and Lehto (1992) 38 *AFDI* 183, 191–2, 197–8; Müllerson (1993) 42 *ILQ* 473, 480–3; Shaw (1994) 5 *Finn YBIL* 34, 56–9; Dörr, *Inkorporation*, 355; Mälksoo (2000) 69 *Nordic JIL* 289, 316. Though remnants of their pre-1940 diplomatic and consular apparatus continued to be treated as having some official status, the governments of Estonia, Latvia and Lithuania did not continue in exile after Soviet annexation: Grant (2001) 1 *Baltic YBIL* 23, 41–9.

and the government retains accreditation with other States and representation with international organizations.[103] The core modern example, Kuwait, was all the clearer given unambiguous statements by the Security Council providing a framework for collective action to reverse an unlawful occupation and purported annexation.[104]

## (8) Multiple changes and State continuity: the case of Poland after 1945

The rules or presumptions referred to above relate to changes in one or other of the constituent elements of statehood. Where a State undergoes multiple changes, the problem is more difficult and the role of recognition still more important. Examples of asserted identity despite multiple changes of this type include Serbia after 1918,[105] Germany after 1945 and the Federal Republic of Yugoslavia after 1991. Perhaps the best example, however, is the case of Poland after 1945.

Pursuant to the Yalta and Potsdam Agreements, Poland's territory and population were radically redistributed, and an entirely different political and constitutional system was imposed.[106] The new government of Poland was hardly independent. But Poland after 1945 was treated in practice as the same State as Poland before 1939, so that, although there was in 1945 a succession of governments, there was at no time a succession of States or the creation of a new Polish State not identical with pre-1939 Poland. For example, treaties made by the Polish Government before 1939 generally continued in force.[107] The

[103] Cf *Land Registry of Waldsassen v Towns of Eger and Waldsassen* (Bavaria, SC, 1965) 44 ILR 50, 57–8: 'The question whether the Czechoslovak State in 1939 became extinct in consequence of its union, as a protectorate, with the German *Reich* is disputed in international legal doctrine because of the extensive recognition of the Czechoslovak Government-in-exile in London. This question need not be decided here. For even if one assumed the extinction of the Czechoslovak State in 1939, this would not exclude the subsequent identification of the later re-established State with the previous State, by way of legal fiction and the assumption that the State had existed continuously without interruption.'

[104] SC resns 660, 2 Aug 1990; 661, 6 Aug 1990; 662, 9 Aug 1990; 664, 18 Aug 1990; 665, 25 Aug 1990; 666, 13 Sept 1990; 667, 16 Sept 1990; 670, 25 Sept 1990; 677, 28 Nov 1990; 678, 29 Nov 1990.

[105] Although a number of treaties between Serbia and other States continued in force, apparently on the assumption of continuity (O'Connell, *State Succession*, vol II, 378–9), the better view seems to be that Yugoslavia (the Serb-Croat-Slovene State) was not a continuation of pre-1914 Serbia: Marek, *Identity and Continuity*, 237–62; *Artukovic v Boyle* 107 F Supp 11 (1952). But a German–Yugoslav MAT held that Yugoslavia was not a 'new State' for the purposes of Art 297(h) of the Treaty of Versailles: *Katz & Klump v Yugoslavia* (1925) 5 Rep MAT 963. Cf also Hackworth, 5 *Digest* 374–5.

[106] See Karski, *The Great Powers & Poland 1919–1945*, 565–8; Berend, *Central and Eastern Europe 1944–1993*, 4–5, 7–10; Davies, *Europe*, 1037–8.

[107] Dabrowa (1968–9) 2 *Polish YBIL* 50. *US Treaties in Force 1977* listed the 1927 Extradition Treaty with Poland (92 LNTS 101) and the 1922 Agreement relating to the Funding of Polish Indebtedness (58 LNTS 97). The US emphasized, in its negotiations with the Polish Provisional Government that the 1931 Treaty of Friendship (USFR 1931/II 933) was still in force: USFR 1945/V, 362.

post-1945 Government appears to have regarded itself as still bound by agreements or obligations entered into before 1945 by the Polish Government-in-exile.[108] A Trade and Payments Agreement of 11 November 1954 between Great Britain and the Polish People's Republic provided for some £2,800,000 for pre-war debts guaranteed by the pre-1939 Polish Government.[109] An Agreement for the Settlement of Lend-Lease and Other Claims of 28 June 1956 between the United States and Poland referred to the 'London' Government and the post-1945 Government indistinguishably as 'the Government of Poland'.[110] A decision of the Polish Supreme Court in 1963 referred to the Concordat with Poland of 10 February 1925 as continuing to regulate the activities of the Catholic Church in Poland until unilaterally terminated by a resolution of the Polish Council of Ministers of 12 September 1945.[111] Practice points clearly to the conclusion that Poland before 1939 and after 1945 was the same State for relevant purposes, despite substantial changes in territory, population, and government.

However, Marek argued that post-1945 Poland was, if a State at all, a new State not identical with the pre-1939 Polish State, which continued to exist in the Government-in-exile in London. Her position is exemplified by the following passage:

> It has been seen that the entity established in Poland by the Soviet Union prior to the Yalta Conference was a puppet State, entirely delegated by the Soviet Union by means of consistent intervention, partly disguised as revolution, and, as such, not identical with the Polish Republic . . . It has been seen that, notwithstanding temporary vacillations by the Western Powers, the Yalta decision on Poland . . . accepted and confirmed this situation. There is . . . little to be added to the above analysis of the . . . Polish puppet State as it had existed prior to Yalta. Now as then, the immediate subordination to international law of the independent Polish Republic was replaced by a delegation of the new State. Now as then, the basic norm identifying the Polish Republic was replaced by a basic norm derived from outside. Now as then, the delegated entity . . . was set up for an altogether different territorial and personal delimitation. Everything that went to delimit the separate, independent Polish State under international law, had been lost in the process: its legal order, its territory, its population. In particular, the total elimination of all organs of the Polish Republic must be borne in mind. . . . Now as then, all international delimitation of the State having broken down, there remained not one single element to support the identity and continuity of that State in face of all-round changes to its structure. There is thus not one single

[108] The Lend Lease Agreement of 1942 (103 UNTS 267) is also listed in *US Treaties in Force 1978*. Cf Harriman, USFR 1945/I *The Potsdam Conference*, 730. [109] 204 UNTS 137; Marek, 516.
[110] 273 UNTS 79. [111] *Metropolitan Chapter in Poznán v State Treasury* (1963) 47 ILR 24.

element on which to base a thesis of the identity of Yalta-Poland with the Polish Republic.[112]

The view that the Government established at Lublin under Soviet occupation was the government of a puppet State[113] cannot be right. Even if it was a puppet, it was the puppet government of a State not extinguished by *debellatio*. The 'Lublin government' claimed to be the Government of Poland, the pre-existing State, and after some reconstruction was recognized as such at Yalta. The 'London Government' did not regard the Provisional Government as the government of any other State than Poland.[114] Marek's position appears to be that the only proper course in 1945 would have been the replacement in Poland of the Polish Government-in-exile but this was not even Mikolajczyk's view,[115] nor of course was it that of the Allies.

If the elections which were due under the Yalta and Potsdam Agreements in 1946[116] and which were actually held in January 1947 had produced a representative government the problem of identity could not have been raised. Free elections were not held, but this violation of the Yalta–Potsdam Agreements was not made the basis for withdrawal of recognition: *a fortiori* it could hardly have retroactively invalidated the continued existence of the Polish State as a legal entity. Moreover, if the post-1945 Government had—assuming again its puppet character in 1945—become in some way a genuinely independent government at a later date, it would not have been debarred from claiming continuity with the Polish State as it had existed since 1919. The assumption underlying Marek's thesis is that the lack of independence of the government of a recognized State brings about the extinction of the State as a legal entity; or that where a recognized government of a State is not independent, it must be regarded merely as the government of a different, puppet, State. Neither view is tenable. Even if the total lack of independence of a State over a period of time might lead to its extinction as a State, that result is neither inevitable nor automatic. A State can continue to exist even if its government is reduced to relative impotence (e.g., China 1930–5, Russia 1917–21, Afghanistan 1989–96, Bosnia and Herzegovina 1991–4, Somalia 1991–2004, Zaire/Congo 1997–2004) or even if its territory is wholly occupied (Ethiopia 1935–45, Poland 1939–45, Kuwait 1990–1). Equally the lack

[112] *Identity and Continuity*, 507–8. [113] Ibid, 486. [114] Ibid, 496.

[115] Apart from the re-establishment of the government-in-exile, three other possibilities were envisaged, two of which were 'outside the scope of [*sc.* municipal] legal procedure': USFR 1945/V, 119. After Mikolajczyk resigned as Premier of the government-in-exile in November 1944 the latter's re-establishment in Poland was only a remote possibility: cf Rozek, *Allied Wartime Diplomacy*, 183 ff.

[116] See Davies, *Legal Status*, 1044, 1061–2.

of independence of the government of a State for a certain period of time does not have the automatic effect of extinguishing the State itself. In particular this is unlikely to be the case where other States continue to recognize the State in question.

It might be argued that, although the lack of independence by itself was insufficient to disturb the continuity of the Polish State yet along with the other substantial changes in territory, population and government, the total change was such as to have this effect. But it is still necessary to consider the terms by which recognition was given to the new government. Although recognition is not decisive in matters of territorial and governmental status, it constitutes important evidence of that status, particularly in doubtful or marginal cases. Marek cites at least some evidence of State practice in support of her contention, but much of it is of dubious value. For example, Soviet action vis-à-vis the Lublin Government, which action was on Marek's hypothesis unilateral and unlawful, can scarcely be entitled to much weight.[117] Equally deductions from British practice with respect to the Polish forces are not impressive as evidence of the non-identity of the Polish People's Republic with pre-1945 Poland. In fact, the British position accorded with its recognition of the Republic as a new government, not a new State. The position of the Polish army in exile after 1945 was admittedly anomalous: nevertheless the Polish Resettlement Act 1947 (UK)[118] which retrospectively validated military discipline over the Polish forces was based on the tacit assumption that this required validation.[119] Non-identity of the 'two States' was not the explanation. The conclusion must be that the creation and recognition of the post-1945 Polish Government did not affect the identity or continuity of the Polish State.[120]

## 16.3 Reversion to sovereignty

The term 'reversion' has various meanings in international law. Four of these may be distinguished.

[117] But cf Marek, *Identity and Continuity*, 511 ff.

[118] Section 9(8) provided: 'As respects any period between the first day of January 1945 and the passing of this Act, the powers conferred by subsection (1) of section 1 of the Allied Forces Act, 1940, shall be deemed to have been exercisable in relation to the said forces by reference to the law of Poland in force on that day and as if the said forces had not ceased to be recognized by *the Government of Poland*, and any Order in Council made under or by virtue of that Act shall be deemed to have had effect accordingly.' (Emphasis added.)

[119] Cf also s 9(2) (reference to the military law 'in force . . . under the law of Poland' as at 1 Jan 1945).

[120] As late as 1954, the Lebanon, Spain, the Vatican and Cuba still recognized the Government-in-exile as the Government of Poland. But even they did not, it seems, adhere to the 'two States' theory.

### (1) Rights of reversion by treaty

The simplest meaning of the term is as a description of the right to sovereignty contingent upon some future event—such as, for example, a failure of heirs of the ruling line.[121] Such rights are now rare. Provided that the future contingency is sufficiently defined and (possibly) that its occurrence is not within the control of the reversioner, the entity in question may be an independent State.

### (2) Reversion of territorial enclaves

The claim of a right of reversion with respect to so-called 'colonial enclaves' was discussed in Chapter 14. If it is a valid legal claim at all it applies only to a very restricted category of territories.

### (3) *Postliminium*

The notion of *postliminium* was derived by the classical international lawyers from Roman law, where it had involved reversion of persons or property to their status or ownership before capture by an enemy or alien nation.[122] The classical writers, strongly influenced by the Roman law concept, dealt for the most part with matters of status and private property.[123] Where, by analogy with the status of individuals, *postliminium* was considered with respect to groups of people or nations the answer generally given was that such nations had such a right only when they continued to exist as such and that the right ceased to be applicable on the extinction of the nation.[124] The classical treatises thus assumed as the foundation of the rule the proposition that 'the acquisition of a conquered town is only consummated by the treaty of peace, or by the entire subjugation or destruction of the State to which it belongs.'[125] The converse assumption was that *postliminium* did not survive a peace treaty or the extinction of the State by *debellatio*,[126] and this is stated by Oppenheim as

[121] Cf Monaco: Verzijl, *International Law*, vol II, 472–3, and see Chapter 7.

[122] Oppenheim (7th edn), vol II, 616–17.

[123] Grotius, *De Jure Belli ac Pacis*, vol III, ch IX; Gentili, *De Jure Belli Libri Tres*, vol III, ch XVII; Bynkershoek, *Quaestionum Juris Publici Libri Duo*, vol I, ch XVI; Vattel, *Le Droit de Gens*, ch XIV.

[124] Thus Grotius wrote: 'What we have said in regard to individual persons holds true, I think, in the case of peoples also; those who were free may recover their liberty in case the power of their allies delivers them from the rule of the enemy. But if the population, which formed the state, has been dispersed, I think it more correct not to consider the people as the same, nor to restore their property by postliminy in accordance with the law of nations for the reason that a people . . . obviously perishes by the dissolution of its parts, since its whole nature consists in perpetual union. That was, then, not the same state of Saguntum which previously existed, when this site was restored, eight years later, to the former inhabitants.'

[125] Vattel, *Le Droit de Gers*, §212.

[126] Cf Gentili, *De Jure Belli Libri Tres*, §623.

the modern rule.[127] However, Vattel, with characteristic ambivalence, did suggest that in the case of complete subjugation of a Nation *postliminium* might continue to apply so long as the subjugated people 'has not voluntarily submitted, and has merely ceased to resist from lack of power, if its conqueror has not put aside his sword in exchange for the sceptre of a just and peaceful ruler . . .'.[128] This went further than the proposition that restoration by an ally during a war precluded *debellatio* and involved a real reversion to sovereignty after extinction. But such a reversion was possible only in a situation of unwilling subjugation and then only for a relatively brief period of time, since thereafter the nation's consent to subjugation might be presumed. Precedent for this extension was found in the case of Portugal, which was regarded as reverting to sovereignty after its invasion and annexation by Philip II of Spain (1580–1640).[129]

## (4) Reversion to sovereignty

The case of Portugal, in recovering independence from Spain, was perhaps the first claim to reversion in the sense of a claim of a State to revert to the sovereignty and thus reassume the rights of an assertedly identical State definitively extinguished at an earlier time.[130] Thus in the *Right of Passage* case Judge Moreno Quintana (dissenting) said:

> Curiously enough it was against Portugal that a similar claim of reversion was to be made, by India in the period of twentieth century decolonization . . . To support the Portuguese claim in this case, which implies survival of the colonial system, without categorical and conclusive proof is to fly in the face of the United Nations Charter.[131]

It is not clear what consequences Judge Moreno Quintana sought to derive from this reversion, let alone how it was relevant to the dispute.[132]

[127] Oppenheim (7th edn), vol II, §284 ('No Postliminium after Interregnum').

[128] Vattel, *Le Droit de Gers*, §213.

[129] Cf Bynkershoek, *Quaestionum*, §121; Degan (1999) 279 *HR* 199, 293.

[130] Reversion is defined by Alexandrowicz as follows: 'There is a legal presumption that a State which lost its sovereignty but reverted to it (before the dust of history had settled), recovers a full and unencumbered sovereignty. The interpretation of rights and obligations connected with such sovereignty would therefore be in favour of the reverting State': (1969) 45 *Int Aff* 465, 474.

[131] ICJ Rep 1960 p 6, 95.

[132] The Supreme Court of India, if only tacitly, may have drawn certain consequences from it. The Court did not refer to *Right of Passage* or, for that matter, to reversion. Moreover, its treatment of the case as one of acquisition of 'new' territory obscures the point, but in *Gosalia v Agarwal* (Chandrachud CJ, 1981) the Court would seem to have had reversion in mind, in the sense of an operation of law erasing the effects of the presence of the earlier sovereign:'[W]hen a new territory is acquired in any manner—be it by conquest, annexation or cession following upon a treaty—the new "sovereign" is not bound by the rights which the residents of the conquered territory had against their sovereign or

Alexandrowicz suggests that the basic incident is procedural: in the absence of compelling evidence limitations on the plenary sovereignty of the reversioner as it existed before colonization cannot be presumed.[133] But such a presumption is unnecessary: the matter is covered by existing presumptions and rules (including those of State succession) relating to the sovereignty of new States.[134] Moreover, on the evidentiary point Judge Moreno Quintana was a sole dissentient.

Even if reversion might be arguable in particular cases, the reverting entity would have to be 'identical' with the pre-colonization State, but it is very doubtful whether the Maratha Empire was in any sense identical with India after 1947. In *Western Sahara* Mauritania 'expressly accepted that the "Mauritanian entity" did not . . . [in 1884] constitute a State; and also that the present statehood of Mauritania is not retroactive.'[135] The Court concluded that no legal ties of sovereignty could have existed which could assist Mauritania in its claim to the Spanish Sahara.

Two points may be added to this brief review. First, Algeria, one of the few States which according to the criterion of territorial identity might be regarded as having reverted to sovereignty, has not claimed such a reversion.[136] Second, the ILC after some debate deleted the notion of reversion from its draft Article 7 ('Date of Transfer of public property') of its Draft Articles on State Succession in Respect of Matters other than Treaties.[137] It must be concluded that,

by the obligation of the old sovereign toward his subjects. The rights of the residents of a territory against their State or sovereign come to an end with the conquest, annexation or cession of that territory and do not pass on to the new environment.' AIR 1981 SC 1946, 1951; 118 ILR 429, 438.

133 Alexandrowicz (1968) 123 *HR* 117, 166–7.

134 No distinction between reverting and non-reverting States in respect of treaty succession has been made: e.g., Algeria (O'Connell, *State Succession*, vol II, 113, 223).

135 ICJ Rep 1975 p 12, 57.

136 Bedjaoui, *Law and the Algerian Revolution*, 18 ff argues that Algeria's sovereignty was never validly extinguished, and so revived with the belligerency of the NLF. Belkherroubi, rightly, regards Algeria as a 'new State', without discussing the question of reversion: *La naissance et la reconnaissance de la République algérienne*. A similar reversionary claim was made by Chechen separatists during the late 1990s and similar difficulties obtained: Grant (1998) 9 *Finn Ybk* 145, 145–8.

137 Draft Art 7 had originally provided that public property was to be transferred on the date at which the change of property occurred, but excepted, *inter alia*, cases 'where sovereignty has been restored and is deemed to be retroactive to the date of its termination'. *ILC Ybk* 1973/I, 137. In explanation, the Special Rapporteur (Bedjaoui) instanced the cases of Poland in 1918 and Ethiopia and Albania in 1947 (although in the latter two cases the better view is that sovereignty was never extinguished so that the problem of reversion did not arise): ibid, 1228th mtg, para 6o. The confusion between continuity and reversion was evident also in the debate. Members were unanimous in agreeing that a State invaded and illegally annexed did not thereby become extinct, but such a hypothesis was already, as was pointed out, excluded from the scope of the Draft Articles: cf Tammes, ibid, 1229th mtg, para 3; Ago, ibid, paras 19–20; nor was it a case of succession: Ushakov, ibid, para 31. The notion

whatever the validity or usefulness of reversion as a political claim, there is little authority and even less utility for its existence as a legal claim.

of reversion as at least a principle of international morality was generally accepted, although it was, in Hambro's words, a principle of a 'special and extraordinary character': ibid, paras 14–17; cf Yasseen, ibid, para 11; Camara, ibid, para 9; Kearney, ibid, para 4. Ramangasoavina's comment is both representative and instructive: he 'supported the principle that when sovereignty was restored the transfer of public property was retroactive; that principle certainly reflected an idea of justice. However, the period during which sovereignty disappeared might be very long . . . Furthermore, after a State had seized a territory by force, it might try to obliterate all trace of the former sovereignty by destroying its property . . . [For example] in 1895 . . . the Kingdom of Madagascar had fallen into the hands of the French. Previously, the Kingdom of Madagascar had concluded international treaties . . . and had maintained diplomatic missions abroad. After being a protectorate for a year, Madagascar had become a colonial territory. It was difficult to consider that when it had attained independence 65 years later its sovereignty had been restored. Even if the principle of restoration were accepted in such cases, it would obviously be very difficult to reconstitute the property which had existed at the time of the original sovereignty.' ibid, paras 23–4, and cf Bedjaoui's reply: paras 37–41. See also Oraison (1981) 85 *RGDIP* 465, 497; Dörr, *Inkorporation*, 279–81. Reference to retroactivity of restored sovereignty was deleted from art 7 in the Drafting Committee: ibid, 1239th mtg, para 21.

# Chapter 17

# THE EXTINCTION OF STATES


| | | |
|---|---|---|
| **17.1** | **General principles** | 700 |
| **17.2** | **Extinction and illegal annexation** | 702 |
| **17.3** | **State Extinction and the possibility of prescription** | 703 |
| **17.4** | **Extinction, merger and the creation of new States** | 705 |
| | (1) Voluntary absorption: the German Democratic Republic | 705 |
| | (2) Extinction by merger: Yemen | 705 |
| | (3) Extinction by voluntary dissolution: the Czech and Solvak Federal Republic | 706 |
| | (4) Extinction by involuntary dissolution: the SFRY and its successor States | 707 |
| **17.5** | **International law and the survival of States** | 715 |


## 17.1 General principles

Intimately connected to the problem of identity and continuity, discussed in Chapter 16, is that of extinction: in what circumstances does a State become extinct so that the various incidents of succession are brought into play?[1] The rules or presumptions discussed in Chapter 16 are equally relevant here. A State is not necessarily extinguished by substantial changes in territory, population or government, or even, in some cases, by a combination of all three. Continuation of a State entity under a regime such as a protectorate with some degree of international personality may preserve

[1] The literature on extinction is not extensive: apart from Marek, *Identity and Continuity* and Langer, *Seizure of Territory*, see Raestad (1939) 20 *RDILC* 441; Oppenheim (8th edn), vol I, 155–6, (9th edn), vol I, 206–8; Verzijl, *International Law*, vol II, 122–31; Ruiz-Fabri (1992) 38 *AFDI* 153; Burdeau and Stern, *Dissolution, Continuation et Succession en Europe de l'Est*; Bühler, *State Succession and Membership in International Organizations*.

the legal identity of the State over time. Belligerent occupation does not extinguish the State pending a final settlement of the conflict. And, generally, the presumption—in practice a strong presumption—favours the continuity and disfavours the extinction of an established State.[2] Extinction is not effected by more-or-less prolonged anarchy within the State[3] nor, within equally broad limits, by loss of substantial independence, provided that the original organs of the State remain formally separate and retain at least some semblance of control.

On the other hand, effective submersion and disappearance of separate State organs in those of another State over a considerable period of time will normally result in the extinction of the State, so long as no substantial international illegality is involved and there is no other perceived international interest in asserting the continuity of the State.[4] This is particularly so where the previous State organs have voluntarily relinquished their separate identity, for example in the case of the merger of one State in another or the resubmission of a previously self-governing colony to Imperial rule (as with the case of Newfoundland in 1934[5] or Anguilla in 1980[6]). More difficult is the case of purported annexation of the entire territory of a State by external force, a situation which occurred frequently in the period 1935 to 1940 and even, on a few occasions, since 1945.

[2] Cf Marek, *Identity and Continuity*, 548; Schachter (1993) 33 *Va JIL* 253, 258–60; Mushkat (1997) 46 *ICLQ* 181, 183–7.

[3] In the Manchurian Crisis, various delegates to the League raised, mostly in a tentative manner, the question whether China, then in a state of considerable governmental disarray, still qualified as a State for the purposes of the protection afforded by the Covenant. There was little support for this view. Cf LNOJ Sp Supp III, Annex X (December 1932) 333; Thorne, *The Limits of Foreign Policy*, 150–1. But Baty, then Legal Adviser to the Japanese Government, took a different view: (1934) 28 *AJ* 444. The strength of the presumption is demonstrated in more recent practice by the fact that scarcely any doubt has been expressed as to the continuity of States such as Somalia, the Democratic Republic of Congo and Solomon Islands, notwithstanding total, or nearly total collapse of internal public order. On the so-called 'failed States' see below.

[4] Cf *In re Savini* (1927) 4 ILR 166 (Montenegro); *Achikian v Bank of Athens* (Cairo, Mixed Tribunal, 1923) 2 ILR 18 (Armenia); *Nankive v Omsk All Russian Government* (1932) 237 NY 150; 142 NE 569.

[5] For the dissolution of 'responsible government' and its replacement in 1934 by a Commission of Government subordinate to the Westminster Parliament, see Newfoundland Act 1933 (UK). The Supreme Court of Canada found that this extinguished any capacity Newfoundland might have had to acquire extraterritorial rights. *Reference re Newfoundland Continental Shelf* [1984] 1 SCR 86, 397–410; 86 ILR 593, 603–16. On questions of identity and continuity in connection with 'partial international legal persons' see Dörr, *Inkorporations*, 134; on Newfoundland, ibid, 359–63.

[6] Anguilla Act 1980 (UK), which formalized a status quo existing since 1969. See Chapter 14.

## 17.2 Extinction and illegal annexation

As seen in Chapter 12, the various States (Ethiopia,[7] Austria,[8] Czechoslovakia,[9] Poland,[10] and Albania[11]) effectively submerged by external illegal force in the period 1935 to 1940 were reconstituted by the Allies during or after the termination of hostilities. Despite a considerable amount of recognition of annexation, at least *de facto* and in some cases *de jure*, the view was taken that the legal existence of these States was preserved from extinction: the maxim *ex injuria jus non oritur* was regarded, at least retrospectively, as more cogent than its competitor, *ex factis jus oritur*, and this despite the inconsistency of non-recognition practice in this period.[12] Indeed, the illegality of the extinction seems to have been regarded as constituting grounds for withdrawal of recognition (as with Austria in 1943).

It is necessary, however, to distinguish between the States effectively submerged prior to the outbreak of World War II (Ethiopia, Austria, Czechoslovakia and Albania) and those occupied and annexed after the commencement of hostilities (in particular Poland).[13] In the latter case even the traditional law, based as it was largely on the notion of effectiveness,[14] allowed belligerency on behalf of a subjugated State by an ally to prevent its extinction. On the other hand, on the traditional view *debellatio* occurred when all effective organized resistance to the invader had ceased.[15] State

[7] Dörr, *Inkorporation*, 323–7.

[8] Austria was not regarded as extinguished by the *Anschluss*, despite the acquiescence of its population in union with Germany. Cf Brandweiner in Lipsky (ed), *Law and Politics in the World Community*, 221; Clute, *The International Legal Status of Austria 1938–1955*; Grayson, *Austria's International Position 1938–1953: The Reestablishment of an Independent Austria*; Dörr, *Inkorporation*, 327–33.

[9] Marek, *Identity and Continuity*, 283–330; Langer, *Seizure of Territory*, 207–44; *Valk v Kokes* (1950) 17 ILR 357. For the events see Lukes, *Czechoslovakia between Stalin and Hitler*.

[10] Dörr, *Inkorporation*, 343–5.

[11] Lemkin, 99–107.

[12] Cf Green in Schwarzenberger (ed), *Law, Justice and Equity*, 152, 153–8.

[13] As to the legal status of the Free City of Danzig after World War II see Whiteman, 3 *Digest* 307; 415 *HC Deb* cols 406–7, 31 October 1945. Turack (1968–9) 43 *BY* 209, 212 states, without argument, that the Free City of Danzig 'still exists in law', but cf Skubiszewski (1973) 67 *AJ* 23.

[14] Cf de Visscher, *Théories et réalités* (4th rev edn), 188–91. Cases of extinction during the 19th century are legion. In many cases the entities themselves were probably ephemeral: e.g., the Kings and Chiefs of Old Calabar, discussed in the *Cameroon/Nigeria Case*, ICJ Rep 2002 p 301, 405–7 (paras 207–8); but see the dissenting opinion of Judge Koroma, paras 9–10, 15–16, 23, 29. Other more substantial entities disappeared through outright annexation, generally recognized, or by treaty: see the Papal States (annexed by Decree of 9 October 1870, 62 BFSP 436), Madagascar (protectorate established by treaty of 17 December 1885, 167 CTS 133; annexed by Law of 6 August 1896, 89 BFSP 486, about which see ICJ Rep 2002, p 303, 471, separate opinion of Judge Ranjeva (para 5)), the South African Republic (annexed after surrender of Boer forces, for which see Terms of Surrender, 1 June 1902, 95 BFSP 160) and Korea (Japan–Korea, Protocol regarding the Situation of Korea, 23 February 1904, 195 CTS 75 (establishing protectorate); Treaty of Annexation, 22 August 1910, 212 CTS 43).

[15] See Degan (1999) 279 *HR* 199, 280–4.

practice in the cases of Ethiopia, Austria, Czechoslovakia and Albania was inconsistent with that view.[16] Only in the case of Ethiopia was there significant continuing opposition to the invader and yet recognition of the Italian annexation was forthcoming. But the legal personality of the State was subsequently regarded as having been preserved so as to form the basis for the reconstruction of the State, which was not required to await a peace treaty with the defeated claimant.

The case of the Baltic States and the prevalence of the view that they 'reappeared' in the 1990s after fifty years 'abeyance'[17] further supports the proposition that a very long time indeed will be required for effective control that is tainted by underlying illegality to displace the presumption of continuity of statehood. Koskenniemi writes:

> [I]t is always possible to challenge the application of whatever succession rules might otherwise seem valid by the argument that despite the effectiveness of . . . possession no statehood or legitimate transfer of sovereignty has resulted as the criteria for the establishment or extinction of statehood (lawful possession) have not been met. That is the argument that enabled the Russian Federation to step into the shoes of the Soviet Union while excluding the passing of the rights and obligations of the Soviet era to the Baltic republics after the-re-establishment of their independence in 1991. Juridical doctrine deals with those cases by reference to the distinction between continuity/identity and succession, regarded as analytically prior to the application of succession law itself.[18]

## 17.3 State extinction and the possibility of prescription

The difficulty remains: how long can it be said that the identity of the State is preserved despite its lack of control in face of effective but unlawful annexation? Post-1945 practice gives limited guidance since illegal invasion of a State for the purpose of its annexation has rarely occurred and when it has been attempted has usually failed.[19] The most significant case, that of the Baltic States, initially shed little light on the problem. On the whole, few States formally recognized the annexation of the Baltic States; on the other hand, it is

[16] Cf, however, Lauterpacht, *Recognition*, 356.

[17] For events leading to the independence of the Baltic States, including internal legal developments, see Kherad (1992) 96 *RGDIP* 843, 848–54. For the legal issues see Marek, *Identity and Continuity*, 369–416; Langer, *Seizure of Territory*, 262–70, 284; Chapters 9 and 16.

[18] Koskeniemmi, 'The Present State of Research' in *La succession d'états*, 127. Cf Talari (1996) 7 *Finn YBIL* 134, 166–7.

[19] Cf Bot, *Non-Recognition and Treaty Relations*, 60–4. Hyderabad is probably the only instance: see Chapter 11. For the Republic of Vietnam see Chapter 10.

difficult to deny that their continued existence was as much a matter of 'cold-war politics' as law.[20] Marek's conclusion was to similar effect: after referring to 'the survival of those States, whose physical suppression, although not assuming the orthodox form of belligerent occupation, proved equally temporary or transient' she states that: 'At the same time, the final loss of independence, either by way of a legal settlement or by way of a total obliteration of the entire international delimitation of a State, signified its extinction.'[21] If, on the other hand, continued recognition by some States of Latvia, Lithuania and Estonia signified their continued existence,[22] then we must conclude that the rule protecting State personality against illegal annexation has acquired a peremptory character, reflecting the peremptory character of the rules relating to the use of force.[23]

The uncertainty of this position is similar to that of prescription in general international law.[24] The essential point is that in cases of a material violation of a peremptory norm, the lapse of time in and of itself does not extinguish title; what is required is a settlement of the underlying problem—either an explicit settlement, as with Southern Rhodesia, Namibia and East Timor, or a general acceptance by the international community as a whole that the situation has been resolved. The internal situation within the territory concerned and the positive integration of its people into the State (or, as in East Timor, the reverse) will be highly relevant in any assessment. According to this approach prescription bears little resemblance to its private law analogue—it is rather a surrogate term for some general judgement of the international community that the new situation is peaceful and in accordance with international order, despite its origins in unlawful conduct.[25] What matters is not isolated acts of recognition

[20] Cf Jessup, *Transnational Law*, 62; *In re De-Sautels*, 307 NE 2d 576 (1974); [1966] *BPIL* 82.

[21] Marek, *Identity and Continuity*, 589.

[22] Cf Brownlie, *Principles*, 78: 'illegal occupation cannot of itself terminate statehood. . . [W]hen elements of . . . *jus cogens* are involved, it is less likely that recognition and acquiescence will offset the original illegality.'

[23] Benvenisti argues that the doctrine of *debellatio* is simply no longer operative: 'The only lawful change of status . . . may . . . take effect with the consent of the people involved.' *The International Law of Occupation* (1993), 94–6. See also Kherad (1992) 96 *RGDIP* 843, 856–7. For an overview of modern practice regarding forcible incorporation of territory, see Dörr, *Inkorporation*, 54–132.

[24] In cases of territorial disputes the International Court has been careful not to commit itself to any theory of prescription: see *Case Concerning Kasikili/Sedudu Island*, ICJ Rep 1999 p 1045, 1101–4 (paras 90–4). Cf Johnson (1950) 27 *BY* 332; Radojkovic, in *Mélanges Andrassy*, 225; Das (1997) *RBDI* 607, and especially the magisterial work by Kohen, *Possession contestée et souveraineté territoriale*.

[25] On the role of the 'international community of States as a whole' in relation to breaches of peremptory norms cf Vienna Convention on the Law of Treaties, 23 May 1969, Arts 53, 71. Both the International Court (*Barcelona Traction*, ICJ Rep 1970 p 3, 32 (para 33)) and the ILC (ARSIWA, commentary to Art 25, para (18), commentary to Art 48, para (10)) have preferred the phrase 'international

by individual third States but their cumulative effect as expressing such a judgement.

## 17.4 Extinction, merger and the creation of new States

In a number of cases new States have arisen out of a process of dissolution of a predecessor State, and questions have arisen as to the continuation of the predecessor under one or another guise. For example, the legal situation surrounding the dissolution of the Soviet Union could be characterized in quite different ways, as a case of extinction followed by the establishment of a new State on the territory of the Russian Republic[26] or as a series of secessions. The better view, and certainly the view that prevailed, is that the legal process was one of devolution resulting in the establishment of a number of new States with the 'core' State, Russia, retaining the identity of the former Union. The Russian Federation's claim to continue the legal personality of the USSR is 'generally accepted',[27] not least through its continuing the permanent seat allocated to the USSR under Article 23(1) of the Charter. In retrospect we can judge that no State was extinguished.

In other cases in the post-war period States were regarded as having disappeared, and to have done so voluntarily. Four cases may be mentioned.

### (1) Voluntary absorption: the German Democratic Republic

The unification of Germany explicitly involved the extinction of the German Democratic Republic and disappearance of its seat at the United Nations.[28] The Federal Republic of Germany was thereby enlarged while retaining its identity. This transformation and the connected question of the continuity of pre-1945 Germany were discussed in Chapter 16.

### (2) Extinction by merger: Yemen

Whether or not there were more than two Germanies at any time, there seem clearly to have been three Yemens. The States of North and South Yemen, after

community as a whole': see Crawford, *Selected Essays*, 40–1 for discussion. It should be noted that Lauterpacht, an adherent to private law analogies, stressed the need for a situation to be open and peaceful before prescription could operate, and noted that 'the private law requirements of prescription can only be applied with great difficulty to conditions in which precariousness and force are the characteristic features of the situation': *Private Law Sources and Analogies of International Law*, 276.

[26] A characterization seemingly lent support by the Declarations of Minsk, 8 December 1991, A/46/771, 31 ILM 142 and Alma Ata, 21 December 1991, A/47/60, 31 ILM 148.

[27] Koskenniemi, *La Succession d'états*, 101.

[28] Bühler, *Membership in International Organizations*, 142–51, and see above, Chapters 10 and 12.

protracted negotiations,[29] entered into an Agreement on the Establishment of the Republic of Yemen on 22 April 1990. Article 1 provided for a merger of the two States, which they characterized as involving the extinction of the two predecessor States and emergence of a single successor:

> On the 26th of May 1990 . . . there shall be established between the State of the Yemen Arab Republic and the State of the People's Democratic Republic of Yemen (both parts of the Yemani Homeland) a full and complete union, based on a merger, in which the international personality of each of them shall be integrated in a single international person called the 'Republic of Yemen.'[30]

The result has been described as a double succession, with neither North nor South Yemen absorbing or annexing the other, but rather both becoming extinct and their union generating one new State instead.[31] As with the United Arab Republic in 1958, treaties of the former States were to remain in force as respects their former territories. The same precedent was followed with membership of international organizations: the Arab League, the Organization of the Islamic Conference and the United Nations did not require the new State to pass through the ordinary procedures for admission but allowed Yemen to continue the membership of the two former Yemeni States as one.[32]

### (3) Extinction by voluntary dissolution: the Czech and Slovak Federal Republic

The Czech and Slovak Federal Republic, by agreement, ceased to exist at midnight on 31 December 1992 and two new States were created as its successors—a transaction achieved without plebiscites in either State and purely on the basis of legislation.[33] Though a substantial body of treaty obligations survived the extinction,[34] the Czech Republic and Slovakia applied as new States for

[29] See Goy (1990) 36 *AFDI* 249, 254–6, 259–63; Ribbelink (1995) 26 *Neth YBIL* 139, 158–9; Dörr, *Inkorporation*, 151–2.

[30] (1991) 30 ILM 820, 822.

[31] Goy (1990) 36 *AFDI* 249, 263. Federal structures for the union were considered but rejected in favour of a unitary State: Dunn (1994) 3 *Middle East Policy* 148, 150–1.

[32] See, e.g., ST/CS/SER.A/31, 7 Aug 1990, concerning 'substitution' of unified Yemen for its two predecessor States. See also Bühler, *State Succession*, 115–27. For the United Arab Republic (1958–61) see Chapter 11.

[33] For the historical background and internal legal processes see Malenovsky (1993) 39 *AFDI* 328, 306–10, 314–26; Mikulka in Mrak (ed), *Succession of States*, 109, 109–11. Cf Hošková, (1993) 53 *ZaöVR* 689, 691; Scharf (1995) 28 *Cornell ILJ* 29.

[34] See Mikulka in Mrak (ed), *Succession of States*, 111–24; Mikulka, *State Succession in Respect of Treaties. Slovak Republic* (Report to the ILA, Bratislava, 15 Apr 1996); Malenovsky (1993) 39 *AFDI* 328, 328–30; Drtinová, (1997) 4 *Mezinárodni vztahy* (*International Relations*) 57. See also letter of the UK Prime Minister to the Prime Minister of the Czech Republic, 1 January 1993, (1994) 65 *BY* 587: '[W]e regard Treaties and Agreements in force to which the United Kingdom and the Czech and

membership in international organizations, including the United Nations.[35] The preponderance of the economic resources, territory and population of the former CSFR lay in the Czech Republic—a consideration that might have militated in favour of treating the situation as one of continuity and devolution.[36] That no third State appears to have doubted that the CSFR was extinguished illustrates the importance of claims to continuity or their absence.

### (4) Extinction by involuntary dissolution: the SFRY and its successor States[37]

Much more contentious than any of these cases was the situation of the Federal Republic of Yugoslavia after 1992. Until 2000, it was the position of the Federal Republic of Yugoslavia that it 'continu[ed] the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia.'[38] The Belgrade Government adduced as evidence in support of its position the fact that Serbia and Montenegro constituted the largest part of the former SFRY and its historical-territorial core. It stressed that the independence of the other republics of the SFRY did not take place simultaneously but rather by way of a series of separations from the parent State. Its statehood was unquestioned but it made no claim to have constituted a new State. It controlled all but one of the SFRY's missions abroad. It continued to pay financial contributions to the UN, though excluded from participation in its principal organs; SFRY's UN

Slovak Federated [*sic*] Republic were parties as remaining in force between the United Kingdom and the Czech Republic.' A similar letter was written to the Prime Minister of Slovakia: ibid. See also *Case concerning the Gabčíkovo-Nagymaros Project*, ICJ Rep 1997 p 7, 71–3 (paras 123–4).

[35] The Czech Republic and Slovakia were admitted as new States in January 1993. SC res 800, 8 Jan 1993, GA res 47/221 (Slovakia); SC res 810, 8 Jan 1993, GA res 47/222, 19 Jan 1993 (Czech Republic). See statement of CSFR foreign ministry, quoted in Scharf (1995) 28 *Cornell ILJ* 29, 65 n 192: '[T]he Czech and Slovak Federal Republic as well as the CSFR membership of the United Nations will cease to exist on December 31, 1992. See also Malenovsky (1993) 39 *AFDI* 328, 332–4; Hošková (1993) 53 *ZaöRV* 689, 720–3.

[36] The Czech Republic contained 66% of the population, 62% of the territory and 71% of the economic resources of the former federation: Williams (1994) 43 *ICLQ* 776, 785. Malenovsky (1993) 39 *AFDI* 328, 317–18 takes the view that the situation could have been characterized as a secession and that only the agreement between the two constituent republics established a legal process of dissolution.

[37] See Weller (1992) 86 *AJ* 569; Pellet (1993) 39 *AFDI* 286; Warbrick (1992) 41 *ICLQ* 473, 475–80; Warbrick (1993) 42 *ICLQ* 433; Craven (1995) 66 *BY* 333; Bühler, *State Succession*, 18–86 (on SFRY), 187–213 (on FRY); Bär, *Der Zerfall Jugoslawiens im Lichte des Völkerrechts*; Silber and Little, *Yugoslavia: Death of a Nation*, 119–204; Glenny, *The Fall of Yugoslavia: The Third Balkan War* (rev edn), 31–50. See also (1992) 46 *UNYB* 327–87, (1993) 47 *UNYB* 432–98 and reports of the Secretary-General cited therein.

[38] Declaration of the Assemblies of Serbia, Montenegro, and the FRY, 27 April 1992, S/23877, annex, p 2 (1992), cited by the Court in *Bosnian Genocide Case* (*Provisional Measures*), ICJ Rep 1993 p 3, 15 (para 21); Scharf (1995) 28 *Cornell ILJ* 29, 53.

membership was not regarded as having terminated and the flag of the SFRY continued to fly outside United Nations offices. But the weight of practice tending in the opposite direction was considerable. No devolution agreements were concluded with other Yugoslav Republics, which neither claimed continuity themselves nor recognized the FRY as continuing the legal personality of the SFRY.[39] Third States also took exception to the claim of continuity put forth by the FRY.[40] Unlike Russia and India, the putative continuing State did not form a majority of the territory or population of the earlier State.[41]

The United Nations generally reinforced the position that the SFRY had become extinct and that no State continued its legal personality, though the General Assembly and the Secretariat took a less categorical position on the matter than the Security Council.[42] The Security Council '[c]onsider[ed] that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore recommend[ed] to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly.'[43] In the same resolution, the Council '[c]onsider[ed] that the state formerly known as the Socialist Federal Republic of Yugoslavia [had] ceased to exist.'[44] Security Council resolution 752 of 15 May 1992 and earlier resolutions[45] had mandated measures to resolve the conflict in the former SFRY, and resolution 757 set out a series of sanctions and penalties against the FRY in response to its non-compliance.[46] Resolution 757 noted 'that the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted.' The Security Council later reaffirmed this, reaffirming its conclusion that Yugoslavia had ceased to exist.[47] It is probably not a coincidence that the rejection of the claim of

[39] See Williams (1994) 43 *ICLQ* 776, 785–6. On the position of the other republics, see Wood, (1997) 1 *Max-Planck YB 48 UN Law* 231, 243–4.

[40] E.g., statement of the United Kingdom: 'The FRY is one of the successor states of the Socialist Federal Republic of Yugoslavia.' FCO telegram of 11 Apr 1996, reprinted at (1996) 67 *BY* 719, and see Scharf (1995) 28 *Cornell ILJ* 29, 53–5.

[41] Williamson and Osborn, 4271.

[42] For summaries of UN practice, see *Application for Revision of the Judgment of 11 July 1996* (Preliminary Objections), Decision of 3 Feb 2003, paras 25–50; *Legality of Use of Force (NATO Cases)*, Decision of 15 Dec 2004, paras 55–72.

[43] SC res 777, 19 Sept 1992, para 1.

[44] SC res 777, 19 Sept 1992, preamble.

[45] SC resns 713, 25 Sept 1991; 721, 27 Nov 1991; 724, 15 Dec 1991; 727, 8 Jan 1992; 740, 7 Feb 1992; 743, 21 Feb 1992; 749, 7 Apr 1992.

[46] SC res 757, 30 May 1992, paras 4–8.

[47] SC res 1022, 22 Nov 1995, preamble: indicating 'that that State has ceased to exist'.

automatic continuity was associated with the involvement of the FRY in the civil wars in Croatia and Bosnia and Herzegovina. The General Assembly, by contrast to the Security Council, declined to state in plain terms that the SFRY had ceased to exist.[48] Indeed, General Assembly statements, by referring to the seat, name-plate, flag, etc of Yugoslavia, suggested that the problem here was more like one of representation or credentials than of the existence of the entity in question as a State. Despite some earlier indication to the contrary,[49] it was decided that the UN seat of the SFRY could not be taken over automatically by the FRY, but this did not mean that there was no entity called 'Yugoslavia'.

The nuanced position of the Secretariat was recorded in a letter of the then Legal Counsel, C-A Fleischauer, in the following terms:

> While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not *participate* in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer *participate* in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it. On the other hand, the resolution neither terminates nor suspends Yugoslavia's *membership* in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign 'Yugoslavia'. Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The

[48] See, e.g., GA res 47/1, 22 Sept 1992, para 1: '[c]onsider[ing] that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue *automatically* the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly' (emphasis added). Membership of the FRY in other international organizations was also was suspended rather than terminated, e.g., the World Bank. Mrak (1999) 30 *Rev d'études comp est-ouest* 159, 161.

[49] 1992 *UNYB* 139–40, respecting determination by UN legal counsel that FRY representatives could participate in UN activities, cited in Murphy (2000) 94 *AJ* 678. Wood (1997) 1 *Max-Planck YB UN Law* 221, 247 notes the differences in emphasis as between the Security Council and the General Assembly. On the position of the UN Secretariat (in particular the Legal Counsel), see Hummer and Mayr-Singer (2000) 38 *AdV* 298, 308–9.

admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1.[50]

The position was evidently complex and not fully resolved. Indeed one could have envisaged a resolution of the situation in which the *de facto* continuity of the Belgrade regime might have been recognized, in return no doubt for its cooperation in resolving associated issues.[51]

The Arbitration Commission on the Former Yugoslavia supported the position that the SFRY had disappeared as a juridical entity.[52] Opinion 1 of 29 November 1991 already indicated that 'the Socialist Federal Republic of Yugoslavia is in the process of dissolution.'[53] Opinion 8 of 4 July 1992, noting Security Council resolutions 752 and 777 and a European Council Declaration of 27 June 1992, indicated flatly that 'the SFRY no longer exists'.[54] Further opinions of the Commission expressed the same position.[55]

This was in time accepted formally by the FRY itself,[56] and in November 2000 the FRY was admitted as a Member State of the United Nations.[57] The thesis of continuity earlier favoured by the government of the FRY was further rejected in an Agreement on Succession Issues of 29 June 2001, which posited the 'sovereign equality of the five successor States to the former Socialist Federal Republic of Yugoslavia'.[58]

Though with these transactions the States involved reached a basis for the more-or-less final settlement of the matter,[59] there was still a serious difficulty: how should the unresolved legal situation of the FRY in the period from 1992

[50] Letter dated 29 September 1992 from the Under-Secretary General, the Legal Counsel, addressed to the Permanent Representatives of Bosnia and Hercegovina and Croatia to the United Nations: A/47/485, Annex (emphasis in original).

[51] On the UN position generally, see Hummer and Mayr-Singer (2000) 38 *AdV* 298, 305–13.

[52] On the Commission generally, see esp Craven (1995) 66 *BY* 333, 354–5; Degan (1999) 279 *HR* 199, 228–32, 265–7, 367–75; Pellet (1993) 39 *AFDI* 286; Grant, *Recognition*, 153–68; Hummer and Mayr-Singer (2000) 38 *Adv* 298, 313–17.

[53] 92 ILR 162, 162–3.

[54] 92 ILR 199, 202.

[55] Opinion 10, 4 July 1992, 92 *ILR* 206, indicating that the FRY is a new State, not '*ipso facto* enjoy[ing] the recognition enjoyed by the SFRY under completely different circumstances'; also Opinion 9, 4 July 1992, 92 ILR 203, holding that issues of succession amongst the States in the territory of the former SFRY should be resolved through negotiation. It should be noted that although it was entitled an Arbitration Commission, the jurisdiction of this entity was not accepted by the various parties and its opinions were advisory.

[56] See Letter dated 27 Oct 2000 from President of the FRY to the Secretary-General, A/55/528, S/2000/1043. See also FRY pleadings in *Application for Revision of the Judgment of 11 July 1996* and in *Legality of Use of Force* cases (the *NATO* cases).

[57] SC res 1326, 31 Oct 2000; GA res 55/12, 1 Nov 2000.

[58] For the Agreement see (2002) 41 ILM 3. For comment Carsten Stahn (2002) 96 *AJ* 379, 382.

[59] Many of the issues were refought, at the level of individual criminal responsibility, before the International Criminal Tribunal for the Former Yugoslavia (ICTY), in particular in the context of the

to 2000 have been treated, and how should acts performed during that period be treated now? International law is normativity in collision with history; if it is to be of any value it must give guidance to persons at the time of the events and, prima facie at least, acts which were valid or produced legal effects at a particular time should not retroactively be treated as void. If the denouement of the dissolution of the SFRY after 2000 clarified matters, still it was necessary to deal with transactions and claims in the intervening period when the United Nations approach to the problem (as shown above) was by no means unequivocal. Undeniably the FRY of 1992, with its capital in Belgrade, was the same entity as that newly admitted to the United Nations in 2000 and renamed Serbia and Montenegro in 2003. Yet this entity had acted as or in the place of the former SFRY in important respects and its conduct had been questioned and criticised on the basis of treaty standards adhered to by the SFRY. Not least it had been a party to litigation before the International Court, both as Respondent and Applicant—litigation brought on the footing that it stood in the place of the SFRY and on the basis of jurisdictional clauses assented to by the SFRY. Even if a State can succeed generally to substantive treaty commitments there can be no succession to membership of the Court's Statute, and succession to jurisdictional clauses is at best problematic. Faced with continued uncertainty the International Court maintained a studied neutrality: the FRY was entitled to appear under the jurisdictional garb of the SFRY, given that it had accepted that position and that Bosnia and Herzegovina and Croatia, which both commenced proceedings against it on that basis, could not be heard to deny it.[60] The position was explained by the Court in *Application for Revision of the Judgment of 11 July 1996* in the following terms:

> . . . the admission of the FRY to membership of the United Nations took place more than four years after the Judgment which it is seeking to have revised. At the time when that Judgment was given, the situation obtaining was that created by General Assembly resolution 47/1. In this regard the Court observes that the difficulties which arose regarding the FRY's status between the adoption of that resolution and its admission to the United Nations on 1 November 2000 resulted from the fact that, although the FRY's claim to continue the international legal personality of the Former Yugoslavia was not 'generally accepted'. . . the precise consequences of this situation were determined on a case-by-case basis (for example, non-participation in the work of the

prosecution of ex-President Milosevic. See Kerr, *The International Criminal Tribunal for the Former Yugoslavia*, esp 185–9.

[60] For an overview of the arguments, see correspondence, 87 *AJ* 240–51 (1993); Degan (1999) 279 *HR* 199, 308–29; Wood (1997) 1 *Max-Planck YB UN Law* 231, 241–51; Olleson (2005) 18 *Leiden JIL* 237.

General Assembly and ECOSOC and in the meetings of States parties to the International Covenant on Civil and Political Rights, etc.). Resolution 47/1 did not *inter alia* affect the FRY's right to appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute. Nor did it affect the position of the FRY in relation to the Genocide Convention. To 'terminate the situation created by resolution 47/1', the FRY had to submit a request for admission to the United Nations as had been done by the other Republics composing the SFRY. All these elements were known to the Court and to the FRY at the time when the Judgment was given. Nevertheless, what remained unknown in July 1996 was if and when the FRY would apply for membership in the United Nations and if and when that application would be accepted, thus terminating the situation created by General Assembly resolution 47/1.

71. The Court wishes to emphasize that General Assembly resolution 55/12 of 1 November 2000 cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention . . .

72. It follows from the foregoing that it has not been established that the request of the FRY is based upon the discovery of 'some fact' which was 'when the judgment was given, unknown to the Court and also to the party claiming revision' . . .[61]

This nuanced position was however virtually abandoned by the Court in the *NATO* cases (Preliminary Objections).

74. It must be stated that this qualification of the position of the Federal Republic of Yugoslavia as '*sui generis*', which the Court employed to describe the situation during this period of 1992 to 2000, is not a prescriptive term from which certain defined legal consequences accrue; it is merely descriptive of the amorphous state of affairs in which the Federal Republic of Yugoslavia found itself during this period . . . The Court did not commit itself to a definitive position on the issue of the legal status of the Federal Republic of Yugoslavia in relation to the Charter and the Statute in its pronouncements in incidental proceedings, in the cases involving this issue which came before the Court during this anomalous period . . .

77. As the letter of the President of the Federal Republic of Yugoslavia [of 27 October 2000] . . . demonstrates, this action on the part of the Federal Republic of Yugoslavia signified that it had finally decided to act on Security Council resolution 777 (1992) by aligning itself with the position of the Security Council . . .

78. This new development effectively put an end to the *sui generis* position of the Federal Republic of Yugoslavia within the United Nations, which, as the Court has observed in earlier pronouncements, had been fraught with 'legal difficulties' throughout the period between 1992 and 2000 . . . The Applicant thus has the status of membership in the

[61] ICJ Rep 2003, judgment of 3 February 2003, paras 70–2.

United Nations as from 1 November 2000. However, its admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the Socialist Federal Republic of Yugoslavia broke up and disappeared; there was in 2000 no question of restoring the membership rights of the Socialist Federal Republic of Yugoslavia for the benefit of the Federal Republic of Yugoslavia. At the same time, it became clear that the *sui generis* position of the Applicant could not have amounted to its membership in the Organization.[62]

It was with justification that seven Members of the Court commented that:

10. We would first observe that the question whether Yugoslavia was a Member of the United Nations and as such a party to the Statute between 1992 and 2000, remained a subject of debate during that period. The Court declined to settle the issue, both in 1993 . . . and in 1999 . . . It then confined itself to stating that the solution adopted in this respect by Security Council resolution 757 and General Assembly resolution 47/1 was 'not free from legal difficulties'. . . Subsequent to the admission of Serbia and Montenegro to the United Nations on 1 November 2000, the Court had to consider the question whether that admission clarified the previous position. The Court then found . . . that 'resolution 47/1 did not *inter alia* affect the Federal Republic of Yugoslavia's right to appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute'. . . The Court thus previously found in 2003 that the Federal Republic of Yugoslavia could appear before the Court between 1992 and 2000 and that this position was not changed by its admission to the United Nations in 2002.

11. Further, the interpretation given in the present Judgment of Article 35, paragraph 2, of the Statute also appears to us to be at odds with the position previously adopted by the Court in its Order of 8 April 1993, where it considered that 'proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946'. . . It is moreover astonishing that the Court found it necessary to rule on the scope of Article 35, paragraph 2, whereas the Applicant did not invoke this text.

12. . . . Nothing has occurred, in the series of cases concerning Kosovo, since the Court's last judgment in 2003, to suggest that the grounds previously chosen have now lost legal credibility. Further, the grounds today selected by the Court are less certain than others open to it. The Court . . . asserts that it has now become 'clear that the *sui generis* position of the Applicant could not have amounted to its membership in the Organization'. We find this proposition far from self-evident and we cannot trace the steps of the reasoning. Such grounds seem to us to be less legally compelling and

[62] ICJ Rep 2004, judgment of 15 December 2004, paras 74, 77–8, in 44 ILM 299, 323.

therefore less certain, and more open to different points of view, than the grounds relied upon by the Court thus far and which are now set aside by the Court.[63]

More broadly, the proper characterisation of the events leading to the end of the SFRY continued to be contested. One view was that the events of 1991 and 1992 were a series of secessions, with constituent republics of the SFRY breaking away from the federal centre, until only Serbia and Montenegro remained. The union itself, however, could be said to continue, just as Austria and Hungary probably had in 1918.[64] On the other hand, as noted in Chapter 9, the organs of federal government which represented the Yugoslav State had ceased to function.[65] It is true that the distinction between dismemberment and a series of secessions may be in the eye of the beholder:[66] there may be clear cases at each end of the spectrum,[67] but this case was far from clear. In the end—or rather, very soon after the beginning—a position had to be taken as to whether one of the six republics was not, under the guise of the federal State, waging through the national army and various surrogates in the other Republics an irredentist war. If so (as the FRG argued) it should not be given the moral and legal advantage which would flow from being able to characterize the conflict as civil and its own position as metropolitan. This was the central issue, and allowing some flexibility for diplomatic initiatives the position was taken, at first tentatively but in the end definitively, that what had occurred was the dismemberment of Yugoslavia, and that all the Republics should be treated as successors to a State become extinct.[68]

[63] Declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, paras 10–12, in 44 ILM 299, 338–9.

[64] This was the view taken by Blum (1992) 86 *AJ* 830.

[65] Degan (1999) 279 *HR* 199, 285–92; Mrak, *Succession of States*, 153–5.

[66] Cf Czapliński (1993) 26 *RBDI* 374, 391–2. On the problem generally of distinguishing between secession and dismemberment, see Fielder in Hafner *et al*, (eds), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern*, 133, 136–9; Dörr *Inkorporation*, 132–77; Hummer and Mayr-Singer (2000) 38 *AdV* 298, 299–302.

[67] The distinction is drawn in the 1978 and 1983 Conventions on State succession. In the 1978 Convention, 1946 UNTS 3, Art 34(1) addresses situations in which 'a part or parts of the territory of a State separate to form one or more States, *whether or not the predecessor State continues to exist*' (emphasis added), but Art 35 addresses situations in which 'after separation of any part of the territory of a State, the predecessor State continues to exist'. The 1983 Convention, A/Conf 117/14, 22 ILM 306, is clearer in drawing a distinction between continuity and extinction. Art 17(1) addresses the situation in which 'part or parts of the territory of a State separate from the State and form a successor State'; Art 18(1) the situation in which 'a State dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States.' Cf also Arts 30–1 and Arts 40–1. Cf also Arts 22 and 23 of the Articles on Nationality of Natural Persons in Relation to Succession of States, annexed to GA res 55/153, 12 December 2000. For discussion of the distinction see Crawford, *Collected Essays*, 287–91.

[68] See Craven (1995) 66 *BY* 333, 354–5 (1995); Mrak, *Succession of States*, 158–9; Crawford, *Collected Essays*, 213–21 (and Chapter 9 above).

## 17.5 International law and the survival of States

International law is commonly portrayed as a weak system of law, the international system as one embodying the values of the law of the jungle and the survival of the fittest. Hobbes is still held up as a defining model for international relations, both by those who advocate change and those who see virtue in resigning oneself to the realities of power politics. It may be noted that a large proportion of the latter group are citizens of powerful States.[69]

Yet it is the case that in the Charter period there have been very few cases of the extinction of States and almost no case of involuntary extinction. The list of the deceased, so to speak, is short (see Table 7). Attempts were occasionally made on other States in this period—notably Kuwait (1990–1), but the victim survived. In other cases, notably the Union of Soviet Socialist Republics, continuity prevailed despite the initial language of dissolution and disappearance. If the FRG does not continue the legal personality of pre-1945 Germany following German reunification, a matter considered in Chapter 16, then the German *Reich* must be added to the list, perhaps the last (and if so a technical) casualty of the Cold War. Other entities which might be considered for inclusion (e.g., Tibet, Oman, Sikkim) were not generally considered States.[70]

During the same period it should be noted that 128 new States have come into existence or been reconstituted (see Appendix 1). No doubt the underlying reasons for outcomes in international relations are difficult to discern and to assess: realists will say that even if the twin Charter values of decolonization and protection of the political independence of existing States have been vindicated this can only be accidental. Even so, it may be noted that the *predictive* value of the Charter during this period has been remarkable. But it is not so: there is a strong presumption against the extinction of States once firmly established. It is significant that almost all the cases of extinction listed above involved either entities that were ephemeral or whose independence was not clearly established or were instances of voluntary extinction, when a people (in the case of the GDR) or their representatives (in the case of Czechoslovakia) decided to put an end to their State and to opt for a different future.

[69] For the broader debate see, e.g., Vasquez, *The Power of Power Politics*; Tuck, *The Rights of War and Peace*; Bobbitt, *The Shield of Achilles*. For representative views see Morgenthau, *Politics Among Nations*, ch 16; Abbott (1989) 14 *Yale JIL* 335, 337; Slaughter (1993) 87 *AJ* 205, 217.

[70] Also excluded are States temporarily merged in short-lived unions: e.g., Syria and Egypt in the UAE (1959–62). See Chapter 11.

**Table 7. Extinction of States 1945–2005**

| Name | Date | Comment | Discussion |
|---|---|---|---|
| Hyderabad | Ca 1948–9 | Involuntary merger with India | Chapter 7 |
| Somaliland | 1 July 1960 | Voluntary union with Somali Republic on latter's independence | Chapter 13 (and for attempted secession see Chapter 9) |
| Tanganyika/ Zanzibar | 26 April 1964 | Voluntary merger in United Republic of Tanganyika and Zanzibar (name changed to Tanzania, 1 November 1964)[71] | Chapter 14 |
| Republic of Vietnam | 2 July 1976 | Merger into Socialist Republic of Vietnam after forcible change of government in April/May 1975[72] | Chapter 10 |
| Yemen Arab Republic/People's Democratic Republic of Yemen | 26 May 1990 | Voluntary merger in Republic of Yemen | Chapter 17 |
| German Democratic Republic | 3 October 1990 | Voluntary union after plebiscite | Chapters 10, 17 |
| Socialist Federal Republic of Yugoslavia | Uncertain (not before 29 November 1991) | Involuntary dissolution (despite initial claim to continuity by FRY) | Chapters 16, 17 |
| Czech and Slovak Federal Republic | 1 January 1993 | Voluntary dissolution | Chapter 17 |

[71] See Articles of Union, Zanzibar, 22 April 1964, enacted into law by Union of Tanganyika and Zanzibar Law 1964 (Zan); Union of Tanganyika and Zanzibar Act 1964 (Tan): see 3 ILM 763. This seems to have been treated as a merger in the manner of the Yemens, extinguishing Tanganyika (independent 1961) and Zanzibar (independent 1963).

[72] *See Republic of Vietnam v Pfizer, Inc* 556 F 2d 892, 893–4 (8th Cir 1977): 'the Republic of Vietnam . . . is not simply moribund; it is defunct.'

In this context we may have reached the limits of a purely formal approach, for all the 'wonderful artificiality of States'.[73] At any rate it seems clear that continued pursuit of an implicit analogy of the State as a sort of international corporation holding its territory and people as if they were property will not do.[74] If the State does not 'own' its people—an impossible proposition for a legal system which outlaws slavery and has regard, if not always consistently, to the principle of self-determination—then it does not own territory as property either, and the persistent analogy of territorial sovereignty to ownership of real property is misguided. As so often, Grotius (whose conception of the State, embryonic as it no doubt was, was generally patrimonial) nonetheless introduced other elements. In a chapter revealingly entitled 'When sovereignty *or ownership* ceases', different strands are mingled. On the one hand the State is a corporate vessel of indeterminate content: a king who replaces a free people 'is entitled to the same place which the people itself had occupied'; conversely 'a free people will take the place which had belonged to their king' if the latter is overthrown.[75] But the substrate of the State is not property, it is the people of the State seen as a collective. Thus:

> Whenever two peoples are united, their rights will not be lost but will be shared in common . . . The same principles should be applied in the case of kingdoms which are united not by treaty or by the fact merely that they have a king in common, but in a true union.[76]

In a true union, according to Grotius, nothing is lost, not even personality. Hence the idea that, the two Yemens having joined in a true union in 1990 (or Syria and Egypt having failed to do the same in their 'union' of 1958 and separated), no formality of new United Nations membership is required, has a certain ancestry.

[73] Koskenniemi (1994) 88 *PASIL* 22.

[74] Any more than a view of the State as a forum for reflective temporary equilibrium: ibid, 29.

[75] Grotius, *De Jure Belli ac Pacis*, Bk II, ch VIII. [76] Ibid, ch IX.

# CONCLUSIONS

The criteria for statehood, and modern practice in the field, have been examined at length in this study and there is no point in repeating the conclusions reached in earlier chapters. Four specific problems, however, deserve brief mention.

In the first place, the concept of 'sovereignty' as a criterion for plenary competence has been rejected. Although that view gained a certain degree of acceptance among nineteenth-century writers and was accepted in the twentieth century in Soviet and in some western doctrine, the notion of 'sovereignty' has been seen to be both unhelpful and misleading as a criterion. It is unhelpful since both the legal and the effective capacities, rights, immunities and so on of States may vary widely, within the limits established by the criteria for separate independence. It is misleading since it implies a necessary and overriding omnipotence which States do not possess in law or in fact. Rejection of 'sovereignty' as a criterion involves rejection of the old notion of the 'semi-sovereign State'. Those dependent, devolving or *sui generis* entities that qualify as States under the general criteria do so despite specific limitations as to capacity and the like: entities that do not so qualify are not States, although they may retain a more limited legal personality. The adoption of this terminology both avoids confusion and accords with most modern practice.

Secondly, although the criteria for statehood provide a general, applicable standard, the application of that standard to particular situations where there are conflicting and controversial claims is often difficult. It is here in particular that recognition and, equally importantly, other State practice relating to or implying a judgement as to the status of the entity in question are important. Apart from its evidential value such recognition may render particular situations opposable to recognizing States, at least in the absence of any issues of the legality of those situations in accordance with peremptory norms of general international law. This is, as we have seen, particularly the case with problems of identity and extinction, where the general criteria tend to be equivocal and unhelpful.

Thirdly, while statehood is a legal concept with a determinate, though flexible, content it is probably the only such concept in the field of legal personality.[1]

[1] But cf Seyersted (1964) 34 *Acta Scandinavica* 3.

Other general terms (protectorate, suzerain, confederation, internationalized territory, and so on) may be more or less convenient *classifications* of common forms of organization; but they are classifications without legal consequences beyond those arising from the specific agreements or instruments in question. It follows that the description of any given entity as, say, a 'protectorate' or a 'vassal' has no direct bearing on that entity's general legal status (or lack of it) as a State under the criteria referred to. The 'common features' of, say, protectorates may make it unlikely that any entity classified as a protectorate could be sufficiently independent to qualify as a State. But that result is reached by application of the relevant criteria, and not by deduction from any other classification.

Finally, the application of this last principle to problems of the creation of States requires some comment as to the 'modes' of creation distinguished in Parts II and III of this study. Like the various accepted classifications of non-State entities, these modes of the creation of States are distinguished here because of relevant 'common features'. For example, it is useful to distinguish cases of grant of independence by a former sovereign from cases of forcible seizure, since in the former case the criteria for statehood are likely to be more readily fulfilled: problems of consolidation of 'divided States' raise similar difficulties and warrant discussion under the one rubric. But these classifications remain in principle ones of convenience, and a particular entity may achieve statehood in a variety of ways. Discrimination between different States, for example, for State succession purposes, on the basis of the different 'modes' by which each has come into existence is thus fraught with difficulty, in the absence of special factors such as continuity of personality with a pre-independence protectorate, or the extension of competence of a devolving territory with separate legal personality, or administrative and political continuity of an entity formerly the member of a federation or other political union.

***

In the post-decolonization period, a number of related strands in thinking about the State have arisen. For example, there is the idea that very many of these States, and especially the new States that have emerged since 1945, are not real but are 'quasi-States' and that their statehood should in some way be discounted. Then there is a body of literature on the so-called 'failed States'. On closer examination this is more properly a debate about intervention, security and development, but since it has been partly conducted in the language of statehood and sovereignty something needs to be said about it.

The notion that a significant number of third world States amount to little more than damaging legal fictions has been advanced by Robert Jackson.[2] Referring to the phenomenon of the 'quasi-State', he argues that 'a greater variety of international statuses including more intrusive forms of international trusteeship might have rendered the post-colonial situation less unsatisfactory than it proved time and again to be under the one-dimensional negative sovereignty regime.'[3] Jackson does not provide a list of quasi-States, but he refers rather generally to 'ex-colonial peoples',[4] and the tenor of his account is that the list would be a long one.

In later work the vogue term has been that of the 'failed State',[5] and it has generated a substantial literature among authors from successful States.[6] Its definition is not precise, but 'failed State' would seem to encompass various instances of governmental crises and breakdown: 'State collapse is a deeper phenomenon than mere rebellion, coup, or riot. It refers to a situation where the structure, authority (legitimate power), law, and political order have fallen apart and must be reconstituted in some form, old or new.'[7] The Geographer of the Department of State in 2005 described them as States in which 'national institutions are often absent, corrupted, and/or dysfunctional'.[8] According to Kreijen:

The essence of State failure . . . is a lack of capacity or factual power pure and simple . . . State failure is the inability to run a modern State as a going concern. Within

[2] Jackson, *Quasi-States: Sovereignty, International Relations and the Third World*, and see, e.g., Inayatullah in Biertsecker and Weber, *State Sovereignty as Social Construct*, 50.

[3] Jackson, *Quasi-States*, 202.

[4] E.g., Jackson, *Quasi-States*, 159; for 'negative sovereignty' (a condition characterizing States that cannot act effectively on the municipal plane but that benefit from the presumption of non-interference by other States) see ibid, 27–30. See also Jackson, *The Global Covenant*, 296; and generally Handel, *Weak States in the International System* (2nd edn); Türk (1995) 27 *NYUJILP* 625.

[5] Helman and Ratner seem to have originated the expression: see Helman and Ratner (1992–3) 89 *Foreign Policy* 3, 4; see also Ratner (1993) 87 *AJ* 1, 41. The UN Secretary-General used it in a speech in 1993: Boutros-Ghali (1993) 16 *Loyola LA ICLJ* 1, 4; Franck in an article in 1994: (1994) 29 *U Richmond LR* 1, 19 (citing Helman and Ratner).

[6] See, e.g., Richardson (1996) 10 *Temple ICLJ* 1; Schachter (1997) 36 *Col JTL* 7; Kriejen in Kreijen (ed), *State, Sovereignty, and International Governance*, 45; Rotberg (ed), *State Failure and State Weakness in a Time of Terror*; Kreijen, *State Failure, Sovereignty and Effectiveness*; Wilde (2004) 15 *EJIL* 71; Geiss (2004) 47 *German YBIL* 457; Geiβ, '*Failed States' Die normative Erfassung geschreiterter Staaten.* See also the balanced account by the Dutch Advisory Council on International Affairs, Advisory Committee on Issues of Public International Law, *Failing States. A Global Responsibility.*

[7] Zartman in Zartman (ed), *Collapsed States: The Disintegration and Restoration of Legitimate Authority*, 1.

[8] Wood (2005) 29 *Fletcher Forum of World Aff* 119, 130. Clarke and Herbst (1996) 89 *For Aff* 84 propose 'failed State' as a term 'to express the idea that a state's fundamental institutions have so deteriorated that it needs long-term external help, not to institutionalize foreign control but to create stronger domestic institutions capable of self-government.'

the failed State there is an inability *per se* to uphold a minimum level of normative institutional order that statehood requires. Hence the overall situation of disorder and anarchy that characterizes State failure.[9]

Apparently much of Africa and swathes of Asia are covered by the term, and the epidemic may be spreading.

The 'failed State' problem has been vastly complicated by its relation to questions of international security and the use of force.[10] The United States, for example, has specifically included 'failed States' in its defence doctrine[11] and some of its lawyers have asserted that 'State failure' may condition the application of treaty rights and even individual rights.[12]

The underpinnings of such assertions were doubted well before the advent of the 'global war against terror'. Wedgwood, for example, has identified the notion of 'failed State' as an invitation to questionable exercises in international intervention:

> Some observers speak of 'failed states'—a locution resented by the developing world, which points out that European state formation was a slow and difficult process. The 'failed state' proposal calls for the United Nations to step in, perhaps through the Trusteeship Council, when local leaders are unable to stem anarchy or govern effectively. At times there is almost an intimation that sovereignty does not properly belong to people who cannot employ it well. What sounds so utterly benign as peacekeeping can devolve into a kind of multilateral condescension . . .'[13]

But the condescension can be unilateral as well, and it is not confined to peace-keeping.

The perils of the expression go back to a conceptual confusion at its core. The situations described by some writers as 'failed States' are, evidently, crises

[9] Kreijen, *State Failure*, 96.

[10] Cf Franck (2003) 97 *AJ* 607, 615.

[11] *The National Security Strategy of the United States of America*, 1, 10–11, about which see Rice, *Brookings Institution Policy Brief* 116 (February 2003).

[12] See, e.g., Yoo, Deputy Assistant Attorney General, US Department of Justice, Office of Legal Counsel, Memorandum re: Application of Treaties and Laws to al Qaeda and Taliban Detainees, 9 January 2002, 2, reprinted in Greenberg and Dratel, *The Torture Papers: The Road to Abu Ghraib*, 38, 39: '[T]he Geneva Conventions do not apply for several reasons . . . Afghanistan was not—even prior to the beginning of the present conflict—a functioning State during the period in which [it] engaged in hostilities against the United States and its allies. Afghanistan's status as a failed state is ground alone to find that members of the Taliban militia are not entitled to enemy POW status under the Geneva Conventions . . .' In honourable opposition see the letter of WH Taft IV, State Department Legal Advisor, 2 February 2002: 'The President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years. It is consistent with the advice of DOS lawyers and, as far as is known, the position of every other party to the Conventions': ibid, 129.

[13] Wedgwood (1995) 28 *Cornell ILJ* 631, 636.

of government or, if the vaguer term be preferred, governance.[14] None of the situations so described—Somalia, the Congo, Liberia, etc—has involved the extinction of the State in question, and it is difficult to see what possible basis there could be for supposing otherwise. No doubt in many cases the *regime* has failed—either in the narrow sense of the group of thugs and cronies controlling the Presidential palace or in the broader sense of the governmental system, civil service, army, opposition and all. But although there are many poor, often desperately poor, States, one must ask what they might otherwise be or have been—satellites of a neighbour, for example, or equally poor or even poorer colonies? No doubt most Somalis, whose self-determination and security the governmental system of Somalia has conspicuously failed to protect, would prefer it were otherwise. But there is no indication that they wish to be, for example, Ethiopians. To talk of States as 'failed' sounds suspiciously like blaming the victims.

A further problem lies in the assumption that 'State failure' arises from weakness and anarchy rather than overweening strength. The evils of the last century were overwhelmingly due to strong regimes, and to their aftermath when eventually they collapsed. The Third Reich and Stalin's Russia, like the earlier Congo of King Leopold, were failures in any human or moral terms—but not in terms of the definitions referred to above.

This is not at all to deny the systematic problems that colonization helped to produce and that decolonization has revealed and in some cases exacerbated. When knowledgeable observers of Africa speak of 'the curse of the Nation-State' the situation has to be taken seriously.[15] But it is necessary to disaggregate the problems: few if any of them are due to the international law of territorial status or the qualified modern doctrine of sovereignty.[16] A functioning International Criminal Court (used as a last resort), a functioning Security Council, orderly regional initiatives (as with the Solomon Islands[17] and Bougainville[18]),

[14] Cf Acquaviva (2005) 38 *Vanderbilt JTL* 345, 379 n 153: 'So-called "failed states" are actually governments unable to assert themselves . . .'.

[15] Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-state*, and see Clapham, *Africa and the International System*; Bayart, Ellis and Hibou, *The Criminalization of the State in Africa*.

[16] In this regard it may be symptomatic that the only official talk of recognizing Somaliland as a State occurs when what is at stake is the return of asylum seekers who come from *other* parts of that failed union. See, e.g., Judgment of 30 October 2003, 4 UE 4952/96.A (Hesse Administrative Court, Kassel); *Hagi-Salad v Ashcroft*, 359 F 3d 1044, 1046 (8th Cir 2004, Loken CJ). But cf *Ministry of Immigration & Multicultural Affairs v Jama* [1999] FCA 1680 (Sydney) (Branson & Sackville JJ) para 29; *Ministry of Immigration & Multicultural Affairs v Haji Ibrahim* [2000] HCA 55, 204 CLR 1, 36, para 112 (2000) (Gleeson CJ)—and see further Chapter 9.

[17] See Declaration of Pacific Islands Forum States, Biketawa, 28 October 2000, S/2003/799, Annex.

[18] See Agreement Covering Implementation of the Ceasefire, Arawa, 30 April 1998, S/1998/506, Annex.

a capacity to deliver humanitarian aid irrespective of non-recognition—these are available now.

In short, what is needed is not a more intrusive intervention *doctrine*, but more effective *measures*. These may in the last resort involve military intervention, though the overall record of sustained, successful military intervention is dismal. Above all a systematic set of measures not involving the use or threat of force, or the illusory (and inevitably temporary) 'relief' provided by an intervention force, is required—including freer access of third world countries to agricultural markets, appropriate arrangements for delivery of health care and medicine, and so on. To this real debate about development and governance the language of State failure has added little but confusion.

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# APPENDICES


| | | |
|---|---|---|
| **Appendix 1.** | **List of States and Territorial Entities Proximate to States (as at 31 December 2005)** | 727 |
| **Appendix 2.** | **League Mandates and United Nations Trusteeships** | 741 |
| **Appendix 3.** | **The United Nations and Non-Self-Governing Territories, 1946 to 2005** | 746 |
| **Appendix 4.** | **Consideration by the International Law Commission of the Topic of Statehood (1996)** | 757 |

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# APPENDIX 1

# List of States and Territorial Entities Proximate to States (as at 31 December 2005)

## A. STATES (192)[1]

| State | Created[2] | UN Admission | Comment[3] |
|---|---|---|---|
| Afghanistan | 19 August 1919 | 19 November 1946 | End of British control over foreign affairs[4] |
| Albania | 28 November 1912 | 14 December 1955 | Independence from the Ottoman Empire[5] |
| Algeria | 5 July 1962 | 8 October 1962 | Independence from France |
| Andorra | 8 September 1278 | | Formed by paréage under the joint suzerainty of the French count of Foix and the Spanish bishop of Urgel; |
| | 1 June 1993 | | reformed by Treaty of |
| | | 28 July 1993 | Vicinage 1993 |
| Angola | 11 November 1975 | 1 December 1976 | Independence from Portugal |
| Antigua and Barbuda | 1 November 1981 | 11 November 1981 | Independence from UK |
| Argentina | 9 July 1816 | Original Member | Independence from Spain |
| Armenia | 21 September 1991 | 2 March 1992 | Independence from Soviet Union |
| Australia | 1 January 1901 | | Federation of 6 Australian colonies |
| | 18 November 1926 | | Independent: see Report of Inter-Imperial Relations |
| | | Original Member | Committee, Cmnd 2768 |

[1] In the first edition (effective date December 1977), 155 States were listed. Since then 5 (SFRY, GDR, Czechoslovakia, North Yemen and South Yemen) have disappeared; 37 have been created or re-established and 5 have emerged from a status of dependency or uncertainty (the 3 Baltic States, Brunei, Andorra).

[2] In the case of States created by secession or similar processes, the date given is that of the declaration of independence unless otherwise stated.

[3] This provides a summary statement only. For details see the index entry for the country concerned.

[4] See also Treaty of Peace (Afghanistan–Great Britain), Rawal Pindi, 8 August 1919, 225 CTS 446.

[5] See also Treaty of Peace (Bulgaria, Greece, Montenegro, Servia and Turkey), London, 30 May 1913, 218 CTS 159.

A. STATES (192)(*Continued*)

| State | Created | UN Admission | Comment |
|---|---|---|---|
| Austria | 1156 CE | | Duchy of Austria established |
| | 1 October 1273 | | Rudolf of Habsburg elected Holy Roman Emperor |
| | 10 September 1919 | | Treaty of St Germain-en-Laye[6] |
| | 12 March 1938 | | Annexation by Germany |
| | 28 June 1946 | | Allied Control Machinery established |
| | 15 May 1955 | 14 December 1955 | State Treaty ends Allied control[7] |
| Azerbaijan | 30 August 1991 | 9 March 1992 | Independence from USSR |
| Bahamas | 10 July 1973 | 18 September 1973 | Independence from UK |
| Bahrain | 15 August 1971 | 21 September 1971 | Independence from UK |
| Bangladesh | 16 December 1971 | 17 September 1974 | Secession from Pakistan |
| Barbados | 30 November 1966 | 9 December 1966 | Independence from UK |
| Belarus (formerly Byelorussia) | 25 August 1991 | Original Member (as part of USSR); retained membership post-independence | Independence from Soviet Union |
| Belgium | 4 October 1830 | Original Member | Independence from the Netherlands |
| Belize | 21 September 1981 | 25 September 1981 | Independence from UK |
| Benin (Dahomey) | 1 August 1960 | 20 September 1971 | Independence from France |
| Bhutan | Unclear; political relations with UK, C18th | 21 September 1971 | Special treaty relations with UK, 1865<br>Independence acknowledged by India, 8 August 1949 |
| Bolivia | 6 August 1825 | Original Member | Independence from Spain |
| Bosnia and Hercegovina | 3 March 1992 | 22 May 1992 | Successor State of former Yugoslavia |
| Botswana | 30 September 1966 | 17 October 1966 | Independence from UK |
| Brazil | 7 September 1822 | Original Member | Independence from Portugal |
| Brunei Darussalam | 1 January 1984 | 21 September 1984 | Independence from UK |
| Bulgaria | 3 March 1878 | | 3 March 1878: autonomous principality within the Ottoman Empire. |

[6] 226 CTS 8.

[7] State Treaty for the re-establishment of an independent and democratic Austria, 15 May 1955, Vienna, 217 UNTS 224.

A. STATES (192) (*Continued*)

| State | Created | UN Admission | Comment |
|---|---|---|---|
| | | 14 December 1955 | 22 September 1908: independence |
| Burkina Faso | 5 August 1960 | 20 September 1960 | Independence from France |
| Burundi | 1 July 1962 | 18 September 1962 | Independence from Belgian trusteeship |
| Cambodia | 9 November 1953 | 14 December 1955 | Independence from France |
| Cameroon | 1 January 1960 | 20 September 1960 | Independence from French trusteeship |
| Canada | 29 March 1867 | | Confederation of Ontario, Quebec, Nova Scotia, New Brunswick |
| | 18 November 1926 | | Independent: see Report of Inter-Imperial Relations Committee, Cmnd 2768 |
| | | Original Member | Newfoundland joined 1949 |
| Cape Verde Islands | 5 July 1975 | 16 September 1975 | Independence from Portugal |
| Central African Republic | 13 August 1960 | 20 September 1960 | Independence from France |
| Chad | 11 August 1960 | 20 September 1960 | Independence from France |
| Chile | 18 September 1810 | 24 October 1945 | Independence from Spain |
| China, People's Republic of | 2nd century BCE | | 221 BC: unification under Qin dynasty<br>1 January 1912: Hanchu dynasty replaced by a republic<br>1 October 1949: PRC established |
| | | Original Member | |
| Colombia | 20 July 1810 | Original Member | Independence from Spain |
| Comoros | 6 July 1975 | 12 November 1975 | Independence from France |
| Congo, Democratic Republic of | 30 June 1960 | 20 September 1960 | Independence from Belgium as DRC; called Zaïre (1971–1997) |
| Congo, Republic of | 15 August 1960 | 20 September 1960 | Independence from France as Congo (Brazzaville) |
| Costa Rica | 15 September 1821 | 2 November 1945 | Independence from Spain |
| Côte d'Ivoire | 7 August 1960 | 20 September 1960 | Independence from France |
| Croatia | 25 June 1991 | 22 May 1992 | Successor State of former Yugoslavia |
| Cuba | 10 December 1898 | Original Member | Independence from Spain; administered by US from 1898–1902 |

A. STATES (192) (*Continued*)

| State | Created | UN Admission | Comment |
|---|---|---|---|
| | | | 20 May 1902: Independence from the US |
| Cyprus | 16 August 1960 | 20 September 1960 | Independence from UK<br>The Turkish Cypriot area proclaimed its independence in 1975; self-styled Turkish Republic of Northern Cyprus established in 1983; unrecognized except by Turkey |
| Czech Republic | 1 January 1993 | 19 January 1993 | Successor State of former Czechoslovakia |
| Denmark | 10th century CE | Original Member | Since 1849 a constitutional monarchy;<br>Faroe Islands (1948) and Greenland (1979) autonomous |
| Djibouti | 27 June 1977 | 20 September 1977 | Independence from France |
| Dominica | 3 November 1978 | 18 December 1978 | Independence from UK |
| Dominican Republic | 27 February 1844 | Original Member | Independence from Haiti |
| Ecuador | 24 May 1822 | Original Member | Independence from Spain |
| Egypt | 28 February 1922 | Original Member | Independence from UK |
| El Salvador | 15 September 1821 | Original Member | Independence from Spain |
| Equatorial Guinea | 12 October 1968 | 12 November 1968 | Independence from Spain |
| Eritrea | 27 April 1993 | 28 May 1993 | Independence from Ethiopia following referendum, April 1993 |
| Estonia | 24 February 1918 | | UDI from Russia |
| | 2 February 1920 | | Russia–Estonia, Peace Treaty of Dorpat |
| | 22 July 1940 | | Annexed by Russia |
| | 20 August 1991 | | Resolution on National Independence |
| | | 17 September 1991 | |
| Ethiopia | 300 BCE | Original Member | Aksumite kingdom<br>Temporarily annexed by Italy 1936; independence restored 1941 |
| Fiji | 10 October 1970 | 13 October 1970 | Independence from UK |
| Finland | 6 December 1917 | 14 December 1955 | Independence from Russia |
| France | 486 CE | Original Member | Unified by Clovis |
| Gabon | 17 August 1960 | 20 September 1960 | Independence from France |

A. STATES (192) (*Continued*)

| State | Created | UN Admission | Comment |
|---|---|---|---|
| Gambia | 18 February 1965 | 21 September 1965 | Independence from UK |
| Georgia | 9 April 1991 | 31 July 1992 | Independence from Soviet Union |
| Germany, Federal Republic of | 1 July 1867 | | North German Confederation |
| | 18 January 1871 | | Proclamation of German Empire |
| | 5 June 1945 | | Four Allies assume government of Germany |
| | 23 May 1949 | | Creation of FRG |
| | | 18 September 1973 (with GDR) | |
| | 3 October 1990 | FRG membership maintained | Unification of Germany |
| Ghana | 6 March 1957 | 8 March 1957 | Independence from UK |
| Greece | 27 May 1832 | 25 October 1945 | Independence from Ottoman Empire |
| Grenada | 7 February 1974 | 17 September 1974 | Independence from UK |
| Guatemala | 15 September 1821 | Original Member | Independence from Spain |
| Guinea | 2 October 1958 | 12 December 1958 | Independence from France |
| Guinea-Bissau | 24 September 1973 | 17 September 1974 | 1973: UDI recognized by UN GA res 3061(XXVIII), 2 November 1973 |
| Guyana | 26 May 1966 | 20 September 1966 | Independence from UK |
| Haiti | 1 January 1804 | Original Member | Independence from France |
| Honduras | 15 September 1821 | Original Member | Independence from Spain |
| Hungary | 25 December 1000 | 14 December 1955 | Coronation of King Stephen I, unifier of Hungary |
| | 8 June 1867 | | *Ausgleich* establishes Dual Monarchy |
| | 4 June 1920 | | Treaty of Trianon[8] |
| Iceland | 1 December 1918 | | Personal union with Denmark |
| | 17 June 1944 | 19 November 1946 | Unilateral abrogation of Union |
| India | 15 August 1947 | Original Member (British India) | Independence from UK |
| Indonesia | 17 August 1945 | | Independence proclaimed |
| | 27 December 1949 | 28 September 1950 | Dutch recognition |
| Iran (Islamic Republic of) | 550 BCE | Original Member | Foundation of Persian Empire under Kyros II |
| Iraq | 3 October 1932 | Original Member | Independence from UK mandate |

[8] 6 LNTS 187.

A. STATES (192) (*Continued*)

| State | Created | UN Admission | Comment |
|---|---|---|---|
| Ireland | 6 December 1921 | 14 December 1955 | Irish State Treaty |
| Israel | 14 May 1948 | | Independence from Mandated |
| | 24 February 1949 | 11 May 1949 | Palestine following British withdrawal and first Arab–Israeli War |
| Italy | 17 March 1861 | 14 December 1955 | Kingdom of Italy proclaimed |
| Jamaica | 6 August 1962 | 18 September 1962 | Independence from UK |
| Japan | 660 BC | 18 December 1956 | Founded by Emperor Jimmu |
| Jordan | 20 February 1928 | | League of Nations Mandate |
| | | | Provisional recognition by UK |
| | 22 March 1946 | 14 December 1955 | UK–Jordan Treaty of Alliance |
| Kazakhstan | 16 December 1991 | 2 March 1992 | Independence from Soviet Union |
| Kenya | 12 December 1963 | 16 December 1963 | Independence from UK |
| Kiribati | 12 July 1979 | 14 September 1999 | Independence from UK |
| Korea, | 15 August 1945 | | 1945: Separation of Korea |
| Democratic | 9 September 1948 | | from Japan |
| People's | | | 1948: Foundation of DPRK |
| Republic | | 17 September 1991 | |
| Korea, | 15 August 1945 | | 1945: Separation of Korea |
| Republic of | | | from Japan |
| | 15 August 1948 | | RoK established under UN |
| | | 17 September 1991 | auspices |
| Kuwait | 19 June 1961 | 14 May 1963 | Independence from UK |
| Kyrgyzstan | 31 August 1991 | 2 March 1992 | Independence from Soviet Union |
| Lao People's Democratic Republic | 19 July 1949 | 14 December 1955 | Independence from France |
| Latvia | 18 November 1918 | | Declaration establishing a Provisional Government of Latvia |
| | 21 July 1940 | | Annexed by Russia |
| | 21 August 1991 | | Constitutional Law on the Sovereign Status of the |
| | | 17 September 1991 | Republic of Latvia |
| Lebanon | 22 November 1943 | Original Member | Independence from French Mandate |
| Lesotho | 4 October 1966 | 17 October 1966 | Independence from UK |
| Liberia | 26 July 1847 | Original Member | Declaration of independence |
| Libyan Arab Jamahiriya | 24 December 1951 | 14 December 1955 | Independence from Italy |

A. STATES (192)(*Continued*)

| State | Created | UN Admission | Comment |
|---|---|---|---|
| Liechtenstein | 23 January 1719 | | Principality established |
| | 12 July 1806 | | Independence from the Holy |
| | | 18 September 1990 | Roman Empire |
| Lithuania | 18 February 1918 | | UDI from Russian Empire |
| | 21 July 1940 | | Annexed by Russia |
| | 11 March 1990 | | Act on the Restoration of the |
| | | 17 September 1991 | Lithuanian State |
| Luxembourg | 19 April 1839 | | Grand Duchy with defined borders[9] |
| | 11 May 1867 | Original Member | Declared neutral and independent State[10] |
| Macedonia | 8 September 1991 | 8 April 1993 | Independence from Yugoslavia as Former Yugoslav Republic of Macedonia (FYROM) |
| Madagascar | 26 June 1960 | 20 September 1960 | Independence from France |
| Malawi | 6 July 1964 | 1 December 1964 | Independence from the UK |
| Malaysia | 31 August 1957 | 17 September 1957 | Independence from UK as Malaya |
| | 16 September 1963 | | Federation of Malaysia (Singapore, Sabah and Sarawak joined) |
| Maldives | 26 July 1965 | 21 September 1965 | Independence from UK |
| Mali | 22 September 1960 | 28 September 1960 | Independence from France |
| Malta | 21 September 1964 | 1 December 1964 | Independence from UK |
| Marshall Islands | 21 October 1986 | 17 September 1991 | Formerly part of US strategic trust territory |
| Mauritania | 28 November 1960 | 17 October 1961 | Independence from France |
| Mauritius | 12 March 1968 | 24 April 1968 | Independence from UK |
| Mexico | 16 September 1810 | Original Member | Independence from France |
| Micronesia, Federated States of | 3 November 1986 | 17 September 1991 | Formerly part of US strategic trust territory |
| Moldova | 27 August 1991 | 2 March 1992 | Independence from Soviet Union |
| Monaco | 8 January 1297 | | Seizure by House of Grimaldi |
| | 10 February 1512 | | Recognition of independence by France |

[9] Treaty in respect of territorial arrangements touching Luxembourg, with Annex, London, 19 April 1839, 88 CTS 411.

[10] Treaty relative to the Grand Duchy of Luxembourg, London, 11 May 1867, 135 CTS 1.

A. STATES (192) (*Continued*)

| State | Created | UN Admission | Comment |
|---|---|---|---|
| | November 1524 | | Spanish protectorate |
| | 14 September 1641 | | French protectorate |
| | 1793–1814 | | Annexed by France |
| | 20 November 1815/7 November 1817 | | Sardinian protectorat[11] |
| | 2 February 1861 | | Special treaty relations with France |
| | 17 July 1918 | 28 May 1993 | |
| Mongolia | 13 March 1921 | 27 October 1961 | Independence from China |
| Morocco | 791 CE | | Establishment by Idris I |
| | 30 March 1912/27 November 1912 | | French/Spanish protectorates established[12] |
| | 2 March 1956 | 12 November 1956 | Independence |
| Mozambique | 25 June 1975 | 16 September 1975 | Independence from Portugal |
| Myanmar | 4 January 1948 | 19 April 1948 | Independence from UK |
| Namibia | 21 March 1990 | 23 April 1990 | Independence under UN auspices following revocation of Mandate (South Africa) |
| Nauru | 31 January 1968 | | Independence from Australia–NZ–UK trusteeship |
| | | 14 September 1999 | |
| Nepal | ca 1768 | | Unified by Prithvi Narayan Shah |
| | 21 December 1923 | 14 December 1955 | UK–Nepal Treaty |
| Netherlands | 23 January 1579 | | Union of Utrecht, breaking with Spain |
| | 30 January 1648 | | Treaty of Münster (Spain–Netherlands) |
| | | Original Member | |
| New Zealand | 18 November 1926 | | Independence from UK See Report of Inter-Imperial Relations Committee, 1926 Cmnd 2768 |
| | | Original Member | |
| Nicaragua | 15 September 1821 | Original Member | Independence from Spain |
| Niger | 3 August 1960 | 20 September 1960 | Independence from France |
| Nigeria | 1 October 1960 | 7 October 1960 | Independence from UK |
| Norway | 7 June 1905 | | Norway declares union with Sweden (1814) dissolved |
| | 26 October 1905 | Original Member | Sweden agrees to repeal union |

[11] Definitive Treaty of Peace (Austria, Great Britain, Prussia and Russia–France), Vienna, 65 CTS 251; Treaty of Protection (Monaco–Sardinia), Turin, 68 CTS 141.

[12] Treaty for the Organisation of the Protectorate (France–Morocco), Fez, 216 CTS 20; Convention Respecting Relations in Morocco (France–Spain), Madrid, 217 CTS 288.

A. STATES (192) (*Continued*)

| State | Created | UN Admission | Comment |
|---|---|---|---|
| Oman | 8th century CE | | |
| | 12 October 1798 | | Special treaty relations with |
| | | 7 October 1971 | UK (Muscat and Oman) |
| Pakistan | 14 August 1947 | 30 September 1947 | Independence from UK |
| Palau | 1 October 1994 | 15 December 1994 | Formerly part of US strategic trust territory |
| Panama | 3 November 1903 | Original Member | Independence from Colombia |
| Papua New Guinea | 16 September 1975 | 10 October 1975 | Independence from Australia |
| Paraguay | 14 May 1811 | Original Member | Independence from Spain |
| Peru | 28 July 1821 | Original Member | Independence from Spain |
| Philippines | 4 July 1946 | Original Member | Independence from United States |
| Poland | 11 November 1918 | | Independent republic |
| | | Original Member | proclaimed |
| Portugal | 5 October 1143 | | Kingdom of Portugal |
| | | 14 December 1955 | (union with Spain 1580–1640) |
| Qatar | 3 September 1971 | 21 September 1971 | Independence from UK |
| Romania | 5 February 1859 | | Merger of principalities of Moldavia and Wallachia |
| | 5 February 1862 | | Union formally establishing Romania |
| | 13 July 1878 | | Treaty of Berlin; independence |
| | | 14 December 1955 | from Ottoman Empire[13] |
| Russian Federation | 862 CE | | Rurik dynasty and founding of Principality of Novogorod |
| | 2 November 1721 | | Russian Empire declared by Peter I |
| | 26 October 1917 | | RSFSR |
| | 30 December 1922 | Original Member | Soviet Union |
| | 24 August/8 December 1991 | Membership maintained | Dissolution of Soviet Union; Russian Federation recognized as continuator |
| Rwanda | 1 July 1962 | 18 September 1962 | Independence from Belgian trusteeship |
| Saint Kitts and Nevis | 19 September 1983 | 23 September 1983 | Independence from UK |
| Saint Lucia | 22 February 1979 | 18 September 1979 | Independence from UK |

[13] Treaty for the Settlement of Affairs in the East (Austria-Hungary, France, Germany, Great Britain, Russia and Turkey), Berlin, 13 July 1878, 153 CTS 171.

A. STATES (192) (*Continued*)

| State | Created | UN Admission | Comment |
|---|---|---|---|
| Saint Vincent and the Grenadines | 27 October 1979 | 16 September 1980 | Independence from UK |
| Samoa | 1 January 1962 | | Independence from NZ trusteeship as Western Samoa; |
| | | 15 December 1976 | changed name 1997 |
| San Marino | 4th century CE | | Ancient vassal of Papal States |
| | 22 March 1862 | 2 March 1992 | Italy–San Marino Treaty[14] |
| São Tomé e Príncipe | 12 July 1975 | 16 September 1980 | Independence from Portugal |
| Saudi Arabia | 29 January 1927 | | Unification of Hedjaz and the Nejd by Ibn Saud |
| | 18 September 1932 | | Name changed to Saudi |
| | | Original Member | Arabia |
| Senegal | 4 April 1960 | | Independence from France |
| | September 1960 | 28 September 1960 | Separation from Mali Federation |
| Serbia and Montenegro | Uncertain, not before 29 November 1991 | | Yugoslavia original Member of the United Nations; 27 April 1992: SFRY proclaimed continuation of former Yugoslavia 27 October 2000: newly elected government abandoned claim to continuity; renamed Serbia |
| | | 1 November 2000 | and Montenegro 2002 |
| Seychelles | 29 June 1976 | 21 September 1976 | Independence from UK |
| Sierra Leone | 27 April 1961 | 27 September 1961 | Independence from UK |
| Singapore | | | Formerly (1962–5) component State of Malaysia |
| | 9 August 1965 | 21 September 1965 | Independent |
| Slovakia | 1 January 1993 | | Successor State of former |
| | | 19 January 1993 | Czechoslovakia |
| Slovenia | 25 June 1991 | | Independence from |
| | | 22 May 1992 | Yugoslavia |
| Solomon Islands | 7 July 1978 | 19 September 1978 | Independence from UK |
| Somalia | 1 July 1960 | 20 September 1960 | Merger of British Somaliland and Italian Somaliland |

[14] 125 CTS 417. For earlier treaties with the Holy See cf Duursma, *Microstates* 208–10.

A. STATES (192)(*Continued*)

| State | Created | UN Admission | Comment |
|---|---|---|---|
| South Africa | 31 May 1910 | | Union of South Africa; Dominion status |
| | 18 November 1926 | | Independent: see Report of Inter-Imperial Relations Committee, Cmnd 2768 |
| | | Original Member | |
| Spain | 1492 | 14 December 1955 | Seizure of Granada; expulsion of Moors |
| Sri Lanka | 4 February 1948 | 14 December 1955 | Independence from UK |
| Sudan | 1 January 1956 | 12 November 1956 | Independence of Anglo-Egyptian Sudan |
| Suriname | 25 November 1975 | 4 December 1975 | Independence from the Netherlands |
| Swaziland | 6 September 1968 | 24 September 1968 | Independence from UK |
| Sweden | 6 June 1523 | | Election of Gustav Vasa as King |
| | | 19 November 1946 | |
| Switzerland | 1 August 1291 | 10 September 2002 | Swiss confederation |
| Syrian Arab Republic | 17 April 1946 | Original Member | Independence from French Mandate |
| Tajikistan | 9 September 1991 | 2 March 1992 | Independence from Soviet Union |
| Tanzania, United Republic of | | 14 December 1961 (Tanganyika) | 9 December 1961: Tanganyika independent from UK trusteeship |
| | | 16 December 1963 (Zanzibar) | 19 December 1963: colony of Zanzibar independent from UK |
| | 26 April 1964 | UN membership of Tanzania continued | union of Tanganyika and Zanzibar; |
| | 2 November 1964 | | renamed United Republic of Tanzania |
| Thailand | 1238 | | Founding of Sukothai Kingdom |
| | | 16 December 1946 | |
| Timor-Leste | 20 May 2002 | 27 September 2002 | Former Portuguese colony; occupied by Indonesia from 27 December 1975; plebiscite under UN auspices 30 August 1999[15] |

[15] See SC resns 1236, 7 May 1999; 1246, 11 June 1999; 1262, 27 August 1999; 1264, 15 September 1999; 1272, 25 October 1999; and Report of the Secretary-General, 4 October 1999, S/1999/1024.

A. STATES (192) (*Continued*)

| State | Created | UN Admission | Comment |
|---|---|---|---|
| Togo | 27 April 1960 | 20 September 1960 | Independence from French trusteeship |
| Tonga | 4 June 1970 | 14 September 1999 | Independence from UK protectorate |
| Trinidad and Tobago | 31 August 1962 | 18 September 1962 | Independence from UK |
| Tunisia | 20 March 1956 | 12 November 1956 | Independence from France |
| Turkey | ca C13th CE | Original member | Continuator of Ottoman Empire |
| Turkmenistan | 27 October 1991 | 2 March 1992 | Independence from the Soviet Union |
| Tuvalu | 1 October 1978 | 5 September 2000 | Independence from UK |
| Uganda | 9 October 1962 | 25 October 1962 | Independence from UK |
| Ukraine | 8 December 1991 | Original Member (as part of USSR); same membership after 1991 | Independent from Soviet Union |
| United Arab Emirates | 2 December 1971 | 9 December 1971 | Independence from UK |
| United Kingdom of Great Britain and Northern Ireland | 1284 | | Statute of Wales, 12 Edw I |
| | 1536 | | Act of Union with Wales, 27 Henry VIII c 26 |
| | 1 May 1707 | | Act of Union with Scotland, 6 Anne c 11 |
| | 1 January 1801 | Original Member | Act of Union with Ireland, 39 and 40 Geo III c 67 |
| United States of America | 4 July 1776 | Original Member | Independence from Great Britain |
| Uruguay | 25 August 1825 | 18 December 1945 | Independence from Brazil |
| Uzbekistan | 1 September 1991 | 2 March 1992 | Independence from Soviet Union |
| Vanuatu | 30 July 1980 | 15 September 1981 | Independence after termination of Anglo-French condominium of New Hebrides |
| Vatican City | 11 February 1929 | | Independence acknowledged by Lateran Treaty (Italy–Holy See)[16] |
| Venezuela | 5 July 1811 | 15 November 1945 | Independence from Spain |
| Vietnam | 2 September 1945 | | DRVN declares independence |

[16] (1929) 23 *AJ Supp* 187; 130 BFSP 791.

## A. STATES (192) (*Continued*)

| State | Created | UN Admission | Comment |
|---|---|---|---|
| | | | from France |
| | 5 June 1948 | | RVN established by France[17] |
| | 2 July 1976 | 20 September 1977 | RVN merged with North |
| Yemen | November 1918 | 30 September 1947 | North Yemen independent from Ottoman Empire |
| | 30 November 1967 | 14 December 1967 | Aden independent from UK as South Yemen |
| | 26 May 1990 | UN membership continued | Merger of two Yemens |
| Zambia | 24 October 1964 | 1 December 1964 | Independence from UK |
| Zimbabwe | 18 April 1980 | 25 August 1980 | Independence from UK |

## B. TERRITORIAL ENTITIES PROXIMATE TO STATE (9)[18]

| Entity | Establishment of current status | Comment |
|---|---|---|
| Cook Islands | 4 August 1965 | State in free association with New Zealand under Cook Islands Act 1964 (NZ); GA res 2064 (XX) 16 December 1965 |
| Faroe Islands | 13 March 1948 | Home rule established by Faroes Home Rule Act, Danish Law no 137 (1948) |
| Greenland | 1 May 1979 | Home rule established by Greenland Home Rule Act, Danish Law no 577 (1978) |
| Niue | 19 October 1974 | Associated State of New Zealand under Niue Constitution Act 1974 (NZ); GA res 3285 (XXIX) 16 December 1965 |
| Northern Mariana Islands | 9 January 1978<br>22 December 1990 | Commonwealth territory of the USA under Covenant of 1975 (in force 9 January 1978); partial trusteeship terminated by SC res 683 (1990) |
| Palestine | 14 May 1948/3 April 1948 | Creation of Israel; first Arab–Israel War; ceasefire agreement with Jordan (as occupant of territories beyond green line) |
| | 15 November 1988 | Palestinian Declaration of Independence |

[17] Declaration Regarding the Independence of Viet-Nam, Baie D'Along, 5 June 1948, 152(iii) BFSP 414.

[18] In the first edition, Andorra was placed in this category.

## B. TERRITORIAL ENTITIES PROXIMATE TO STATE (9) (*Continued*)

| Entity | Establishment of current status | Comment |
|---|---|---|
| | 1993–present | Various attempts at agreement; some partial withdrawals of Israel from Occupied Palestinian Territory |
| Puerto Rico | 6 February 1952 | Associated State of USA under Puerto Rican Federal Relations Act 1950 (USA); Commonwealth Constitution adopted 6 February 1952, entered into force 25 July 1952; GA res 748 (VIII), 27 November 1953 |
| Somaliland | 17 May 1991 | Former British protectorate united in Somalia, 1 July 1960; UDI, 1991; definitive Constitution approved following a referendum, 21 May 2001; unrecognized |
| Taiwan | 8 December 1949 | Republic of China establishes provisional capital in Taipei |
| | 8 July 1951 | Taiwan retroceded to China by Japanese Peace Treaty<br>RoC recognized as such by some States; miscellaneous participation in international affairs as separate entity of China |

# APPENDIX 2
# League Mandates and United Nations Trusteeships

## 'A' MANDATES

All 'A' Mandates were territories detached from Turkey by Article 16 of the Treaty of Lausanne, 1923. The terms of the Mandates were approved by the League Council: for Syria, Lebanon and Palestine (including Transjordan) on 24 July 1922; for Iraq on 16 September 1922. Armenia was also intended to be placed under mandate, but the USA refused the responsibility as did the League itself. Part of Armenia was then reconquered by Turkey, and part organized as a soviet republic within the USSR.[1]

| **Dependent Territory & Administering State** | **Independence, Termination, etc** | **Relevant Resolution** |
|---|---|---|
| Iraq<br>(Great Britain) | No special mandate agreement; Treaty of Alliance 10.10.1922 and Protocols. Further treaty of 30.6.1930 provided for renunciation of Mandate and admission to League—effective 4.10.1932 | LNOJ (1932), 1212, 1347 |
| Palestine<br>(Great Britain) | In force 29 September 1923. Not transferred to Trusteeship. UN partition plan (Nov 1947) failed | |
| | UK withdrew unilaterally, 14 May 1948, thereby terminating mandate | GA res 181 (II) |
| | State of Israel declared; after first Arab–Israel War admitted to UN, 11 May 1949 | SC res 70 (1949)<br>GA res 273 (III) |
| | Occupied Palestinian Territory came under Israeli control in 1967; not yet independent despite partial Israeli withdrawal | SC res 242 (1967) etc[2] |
| Transjordan<br>(Great Britain)<br>separately | Part of Palestine Mandate administered<br>By agreement of 20 February 1928<br>Great Britain recognized *de facto* independent Government. Further Treaty of Alliance 22 March 1946 extended United Kingdom's *de jure* recognition as State of Jordan: admitted to UN, 14 December 1955 | GA res 11 (I); cf LNOJ 21st Ass 1946 Sp Supp No 194, 58 |

[1] See Mandelstam, *La Société des Nations et les puissances devant le problème arménien*.

[2] See Chapter 9.

## 'A' MANDATES (*Continued*)

| Dependent Territory & Administering State | Independence, Termination, etc | Relevant Resolution |
|---|---|---|
| Syria (France) | In force 29 September 1923. Treaty of Alliance 9 September 1936 suspended by War. After Vichy collapse proclamation of 27 September 1941 gave status of[6] independent republic'. French withdrawal 1 January 1944. Syria an original UN Member | LNOJ 21ST Ass Sp Supp No 194, 58 |
| Lebanon (France) | In force 29 September 1923. Treaty of Alliance 13 November 1936 suspended by war. Proclamation of 27 September 1941 gave status of 'independent republic'. French withdrawal 1 January 1944: Lebanon an original UN Member | LNOJ 21st Ass Sp Supp No 194, 58 |

## 'B' MANDATES

All 'B' Mandates were African territories of Germany detached by Articles 118 to 119 of the Treaty of Versailles, 1919. The terms of the Mandates were approved by the League Council: for Togoland and the Cameroons on 18 July 1922; for Tanganyika and Ruanda-Urundi on 20 July 1922.

| Dependent Territory & Administering State | Independence, Termination, etc | Relevant Resolution |
|---|---|---|
| Tanganyika (Great Britain) | Former German East Africa: transferred to Trusteeship 13 December 1946. Independent 9 December 1961. | GA res 63 (I) GA res 1642 (XVI) |
| British Togoland (Great Britain) | Transferred to Trusteeship 13 December 1946. United after plebiscite with new independent Republic of Ghana (formerly Gold Coast): 6 March 1957. | GA res 63 (I) GA res 1044 (XI) |
| French Togoland (France) | Transferred to Trusteeship 13 December 1946. Independent as Togolese Republic, 27 April 1960. | GA res 63 (I) GA res 1416 (XIV) |
| British Cameroons (Great Britain) | Administered in 2 provinces separately. Transferred to Trusteeship 13 December 1946. After plebiscites, Southern Cameroon | GA res 63 (I) GA res 1608 (XV) |

## 'B' MANDATES (*Continued*)

| Dependent Territory & Administering State | Independence, Termination, etc | Relevant Resolution |
|---|---|---|
| | joined new Republic of Cameroon, 30 September 1961; Northern Cameroon joined Nigeria: 1 June 1961. | |
| French Cameroons (France) | Transferred to Trusteeship 13 December 1946. Independent as Republic of Cameroon, 1 January 1960. | GA res 63 (I) GA res 1349 (XIII) |
| Ruanda-Urundi (Belgium) | Transferred to Trusteeship, 13 December 1946. After plebiscite divided into 2 new independent Republics of Rwanda & Burundi, effective 1 June 1962. | GA res 63 (I) GA res 1746 (XVI) |

## 'C' MANDATES

These were, in terms of Article 22, 'territories . . . which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.' All 'C' Mandates were territories of Germany detached by Articles 118–19 of the Treaty of Versailles. The terms of the 'C' Mandates were approved by the League Council on 17 December 1920.

| Dependent Territory & Administering State | Independence, Termination, etc | Relevant Resolution |
|---|---|---|
| New Guinea (Australia) | Transferred to Trusteeship 13 December 1946. Administered together with Australian Territory of Papua: independent as Papua New Guinea 16 September 1975. | GA res 63 (I) GA res 3284 (XXIX) |
| Nauru (British Empire (NZ, UK, Australia)) | Administration delegated to Australia. Transferred to Trusteeship, November 1947. Independent 31 December 1968. | GA res 140 (II) GA res 2347 (XXII). |
| Western Samoa (New Zealand) | Transferred to Trusteeship 13 December 1946. Independent 1 January 1962. | GA res 63(I) GA res 1926 (XVI) |
| Pacific Islands (Japan 1920–1944) | Used by Japan as a military base: occupied by US troops during War, and thereafter | SC res 21 |

'C' MANDATES (*Continued*)

| Dependent Territory & Administering State | Independence, Termination, etc | Relevant Resolution |
|---|---|---|
| USA 1947–1990 | administered by USA. Terms of Strategic Trusteeship approved by SC, 2 April 1947. | |
| | Trusteeship Council determined US had discharged obligations under the 1947 agreement, 28 May 1986. | TC res 2183 (LIII) |
| | Trusteeship terminated with respect to Marshall Islands, Micronesia and Mariana Islands, 22 December 1990; with respect to | SC res 683 |
| | Palau, 10 November 1994. | SC res 956 |
| | Independent as Federated States of Micronesia, Republic of the Marshall Islands, and Palau; Commonwealth Covenant for Northern Mariana Islands in force since 9 January 1978. | |
| South West Africa (South Africa) | Not brought under Trusteeship. Permission to annex refused by GA. | GA res 2145 (XXI) approved by SC res 264, 269, 276. |
| | Mandate declared revoked for fundamental breach, 27 October 1966. | |
| | United Nations Council for Namibia established as 'legal Administering Authority', 19 May 1967. | GA res 2248 (S-V) |
| | Independent under UN auspices as Namibia, 21 March 1990. | SC res 652 GA res S-18/1 |

## 'TERRITORIES DETACHED . . . AS A RESULT OF THE SECOND WORLD WAR' (CHARTER ART 77(1)(B)).

The Japanese Pacific Mandate was detached from Japan 'as a result of the Second World War'. By Article 2(d) of the Japanese Peace Treaty of 8 September 1951, Japan renounced its rights under the Mandates System and accepted the action of the Security Council in placing the Pacific Islands under Strategic Trusteeship.[3]

In addition three territories were detached from Italy by Article 23 and Annex XI of the Italian Treaty of Peace 1947.[4] Of these, Libya became independent on 24 December 1951, and Eritrea was put under a United Nations Commission and ultimately

[3] 136 UNTS 45, 48–50. [4] 49 UNTS 3, 139, 214.

federated with Ethiopia: see GA res 284 (VI). Only one territory was placed under trusteeship.

| **Dependent Territory & Administering State** | **Independence, Termination, etc** | **Relevant Resolution** |
|---|---|---|
| Somalia (Italian Somaliland) (Italy) | Placed under Trusteeship for a fixed period of 10 years (1950). United after plebiscite with former British Protectorate of Somaliland to form Somali Republic, 1 July 1960. | GA res 289 (IV) GA res 442 (V) GA res 1418 (XIV) |

APPENDIX 3

# The United Nations and Non-Self-Governing Territories, 1946 to 2005

The following tables set out the territories so far treated as 'non-self-governing' for purposes of Article 73, together with an indication of significant local, national or international action affecting the status of the territory in question. For further information consult the index reference for each territory.[1]

## A. TERRITORIES LISTED IN GA RES 66(I)

| Administering Authority and NSG Territory | Comments | GA res |
|---|---|---|
| ***Australia*** | | |
| Papua | Independent 16 September 1975 in union with former Australian Trust Territory of New Guinea. | 3284 (XXIX) |
| ***Belgium*** | | |
| Belgian Congo | Independent as Democratic Republic of Congo, 15 August 1960. Later Zaire; name changed 17 May 1997 to Democratic Republic of the Congo. | 1480 (XV) |
| ***Denmark*** | | |
| Greenland | Voted in 1952 for union with Denmark: effective 1953. | 849 (IX) |
| ***France*** | | |
| French West Africa | Information ceased 1957. Part of French Community under 1958 Constitution. Following territories independent: | |
| | Dahomey (now Benin), 1 August 1960 | 1481 (XV) |

[1] All territories not independent or self-governing remain subject to Art 73e unless stated. Where territories have achieved self-government through independence, in most cases no formal UN decision as to cessation of information has been taken, although admission of the new State to the UN can be taken as confirmation of the appropriateness of cessation of information. Since the first edition in 1977, 13 former non-self-governing territories have achieved independence: Antigua and Barbuda, Belize, Brunei, Dominica, Kiribati, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Solomon Islands, Timor-Leste, Tuvalu, Vanuatu and Zimbabwe. All have been admitted to UN membership.

## A. TERRITORIES LISTED IN GA RES 66(I) (*Continued*)

| **Administering Authority and NSG Territory** | **Comments** | **GA res** |
|---|---|---|
| | Guinea, 28 September 1958 | 1325 (XIII |
| | Ivory Coast (now Cote D'Ivoire), 7 August 1960 1491 (XV) | 1484 (XV) |
| | Mali (formerly French Sudan), 20 June 1960 | 1631 (XVI) |
| | Mauritania, 28 November 1960 | 1482 (XV) |
| | Niger, 3 August 1960 | |
| | Senegal, independent as part of Mali Federation, 20 June 1960; withdrew, 20 August 1960 | 1490 (XV) |
| | Upper Volta (now Burkina Faso), 5 August 1960 | 1483 (XV) |
| French North Africa | Information submitted on French protectorates of Morocco and Tunisia, but not on Department of Algeria. Independent as follows: | |
| | Morocco, 2 March 1956 | 1111 (XI) |
| | Tunisia, 20 March 1956 | 1112 (XI) |
| | Algeria, 3 July 1962 | 1754 (XVII) |
| French Equatorial Africa | Information ceased in 1957. | |
| | Various territories Associated States in French Community under 1958 Constitution. | |
| | Independent as follows | |
| | Central African Republic (Ubangi Shari), 13 August 1960 | 1488 (XV) |
| | Chad, 11 August 1960 | 1485 (XV) |
| | Congo (Brazzaville), 15 August 1960 | 1486 (XV) |
| | Gabon, 17 August 1960 | 1487 (XV) |
| French Somaliland (Djibouti) | French overseas territory: Information discontinued 1957. | |
| | Renamed French Territory of Afars and Issas. | |
| | 1967 Referendum voted 58% in favour of French connection. Rejected by UN. | 2288 (XXI) 2356 (XXII) |
| | Independent as Djibouti, 27 June 1977. UN Member, 20 September 1977 | 32/1 (XXXII) |
| Madagascar & Dependencies | Overseas territory, elected in 1958 to be Member State of French Community. Information discontinued 1958. | |
| | Independent as Malagasy Republic, 26 June 1960. | 1478 (XV) |
| French Establishments in | French overseas territory 1946: integral part of | |

## A. TERRITORIES LISTED IN GA RES 66(I) (*Continued*)

| **Administering Authority and NSG Territory** | **Comments** | **GA res** |
|---|---|---|
| Oceana (French Polynesia) | French Republic.<br>Information ceased 1947. | |
| French Indochina | Associated States in French Union under 1946 Constitution. Information ceased 1948.<br>Independent as follows:<br>Laos, 19 July 1949<br>Cambodia, 9 November 1953<br>Vietnam, 1956 | <br><br>995 (X)<br>995 (X)<br>602C (VII) |
| French Establishments in India (Chandernagore Pondicherry, Karikal, Mahe,Yanam) | Transferred to India, 1950–54 as Union Territory. Ratified by treaty of 28 May 1956.[2]<br>Information ceased 1956. | |
| New Caledonia and Dependencies | French overseas territory 1946: integral part of French Republic. Information ceased 1947.<br>GA reaffirmed obligation to report 1987.<br>1988 Matignon Accords granted substantial autonomy to the Islands. At a national referendum held November 1998, voters supported the Noumea Accord for increased autonomy for the territory. French constitutional amendments then established a new constitution for New Caledonia. A further referendum scheduled to take place at some point in the years 2013–18. | <br>A/Res/42/7<br><br>A/Res/49/45<br><br>A/Res/57/136 |
| French Guiana and Reunion | Overseas Department of France and integral part of French Republic 1946.<br>Information ceased 1947. | |
| ***Netherlands*** | | |
| Netherlands Indies | Indonesia independent after liberation conflict, 1950: West Irian (West New Guinea) ceded to Indonesia in 1962 subject to UN supervised referendum in 1969—in favour of continued association. | 448 (V)<br>491 (VI)<br><br>1752 (XVI) |
| Surinam | Autonomous and equal part of Netherlands after 1954. Independent 25 November 1975. | 945 (X)<br>3413 (XXX) |

[2] Treaty of Cession of the Territory of the Free Town of Chandernagore, Paris, 2 Feb 1951: 203 UNTS 155; Treaty ceding French Establishments in India, New Delhi, 28 May 1956: 162 BFSP 848. Cf 49 ILR 484.

## A. TERRITORIES LISTED IN GA RES 66(I) (*Continued*)

| Administering Authority and NSG Territory | Comments | GA res |
|---|---|---|
| Curacao (and other islands—Netherlands Antilles) | Autonomous and equal part of Netherlands after 1954.<br>Aruba (part of Netherlands Antilles group) seceded and was granted home rule in 1986; remains a dependency of Netherlands. | 945 (X) |
| ***New Zealand*** | | |
| Cook Islands | Associated with New Zealand under Cook Islands Act 1964–5; approved by GA 1965, after elections under UN supervision. | 2064 (XX) |
| Tokelau | Still dependent. | A/Res/52/77<br>A/Res/49/47<br>A/Res/59/133 |
| Niue Islands | Associated with New Zealand under Niue Constitution Act 1974. | 3285 (XXIX) |
| ***United Kingdom***[2a] | | |
| Aden (Colony and Protectorate) | After period of conflict with UN, a Special Mission sent to Territory; British military base disbanded.<br>Independent 30 November 1967. Admitted to UN as Peoples' Republic of Southern Yemen, 14 December 1967.<br>Republic of Yemen established after merger of North and South Yemen: independent 26 May 1990; UN membership continued. | 1949 (XVIII)<br>2023 (XX)<br>2310 (XXII) |
| Bahamas | Independent July 1973, after voting for independence rather than association. (Respecting the Turks and Caicos, see, below, this appendix, B.1). | 3051 (XXVII1) |
| Barbados | Independent 30 November 1966. | 2175 (XXI) |
| Basutoland | Enclave within S. Africa.<br>Independent as Lesotho, 4 October 1966. | 2003 (XX)<br>2134 (XXI)<br>2136 (XXI) |
| Bechuanaland Protectorate | Independent as Botswana, 30 August 1966. | 2063 (XX)<br>2134 (XXI)<br>2137 (XXI) |
| Bermuda | Independence rejected in 1995 referendum. Remains dependent.[3] | 3289 (XXIX)<br>A/Res/52/77 |

[2a] On the remaining UK dependencies, see House of Commons White Paper: Britain and the Overseas Territories, 17 March 1999, reprinted A/AC.109/1999/1 and Corr.1, Annex; and British Overseas Territory Act 2002.

[3] A/AC.109/2004/14, paras 1–3; GA res 59/134/A-B, 10 Dec 2004; A/59/478.

## A. TERRITORIES LISTED IN GA RES 66(I) (*Continued*)

| **Administering Authority and NSG Territory** | **Comments** | **GA res** |
|---|---|---|
| British Guiana | Independent as Guyana, 26 May 1966. | 2133 (XXI) |
| British Honduras (Belize) | Claimed by Guatemala. UN affirmed right to self-determination, 11 March 1981 agreement with Guatemala not ratified but Belize became independent 21 September 1981. | 3432 (XXX)<br>A/Res/36/3 |
| British Somaliland Protectorate | Independent, together with Italian Trusteeship of Somaliland, as Somalia, 1 July 1960. | 1479 (XV) |
| Brunei | Protected State. Declined in 1963 to join Federation of Malaysia. Disputed as Ch XI territory.<br>UK and Brunei signed a Treaty of Friendship, January 1979. Independent 1 January 1984. | 3159C (XXVIII)<br>A/Res/39/1 |
| Cyprus | Independent 16 August 1960, despite majority desire for *enosis* (union with Greece). | A/Res/37/253<br>1489 (XV) |
| Dominica | Associated State with UK under West Indies Act 1967: UK ceased transmission of information, but not approved by GA.<br>Independent 3 November 1978. | 2422C (XXIII)<br>2707 (XXV)<br>A/Res/33/107 |
| Falkland Islands Malvinas | Claimed by Argentina: negotiation invited by GA.<br>Remains dependent. | 2065 (XX)<br>A/Res/43/25<br>A/Res/51/407 |
| Fiji | Independent 10 October 1970. | 1951 (XVIII)<br>2068 (XX)<br>2622 (XXV) |
| Gambia | Independent 18 February 1965. | 2008 (XX) |
| Gibraltar | Claimed by Spain, with UN support. Referendum held 10 August 1967, voted overwhelmingly in favour of UK sovereignty.<br>Repudiated by GA. | 2353 (XXII) |
| Gold Coast (Colony and Protectorate) | Independent as Republic of Ghana, 6 March 1957. | 1118 (XVI) |
| Grenada | Previously associated State with UK under West Indies Act 1967; UK ceased transmission of information but not approved by GA.<br>Independent, 7 February 1974. | 3204 (XXIX) |
| Hong Kong (Crown Colony and leasehold) | Handover to China on 30 July 1997 under terms of Sino-British Joint Declaration of 1984, by which China guarantees rule of law and a capitalist economy in the territory for 50 years. No GA action taken. | |
| Jamaica | Independent, 6 August 1962. (Respecting the Cayman Islands, see, below, this appendix,B.1). | 1750 (XV) |

## A. TERRITORIES LISTED IN GA RES 66(I) (*Continued*)

| **Administering Authority and NSG Territory** | **Comments** | **GA res** |
|---|---|---|
| Kenya (Colony and Protectorate) | Independent, 12 December 1963. | 1976 (XVIII) |
| Leeward Islands (incl. Antigua and Barbuda; | Associated States under West Indies Act 1967. | A/Res/36/26 |
| St. Kitts; Nevis-Anguilla; | Antigua and Barbuda: independent, | A/Res/38/18 |
| Montserrat; British Virgin Islands) | 1 November 1981. | A/Res/39/11 |
| | St. Kitts and Nevis: independent, 19 September 1983 | |
| | (Respecting Anguilla, the British Virgin Islands, and Montserrat, see, below, this appendix, B.1). | A/Res/52/77<br>A/Res/52/77 |
| Malayan Union | Independent as Malaya 31 August 1957; later Federation of Malaysia, 16 September 1963. | 1134 (XI) |
| Malta | UK ceased transmission 1949; resumed after constitution revoked in 1959. Independent 21 September 1964. | 1950 (XVIII)<br>Admission by consensus 1 Dec 1964 |
| Mauritius | Independent 12 May 1968. | 2232 (XXI) |
| Nigeria | Independent 1 October 1960. | 1492 (XV) |
| North Borneo (Sabah) | State within Federation of Malaysia, 16 September 1963. | No res. See *UN Ybk*, 1963, 41–4 |
| Northern Rhodesia | Part of Federation of Rhodesia and Nyasaland (1954–63). Independent as Zambia, 24 October 1964. | Admission by consensus 1 Dec 1964 |
| Nyasaland | Part of Federation of Rhodesia and Nyasaland (1954–63). Independent as Malawi, 6 July 1964. | Admission by consensus 1 Dec 1964 |
| Oman. Previously Sultanate of Muscat and Oman in special treaty relations with UK | Independence disputed between UK and UN (1963–70); admitted to UN in 1971. | 2754 (XXVI) |
| St Helena | Crown Colony since 1834. Remains dependent.[4] | |
| St Lucia | Associated State under West Indies Act. See note for Dominica. Independent 22 February 1979. | A/Res/34/1 |
| St Vincent | Associated State (1969) under West Indies Act. See note for Dominica. Independent 27 October 1979. | A/Res/35/1 |

[4] A/AC.109/2004/9, para 4; GA res 59/134/A-B, 10 Dec 2004; A/59/478.

## A. TERRITORIES LISTED IN GA RES 66(I) (*Continued*)

| **Administering Authority and NSG Territory** | **Comments** | **GA res** |
|---|---|---|
| Sarawak | Claimed by North Borneo (Sabah).[5] Incorporated into Federation of Malaysia, 16 September 1963. | No res. See *UN Ybk* 1963, 41–4. |
| Seychelles | Independent, 29 June 1976. | 3287 (XXIX) |
| Sierra Leone | Independent, 27 April 1961. | 1623 (XVI) |
| Singapore | Became part of Federation of Malaysia, 16 September 1965. Independent, 9 August 1965. | 2019 (XX) |
| Swaziland | Former High Commission Territory. Independent 6 August 1968. | 2063 (XX) 2134 (XXI) |
| Trinidad and Tobago | Independent, 31 August 1962. | 1751 (XVII) |
| Uganda Protectorate | Independent, 9 October 1962. | 1758 (XVII) |
| Western Pacific High Commission Territories: | | 3288 (XXIX) |
| British Solomon Islands | Solomon Islands: Independent, 7 July 1978 | A/Res/33/1 |
| Gilbert and Ellice Island Colony[6] | Ellice Island: Separate British colony of Tuvalu in 1975; Independent as Tuvalu, 1 October 1978. | A/Res/55/1 |
| | Gilbert Islands: Independent as Kiribati, 12 July 1979. | A/Res/54/1 |
| Pitcairn Island | Pitcairn Island: remains dependent. | |
| Zanzibar Protectorate | Independent 9 December 1963. On 26 April 1964 became part of United Republic of Tanzania (together with Tanganyika). | 1975 (XVIII) |
| ***United States*** | | |
| Alaska | Incorporated as 49th State of USA, 31 January 1959. | 1469 (XIV) |
| American Samoa | Unorganized, unincorporated US territory. | 2069 (XX) A/Res/49/47 A/Res/52/77 |
| Guam | Organized, unincorporated US territory. | 2069 (XX) A/Res/52/77 A/Res/49/46 |
| Hawaii | Incorporated as 50th state, 21 August 1959 | 1469 (XIV) |
| Panama Canal zone | 'Leased' to US by Panama. After objection, | |

[5] See *Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Application by the Philippines for Permission to Intervene, ICJ Rep 2001 p 575, 580, 604 (paras 7, 84).

[6] Administratively separated, January 1976, resulting in separate Gilbert Islands territory and Tuvalu. See (1975) 80 *RGDIP* 7; GA 1165–7; GA Consensus, 32/407, 28 November 1977.

## A. TERRITORIES LISTED IN GA RES 66(I) (*Continued*)

| Administering Authority and NSG Territory | Comments | GA res |
|---|---|---|
| | US ceased transmitting information.[7] Transfer to Panama, 30 December 1999. | |
| Puerto Rico | In association with US via 'Commonwealth status', with an assurance of full independence if desired, effective 25 July 1952. In a non-binding Plebiscite 13 December 1998, voted against any change in current status as a Commonwealth of the US. | 748 (VIII) |
| US Virgin Islands | Organized, unincorporated US territory. | 2069 (XX)<br>A/Res/52/77<br>A/Res/49/46 |

## B. OTHER NON-SELF-GOVERNING TERRITORIES

### 1. Territories not listed in GA res 66(1) but Treated as Non-Self-Governing

| Administering Authority and NSG Territory | Comments | GA res |
|---|---|---|
| ***Australia*** | | |
| Cocos (Keeling Islands) | Transferred from Straits Settlement in 1955; subsequently reported on separately.[8] Remains dependent. | A/Res/39/30 |
| ***France*** | | |
| Comoro Archipelago | Reported on until 1957. Independent 6 July 1975. (Respecting Mayotte, see next entry). | 3385 (XXX) |
| Mayotte | Constituent island of Comoro Archipelago, but remained a French dependency after Comoran independence, notwithstanding resolutions of General Assembly affirming sovereignty of Comoros over the island. Remains dependent. | A/Res/49/18 |

[7] On negotiations over the Zone see 13 ILM 390; Simpson (1975) 5 *Georgia JICL* 195–215; (1978) 82 *RGDIP* 278–82. For the Panama Canal Treaties see (1977) 16 ILM 1021. The Treaty recognized Panamanian sovereignty over the Zone (Arts I(2), III(1), VII(I)), and provided for the termination of US control over the canal in 1999 (Art II).

[8] Cf Australian Senate, Standing Committee on Foreign Affairs and Defence, *United Nations Involvement with Australia's Territories* (Canberra, 1975), 61–7. Christmas Island, which was transferred in a similar manner in 1957, has not been reported on: ibid, 108–11.

## B. OTHER NON-SELF-GOVERNING TERRITORIES (*Continued*)

| Administering Authority and NSG Territory | Comments | GA res |
|---|---|---|
| ***United Kingdom and France*** | | |
| New Hebrides | Condominium: not listed in res 66(I); Independent as Vanuatu, 30 July 1980. | 3290 (XXIX) A/Res/36/1 |
| ***United Kingdom*** | | |
| Anguilla | Seceded from St. Kitts and Nevis 11 July 1967,[9] remains dependent. | |
| British Virgin Islands | Incorporated into Federation of the Leeward Islands in 1872; separately administered colony in 1956; remains dependent.[10] | |
| British Indian Ocean and Territory | 4 groups of islands detached from Mauritius Seychelles in 1965; 3 returned to Seychelles after independence. 1 group (including Diego Garcia) remains dependent but is not reported on.[11] | 3430 (XXX) A/Res/52/44 |
| Cayman Islands | Administered by UK authorities in Jamaica after 1863; separately administered since adoption of constitution in 1959; remains dependent.[12] | |
| Montserrat | Incorporated into Federation of the Leeward Islands in 1872; rejected associated statehood in 1967; remains dependent.[13] | |
| Pitcairn Island | Formerly part of Western Pacific High Commission Territories. Following independence of other constituents thereof, Pitcairn Island remained dependent. Still a UK dependency.[14] | |
| Turks & Caicos Islands | Governed by UK as dependency of Jamaica, 1874–1959; became separate UK colony administered from Bahamas in 1962. Did not become independent with Bahamas. Remains a UK dependency.[15] | |

[9] A/AC.109/2004/10, paras 2–4. [10] A/AC.109/2004/3, para 2.

[11] See *Keesing's* 1976, 27620A, 27852B, 27871A. Only the Chagos Archipelago now remains of the Territory: in view of Mauritius' apparent acceptance of the position, its status as a Chapter XI territory must be considered doubtful. [12] A/AC.109/2004/15, para 3.

[13] See Fergus, *Montserrat: History of a Caribbean Colony* (1994), 100–4, 211–17.

[14] See generally A/AC.109/2004/2, paras 1–18. [15] A/AC.109/2004/16, para 2.

## 2. Territories Subsequently Determined to be Non-Self-Governing

| Administering Authority and NSG Territory | Comments | GA res |
|---|---|---|
| *Portugal* | | |
| Cape Verde Archipelago | Independent 5 July 1975.[16] | 3363 (XXX) |
| Portuguese Guinea (Guinea Bissau) | Declared independence 26 September1973; Recognized by Portugal 10 September 1974. | 3061 (XXVIII) |
| São Tomé Principe and Dependencies | Independent 12 July 1975.[17] | 3364 (XXX) |
| São João Batista de Ajudá | United with Dahomey 1961. | No express approval; but cf *UN Ybk* 1961, 420, & res 1699 (XVI) |
| Angola including the enclave of Cabinda | Independent 11 November 1975. Civil war with foreign intervention.[18] | |
| Mozambique | Independent 25 June 1975 pursuant to Agreement of 7 September 1974 between FRELIMO and Portugal.[19] | 3365 (XXX) |
| Goa and Dependencies (called the state of India) | Annexed by India, 18 December 1961. Union Territory. | No UN Action |
| Macau and Dependencies[20] | Sino-Portuguese Joint Declaration signed April 1987; China resumed sovereignty 20 December 1999. Macau Special administrative region instituted. | |
| Portuguese Timor | Invaded by Indonesia 7 December 1975. Assembly and Council resolutions demanded self-determination and Indonesian withdrawal. Inhabitants chose independence in referendum under UN auspices, 30 August 1999. Independence and UN admission (UNTAET) after period of interim UN administration. | E.g., GA res 3485 (XXX) SC res 1236 (1999) SC res 1272 (1999) GA res 55/3 |

[16] See 13 ILM 1244.
[17] 14 ILM 39.
[18] (1975) 79 *RGDIP* 1098–101; (1976) 80 *RGDIP* 555–74; (1977) 81 *RGDIP* 240–7.
[19] Ibid 1179–81; 13 ILM 1467. [20] See note for Hong Kong.

## 2. Territories Subsequently Determined to be Non-Self-Governing (*Continued*)

| **Administering Authority and NSG Territory** | **Comments** | **GA res** |
|---|---|---|
| ***Spain*** | | |
| Equatorial Guinea (Fernando Poo, Rio Muni) | Elections in 1968 under UN Supervision. Independent as Guinea, 12 October 1968. | 2384 (XXIII) |
| Ifni | Province of Spain claimed by Morocco. Agreement in principle 10 October 1967, on practical implementation of self-determination between Spain and Morocco, approved by GA. | 2354 (XXII) |
| Spanish Sahara | Spanish colony claimed by Morocco and Mauritania; partition agreement noted. Referendum on final status originally scheduled for January 1992 under the auspices of the UN not yet held. | 3458 (XXX) A/B |
| ***United Kingdom*** | | |
| Southern Rhodesia | Declared a Chapter IX Territory in 1962. UDI by minority government, 1965: rejected by UN. Unrecognized. Independent under majority rule (as Zimbabwe), 18 April 1980. | 1747 (XVI) 1755 (XVII) GA res S-11/1 (11th spec sess) |

# APPENDIX 4

# Consideration by the International Law Commission of the Topic of Statehood

Note: In 1996 an ILC Working Group undertook further consideration of its long-term project of work against the background of a 'general scheme' of the field (reproduced in the Commission's Report: A/51/10, *ILC Ybk* 1996, vol II(2), Annex II). The following paper was produced for the Working Group and is reproduced here with the kind permission of the Commission's Secretary, Mr Vaclav Mikulka. The topics finally proposed by the Working Group did not include issues pertaining to statehood or recognition: ibid, para 249.

## INTERNATIONAL LAW COMMISSION

## PLANNING GROUP

## WORKING GROUP ON THE LONG-TERM PROGRAMME OF WORK

## ANNEX 2

### Outline of Issues on the Topic of Statehood

**Introduction**

1. The topic of Recognition of States and Governments was listed as a possible topic for the Commission from the very beginning, in 1949, but was not taken up because of its difficulty and the political implications of recognition. Related topics proposed at different stages but not selected for codification included

Subjects of international law (1949),
Obligations of international law in relation to the law of States (1949),
Independence and sovereignty of States (1962), and
Position of States in international law (1971).

2. As a legal institution, recognition of governments has greatly declined in significance, and should be sharply distinguished from issues of statehood as such. The existence of stable government as an aspect of an initial claim to statehood is another matter, and would be understood as included in the topic.

3. Recognition of States raises questions of a different order from changes of government within an existing State. It also raises two classes of questions having a different character. On the one hand there is the question whether a new State has come into existence so as to qualify to be treated as a full member of the international community, e.g. in the context of admission to the United Nations. On the other hand there is the question of the decision by other States to extend formal recognition, which is generally regarded as a decision to be made by each existing State acting for its own reasons and in the light of its own policies. The latter decision—to recognise or not—is plainly not appropriate for 'codification or progressive development'; it is intensely political and apparently discretionary in character, and the range of factors that may be taken into account does not appear to be limited to considerations directly related to the statehood of the entity concerned. Recognition is also associated as a prerequisite or co-requisite with the opening of full diplomatic relations, which is clearly understood to be a matter for agreement between the States concerned.

4. By contrast, the question whether an entity qualifies for recognition as a State is a question of a general character, separate from the particular policies of particular States. It is also a question on which existing materials give inadequate guidance. For example, Article 1 of the Montevideo Convention on the Rights and Duties of States of 1933, which is frequently cited, is inadequate in its formulation and of course takes no account of subsequent practice. There has been a great deal of such practice, especially since 1945.

5. Accordingly there is a case for considering whether the Commission might not propose to the General Assembly the preparation of a declaratory instrument (not in treaty form) setting out the intrinsic factors relevant to the decision whether an entity qualifies to be treated as a State and, eventually, a full member of the international community, and having full regard to modern State practice. Such an instrument might take the form of a General Assembly resolution, or alternatively the Assembly might take note of the Commission's own conclusion in the matter. The title of such an instrument might be, for example, 'Factors to be taken into account in determining whether an entity which claims to be a State qualifies to be treated as such'.

6. The following outline of a study along these lines is very tentatively suggested:

**Preliminary outline**

1. The distinction between the material criteria for statehood and recognition of statehood

2. Matters excluded from the scope of the study:

(a) Recognition;
(b) Succession of governments;
(c) The range of legal consequences of statehood;
(d) The consequences of recognition of states in national courts.

3. Principles of international law relevant to the question whether an entity claiming to be a State is entitled to be regarded as such

Note: This central section would review the (sometimes conflicting) considerations relevant to the question whether an entity is entitled to be treated as a State. Such considerations derive from the existing principles of modern international law, and include respect for the principles of the Charter, and in particular the principles of self-determination and territorial integrity of states, non-use of force in international relations in accordance with the Charter, non-intervention in internal affairs, including internal armed conflict, respect for fundamental principles of human rights and humanitarian law on the part of all entities concerned, etc. It is however undesirable to anticipate the results of the review of these principles, including the questions of their interaction.

4. Modalities of the emergence of an entity as a new State

5. [Possibly] Position of third States in relation to situations in which a new State is emerging

JRC
26 June 1996

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# *Index*


Abkhazia 403
Åland Islands 24, 58–9, 108–12, 245, 383, 531, 536–7, 626, 657, 658
Abyssinia, *see* Ethiopia
Aden (Protectorate and Colony) (*see also* South Yemen, People's Republic of) 287, 301, 335
Afars and Isaas, French Territory of (*see also* British Somaliland; Djibouti; Italian Somaliland; Somaliland) 610, 622
Afghanistan 73, 151, 261, 324, 327, 653, 694
African Union 194
Alaska 47
Albania 50, 81, 140, 408, 447, 510, 511–2, 514, 524, 532, 544, 702–3
Alexandrowicz, Charles 12, 260, 266, 299, 697–8
Algeciras, Act of (1906) 285, 294–5, 307, 510, 513, 538–9
Algeria 262, 304, 385, 387, 639, 698
American Samoa 634, 635, 636
Ammoun, Fouad 165, 267, 639
Andorra 43, 52, 76, 197, 254, 316
Angola 137, 181, 386
Anguilla 388, 631, 634, 635, 701
Anjouan (*see also* Mayotte; Comoros, Republic of) 403, 646
*Anschluss* (*see also* Austria) 520, 669–70, 702
Antarctica 43
Antigua and Barbuda 630
Anzilotti, Dionisio 14, 45, 64, 65–6, 239, 240, 283, 538
Aragon 7, 10
Arangio-Ruiz, Gaetano 225, 229
Argentina 125, 178, 229, 608
Armenia 177, 391, 395, 512, 531, 701
Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)
  art 4 480, 488
  art 8 63
  art 10 659
  art 11 63
  arts 14, 15 481
  arts 16, 17, 18 63, 481
  arts 19–24 481
  art 25 481, 704–5
  art 26 101, 481
  arts 27–32 481
  art 33 44, 481, 495
  arts 34–7 481
  art 40 101, 168
  art 41 168
  art 48 597, 663, 704–5
  art 50(1)(d) 101
  art 57 495
Aruba (*see* Netherlands Antilles)
Associated States 625–33
  generally 492, 625–32
  specific examples of 83, 185, 293, 318, 473, 492, 610, 623, 626, 747, 748, 751
  International Court of Justice, access to 192
  international status of 632–3
Australia (*see also* Dominions) 101, 152, 267, 272, 304, 336, 370–2, 484, 486, 500, 561–2, 604
  Constitution of 1900 371–2
  disputes involving 168–72, 192, 597, 598–600, 617
  Dominion status 249–50, 352, 358–9, 362–4
  Foreign Corporations (Application of Laws) Act 1989 203
  recognition practice 19, 168–70, 172, 617
  *terra nullius* and 265–6
  Trusteeship and 567
Austria 14, 33, 54, 97, 106, 234, 262, 327, 382, 483, 508, 519, 520–1, 549, 702–3
  continuity (1918–20) 94
  continuity (1936–55) 73, 93
  independence in Customs Union 63–6
  non-extinction (1936) 520
  re-establishment (1946–55) 669–70
  responsibility of League of Nations for 63–4
  status under Dual Monarchy 70, 675
Austria–Hungary 70, 261, 276, 285, 483, 509, 516, 714
Autonomous zones 323–7
Azerbaijan 86, 391, 395, 403, 512, 531

Bahamas 728, 749
Bahrain 291, 310, 312, 321, 666
Balfour Declaration (1917) 422–3, 428–30, 435, 578
Balfour Declaration (1926) 358, 361–2, 364, 366
Baltic States (*see also* Estonia; Latvia; Lithuania) 34, 51, 80, 97, 99, 140, 177, 337, 393, 394, 416, 439, 531, 689, 691, 703

Bangladesh 126, 140, 141, 143, 145, 146, 158, 176, 180, 181, 191, 375, 386, 387, 390, 391, 393, 415
Bantustans 159, 336, 338, 340–45
  origin of policy 338–40
  denationalization through 340–1
  dissolution 345–8
  in Namibia 340, 341
  in South Africa 97, 105, 155, 338–48
  non-recognition of 47, 341–5
Barbados 728, 749
Barotse Kingdom 263
Basutoland 749
Bechuanaland (*see also* Botswana) 287
Belarus 45, 66, 152, 178, 179, 367, 391, 395, 489, 546
Belgian Congo (*see also* Zaire; Congo, Free State of) 56
Belgium 26, 42, 47, 103, 201, 304, 375, 382, 383, 487, 500, 506, 516, 517, 535, 542, 543, 566, 604
  'Belgian thesis' 607
  independence of the Congo 56–8, 659
  personal union of Congo Free State with 276–7
  recognition practice 152
  secession from the Netherlands 375, 382, 506, 542–4
Belize (*see also* British Honduras) 20, 49, 180, 624, 666
  claim of Guatemala to 637, 638, 641
  recognition of 665
Belligerency
  of protectorates 316–7
  recognition of 380–2, 387, 406, 418–20, 659
Belligerent occupation
  and continuity of statehood 73, 74–6, 453, 534, 688–9, 701, 704
  status of entities formed under 74–6, 88, 89, 132, 148
Benin 624
Berlin (1945–1990) vi, 459, 460, 461
Berlin Conference (1885) 504
Berlin Congress (1878) 263–4, 276, 277, 299–300, 301, 307, 513
Bermuda 634, 635, 636
Bessarabia 509, 513, 517, 518, 522, 535
Bhutan 141, 289
Biafra 128, 330, 375, 403, 406, 419
Boer Republic 257, 275–6
Bohemia and Moravia (*see also* Czechoslovakia) 691
Bolivia 728
Bonaire (*see* Netherlands Antilles)
Bophuthatswana (*see also* Bantustans) 47, 134, 338, 342, 343, 345, 346, 347, 348
Borneo 191, 261, 640
Bosnia and Herzegovina (*see also* Yugoslavia) 25, 34, 82, 93, 95, 101, 106, 133, 134, 157, 180, 189, 216, 236, 391, 395, 398, 399, 400, 403, 406, 407, 487, 490, 491, 492, 508, 528, 529, 530, 544, 600, 662, 663, 694, 708, 711
Botswana 328, 348
Bowett, Derek 126
Brazil 382
Brčko 529
Brierly, James 38, 64
British Cameroons 336, 585
British Commonwealth 352
  devolution within 358–72
British Dominions 36
British East India Company 289
British Empire (*see also* Dominions) 358–72
British Guyana 731, 749
British Honduras (*see also* Belize) 220, 302, 638
British India (*see also* Hyderabad; India; Indian Native States; Pakistan) 45, 306, 322, 366–8
British Indian Ocean Territory (*see also* Chagos Archipelago; Diego Garcia) 125, 303, 337, 646
British Somaliland (*see also* Afars and Isaas, French Territory of; Italian Somaliland; Somali Republic; Somalia; Somaliland) 90
British Togoland 742
British Virgin Islands 634, 635, 636
Brownlie, Ian v, ix, 25, 26, 29, 42, 131, 208–9, 476, 623, 654, 704
Brunei 261, 287, 297, 298, 319, 320
Brunei Darussalam 298
Buenos Ayres 377
Bukhara 261
Bulgaria 285, 316, 350, 354, 508
Bull, Hedley vi
Burkina Faso 201
Burma (*see also* Myanmar) 261, 320, 322, 332, 368, 403
Burundi 59, 336
Byelorussia, (*see* Belarus)

Cabinda 755
Calabar, Old 311–4, 702
Cambodia 73, 95, 151, 261, 474, 526, 527, 600
Cameroon, Republic of (*see also* British Cameroons; French Cameroons) 299, 311, 312, 328, 584, 585, 661
Canada (*see also* Dominions) 152, 272, 279, 351, 484, 486, 487, 500, 558
  'patriation' of constitution 68

and Newfoundland 691, 701
as a Dominion 249–50, 352, 353, 357, 358–65, 369, 371, 482
indigenous peoples and 279
*Quebec secession* case 119–20, 389, 411–2
recognition practice of 220
Cape Verde Islands 386, 729
Carelia, Eastern 42
Cassese, Antonio 120, 136, 646
Castile 7, 10
Cayman Islands 634, 635, 636
Central African Republic 747
Ceylon 261, 320, 322, 368
Chad 50, 152, 201, 328
Chagos Archipelago (*see also* British Indian Ocean Territory; Diego Garcia) 337
Chanak Incident 364
Chandernagore (*see* French Establishments in India)
Charney, Jonathan 32, 385
Charpentier, Jean 97
Charter of the United Nations (*see also* United Nations) 157, 170, 172, 504, 523, 545, 551, 677
art 1 639
art 1(2) 112, 114
art 2(4) 6, 131–47, 147
art 2(7) 304
art 3 177
art 4 174, 179–80, 190, 192
art 11 405
art 11(2) 175
art 17 550
art 17(2) 405, 557
art 23(1) 705
art 24 164
art 25 164
art 32 129, 175, 190–1, 385
art 33 220
art 35 326
art 35(2) 175, 190–1, 323
art 39 405, 522
art 42 552
art 51 131, 475
art 55 112, 114, 639
art 73 116–7, 603–6, 608, 611–3, 621
art 73(b) 114, 621
art 73(c) 621, 631
art 73(e) 117–8, 607–11, 622, 627, 746
art 74 606–7, 611
art 76(b) 114, 116, 566, 584
art 77(2) 117
art 77(1)(c) 117, 589, 600
art 78 601, 611
art 79 581
art 80 428–9, 436, 441–2
art 81 494
art 82 581, 590
art 85 590
art 85(1) 581
art 87(b) 574
art 93(1) 191
art 93(2) 175, 191–2
art 105 494
art 108 601
Chapter VI 527
Chapter VII 160, 162, 190, 403, 405, 494, 527, 557–8, 560, 563, 666, 689
Chapter IX 606
Chapter XI 113, 116–8, 125, 127, 129, 142, 169, 249, 373, 390, 573, 603, 604–5, 606–12, 622, 624, 626, 632–4, 637, 642, 644–6, 750
Chapter XII 113, 117, 390, 560, 566, 591, 600, 604, 611–2, 614, 622
Chapter XIII 116, 560, 566, 600, 622
Chechnya 149, 330, 375, 403, 408, 409, 410,
Chile 229, 729
China (*see also* Hong Kong; Manchuria; Taiwan; Tibet) 15, 60, 78, 112, 159, 180, 188, 198, 251, 253, 260, 261, 277, 280, 289, 324, 325, 386, 403, 424, 449, 451, 468, 469, 474, 477, 478, 652
'one China' policy 207, 209–10, 217
indigenous peoples 280–1
Anti-Secession Law (2005) 218
as a 'divided State' 477
Civil War 199, 211
early relations with European States 92, 261
Joint Declaration on Hong Kong 246–8, 642
recognition practice 473, 526
State continuity 679, 701
territorial concessions in 70, 245, 260–1
territorial integrity of 71, 75, 133, 210, 248–9
UN representation 182, 200–1, 203, 451, 729
Christmas Island 336
Ciskei (*see also* Bantustans) 338, 340, 342, 346, 347
Civil war, laws of war and 419, 420–1
CNMI (*see* Northern Mariana Islands, Commonwealth of the)
Cocos (Keeling) Islands 336
Colombia 377, 654
Colonial Declaration (GA res 1514 (XV)) 113, 138–9, 604, 610, 621, 623, 638, 639–40

Colonial enclaves 137–8, 147, 337–8, 348, 637–8, 643, 646–7
Colonial protectorates (*see also* Protectorates) 299–303
Commencement of States 651–66
  acquisition of territory by new States xi, 16, 48, 464, 664–5
  and 'illegal entities' 657–64
  and claims to territory 49, 665–6
  ARSIWA, art 10 659
  Bosnia and Herzegovina 662–4
  Convention on Succession of States with respect to Treaties (1978), art 8 659–60
  Czechoslovakia 665
  Dominions 658
  Eritrea 654–5
  generally 651–2
  in international fora 653–7
  in municipal courts 652–3
  Namibia 656
  States *'in statu nascendi'* 658–64
Comoro Archipelago 193, 610
Comoros, Republic of 403, 418, 490, 645
Concert of Europe 259, 506, 510, 512–3, 515, 547–8, 549
Condominium 209, 453–4, 529, 609, 738
Confederate States of America 381
Confederation of North American States (1778–87) 653
Confederations of States 94, 254, 263, 340, 422, 480–1, 483–90, 439, 506, 719
Congo, Belgian 404
Congo, Democratic Republic of 42, 56, 57, 58, 91, 180, 403, 701, 722
Congo, Free State of 257, 276–7
Congo, Republic of 56, 344, 389
Congress of Vienna (1815) 234, 505–6, 543–4, 547
  Final Act of 505–6, 542
Cook Islands 192, 492, 629, 630, 631, 633
Costa Rica 201, 220
Côte d'Ivoire 729
  recognition of Biafra by 406
Covenant of the League of Nations (*see also* League of Nations)
  art 1(2) 176–7
  art 4 545
  art 5 545
  art 16(4) 587
  art 22 116, 422, 425–6, 428–9, 436, 441, 519, 533–4, 566, 568–70, 597, 574–5, 579, 587–8, 604–6
Cracow, Free City of 234, 235, 505
Crete 71, 285, 354–7, 509–10, 513
Criteria for statehood 37–173, 718
  and continuity of State personality vi, x, 670–1, 703–4
  and principle of effectiveness vi, x, 37–95
  and principles of legality 96–173
  and *sui generis* entities 196–254
  and treaty stipulations 157, 545–6
  and unions of States 479–81
  *Apartheid* and the Bantustans 338–48
  capacity to enter into relations with other States 61–2, 155
  civilization 92
  claim to statehood 156
  defined territory x, 46–52, 185, 664–6
  Democracy 150–5, 333
  government 55–61, 91–2, 701
  human rights 148–55
  illegal use of force and 131–48, 211, 703–5
  independence x, 62–9, 344, 382–3, 457–8
  legal order 93–5
  Montevideo formula 41, 45–62, 97, 218, 343, 436–41, 758
  nature of 44–5
  non-recognition and 157–73
  permanence x, 91–1
  permanent population x, 52–5
  recognition x, 93, 219–21
  self-determination 128–31
  sovereignty 89, 718
  willingness and ability to observe international law x, 91–2
Croatia (*see also* Yugoslavia) 50, 79, 80, 83, 134, 189, 391, 396, 397, 406, 407, 529, 544, 545, 556, 557, 709, 711
Crown (British) 76, 260, 274, 278, 299, 302, 323, 351–52, 360, 362, 365, 369, 371, 482, 487
Cuba 72, 180, 642
Curaçao (*see* Netherlands Antilles)
Cyprus 18, 28, 68, 69, 82, 89, 95, 106, 133, 143, 144, 145, 146, 147, 198, 216, 241–4, 288, 327, 334, 337, 403, 478, 490
Czech Republic 391, 402, 447, 706
Czechoslovakia (*see also* Bohemia and Moravia; Czech Republic; Slovakia) 21, 73, 74, 97, 140, 191, 336, 402, 416, 447, 531, 532, 665, 702, 703, 706, 717
  dissolution of 336, 700
Czech State 691

Dahomey (*see* Benin)
Danube, European Commission of 14–5, 42, 514–5
Danzig, Free City of vi, 31, 95, 181, 198, 233–44, 253, 291, 519, 534, 549
Dayton Agreement (*see* General Framework Agreement for Peace in Bosnia and Herzegovina)
de Castro, Federico 165, 167, 639
Declaration on Principles of International Law 1975 ('Friendly Relations Declaration') 118–21
  'safeguard clause' 118–21
Decolonization (*see* Non-Self-Governing Territories)
Democracy (*see under* Criteria for statehood)
Democratic People's Republic of Vietnam (*see* Vietnam, Democratic People's Republic)
Democratic Republic of Korea (*see* Korea, Democratic Republic of)
Denmark 178, 262, 276
Devine, Dermott 131
Devolution 329, 330–73
Devolution agreements 659–64
Diego Garcia (*see also* British Indian Ocean Territory; Chagos Archipelago) 337
Dillard, Hardy Cross 42, 123, 165–6, 168, 267, 602, 640
Dispositive regimes 535–9
Divided States 449–478
  Germany 452–66
  Korea 466–72
  Vietnam 472–7
  China 477
Djibouti (*see also* Afars and Isaas French Territory of) 610, 623
Dominica (*see also* West Indies Associated States) 630
Dominican Republic 201, 604
Dominions (*see also* Australia; Canada; Irish Free State; New Zealand; Newfoundland; South Africa) 44, 71, 88, 176, 178, 217, 238, 249, 254, 285, 330, 350, 351, 352, 353, 358–72, 658
Dugard, John 139, 161, 180, 184, 192–3, 340, 342
Dutch East Indies (*see* Indonesia; East Indonesia)
Duursma, Jorri 193, 197, 221, 225, 230

East Indonesia 191
East Pubjab 403
East Timor (*see also* Timor-Leste) 98, 99, 101, 103, 113, 159, 168, 169, 170, 171, 193, 236, 560, 561, 562, 600, 617, 622, 647, 649, 704
Eastern Slavonia 50, 529, 556–7
Ecuador 469, 590, 730
Egypt (*see also* United Arab Republic) 287, 314, 372, 425, 489, 517, 540, 577, 717
El Salvador 201, 220
Enclaves (*see also* Colonial Enclaves) 138, 144, 172, 337–8, 348, 463, 614–6, 618, 637, 638, 646–7, 696
England 10, 379, 482, 676, 680
Equatorial Guinea 328
*erga omnes* obligations
  and illegal territorial situations 164, 170, 536
  ARSIWA and 663
  general legal personality as 30
  identity and continuity and 672
  international dispositive settlements as creating 535
  relation to peremptory norms 101, 103, 158
  temporal jurisdiction and 663
Eritrea 54, 126, 375, 391, 402, 416, 554, 625, 654, 655
Estonia (*see also* Baltic States) 34, 51, 177, 391, 394, 531, 689, 704
Ethiopia 54, 97, 140, 262, 311, 402, 413, 414, 519, 625, 654, 655, 694, 702, 703
European Communities 30, 293, 461, 496–8
  recognition practice of 396–401, 689
Extinction of States (*see also* Identity and Continuity of States)
  and illegal annexation 702–3
  and prescription 703–5
  and reversion to sovereignty 703
  and use of force 702–3
  Baltic States 703
  generally 700–1
  in League of Nations practice 701
  in period 1935–1945 702
  list of extinct States 716
  of Papal States 702
  of pre-1945 Germany 716
  of Czech and Slovak Federal Republic 706–7
  of German Democratic Republic 705
  of SFRY 707–14
  of Yemen 705–6

'Failed States' 59, 567, 600, 719–23
Falkland Islands 125, 608, 624, 634, 635, 637, 644
Faroe Islands 278, 404

Fawcett, James Edmund Sanford 77–8, 127, 130–1, 148, 352, 360, 370, 611
Federated States of Micronesia (*see* Micronesia, Federated States of)
Federation of Rhodesia and Nyasaland 370
Federations of States 483–9
Fernando Póo (*see* Equatorial Guinea)
Fez, Treaty of (1912) 295
Fiji 92, 110, 333, 334
Finland 24, 108, 245, 531, 536, 537, 546
  and Treaty of Paris (1856) 536
  establishment in 1917–1918 24, 58, 59, 108, 110, 111
  puppet government in ( 1939–1940) 81
  status before 1917 24, 59
Fiume, Free City of 447, 519, 534
Foreign Jurisdiction Acts (UK) 292, 299
Foreign Corporations Act (UK) 18, 95, 202
Foreign Corporations (Application of Laws) Act (Australia) 18
Former Yugoslav Republic of Macedonia (*see* Macedonia)
Formosa (*see* Taiwan)
France (*see also* French Union) 14, 72, 75–6, 83, 162, 180, 192, 231, 233, 237, 261–3, 272, 285, 303–5, 307–8, 314, 327, 334, 337, 354, 373, 385, 452, 517, 522, 533, 566, 576, 652, 684
  and League Mandates 334, 533–4, 570, 576–7
  and Vietnam 385, 472–6
  Chapter XI territories 610, 622, 623, 645–6
  disputes involving 303–4, 305–7
  government-in-exile, status of 81
  recognition practice 152, 275, 276, 422, 472–3
  relation to Monaco 292–3, 517
  relations with non-European States 263
  reservation to ICCPR 121
  Vichy government 81, 86
Franck, Thomas 46, 624
French Caledonia (*see* New Caledonia)
French Cameroons 743
French Equatorial Africa 747
French Establishments in India 624
French Guiana 623, 748
French Indochina 299, 472
French Polynesia 623, 748
French Republic 9
French Somaliland (*see* Afars and Isaas, French Territory of)
French Togoland 742
French Union 373, 472
Friendly Relations Declaration (*see* Declaration on Principles of International Law 1975)
Frowein, Jochen 674
FSM (*see* Micronesia, Federated States of)
FYROM (*see* Macedonia) 21

Gabon 730
  recognition of Biafra by 406
Gagauzia 403
Gambia 201, 287, 490
  confederation with Senegal
Gaza Strip 171, 420–1, 425, 443–5
Gdansk: (*see* Danzig)
General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement) (Bosnia and Herzegovina-Croatia-FRY) 25, 106, 400, 407, 491, 528–9, 600
Geneva Conventions of 1949 82, 156–7, 233, 420, 440, 470, 476, 495, 721
Georgia 33, 83, 177, 180, 337, 391, 395, 403, 512
German Confederation (1815–66) 506
German Democratic Republic 93, 159, 181, 191, 194, 343, 388, 452, 455–8, 461–6, 523–5, 673–5 681–4, 686–7, 700, 705, 717
  recognition of 456
Germany 475, 478, 487, 521, 522, 533
  unification of 449–50, 452, 519, 523–4, 526, 673, 681, 687–8, 705, 716
Germany, Federal Republic of 44, 182, 194, 452, 454, 458, 460–3, 465, 466, 522–5, 668, 673–5, 681–4, 686–8, 705, 716
Germany (pre-1945) 47, 51, 58–9, 63, 65, 69, 79, 88, 226, 233, 238, 241, 263, 276, 285, 311–2, 359, 453, 464, 466, 519, 534, 537, 566, 587, 661, 685–8, 705, 716
  recognition of continuity of 452–4, 464–6
Ghana 280
Gibraltar 348, 624, 634–5, 637, 643
Gilbert & Ellice Islands (*see also* Kiribati, Tuvalu) 336, 608
Goa 132, 138, 140, 540, 624
Gold Coast 287
Government
  as criterion for statehood 55–61
  distinguished from State 33–5, 230–1
  insurgents, liability of 658–9
  lawfuness of 107, 388
  local *de facto* governments 79–80, 91, 219
  minority governments 333–5
  municipal illegality of 69
  recognition of 150–2, 155

Government, change of and State continuity 34–5, 672–3
Governments-in-exile 34, 79, 81, 208, 211, 232, 477, 520, 522, 688–94
Great Britain: (*see* England; United Kingdom)
Greece 20, 21, 25, 67, 68, 81, 143, 145, 186, 242, 244, 354, 355, 375, 381, 382, 398, 506, 509, 510, 511, 513, 540, 541, 542
Greenland 267, 268, 278, 404
Grenada (*see also* West Indies Associated States) 73, 154, 630
Gros, André 165, 267, 493, 591, 639
Grotius, Hugo 6–7, 286, 696, 717
Guam 334, 628, 634, 635
Guantanamo Bay vi, 303, 642
Guiana (*see* British Guiana, French Guiana, Guyana, Surinam)
Guinea (*see also* Equatorial Guinea) 180, 332
Guinea-Bissau 97, 128, 137, 139, 181, 330, 375, 386, 387, 439, 440
Gulf of Tonkin incident 476
Guatemala 20, 180, 201
  claim respecting Belize 49, 608
Guyana (*see also* British Guiana, French Guiana, Surinam) 188

habeas corpus vi, 302–3, 642–3
Haiti 149, 154, 201
  recognition of Biafra by 406
Hanover 482
Hart, Herbert 85
Hawaii 263
Hedjaz (*see* Saudi Arabia)
Higgins, Rosalyn 45, 51, 57, 86, 125, 175, 179–80, 190, 192, 243, 406
Honduras 201
Holy See (*see also* Vatican City) x, 45, 198, 201, 221–33
Hobbes, Thomas 6–8, 9, 715
Hong Kong 17, 198, 212, 214, 215, 218, 221, 244–52, 327, 624, 642
Huber, Max 46, 59, 62, 109, 110, 259, 263, 267, 286–7, 299, 305–6, 315, 484, 485–6, 539
Human rights (*see under* Criteria for Statehood)
Hungary (*see also* Austria-Hungary) 73, 87, 100, 483, 534, 549
Hyderabad 74, 140, 175, 190, 191, 323, 715

Iceland 42, 496
Identity and Continuity of States
  and 'Germany as a Whole' 681–6
  and post-1990 Germany 673–5
  and pre-1945 Germany 681–8
  and reversion to sovereignty 695–9
  Austria–Hungary 675
  belligerent occupation 688–90
  and *erga omnes* obligations 672
  general principles of 35–6, 667–72
  government, changes in 678–80
  international status, changes in 680–8
  multiple changes, problem of 669
  Ottoman Empire 676
  Poland (1939–1946) 692–5
  population, changes in 678
  *Postliminium* 696–7
  Russia (1917–1990) 676–8
  Secession and 421
  specific rules for 669–72
  territorial changes, and 673–8
  United Kingdom 675–6
Ifni 624
Immunity, sovereign 17, 205, 206, 214, 219, 223, 232–3, 295, 296–7, 476, 485, 494, 630, 655, 684–5
  in protected States 76–8
  in protectorates 77–8, 318, 322
Independence (*see also* puppet States and governments) 62–89
  actual independence 72–88
  agency relationships 70
  belligerent occupation 73, 74–6
  constitutional restrictions upon freedom of action 67–9
  date of: *see* under names of particular States, Appendix 1 (pp 727–40).
  formal independence 67–72
  illegal intervention 73–4
  international organization membership 70–1
  joint organs 70
  military bases or other territorial concessions 70
  municipal illegality and 69
  political alliances and 73
  purported grants of 83–5, 334, 338, 472–3, 582
  relation between formal and actual independence 88–9
  size of the State and 72
  treaty obligations and 69–70
India (*see also* British India) 47, 132, 137, 141, 176, 188, 289, 299, 320, 359, 360, 364, 386, 391, 403
  and UN membership 178, 323
  independence of 368, 615
  recognition practice of 38
  State continuity 179, 658, 680–1, 697–8, 708

Indian Native States 72, 260, 284, 287, 319, 322, 323
Indigenous Communities 260–74
statehood of 260–3
legal personality of 263–7
status of treaties of cession with 268–70
grants of territory to private persons by 270
discovery and 271
intertemporal law and 271
Indochina (*see* French Indochina)
Indonesia 98, 169, 170, 171, 172, 175, 188, 190, 375, 384, 555, 556, 560, 561, 617, 640, 646
International Court of Justice
acquisition of territory and 99, 258, 464
and non-recognition 168–73
associated States and 192
boundaries\frontiers and 50, 327–8
legal persons and 88, 295–6, 444, 262, 510, 536, 574
parties to Statute 175, 183, 188–9, 191–2, 262, 711
peremptory norms and 101, 103–4, 133
self-determination and 116, 258, 439, 566–7, 616–8, 647
International Covenant of Economic, Social and Cultural Rights 112, 125, 491
International Covenant of Civil and Political Rights 112–3, 120–1, 125, 157, 248, 491
International dispositive powers 504–64
Act of Algeciras (1906) 510
and Albania 510–12, 532
and Belgium 542–4
and Bosnia and Herzegovina 528–30
and Cambodia 526–8
and Crete 509–10
and Danzig 534
and East Timor 560–2
and Eastern Slavonia, Barnja and Western Sirmium 556–7
and Fiume 534–5
and Germany 523–6
and 'Germany as a whole' 524–5
and Greece 540–2
and Iraq 562–3
and Italian colonies 554–5
and Jerusalem 563–4
and Kosovo 557–60
and Luxembourg 535
and Memel 534
and Namibia 556
and Poland 522
and Trieste 553
and West Irian 555–6
collective recognition as mechanism for exercise of 539–46
Concert of Europe 506, 547–8
Conference of Berlin (1884–5) 509
Congress of Berlin (1878) 508–9
Congress of Vienna (1815) 505–6
generally 504–5, 549–51, 564
groups of States, delegated to 531–5
in nineteenth century 505–16
in peace settlements since 1945 523–30
in the World War I settlements 516–8
in the World War II settlements 518–22
international organizations, as exercised by 546–64
League of Nations, exercise by 548–9
Mandate system and 533–4
multilateral treaties, exercised through 505–39
principle of consent and 512–6
Soviet Union, new States in and 544
treaties of peace and 505–35
Treaty of Paris (1856) 506–8
United Nations, exercise by 549–64
Yugoslavia, new States in and 544
International Law Commission
and acquisition of territory 390
and devolution agreements 660
and nationality 54
and reversion to sovereignty 698–9
and secession 659
and State succession with respect to protectorates 308–9
and the dispositive/personal distinction 539
attitude to Statehood questions 31, 38–9, 40, 45, 757–9
State responsibility: *see* Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)
State succession and 308
States/international organizations, distinction 495
International legal personality ix
and non-self-governing territories 617–9
concept of 28–31, 718–9
continuity of 24, 35–6, 132, 360, 395, 399, 658–9, 672–90, 703, 705, 708, 711–2, 716
of Associated States 632–3
of dependent States 282–3, 287, 294, 297, 312, 312–4, 349–50
of devolving entities 353, 363, 366, 719
of federal States 255, 480
of indigenous communities 60, 259–60, 263–9
of international organizations 30
of Mandates 574

of European Communities and European Union 497–8
of United Nations 494
of trust territories 574
International organizations
creation of States in 501–647
International protectorates (*see also* Protectorates) 294–9
International responsibility (*see also* Articles on Responsibility of States for International Wrongful Acts)
claims respecting particular States 133, 134, 206, 414, 461, 465, 520, 630, 632, 671, 677, 683, 685, 687
of administering States under the League Covenant and UN Charter 566, 581, 600
of federal States 480, 487–8
of insurgent movements 380–1
of metropolitan States during process of devolution 349–50, 353
of protectorates 285, 287, 298, 305, 314–5
of States establishing 'puppet States' 63, 75, 81–3, 87
of States generally 44, 130–4, 157, 168, 259, 270, 659, 661
of United Nations 448, 527–8, 553, 589
Internationalized territories 233–6
*Inter se* doctrine 216–7, 351, 360
Intertemporal Law 271, 259, 312, 427–8, 644–5
Intervention
'failed States' and 721–3
against revolutions and rebellions 326, 378, 548
and independence of States 74, 87–8
and UN Charter Chapter XI 612
by groups of States 375, 510, 514, 543
illegal 73–4, 133–4
in support of 'puppet' States 80, 132, 693
in support of democratic institutions 155
in support of insurgents/secessionists 139–43, 382, 386–9, 421, 506–7, 508
on humanitarian grounds 57, 149–50, 403–4
putative right of in treaty 71–2, 243
Ionian Islands 285, 299, 310
Iran (*see also* Azerbaijan) 86, 316, 324, 327, 679
Iraq 34, 73, 74, 150, 161, 403, 562, 563, 569, 575, 612, 652, 689
Ireland 43, 49, 278, 331, 352
Free State 359, 360, 362, 363
Israel 26, 48, 161, 171, 172, 180, 194, 257, 277, 374, 375, 421, 432, 433, 434, 436, 437, 442, 443, 445, 578, 687
recognition of (*see also* Palestine) 425–8, 430
Italian Somaliland (*see also* Afars and Isaas, French Territory of; British Somaliland; Somalia) 90, 413, 554, 572
Italy 79, 81, 91, 152, 221, 224, 232, 235, 236, 237, 263, 276, 285, 293, 311, 316, 327, 511, 517, 520, 522, 534, 554, 558, 566
and Trieste dispute 235–6
colonies in Africa 263, 311, 519–20, 522, 554
continuity of with Sardinia–Piedmont 668, 673
Ivory Coast (*see* Côte d'Ivoire)

Jackson, Robert 720
Jamaica 188
Japan 75, 192, 199, 200, 207, 208, 209, 220, 237, 261, 468, 469, 517, 520, 522, 558, 580, 589, 590, 652
Japanese Peace Treaty (1951) 199
Jellinek, Georg 19
Jennings, Ivor 124
Jennings, Robert Yewdall ix, 664, 666, 672
Jerusalem 30, 161, 242, 421, 424, 443, 444, 563, 564
Jessup, Philip 48, 359, 433, 540, 580, 587, 594
Jordan 144, 423, 424, 425, 432, 575, 577, 578, 579
*jus cogens* (*see* peremptory norms)

Karen and Shan States 403
Karikal (*see* French Establishments in India)
Kashmir 403
Katanga 375, 389, 390, 403, 404
Kazakhstan 330, 391, 395
Keith, Arthur Berriedale 350
Kelantan 72, 77, 296
Kelsen, Hans 18, 21, 46, 93–4, 453, 651
Kenya 287
Khiva 261
Kingsbury, Benedict 278–9
Kirghizstan (*See* Kyrgyzstan)
Kiribati (*See also* Gilbert & Ellice Islands) 185, 201
Knights of Malta: *see* Order of St. John of Jerusalem
Kokhand 261
Korea 180, 261, 308, 449, 450, 451, 466, 467, 468, 469, 471, 475, 476, 477, 520
Korea, Democratic People's Republic 26, 182, 191, 261, 375, 388, 467, 469, 470, 471, 472, 477
Korea, Republic of 27, 60, 181, 182, 191, 261, 467, 468, 470, 471, 472
Korean War 26, 199, 207

Koskenniemi, Martti 689, 703
Kosovo 126, 149, 150, 234, 236, 252, 400, 403, 407, 408, 510, 557, 558, 559, 560, 601, 612,
Kowloon 245, 642
Kreijen, Gerard 720–1
Kunz, Josef Laurenz 221, 480, 484
Kurdistan 403
Kutch, Rann of 306
Kuwait 49, 97, 105, 140, 159, 162, 180, 291, 292, 319, 439, 666, 688, 689, 694, 716
Kyrgyzstan 35, 391, 395

Laos 474
Lateran Treaty (1929) 222–5, 227
Latvia (*see also* Baltic States) 34, 51, 177, 220, 391, 394, 531, 689, 704
Lauterpacht, Eli 132, 321
Lauterpacht, Hersch 4, 7, 14, 15, 17, 20–2, 75, 106–7, 159, 167, 390, 426, 540, 543, 550–1, 588, 593, 653
Laws of war (*see also* Geneva Conventions on the Laws of War) 381, 419, 420, 470
League of Arab States 193
League of Nations (*see also* Covenant of the League of Nations)
  and collective non-recognition 159
  dispositive powers of 517–8, 548–9, 553
  Dominions, membership of 178, 352, 359–1, 370
  admission to membership in 176–8, 183–4, 224–5, 393, 512, 532, 545
  protected States, membership in 318
  revocation of Mandates 84, 430, 575–80, 586–90
  territorial administration and 238–41, 533, 549
Lebanon 73, 83, 85, 157, 333, 334, 570, 575, 576
Leeward Islands (*see also* Anguilla; Antigua and Barbuda; British Virgin Islands; Montserrat; St. Kitts and Nevis; West Indies Associated States) 751
Lesotho 340, 341, 344
Liberia 257, 274–5, 722
Libyan Arab Jamahiriya (Libya) 50, 328, 490, 540, 554
Liechtenstein 21, 52, 100, 177, 184, 192, 233, 290, 316, 496, 512
Ligitan and Sipadan (North Borneo) 296, 624, 752
Lithuania (*see also* Baltic States) 10, 34, 51, 107, 177, 237, 238, 253, 391, 394, 531, 534, 689, 704
Lorimer, James 261
*Lotus* presumption 41–2, 240, 237–8, 494–5, 595
Lowe, Vaughan 562
Luxembourg 506, 535

Macao 212, 214, 215, 218, 244–5, 624, 642
Macedonia (*see also* Yugoslavia) 20, 21, 25, 67, 186, 188, 391, 396, 398, 400, 544
Madagascar 262, 308, 699
Mahe (*see* French Establishments in India)
Malawi (*see also* Nyasaland) 201, 220, 334
Malay States (*see also* Brunei Darussalam; Kelantan) 76, 263, 287, 298, 316
Malaya (*see* Malaysia)
Malaysia 220, 319, 392, 624, 640
Maldives 182, 287, 299, 319
Mali Federation 90
Mali 90
Malta 30, 44, 223, 232, 233, 601
Malvinas (*see* Falkland Islands)
Manchukuo (*see* Manchuria)
Manchuria 75, 78, 105, 132, 140, 156, 160, 657
Mandate system 565–601
  Albania, proposal for 511
  and Dominions 363
  and self-determination 566–7, 574, 578, 596
  'A' Mandates, status 569–70
  breach of mandate, process of determining 588–90
  'C' Mandates, status 568, 570–3
  continuity of personality and 680–1
  creation of 574
  effect of termination of League of Nations 577
  League of Nations supervision 573, 593–4
  legal personality of mandated territories 574
  List of territories under 741–4
  post-independence claims 567, 596–9
  residual sovereignty and 573
  revocation by League of Nations 586–90
  revocation by United Nations organs 591–6
  sovereignty and 568–74
  status of mandated territory in national courts 571–2
  termination of Mandates 567, 574–81
  termination of system 577
  United Nations supervision of 593–4, 596
Mann, Frederick Alexander 266, 455, 457
Mann, Thomas 652
Maratha Empire 261, 698
Marek, Krystyna ix, 79–81, 94–5, 102, 156–7, 483, 665, 670–1, 675, 680, 693–5, 700, 703
Mariana Islands (*see* Northern Mariana Islands, Commonwealth of the)
Marshall Islands (*see also* Micronesia, Federated States of; Northern Mariana Islands,

Commonwealth of the; Trust Territory of the Pacific Islands; Palau) 47, 52, 201, 318, 492, 582, 583, 600
Martens, Fedor 12
Mauritania 49, 639, 666, 698
'Mauritanian entity' 639, 644, 698
Mauritius 184, 336, 337
Mayotte (*see also* Anjouan; Comoros, Republic of) 620, 645
McCorquodale, Robert 324
McNair, Arnold Duncan 42, 159, 197, 263, 307, 504, 505, 537, 571, 574, 580, 593
Memel Territory 233, 236, 237, 238, 240, 253, 323, 519, 534
Mexico 23, 150, 377, 638
Micronesia (*see* Micronesia, Federated States of; Marshall Islands; Northern Mariana Islands, Commonwealth of the; Trust Territory of the Pacific Islands; Palau)
Micronesia, Federated States of (*see also* Marshall Islands; Northern Mariana Islands, Commonwealth of the; Trust Territory of the Pacific Islands; Palau) 47, 318, 492, 567, 582, 583, 600
Micro-States v, 93, 108, 125, 182–5, 193
Mikulka, Václav 757
Military bases 70, 337, 524–5, 642
Moldavia (*see also* Bessarabia; Moldova, Republic of) 507, 735
Moldova, Republic of 83, 180, 391, 395, 403, 507
Monaco 52, 72, 93, 185, 233, 292, 293, 316, 318, 496, 517
Mongolia 86
Monroe Doctrine 378
Montenegro (*see also* Serbia and Montenegro, Yugoslavia) 215, 508, 509, 517, 545, 701
Montserrat 634, 635
Morgenthau, Hans 716
Morocco 159, 192, 254, 262, 263, 267, 285, 294–7, 303–8, 314–7, 332, 372, 490, 510, 517, 538, 539, 637, 639, 641, 644, 646, 658
Mozambique 137, 387
Mushkat, Roda 251
Myanmar (*see also* Burma) 680, 734
Muscat and Oman 49, 318, 321, 325, 326

Nagorny-Kharabakh 403
Namibia 99, 113, 116, 171, 195, 328, 336, 430, 439, 556, 565, 591, 597, 598, 704
  as Chapter XI territory 122–3, 604–5
  bantustans in 340–1, 582
  independence of 439–40, 596, 649, 655–6, 734
  non-recognition of South African administration 157–9, 162–8, 171
  post-independence claims of 597–8
  revocation of Mandate 163, 536, 567, 586–7, 594–5
  SWAPO and observer status 195
  United Nations supervision of 181, 431, 439, 556, 595–6, 655–6
Napoleonic Holland 81
National liberation movements (*see also* Governments-in-exile; Guinea Bissau; Polish National Committee)
  capacity of 444
  recognition of 139, 419
  representation of in UN organs 61–2, 193, 619
Nationality 6, 27
  and State succession 407, 654–5
  and statehood 52–5, 453
  denationalization and the Bantustans 340–1
  in 'A' Class Mandates 31, 43, 570, 571
  in Dominions 361
  in non-self-governing territories 655
  in protected States 286–7, 297, 317
  in *sui generis* entities 223, 229, 240
Native communities (*see* Indigenous communities)
Nauru 52, 185, 192, 193, 201, 565, 597, 598, 599
Necatigil, Zaim 145
Nejd (*see* Saudi Arabia)
Nepal 289, 332
Netherlands 11, 47, 152, 175, 261, 262, 276, 373, 375, 384, 506, 542, 543, 555, 560, 656
Netherlands Antilles 620
Netherlands Union 373
New Caledonia 334, 609, 634, 635
New Guinea (Trust Territory) 567
New Hebrides (*see also* condominium, Vanuatu) 609, 754
New South Wales 43
New Zealand (*see also* Dominions) 92, 152, 249, 263, 265, 266, 268, 272, 290, 334, 358, 362, 372, 598, 629, 630, 631
Newfoundland 358, 359, 360, 370, 701
Nicaragua 40, 69, 154, 201, 220
Niger 734
Niger River 312, 509
Nigeria 220, 287, 299, 302, 311, 312, 313, 328, 403, 584
Niue 192, 492, 631

Non-Self-Governing Territories
ambit in practice of 608–10
and sovereignty 573, 613–5
and non-colonial territories 117–8, 126, 610–2
and self-determination 112–3, 123, 127, 604–5, 612, 613–14, 616–20, 638–43, 645–7
and use of force 139, 616–7
associated statehood and 625–33
claims by third States against 637–47
competence to determine status as 607–8
criteria for 117–8, 606–9
criteria for self-government of 621
definition 606–7
development of in practice 116, 122, 336, 606–12
East Pakistan as 142–3, 145, 393
East Timor as 560
Establishment under Chapter XI 116, 127, 560, 603–5, 607–8
forms of self-government 623–34
legal personality 617–9
list of 635, 746–56
nationality in 655
plebiscites in 620
provision for in UN Charter 603–5
Rhodesia as 129, 369, 608, 611–2
secession of 383–4
status of 613–20
termination of Chapter XI status 138, 249, 621–47
North Borneo (*see* Sabah)
North Korea (*see* Korea, Democratic Republic of)
North Yemen 705
Northern Cyprus (*see* Turkish Republic of Northern Cyprus)
Northern Mariana Islands, Commonwealth of the (*see also* Marshall Islands; Micronesia, Federated States of; Palau; Trust Territory of the Pacific Islands) 334, 337, 492, 567, 582, 583, 628, 633, 655
Northern Rhodesia (*see also* Federation of Rhodesia and Nyasaland) 287
Norway 268, 496
Nyasaland (*see also* Malawi) 370

O'Connell, Daniel Patrick 34–5, 211, 293, 309, 361, 693
Occupied Territories (*see* West Bank; Gaza Strip)
Oman (*see also* Muscat and Oman) 49, 180, 292, 320, 324, 325, 326, 716
Oppenheim, Lassa 3, 15, 19, 115, 222, 253, 261, 283, 696–7
constitutive theory of recognition of 5, 13–4
Order of St John of Jerusalem 30, 231
Orange Free State 275, 276
Organization of African Unity (*see also* African Union) 125, 139, 193, 342, 344, 493, 619
Osimo, Treaty of (1975) 236
Ossetia (*see* South Ossetia)
Ottoman Empire (*see also* Turkey) 9, 260, 261, 285, 287, 350, 354, 355, 356, 372, 375, 422, 428, 506, 507, 513, 514, 566, 676
Outer Mongolia (*see* Mongolia)

Pacific Islands Mandate 580
Pacific Islands Strategic Trusteeship (*see* Trust Territory of the Pacific Islands)
Pakistan 47, 140, 141, 142, 144, 181, 306, 320, 322, 323, 368, 386, 390, 391, 393, 416
Palau (*see also* Marshall Islands; Micronesia, Federated States of; Northern Mariana Islands, Commonwealth of the; Trust Territory of the Pacific Islands) 52, 201, 318, 492, 567, 582, 583, 584, 601, 649, 655
Palestine v, 17, 31, 148, 158, 194, 336, 349, 374–5, 421–30, 432, 433–7, 440–4, 446, 448, 533, 570, 578, 580, 658
recognition of 438–9, 441
Palley, Claire 244, 370
Panama 73, 154, 201, 220, 608, 642
Panama Canal Zone 608, 624, 642
Papua 270, 743
Papua New Guinea (*see also* New Guinea (Trust Territory)) 270, 403
Paraguay 201, 220
Paris Agreements (1973) 474–5
Paris, Treaty of (1856) 509, 514, 536–7
Peace Treaties, dispositions anticipatory of 530–1
Pellet, Alain 195
Peremptory norms
and extinction of States 704
and treaties 100–1, 102, 105–6
concept of 99–102, 457, 704
duty of non-recognition and 158–60
effect on situations other than treaties 102–5, 133, 159, 447
Human rights and democracy, relation to 155
racial non-discrimination as 345
relation to 'obligations *erga omnes*' 101, 103, 158
self-determination as 447, 613

UN Charter art 2(4) as 138, 146
under ARSIWA 104–5, 168
Peru 735
People's Republic of China (*see* China)
Persia (*see* Iran)
Personality (*see* international legal personality)
Petrèn, Sture 114, 123, 165–6, 167, 639, 640
Philippines 33, 81, 220, 227, 229, 350, 372–3, 640, 641
Pitcairn Islands 608, 634, 635
Plebiscites 620
specific cases of 221, 234, 334, 359, 402, 406, 523–4, 549, 581, 584–5, 617, 618, 623, 628, 716, 737, 742, 743, 745
standards for conduct of 620, 647
Pondicherry (*see* French Establishments in India)
Poland 10, 24, 50, 51, 69, 97, 241, 519, 522, 526, 530, 531, 532, 545, 661, 691, 694
and Danzig 236, 238, 239, 240, 318
and Yalta Conference 80
Continuity of after 1918 234
Continuity of after 1945 80, 692, 693, 694, 695
'extinction' in 1939 522, 702
in 1918–1919 19, 24, 530–1, 656–7, 661
third partition of (1795) 505
Polish National Committee 19, 530, 661
Polynesia 624, 748
Portugal (*see also* East Timor; Macao) 10, 47, 101, 169, 170, 171, 261, 262, 276, 370, 386, 560, 566, 568, 604, 608, 609, 614, 615, 616, 617, 697
African colonies 137, 181, 386
Chapter XI territories 169
East Timor and 169–71, 560–1, 608–9, 617
Indian enclaves 47, 138, 614–5, 616
secession from Spain 10–11, 697
secession of Brazil from 382
Portuguese Guinea (*see* Guinea-Bissau)
Portuguese Timor (*see* East Timor; Timor-Leste)
*Postliminium* 696–7
Prescription 58–9, 98–9, 209, 258, 268, 464
preclusion of 540
State extinction and 703–5
Principal Allied and Associated Powers 65, 237, 238, 359, 422, 517, 532, 533–5, 566, 587
Protected States 76–8, 88, 254, 283–94, 295, 297, 298, 299, 303, 305–6, 308–9, 310, 312–3, 314–6, 318–9, 320, 570, 596, 680
Protectorates 282–328
and international organizations 318
and State immunity 318
Belligerency and 316–7
cession of territory of 310–4
continuity of pre- and post-protectorate State 658, 680, 692, 699, 700–1
domestic jurisdiction and 260, 303–4
International legal personality of 272, 510, 596–7
International responsibility of 612, 314–5
legal effects of 197, 239, 303–20, 719
nationality in 317
Opposability of 307
relations between protecting States and 305–7
specific instances of 49, 239, 261, 262, 285, 287–8, 289, 291, 293, 294–5, 296, 297–9, 301, 303, 305–6, 312, 319–20, 466, 472, 517, 608, 632, 699, 646, 692
State succession and 307–10
termination of 318–20
treaty-making power with respect to (*see also* Colonial Protectorates; International Protectorates; Protected States) 314–6
Prussia 14, 47, 234, 261
*Pueblo* incident 471–2
Puerto Rico 226, 334, 610, 626, 627, 628, 631, 633
Puffendorf, Samuel 6–7, 10–2, 286, 376, 378
Puntland (*see also* Somaliland) 414
Puppet States and Governments (*see also* independence, purported grants of) 63, 75, 78–83, 87, 156–7

Qatar 291, 292, 310, 312
Quebec 31, 119, 120, 121, 215, 219, 375, 389, 411, 412

Racial discrimination 155, 333
UN Committee on the Elimination of 410
Rann of Kutch 267, 306, 322
Real Union 229, 482–3
Recognition
and extinction of States 12–28, 710–1
and international organizations 30
and modern international law 17–28
and municipal courts 17–8, 88, 205–6, 342–5, 367–8, 652
and nineteenth century international law 14–6
and the United Nations 184, 189, 192–3, 201, 544, 550, 641
as a subsidiary criterion for statehood 93, 198, 292
as evidence of statehood 19, 88, 198, 223, 295, 446, 653, 695, 718

Recognition (*cont.*)
attempts to codify 38–40, 90, 176, 390, 757–8
Brownlie's view on 'great debate' 26
collective recognition 27–8, 67, 98, 501, 539–46, 505, 550, 704–5
conditional recognition 35, 84, 106, 441–2, 473, 506, 545–6, 576
constitutive theory 4–5, 19–22, 131, 382, 438, 540, 672
*de facto* recognition 79, 141, 367–8, 377, 380, 383, 464, 520
*de jure* recognition 51, 181, 377–9, 511–2
declaratory theory 4, 22–6, 130–1
discretion and v–vi, 18–9, 20, 25, 38–9, 115, 381
early view of 12–6
EC guidelines on 67, 153, 397–401, 544–5
effect of positivist theory on 12, 13–5
Articles on Responsibility of States for Internationally Wrongful Acts and 168
International Court of Justice and 168–73
invalid acts of 21, 23–5
Lauterpacht's view on 4, 22, 540
legal effects of ix, 24, 26–8, 381, 704–5
metropolitan recognition of secession 12, 376–9
non-recognition 23, 26, 74, 105, 132–3, 146, 148, 157–73, 341–5, 702
of belligerency 380–2, 406, 418–9, 653, 659
of insurgency 11, 380–2, 419
of national liberation movements 619
of States and governments distinguished 33–5, 80, 150, 151–2, 155
Premature 57, 332, 376–7, 387, 401, 416, 427, 433–4, 439, 543
relevance to problems of identity and continuity 670–2, 680, 683, 688–9, 692, 694–5, 702–3, 704, 718
reparative effect of 189, 223, 293, 295, 666, 695, 718
retrospectivity of 652–3, 653–4, 657, 664–5
secession and 376–82, 384–9, 406, 409, 416–7
State practice in respect of (*see* this index under names of particular States) 4
third party recognition of secession 12, 24, 379, 382–3, 377, 393–4
whether duty to recognize 12, 22, 25
Reisman, W Michael 596–7, 612
Representation in international affairs 283, 290–1, 309, 358, 361, 366
Republic of Korea (*see* Korea, Republic of)
Republic of Vietnam (*see* Vietnam, Republic of)
Republika Srpska 403, 406, 407, 487, 491, 528
Residual sovereignty vi, 66, 323–37, 573, 664
Reunion 623, 748
Reversion of sovereignty 293, 695–9
Revolution
relation to secession 10–1, 109–10, 330, 369, 375, 421, 540–2
effect on State continuity 34, 69, 80, 94, 110, 678–80, 698
recognition and legal status of revolutionary change of government 10–1, 12, 150, 347, 380, 388, 390, 652–3
Rhodes, Cecil 30
Rhodesia (Zimbabwe) 44, 97, 99, 105, 128, 130, 158, 159, 160, 176, 266, 270, 302, 358, 388, 389, 390, 540, 609, 611, 704
and non-recognition 129
as Chapter XI territory 609, 611
devolution and 368–71
effect of non-recognition 130, 369
grant of independence to 334, 335
legality of UDI 129
status before UDI 129
whether a State 129
Rhodesia and Nyasaland (*see* Federation of Rhodesia and Nyasaland)
Rio Muni (*see* Equatorial Guinea)
Romania 504, 507, 508, 509, 513, 514, 515, 517, 518, 522, 545
Ruanda (*see* Rwanda)
Ruanda-Urundi (*see also* Rwanda) 533
Russia 14, 51, 69, 83, 151, 177, 234, 261, 276, 286, 327, 507, 508, 513, 518, 537, 541
conduct in Chechnya of 409–10
devolution in 500
Revolution and Civil War 34, 58, 531, 694
Security Council seat of 678
State continuity through rise and fall of Soviet Union 395, 671, 676–8, 679, 703, 705, 708
Russian Federation 83, 149, 188, 227, 335, 395, 403, 408–10, 559, 676–7, 703, 705
Rwanda 59, 336, 533

Saar Territory 233–4, 519
Sabah 296, 624, 640–1
Saint Germain-en-Laye, Treaty of (1919) 63–4, 517, 531, 535, 538, 549, 665, 675, 728
Saint Helena 634–5
Saint Kitts and Nevis (*see also* West Indies Associated States) 52, 201, 630
Saint Lucia (*see also* West Indies Associated States) 630

Saint Vincent and the Grenadines (*see also* West Indies Associated States) 201, 631
Salmon, Jean 140, 143, 363
Salò, Italian Republic of 91
Samoa (*see also* American Samoa; Western Samoa) 92, 263, 290
Samos 71, 316, 354, 355, 357
San Marino 52, 191–2, 232, 289, 293, 316, 496
São João Batista de Ajudà 624
São Tomé Príncipe and Dependencies 47, 201
São Tomé e Príncipe 47
Schachter, Oscar 19
Schwarzenberger, Georg 30, 100, 365–6
Sipadan (*see* Ligitan and Sipadan)
Sarawak 624
Sardinia-Piedmont 14
Saudi Arabia 180, 292
Scotland 10, 676
Secession (*see also* Åland Islands; Algeria; Angola; Baltic States; Bangladesh; Biafra; Cape Verde Islands; Chechnya; Eritrea; Guinea-Bissau; Katanga; Mozambique; Quebec; Republika Srpska; Revolution; Rhodesia; Senegal; Singapore; Somaliland; Vietnam, Democratic Republic of) 93, 374–448
  as a method of State creation 375–6
  and recognition 376–82
  tests of independence in secessionary situations 382–3
  under modern international law 383–418
  of a self-determination unit 384–8
  in violation of self-determination 388
  outside the colonial context 388–418
  post-1945 cases 415–8
  belligerency, insurgency and 418–9
  international humanitarian law and 420–1
  military and civil aid to seceding regimes 421
  continuity and commencement and 421
  Palestine, Israel and 421–48
Seidl-Hohenveldern, Ignaz 524
Self-determination vi
  and laws of war 421
  and statehood 107–31, 333–8
  and territorial integrity 335–8
  and use of force 134–48
  as a peremptory norm 99–102
  before 1945 108–12
  colonial enclaves and 614–6, 618, 637–8, 640, 643, 646–7
  consequences of 121–2
  criteria for 'peoples' 115–27
  Taiwan and 220–1
  generally 107–31
  Mandate system and 116, 566–7, 574, 578, 596
  non-self-governing territories and 116
  secession in violation of 388
  Trusteeship system and 566–7, 574, 582–3, 585–6, 596
  UN Charter and 112–14
  units of, identification 115–21, 124–7
Senegal 90, 201, 220, 332, 391, 392, 416, 489
  confederation with Gambia 490
Serb-Croat-Slovene State (*see* Yugoslavia)
Serbia (*see also* Serbia and Montenegro; Yugoslavia) 82, 408, 487, 507, 508, 509, 513, 517, 528, 545
Serbia and Montenegro 25, 35, 101, 186, 252, 253, 391, 396, 397, 398, 401, 403, 408, 663, 707, 708, 711, 713, 714
Sèvres, Treaty of (1920) 422–3, 429, 533
SFRY (*see* Yugoslavia)
Seychelles 193
Shanghai, International Settlement of 234
Shaw, Malcolm 619, 677–8
Sierra Leone 331, 332
Sikkim 299, 716
Simla Convention (1914) 325
Sind 306
Singapore 205, 391, 416, 529, 624
Sirmium (*see also* Eastern Slavonia) 529, 556–7
Skubiszewski, Krzysztof 171, 236, 525
Slavonia (*see* Eastern Slavonia)
Slovakia (*see also* Czechoslovakia) 100, 391, 392, 402, 447, 706
  as 'puppet State' in World War II 79
  independence of 706
Slovenia (*see also* Yugoslavia) 50, 189, 396, 397, 544
Smuts, Jan 176, 363, 586
Socialist Federal Republic of Yugoslavia (*see* Yugoslavia)
Socialist Republic of Vietnam (*see* Vietnam, Socialist Republic of)
Solomon Islands 152, 201, 301, 303, 490, 608, 701, 722
Somali Republic (*see also* Afars and Isaas, French Territory of; British Somaliland; Italian Somaliland; Somaliland) 90, 413
Somalia 92, 180, 223, 311, 403, 415, 694, 701, 722
Somaliland (*see also* Puntland) 287, 301, 375, 403, 412, 413, 414, 415, 417, 418, 653, 715,

South Africa (*see also* Dominions; Namibia) 47, 148, 157, 162, 163, 164, 165, 166, 188, 250, 276, 338, 339, 340, 341, 343, 344, 345, 346, 347, 348, 352, 358, 359, 362, 365, 371, 536, 556, 568, 593, 598, 604, 611, 612
and administration of Namibia 163, 164, 165
and Chapter XI of the Charter 611–2
*Apartheid* in 47, 148–9, 155, 371, 611
bantustans in 47, 98, 105, 128, 338–48
devolution of 338–48
status as a Dominion 358–62
UN General Assembly and 188, 344, 591–4
South African Republic 262, 275, 276, 310, 690
South Korea (*see* Korea, Republic of)
South Ossetia 403
South Sudan 403
South West Africa (*see also* Namibia) v, 103, 122, 197, 301, 336, 340, 345, 359, 365, 441, 537, 540, 550, 556, 567, 568, 571, 580, 587, 589, 591, 593, 597
South Yemen, People's Republic of 180, 301, 320, 705
Southern Rhodesia (*see* Rhodesia) 44, 128
Sovereign Order of Malta (*see* Order of St. John of Jerusalem)
Sovereignty
and devolution 349, 351–3, 355
and international dispositive powers 510, 520, 531–2
and Mandated and Trust territories 573, 587–8, 596
and Non-self-governing territories 613–5, 616, 642–4
as criterion for statehood 8–9, 89
concept of 12, 32–3, 34, 56, 62, 65
different meanings of distinguished 8–9, 13, 32–3
reversion to 524, 695–8
Soviet Union (*see also* Armenia; Azerbaijan; Belarus; Estonia; Georgia; Kazakhstan; Kyrgyzstan; Latvia; Lithuania; Moldavia; Russia; Tajikistan; Turkmenistan; Ukraine; Uzbekistan) 30, 80, 152, 178, 180, 191, 199, 226, 238, 327, 336, 337, 364, 386, 408, 416, 424, 426, 455, 456, 457, 461, 462, 464, 465, 467, 468, 522, 523, 526, 546, 583, 683, 684, 689, 693
continuity with Russian Empire 395, 671, 676–8, 679, 703, 705, 708
independence of constituent republics from 395, 544
recognition of 364
recognition practice of 386, 394, 473
United Nations membership and 178–9, 180, 319, 467, 473, 489
Spain 11, 76, 103, 228, 261, 262, 276, 295, 297, 316, 375, 419, 500, 604, 608, 643, 697
and Chapter XI territories 605, 608–9
and Gibraltar 643
and South American provinces 11
Civil War in 34, 419
devolution in 500
Western Sahara and 262, 266, 267, 480
Spanish Sahara (*see* Western Sahara 480, 639, 698)
Special treaty relations 320–1
Spheres of influence 327–8
Sri Lanka (*see also* Ceylon) 221, 403
Starke, Joseph 665
State immunity (*see* Immunity)
State responsibility (*see* International Responsibility)
State succession (*see also* Identity and Continuity of States; Vienna Convention on Succession of States in Respect of Treaties; Vienna Convention on Succession of States in Respect of State Archives, Property and Debts) 35–6
and dispositive treaties 105–6
and illegal use of force 131–2
and passing of state property 348–9
and reversion to sovereignty 697–9
and socialist revolutions 679–80
devolution agreements 659–61
distinguished from State personality 35–6, 659, 675–6
divided States and 451–2, 476
Dominions and 360–1
pre-1945 Germany and 466
protectorates and 307–10
unions of States and 481
Vietnam and 476
Statehood (*see also* Commencement of States; Criteria for Statehood; Devolution; Extinction of States; Identity and Continuity of States; Protectorates; Recognition; Secession; Self-determination; State Succession) 3–16
and acquisition of territory 664–5
and devolution 330–73
and functional interpretation 174–6
and government 33–5
and illegal use of force x, 73–4
and *Lotus* presumption 41–2, 240, 237–8, 494–5, 595
and original occupation 274–7

and secession 375–448
and self-determination 107–31
and United Nations Charter 174–95
as a claim of right 156, 211
as a legal concept v–vi, xii, 5, 31, 97–173
as considered by the ILC 757–9
basic concepts 28–36
Bantustans and 338–48
consequences of 37–40
constituent States of federations 483–9
'Dependent States' 282–328
dispute settlement 190–1
distinguished from State succession 35–6
divided States 449–78
early doctrine of 5–12
early attempts to define 37–45
equality of xii
indigenous communities and 260–3
matter of fact not law 3, 4–6
Micro-States 182–6
'modes' of creation 255–81
non-recognition of 157–73
of international protectorates 294–9
United Nations membership and 179–90, 328
Statute of Westminster (1931) 353–4, 362–3, 365–6, 368, 372
Steck, Johann von 12–3
Stern, Brigitte 667, 671
Strategic Trust Territory (*see* Trust Territory of the Pacific Islands)
Sudan 180, 392, 403
Sudan, Anglo-Egyptian 450, 737
Surinam 623, 737
Suzerainty 66, 276, 285, 287–8, 321–5, 352, 372, 507–9, 511, 541–2
Swaziland 201, 220, 261, 287, 301, 310, 320, 333, 340
Sweden 58, 108, 262, 276, 537
Switzerland 11, 33, 152, 192, 194, 231, 290, 316, 440, 484, 487, 491, 496, 498
federation in 484, 487, 491
League of Nations and 185
neutrality of 185–6, 506
United Nations membership of 185–6, 193
Syria (*see also* United Arab Republic) 83, 84, 85, 157, 333, 334, 489, 533, 570, 575, 576, 671, 690, 717

Tadzhikstan 35, 391, 395
Taft, William Howard 23, 388
Taft, William Howard IV 562, 721
Taiwan (*see also* China) x, 4, 18, 44, 60, 71, 93, 97, 99, 133, 156, 159, 197–221, 251, 253, 257, 277, 477, 522, 535
Taiwan Relations Act (US) 18, 201–3, 205–6
Tamil-Elam 403
Tanganyika 566, 715
(*see also* Tanzania; Zanzibar) vi
Tangier, International City of 234
Tanzania, United Republic of 90, 188, 623, 680, 715, 737
recognition of Biafra by 406
Tatarstan 327
*Terra nullius* 197, 209, 258, 265–8, 277, 278, 379, 426, 432, 433, 568–9
Territorial integrity 39, 70, 113, 118, 183, 211, 234, 244, 249, 385, 404, 408, 511–2
and reversion 645
and secession 390, 409–10, 411–2, 417, 560
and self-determination 118–21, 136–7, 243–4, 384, 418, 640
application to Trust and Non-self-governing territories 511–2, 637–40, 645–6
grants of independence disruptive of 252, 335–8, 341–5, 581–2
guarantees of under treaty and other international instrument 65, 86, 108, 131, 135, 143, 146, 234, 242–3, 324–5, 400, 404, 407, 474, 512, 517, 527, 558
Territory (*see also* criteria for statehood; *terra nullius*)
acquisition of by new State 274–7, 277–81
loss of and State continuity 80, 99, 231, 391, 673, 675–6
of protected State, cession of 310–4
*terra derelicta* 349, 469
Thailand 220, 261, 526
Tibet (*see also* China) 324, 325, 327, 387, 403, 716
Timor-Leste (*see* East Timor) 562
Togo 533
Togoland 742
Tokelau Islands 634, 635
Tomuschat, Christian 504
Tonga 185, 263, 290, 295
Transjordan (*see* Jordan)
Transkei (*see also* Bantustans) vi, 155, 338, 339, 340, 342, 343, 344, 346
Transvaal 262, 275
Trianon, Treaty of (1920) 516–7, 531, 534–5, 549, 665, 675
Trieste, Free City of 235, 236, 447, 519, 522, 553
Trinidad and Tobago 738, 752
TRNC (*see* Turkish Republic of Northern Cyprus)
Trucial States of Oman 287, 291, 292

Trust Territory of the Pacific Islands (*see also* Marshall Islands; Micronesia, Federated States of; Northern Mariana Islands, Commonwealth of the; Palau) 336, 337, 530, 565, 567, 581, 599, 655
Trusteeship system 565–601
  and self-determination 566–7, 574, 582–3, 585–6, 596
  continuity of personality and 680–1
  creation of 566
  future of 600–1
  international responsibility under 597
  legal effects of termination 584–6
  legal interests in 584–5
  legal personality of trust territories 574
  list of territories 742–5
  post-independence claims 596–600
  revocation of 586, 590–1
  scope of 600–1
  'sovereignty' and 568, 570, 572–3
  strategic trust territory 567, 599–600
  termination of Trusteeship status 574–5, 581–6
Tunisia 262, 297, 304, 308, 658
Turkey 144, 145, 146, 162, 242, 243, 276, 285, 288, 316, 327, 350, 365, 383, 403, 507, 508, 513, 532, 541
  and Concept of Europe 14–5, 497
  and Cyprus 81, 143
  and Treaty of Paris (1856) 14–5
  continuity with Ottoman Empire 676
  devolution in Ottoman Empire 372–3, 507–8, 532
  recognition of TRNC 161
  renunciation of territories to League Mandate 423–4, 429, 534, 587
  responsibility for acts of Turkish Cypriot administration 81–2, 133
Turania 68
Turkish Federated State of Cyprus (*see* Turkish Republic of Northern Cyprus)
Turkish Republic of Northern Cyprus 18, 81, 97, 133, 144, 145, 147, 159, 161, 403
Turkistan 68
Turkmenistan 391, 395
Turks & Caicos Islands 634, 635
Tuvalu (*see also* Gilbert & Ellice Islands) 52, 185, 201

Uganda 287
Ukraine 45, 66, 177, 178, 367, 391, 395, 489, 531, 546
Umozurike, U Oji 336, 420
Union of Soviet Socialist Republics (*see* Soviet Union)
Unions of States 479–500
  and international organizations 492–9
  Associated States as 492
  confederation 483–9
  European Union 495–9
  federation 483–9
  personal union 10, 229, 276, 480, 482–3, 731
  problems of classification of 479–81
  real union 229, 482–3
  'remedial federations' 490–2
  United Nations Organization 493–5
Unitary States 482, 484–5, 489
  theory of Dominions as 351–3, 335–6
  devolution within 500
United Arab Emirates (*see also* Trucial States of Oman) 180, 291, 333, 485
United Arab Republic (*see also* Egypt; Syria) 90, 188, 485, 489, 690, 706
United Kingdom 14
  and Rhodesia 334–5, 368–71
  and United Nations membership 178
  as administering authority under Chapter XI 129–30, 336, 636
  change of policy respecting recognition of governments 151
  continuity with British Empire 360, 675–6, 682
  creation of 676
  devolution in 500
  disputes involving 49, 125, 567, 584–6, 638
  Foreign Corporations Act (1991) 202
  position on Taiwan 199, 210
  recognition practice of 18, 22, 47, 50, 68, 84, 473, 675, 691
  relation to Dominions 95, 217, 360–6
  retained powers over Associated States 293, 630–1
  rights respecting Hong Kong 246–7
  'sovereignty' of parliament 33
  treaty relations with former colonies 298, 319
United Nations (*see also* Charter of the United Nations)
  admission to membership 179–90
  and Cambodia 526–8
  and East Timor 560–2
  and Eastern Slavonia, Baranja and Western Sirmium 556–6
  and Jerusalem 563–4
  and Korean conflict 60, 182, 199, 467–72
  and Kosovo 557–60
  and Micro-States 182–6
  and Non-self-governing territories 606–12, 621–3

and principle of self-determination 112–14
and sovereignty of Member States 70–1
and termination of Chapter XI status 621–33
and West Irian 336, 555–6, 620
as government of Namibia 181, 431, 439, 556, 595–6, 655–6
competence to make territorial dispositions 549–64
General Assembly status of resolutions 113–4, 551–2, 584–6
international responsibility of 448, 527–8, 553, 589
Iraq 562–3
issues of statehood before 174–95
legal personality of 494
membership of Switzerland 185–6, 193
membership of Vatican 224–5
micro-State issue and 182–6
observer status in 193–5
original membership 177–9
peacekeeping 56–7, 243–4, 405, 527–8
representation of China in 182, 200–1, 203, 451, 729
revocation of Mandates by 591–6
revocation of Trusteeships by 586, 590–1
Security Council status of resolutions 166–8, 552
specialized agencies membership 183–4
statehood considered before organs of 174–95
table of membership 737–9
Trieste and 235, 553
universal membership vi, 182–6, 187
Yugoslavia and 186–9
United States of America
and Commonwealth territories 334, 372–3, 567, 610, 626–8, 632
and Guantanamo Bay vi–vii
and rights of indigenous peoples 264, 268, 273–4
and Trusteeship 581–4, 589, 590–1, 600
and United Nations membership 178, 182–3, 184, 231
as a federation 653
Civil War 167, 380
disputes involving 40, 69–70, 192, 194–5, 262, 295, 488–9, 600
position on Taiwan 199–206, 208–10
recognition practice of 17, 23, 67, 68, 75, 84, 91, 150, 152, 201, 232, 241, 276, 332–3, 377, 425, 433, 473, 438, 512, 540, 544, 576, 693
'Stimson Doctrine' 75
War of Independence 375, 376–7
United States Virgin Islands 43, 634, 635, 636
Upper Volta (*see* Burkina Faso)
Uruguay 154, 738
Use of force, rules relating to:
and Afghanistan 73, 721
and Cyprus 144, 243
and extinction of statehood 131, 689, 721
and Grenada 73, 153–4
and Iraq 73, 74, 562–3, 612, 689
and Kosovo 559
and Kuwait 49, 97, 140, 161–2, 439, 688–9, 716
and Nicaragua 153–4
and Non-self-governing territories 616–7
and Panama 73, 153–4
and self-determination 125, 134–48, 616–7
as criterion for statehood 80–1
as peremptory norm 101, 132, 146–7, 437, 669, 704, 759
boundaries and 221, 450, 471
entities created in violation of x, 131–48, 211
in secession conflicts 384, 410, 619
insurgents, assistance to 138–9, 475
military intervention, in support of self-determination 139–47
State continuity and 140, 439, 688, 692, 694, 716
Uzbekistan (*see also* Soviet Union) 68, 391, 395

Vanuatu (*see also* New Hebrides) 738
Vassal States 321–3
Vatican City (*see also* Holy See) 4, 52, 178, 185, 198, 221–33, 235, 496
Vattel, Emer de 7–9, 11, 273, 376, 697
Venda (*see also* Bantustans) 338, 342, 346
Venezuela 327, 654
Venice, Republic of 7
Versailles, Treaty of (1919) 237–8, 240, 360–1, 363–4, 515–7, 520–1, 531, 533–5, 537, 545, 665, 692, 742–3
Vienna, Congress of (1815) (*see* Congress of Vienna)
Vienna Convention on the Law of Treaties (1969)
art 3 487
arts 34–7 661
arts 40–1 102
art 44 105
art 52 131
art 53 100–2, 131
art 59 102
art 64 155
arts 65–6 101
art 71 105

Vienna Convention on Succession of States in Respect of Treaties (1978) 36, 132, 671
art 2(1)(b) 39
art 8 660
art 15 481, 673
art 16 310
arts 16–33 481
art 34(1) 714
arts 34–5 391
arts 35–8 481
Vienna Convention on Succession of States in Respect of State Archives, Property and Debts (1983) 36, 671
art 11 348
art 14 481
art 15 481
art 16 481, 673
art 17 391, 481, 714
art 18 391, 481, 741
art 27 481, 673
art 28 481
art 29 481
arts 30–1 481, 714
art 37 481, 673
art 38 481
art 39 481
arts 40–1 481, 714
Vietnam 450, 451, 472–3, 475, 477, 526
Vietnam, Democratic People's Republic 19, 60, 181, 191, 194, 375, 385, 387, 472–7
Vietnam, Republic of 60, 75, 83, 180–1, 191, 473–5, 477, 715
Vietnam, Socialist Republic of 73, 181, 220
Virgin Islands (*see* British Virgin Islands, United States Virgin Islands)
Visscher, Charles de 27, 38, 117
Vitoria, Francisco de 7, 267
Vojvodina 408

Waitangi, Treaty of (1840) 265, 268–9, 272
Wallachia 507
'war against terror' vi
Warbrick, Colin 59, 153
Watts, Arthur 672
Wedgwood, Ruth 721
Weeramantry, Christopher 42, 171
West Bank (*see also* Gaza Strip) 171–3, 421, 424–5, 443–4, 578
West Indies Associated States 610, 626
West Irian 336, 555, 646
Western Pacific High Commission territories (*see also* Solomon Islands, Gilbert and Ellice Islands) 754
Western Sahara 113, 116, 117, 123, 605, 616, 619, 620, 624, 634–5, 637, 639, 641, 644, 646–7, 698
Western Samoa 185, 290
Westlake, John 260, 263, 322, 516
Wheaton, Henry 8–9, 13, 55, 265, 380, 480
view on recognition 380
view on original acquisition 265
Wilson, Woodrow 108, 176, 511, 514, 516, 532
Wood, Michael 188, 709
World War II
Settlements 518–22, 311, 535, 553, 744
termination of 452–4
Wright, Quincy 75, 209, 430, 568, 574

Yalta Conference 78, 178
Yanam (*see* French Establishments in India)
Ydit, Meir 234, 236
Yemen (*see also* South Yemen, People's Republic of; North Yemen) 90, 332, 388, 403
unification of 700, 706
Yugoslavia (*see also* Bosnia and Herzegovina; Croatia; Kosovo; Macedonia; Montenegro; Serbia; Serbia and Montenegro; Sirmium; Eastern Slavonia; Slovenia; Vojvodina) 24, 25, 34, 79, 80, 132, 152, 186, 187, 189, 192, 234, 235, 236, 375, 395, 396, 397, 398, 400, 401, 416, 417, 418, 424, 492, 511, 512, 531, 534, 544, 546, 556, 557, 662, 708, 709, 711, 713, 714
dissolution of 24, 25, 67, 186
Federal Republic of 25, 35, 82, 189, 391, 398, 400, 401, 528, 529, 557, 558, 559, 560, 669, 670, 707, 708, 709, 710, 711, 712, 713
Serb-Croat-Slovene State 90
Socialist Federal Republic of 186, 528, 669, 670, 700, 707, 708, 709, 710, 711, 713, 714

Zaire (*see also* Congo, Democratic Republic of) 56
Zambia 188, 739
recognition of Biafra by 406
Zanzibar (*see also* Tanganyika; Tanzania) 90, 262, 287, 297, 299, 308, 715
Zimbabwe (*see also* Rhodesia) v, 333, 402, 739