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The subjects of international law

Legal personality – introduction

In any legal system, certain entities, whether they be individuals or companies, will be regarded as possessing rights and duties enforceable at law.[1] Thus an individual may prosecute or be prosecuted for assault and a company can sue for breach of contract. They are able to do this because the law recognises them as 'legal persons' possessing the capacity to have and to maintain certain rights, and being subject to perform specific duties. Just which persons will be entitled to what rights in what circumstances will depend upon the scope and character of the law. But it is the function of the law to apportion such rights and duties to such entities as it sees fit. Legal personality is crucial. Without it institutions and groups cannot operate, for they need to be able to maintain and enforce claims. In municipal law individuals, limited companies and public corporations are recognised as each possessing a distinct legal personality, the terms of which are circumscribed by the relevant legislation.[2] It is the law which

[1] See e.g. I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford, 2003, part II; J. Crawford, *The Creation of States in International Law*, 2nd edn, Oxford, 2006; D. P. O'Connell, *International Law*, 2nd edn, London, 1970, vol. I; J. W. Verzijl, *International Law in Historical Perspective*, Leiden, 1969, vol. II; O. Lissitzyn, 'Territorial Entities other than Independent States in the Law of Treaties', 125 HR, 1968, p. 5; C. Berezowski, in *Mélanges Offerts à Juraj Andrassy* (ed. Ibler), 1968, p. 31; H. Lauterpacht, *International Law: Collected Papers*, Cambridge, 1975, vol. II, p. 487; C. Rousseau, *Droit International Public*, Paris, 1974, vol. II; N. Mugerwa, 'Subjects of International Law' in *Manual of Public International Law* (ed. M. Sørensen), London, 1968, p. 247; G. Schwarzenberger, *International Law*, 3rd edn, London, 1957, vol. I, p. 89; A. Cassese, *International Law in a Divided World*, Oxford, 1986, chapter 4, and Cassese, *International Law*, 2nd edn, Oxford, 2005, part II; *International Law: Achievements and Prospects* (ed. M. Bedjaoui), Paris, 1991, part 1, title 1; *Oppenheim's International Law* (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992, chapter 2; R. Higgins, *Problems and Process*, Oxford, 1994, chapter 3; L. Henkin, R. Pugh, O. Schachter and H. Smit, *International Law: Cases and Materials*, 3rd edn, St Paul, 1993, chapters 4 and 5, and S. Rosenne, 'The Perplexities of Modern International Law', 291 HR, 2001, chapter VII.

[2] R. Dias, *Jurisprudence*, 5th edn, London, 1985, chapter 12.

will determine the scope and nature of personality. Personality involves the examination of certain concepts within the law such as status, capacity, competence, as well as the nature and extent of particular rights and duties. The status of a particular entity may well be determinative of certain powers and obligations, while capacity will link together the status of a person with particular rights and duties. The whole process operates within the confines of the relevant legal system, which circumscribes personality, its nature and definition. This is especially true in international law. A particular view adopted of the system will invariably reflect upon the question of the identity and nature of international legal persons.[3]

Personality in international law necessitates the consideration of the interrelationship between rights and duties afforded under the international system and capacity to enforce claims. One needs to have close regard to the rules of international law in order to determine the precise nature of the capacity of the entity in question. Certain preliminary issues need to be faced. Does the personality of a particular claimant, for instance, depend upon its possession of the capacity to enforce rights? Indeed, is there any test of the nature of enforcement, or can even the most restrictive form of operation on the international scene be sufficient? One view suggests, for example, that while the quality of responsibility for violation of a rule usually co-exists with the quality of being able to enforce a complaint against a breach in any legal person, it would be useful to consider those possessing one of these qualities as indeed having juridical personality.[4] Other writers, on the other hand, emphasise the crucial role played by the element of enforceability of rights within the international system.[5]

However, a range of factors needs to be carefully examined before it can be determined whether an entity has international personality and, if so, what rights, duties and competences apply in the particular case. Personality is a relative phenomenon varying with the circumstances. One of the distinguishing characteristics of contemporary international law has been the wide range of participants. These include states, international organisations, regional organisations, non-governmental organisations, public companies, private companies and individuals. To these may be added groups engaging in international terrorism. Not all such entities

[3] See, for example, the Soviet view: G. I. Tunkin, *Theory of International Law*, London, 1974.

[4] See e.g. M. Sørensen, 'Principes de Droit International Public', 101 HR, 1960, pp. 5, 127. For a wider definition, see H. Mosler, *The International Society as a Legal Community*, Dordrecht, 1980, p. 32.

[5] See e.g. Verzijl, *International Law*, p. 3.

will constitute legal persons, although they may act with some degree of influence upon the international plane. International personality is participation plus some form of community acceptance. The latter element will be dependent upon many different factors, including the type of personality under question. It may be manifested in many forms and may in certain cases be inferred from practice. It will also reflect a need. Particular branches of international law here are playing a crucial role. Human rights law, the law relating to armed conflicts and international economic law are especially important in generating and reflecting increased participation and personality in international law.

States

Despite the increasing range of actors and participants in the international legal system, states remain by far the most important legal persons and despite the rise of globalisation and all that this entails, states retain their attraction as the primary focus for the social activity of humankind and thus for international law.

Lauterpacht observed that: 'the orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law'.[6] However, it is less clear that in practice this position was maintained. The Holy See (particularly from 1871 to 1929), insurgents and belligerents, international organisations, chartered companies and various territorial entities such as the League of Cities were all at one time or another treated as possessing the capacity to become international persons.[7]

Creation of statehood[8]

The relationship in this area between factual and legal criteria is a crucial shifting one. Whether the birth of a new state is primarily a question of

[6] Lauterpacht, *International Law*, p. 489.

[7] See Verzijl, *International Law*, pp. 17–43, and Lauterpacht, *International Law*, pp. 494–500. See also the *Western Sahara* case, ICJ Reports, 1975, pp. 12, 39; 59 ILR, pp. 30, 56, and *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, Memorandum of the Secretary-General, 1949, A/CN.4/1/Rev.1, p. 24.

[8] See in particular Crawford, *Creation of States*, chapter 2; R. Higgins, *The Development of International Law through the Political Organs of the United Nations*, Oxford, 1963, pp. 11–57; K. Marek, *Identity and Continuity of States in Public International Law*, 2nd edn, Leiden, 1968; M. Whiteman, *Digest of International Law*, Washington, 1963, vol. I, pp. 221–33, 283–476, and Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, p. 407. See also Société Française pour le Droit International, *L'État Souverain*, Paris, 1994; L. Henkin, *International Law: Politics and Values*, Dordrecht, 1995, chapter 1; R. H. Jackson, *Quasi-States: Sovereignty, International Relations and the*

fact or law and how the interaction between the criteria of effectiveness and other relevant legal principles may be reconciled are questions of considerable complexity and significance. Since *terrae nullius* are no longer apparent,[9] the creation of new states in the future, once the decolonisation process is at an end, can only be accomplished as a result of the diminution or disappearance of existing states, and the need for careful regulation thus arises. Recent events such as the break-up of the Soviet Union, the Socialist Federal Republic of Yugoslavia and Czechoslovakia underline this. In addition, the decolonisation movement has stimulated a re-examination of the traditional criteria. Article 1 of the Montevideo Convention on Rights and Duties of States, 1933[10] lays down the most widely accepted formulation of the criteria of statehood in international law. It notes that the state as an international person should possess the following qualifications: '(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states'.

The Arbitration Commission of the European Conference on Yugoslavia[11] in Opinion No. 1 declared that 'the state is commonly defined as a community which consists of a territory and a population subject to an organised political authority' and that 'such a state is characterised by sovereignty'. It was also noted that the form of internal political organisation and constitutional provisions constituted 'mere facts', although it was necessary to take them into account in order to determine the government's sway over the population and the territory.[12]

Such provisions are neither exhaustive nor immutable. As will be seen below, other factors may be relevant, including self-determination and recognition, while the relative weight given to such criteria in particular

Third World, Cambridge, 1990, and A. James, *Sovereign Statehood: The Basis of International Society*, London, 1986.

[9] See, as regards Antarctica, O'Connell, *International Law*, p. 451. See also below, chapter 10, p. 535.

[10] 165 LNTS 19. International law does not require the structure of a state to follow any particular pattern: *Western Sahara* case, ICJ Reports, 1975, pp. 12, 43–4; 59 ILR, pp. 30, 60–1.

[11] Established pursuant to the Declaration of 27 August 1991 of the European Community: see Bull. EC, 7/8 (1991). See generally, M. Craven, 'The EC Arbitration Commission on Yugoslavia', 65 BYIL, 1994, p. 333, and below, p. 210.

[12] 92 ILR, pp. 162, 165. Note that *Oppenheim's International Law*, p. 120, provides that 'a state proper is in existence when a people is settled in a territory under its own sovereign government'.

situations may very well vary. What is clear, however, is that the relevant framework revolves essentially around territorial effectiveness.

The existence of a permanent population[13] is naturally required and there is no specification of a minimum number of inhabitants, as examples such as Nauru and Tuvalu[14] demonstrate. However, one of the issues raised by the Falkland Islands conflict does relate to the question of an acceptable minimum with regard to self-determination issues,[15] and it may be that the matter needs further clarification as there exists a number of small islands awaiting decolonisation.[16]

The need for a defined territory focuses upon the requirement for a particular territorial base upon which to operate. However, there is no necessity in international law for defined and settled boundaries. A state may be recognised as a legal person even though it is involved in a dispute with its neighbours as to the precise demarcation of its frontiers, so long as there is a consistent band of territory which is undeniably controlled by the government of the alleged state. For this reason at least, therefore, the 'State of Palestine' declared in November 1988 at a conference in Algiers cannot be regarded as a valid state. The Palestinian organisations did not control any part of the territory they claim.[17]

Albania prior to the First World War was recognised by many countries even though its borders were in dispute.[18] More recently, Israel has been accepted by the majority of nations as well as the United Nations as a valid state despite the fact that its frontiers have not been finally settled

[13] A nomadic population might not thus count for the purposes of territorial sovereignty, although the International Court in the *Western Sahara* case, ICJ Reports, 1975, pp. 12, 63–5; 59 ILR, pp. 30, 80–2, held that nomadic peoples did have certain rights with regard to the land they traversed.

[14] Populations of some 12,000 and 10,000 respectively: see *Whitaker's Almanack*, London, 2003, pp. 1010 and 1089.

[15] See below, p. 251.

[16] But see, as regards artificial islands, *United States* v. *Ray* 51 ILR, p. 225; *Chierici and Rosa* v. *Ministry of the Merchant Navy and Harbour Office of Rimini* 71 ILR, p. 283, and *Re Duchy of Sealand* 80 ILR, p. 683.

[17] See *Keesing's Record of World Events*, p. 36438 (1989). See also General Assembly resolution 43/77; R. Lapidoth and K. Calvo-Goller, 'Les Éléments Constitutifs de l'État et la Déclaration du Conseil National Palestinien du 15 Novembre 1988', AFDI, 1992, p. 777; J. Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?', 1 EJIL, 1990, p. 307, and Crawford, 'Israel (1948–1949) and Palestine (1998–1999): Two Studies in the Creation of States' in *The Reality of International Law* (eds. G. Goodwin-Gill and S. Talmon), Oxford, 1999, p. 95. See below, p. 246, with regard to the evolution of Palestinian autonomy in the light of the Israel–Palestine Liberation Organisation (PLO) Declaration on Principles.

[18] See e.g. the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 32.

and despite its involvement in hostilities with its Arab neighbours over its existence and territorial delineation.[19] What matters is the presence of a stable community within a certain area, even though its frontiers may be uncertain. Indeed, it is possible for the territory of the state to be split into distinct parts, for example Pakistan prior to the Bangladesh secession of 1971 or present-day Azerbaijan.

For a political society to function reasonably effectively it needs some form of government or central control. However, this is not a precondition for recognition as an independent country.[20] It should be regarded more as an indication of some sort of coherent political structure and society, than the necessity for a sophisticated apparatus of executive and legislative organs.[21] A relevant factor here might be the extent to which the area not under the control of the government is claimed by another state as a matter of international law as distinct from *de facto* control. The general requirement might be seen to relate to the nineteenth-century concern with 'civilisation' as an essential of independent statehood and ignores the modern tendency to regard sovereignty for non-independent peoples as the paramount consideration, irrespective of administrative conditions.[22]

As an example of the former tendency one may note the *Aaland Islands* case of 1920. The report of the International Committee of Jurists appointed to investigate the status of the islands remarked, with regard to the establishment of the Finnish Republic in the disordered days following the Russian revolution, that it was extremely difficult to name the date that Finland became a sovereign state. It was noted that:

[19] Brownlie, *Principles*, p. 71. In fact most of the new states emerging after the First World War were recognised *de facto* or *de jure* before their frontiers were determined by treaty: H. Lauterpacht, *Recognition in International Law*, Cambridge, 1948, p. 30. See *Deutsche Continental Gas-Gesellschaft* v. *Polish State* (1929), 5 AD, pp. 11, 15; the *Mosul Boundary* case, PCIJ, Series B, No. 12, p. 21; the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 32; 41 ILR, pp. 29, 62, and the *Libya/Chad* case, ICJ Reports, 1994, pp. 6, 22 and 26; 100 ILR, pp. 5, 21 and 25. See also Jessup speaking on behalf of the US regarding Israel's admission to the UN, SCOR, 3rd year, 383rd meeting, p. 41. The Minister of State of the Foreign and Commonwealth Office in a statement on 5 February 1991, UKMIL, 62 BYIL, 1991, p. 557, noted that the UK 'recognises many states whose borders are not fully agreed with their neighbours'. See as to the doctrine of *uti possidetis*, the presumption that on independence entitites will retain existing boundaries, below, chapter 10, p. 525.

[20] See e.g. the Congo case, Higgins, *Development*, pp. 162–4, and C. Hoskyns, *The Congo Since Independence*, Oxford, 1965. See also Higgins, *Problems and Process*, p. 40, and Nguyen Quoc Dinh *et al.*, *Droit International Public*, pp. 415 ff.

[21] See the *Western Sahara* case, ICJ Reports, 1975, pp. 12, 43–4; 59 ILR, pp. 30, 60–1.

[22] See below, p. 251, on the right to self-determination.

> [t]his certainly did not take place until a stable political organisation 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 the foreign troops.[23]

Recent practice with regard to the new states of Croatia and Bosnia and Herzegovina emerging out of the former Yugoslavia suggests the modification of the criterion of effective exercise of control by a government throughout its territory. Both Croatia and Bosnia and Herzegovina were recognised as independent states by European Community member states[24] and admitted to membership of the United Nations (which is limited to 'states' by article 4 of the UN Charter[25])[26] at a time when both states were faced with a situation where non-governmental forces controlled substantial areas of the territories in question in civil war conditions. More recently, Kosovo declared independence on 17 February 2008 with certain Serb-inhabited areas apparently not under the control of the central government.[27] In such situations, lack of effective central control might be balanced by significant international recognition, culminating in membership of the UN. Nevertheless, a foundation of effective control is required for statehood. Conversely, however, a comprehensive breakdown in order and the loss of control by the central authorities in an independent state will not obviate statehood. Whatever the consequences in terms of possible humanitarian involvement, whether by the UN or otherwise depending upon the circumstances, the collapse of governance within a state (sometimes referred to as a 'failed state') has no necessary effect upon the status of that state as a state. Indeed the very

[23] LNOJ Sp. Supp. No. 4 (1920), pp. 8–9. But cf. the view of the Commission of Rapporteurs in this case, LN Council Doc. B7 21/68/106 (1921), p. 22.

[24] On 15 January 1992 and 6 April 1992 respectively: see *Keesing's Record of World Events*, 1992, pp. 38703, 38704 and 38833. But see the Yugoslav Arbitration Commission's Opinion No. 5 of 11 January 1992 noting that Croatia had not met the requirements laid down in the Draft Convention on Yugoslavia of 4 November 1991 and in the Declaration on Yugoslavia and Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union of 16 December 1991: see 92 ILR, p. 178. Opinion No. 4 expressed reservations concerning the independence of Bosnia and Herzegovina pending the holding of a referendum. A referendum showing a majority for independence, however, was held prior to recognition by the EC member states and admission by the UN, *ibid*., p. 173. See also below, p. 209.

[25] See e.g. V. Gowlland-Debbas, 'Collective Responses to the Unilateral Declarations of Independence of Southern Rhodesia and Palestine', 61 BYIL, 1990, p. 135.

[26] On 22 May 1992. See M. Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia', 86 AJIL, 1992, p. 569.

[27] See further below, p. 204.

designation of 'failed state' is controversial and, in terms of international law, misleading.[28]

The capacity to enter into relations with other states is an aspect of the existence of the entity in question as well as an indication of the importance attached to recognition by other countries. It is a capacity not limited to sovereign nations, since international organisations, non-independent states and other bodies can enter into legal relations with other entities under the rules of international law. But it is essential for a sovereign state to be able to create such legal relations with other units as it sees fit. Where this is not present, the entity cannot be an independent state. The concern here is not with political pressure by one country over another, but rather the lack of competence to enter into legal relations. The difference is the presence or absence of legal capacity, not the degree of influence that may affect decisions.

The essence of such capacity is independence. This is crucial to statehood and amounts to a conclusion of law in the light of particular circumstances. It is a formal statement that the state is subject to no other sovereignty and is unaffected either by factual dependence upon other states or by submission to the rules of international law.[29] It is arguable that a degree of actual as well as formal independence may also be necessary. This question was raised in relation to the grant of independence by South Africa to its Bantustans. In the case of the Transkei, for example, a considerable proportion, perhaps 90 per cent, of its budget at one time was contributed by South Africa, while Bophuthatswana was split into a series of areas divided by South African territory.[30] Both the Organisation of African Unity and the United Nations declared such 'independence' invalid and called upon all states not to recognise the new entities. These entities were, apart from South Africa, totally unrecognised.[31]

[28] See e.g. Crawford, *Creation of States*, pp. 719–22; S. Ratner, 'The Cambodia Settlement Agreements', 87 AJIL, 1993, p. 1, and T. M. Franck, 'The Democratic Entitlement', 29 *University of Richmond Law Review*, 1994, p. 1.

[29] See *Austro-German Customs Union* case, (1931) PCIJ, Series A/B, No. 41, pp. 41 (Court's Opinion) and 57–8 (Separate Opinion of Judge Anzilotti); 6 AD, pp. 26, 28. See also Marek, *Identity*, pp. 166–80; Crawford, *Creation of States*, pp. 62 ff., and Rousseau, *Droit International Public*, vol. II, pp. 53, 93.

[30] This was cited as one of the reasons for UK non-recognition, by the Minister of State, FCO: see UKMIL, 57 BYIL, 1986, pp. 507–8.

[31] The 1993 South African Constitution provided for the repeal of all laws concerning apartheid, including the four Status Acts which purported to create the 'independent states' of the four Bantustans, thus effectively reincorporating these areas into South Africa: see J. Dugard, *International Law – A South African Perspective*, Kenwyn, 1994, p. 346.

However, many states are as dependent upon aid from other states, and economic success would not have altered the attitude of the international community. Since South Africa as a sovereign state was able to alienate parts of its own territory under international law, these entities would appear in the light of the formal criteria of statehood to have been formally independent. However, it is suggested that the answer as to their status lay elsewhere than in an elucidation of this category of the criteria of statehood. It lay rather in understanding that actions taken in order to pursue an illegal policy, such as apartheid, cannot be sustained.[32]

An example of the complexities that may attend such a process is provided by the unilateral declaration of independence by Lithuania, one of the Baltic states unlawfully annexed by the Soviet Union in 1940, on 11 March 1990.[33] The 1940 annexation was never recognised *de jure* by the Western states and thus the control exercised by the USSR was accepted only upon a *de facto* basis. The 1990 declaration of independence was politically very sensitive, coming at a time of increasing disintegration within the Soviet Union, but went unrecognised by any state. In view of the continuing constitutional crisis within the USSR and the possibility of a new confederal association freely accepted by the fifteen Soviet republics, it was at that time premature to talk of Lithuania as an independent state, not least because the Soviet authorities maintained substantial control within that territory.[34] The independence of Lithuania and the other Baltic States was recognised during 1991 by a wide variety of states, including crucially the Soviet Union.[35]

It is possible, however, for a state to be accepted as independent even though, exceptionally, certain functions of government are placed in the hands of an outside body. In the case of Bosnia and Herzegovina, for example, the Dayton Peace Agreement of 1995 provided for a High

[32] See M. N. Shaw, *Title to Territory in Africa: International Legal Issues*, Oxford, 1986, pp. 161–2. See also OAU Resolution CM.Res.493 (XXVII), General Assembly resolution 31/61A and Security Council statements on 21 September 1979 and 15 December 1981. Note that the Minister of State at the Foreign and Commonwealth Office declared that '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', 126, HC Deb., cols. 760–1, 3 February 1988.

[33] See *Keesing's Record of World Events*, p. 37299 (1990).

[34] See e.g. the view of the UK government, 166 HC Deb., col. 697, Written Answers, 5 February 1990.

[35] See e.g. R. Müllerson, *International Law, Rights and Politics*, London, 1994, pp. 119 ff.

Representative to be appointed as the 'final authority in theatre' with regard to the implementation of the agreement,[36] and the High Representative has, for example, removed a number of persons from public office. None of this has been understood by the international community to affect Bosnia's status as an independent state, but the arrangement did arise as an attempt to reach and implement a peace agreement in the context of a bitter civil war with third-party intervention. More controversially, after a period of international administration,[37] Kosovo declared its independence on 17 February 2008, noting specifically that it accepted the obligations for Kosovo under the Comprehensive Proposal for the Kosovo Status Settlement (the Ahtisaari Plan).[38] This Plan called for 'independence with international supervision' and the obligations for Kosovo included human rights and decentralisation guarantees together with an international presence to supervise implementation of the Settlement. The provisions of the Settlement were to take precedence over all other legal provisions in Kosovo. The international presence was to take the form of an International Civilian Representative (ICR), who would also be the European Union Special Representative, to be appointed by the International Steering Group.[39] The ICR would be the final authority in Kosovo regarding interpretation of the civilian aspects of the Settlement and, in particular, would have the ability to annul decisions or laws adopted by the Kosovo authorities and sanction and remove public officials whose actions were determined to be inconsistent with the Settlement terms.[40] In addition, an international military presence, led by NATO, would ensure a safe environment throughout Kosovo.[41]

[36] See Annex 10 of the Dayton Peace Agreement. See also R. Caplan, 'International Authority and State Building: The Case of Bosnia and Herzegovina', 10 *Global Governance*, 2004, p. 53, and International Crisis Group, *Bosnia: Reshaping the International Machinery*, November 2001. The High Representative is nominated by the Steering Board of the Peace Implementation Council, a group of fifty-five countries and international organisations that sponsor and direct the peace implementation process, and this nomination is then endorsed by the Security Council. See further below, p. 231.

[37] See, as to the international administration of Kosovo, below, p. 232 and, as to recognition, below, chapter 9, p. 452.

[38] See www.assembly-kosova.org/? krye=news&newsid=1635&lang=en.

[39] To consist of France, Germany, Italy, Russia, the UK, the US, the EU, the European Commission and NATO.

[40] See S/2007/168 and S/2007/168/Add.1. Annex IX of the latter document details the role of the ICR.

[41] See Annex XI. An EU Rule of Law Mission (EULEX) was established on 16 February 2008 to support the Kosovan authorities.

Self-determination and the criteria of statehood

It is the criterion of government which, as suggested above, has been most affected by the development of the legal right to self-determination. The traditional exposition of the criterion concentrated upon the stability and effectiveness needed for this factor to be satisfied,[42] while the representative and democratic nature of the government has also been put forward as a requirement. The evolution of self-determination has affected the standard necessary as far as the actual exercise of authority is concerned, so that it appears a lower level of effectiveness, at least in decolonisation situations, has been accepted.[43] This can be illustrated by reference to a couple of cases.

The former Belgian Congo became independent on 30 June 1960 in the midst of widespread tribal fighting which had spread to the capital. Within a few weeks the Force Publique had mutinied, Belgian troops had intervened and the province of Katanga announced its secession. Notwithstanding the virtual breakdown of government, the Congo was recognised by a large number of states after independence and was admitted to the UN as a member state without opposition. Indeed, at the time of the relevant General Assembly resolution in September 1960, two different factions of the Congo government sought to be accepted by the UN as the legitimate representatives of the state. In the event, the delegation authorised by the head of state was accepted and that of the Prime Minister rejected.[44] A rather different episode occurred with regard to the Portuguese colony of Guinea-Bissau. In 1972, a UN Special Mission was dispatched to the 'liberated areas' of the territory and concluded that the colonial power had lost effective administrative control of large areas of the territory. Foreign observers appeared to accept the claim of the PAIGC, the local liberation movement, to control between two-thirds and three-quarters of the area. The inhabitants of these areas, reported the Mission, supported the PAIGC which was exercising effective *de facto* administrative control.[45] On 24 September 1973, the PAIGC proclaimed the Republic of Guinea Bissau an independent state. The issue of the 'illegal occupation by Portuguese military forces of certain sections of the Republic of Guinea-Bissau' came before the General Assembly and a number of states

[42] See Lauterpacht, *Recognition*, p. 28. [43] See e.g. Crawford, *Creation of States*, pp. 107 ff.
[44] *Keesing's Contemporary Archives*, pp. 17594–5 and 17639–40, and Hoskyns, *Congo*, pp. 96–9.
[45] *Yearbook of the UN*, 1971, pp. 566–7, and A/AC.109/L 804, p. 19. See also A/8723/Rev.1 and Assembly resolution 2918 (XXVII).

affirmed the validity of the independence of the new state in international law. Western states denied that the criteria of statehood had been fulfilled. However, ninety-three states voted in favour of Assembly resolution 3061 (XXVIII) which mentioned 'the recent accession to independence of the people of Guinea-Bissau thereby creating the sovereign state of the Republic of Guinea-Bissau'. Many states argued in favour of this approach on the basis that a large proportion of the territory was being effectively controlled by the PAIGC, though it controlled neither a majority of the population nor the major towns.[46]

In addition to modifying the traditional principle with regard to the effectiveness of government in certain circumstances, the principle of self-determination may also be relevant as an additional criterion of statehood. In the case of Rhodesia, UN resolutions denied the legal validity of the unilateral declaration of independence on 11 November 1965 and called upon member states not to recognise it.[47] No state did recognise Rhodesia and a civil war ultimately resulted in its transformation into the recognised state of Zimbabwe. Rhodesia might have been regarded as a state by virtue of its satisfaction of the factual requirements of statehood, but this is a dubious proposition. The evidence of complete non-recognition, the strenuous denunciations of its purported independence by the international community and the developing civil war militate strongly against this. It could be argued on the other hand that, in the absence of recognition, no entity could become a state, but this constitutive theory of recognition is not acceptable.[48] The best approach is to accept the development of self-determination as an additional criterion of statehood, denial of which would obviate statehood. This can only be acknowledged in relation to self-determination situations and would not operate in cases, for example, of secessions from existing states.[49] In other words, in the case of an entity seeking to become a state and accepted by the international community as being entitled to exercise the right of self-determination,

[46] See GAOR, 28th Session, General Committee, 213rd meeting, pp. 25–6, 28, 30 and 31; GAOR, 28th session, plenary, 2156th meeting, pp. 8, 12 and 16, and 2157th meeting, pp. 22–5 and 65–7. See also *Yearbook of the UN*, 1973, pp. 143–7, and CDDH/SR.4, pp. 33–7. See also the Western Sahara situation, below, p. 213, and the recognition of Angola in 1975 despite the continuing civil war between the three liberation movements nominally allied in a government of national unity: see Shaw, *Title*, pp. 155–6.

[47] E.g. General Assembly resolutions 2024 (XX) and 2151 (XXI) and Security Council resolutions 216 (1965) and 217 (1966). See R. Higgins, *The World Today*, 1967, p. 94, and Crawford, *Creation of States*, pp. 129 ff. See also Shaw, *Title*.

[48] Below, chapter 9, p. 445.

[49] See further below, pp. 237 and 257.

it may well be necessary to demonstrate that the internal requirements of the principle have not been offended. One cannot define this condition too rigorously in view of state practice to date, but it would appear to be a sound proposition that systematic and institutionalised discrimination might invalidate a claim to statehood.

In particular, one may point to the practice of the international community concerning the successor states to the former Yugoslavia. The European Community adopted Guidelines on Recognition of New States in Eastern Europe and the Soviet Union on 16 December 1991,[50] which constituted a common position on the process of recognition of such new states and referred specifically to the principle of self-determination. The Guidelines underlined the need to respect the rule of law, democracy and human rights and mentioned specifically the requirement for guarantees for the rights of minorities. Although these Guidelines deal with the issue of recognition and not as such the criteria for statehood, the two are interlinked and conditions required for recognition may in the circumstances, especially where expressed in general and not specific terms, often in practice be interpreted as additions to the criteria for statehood.

Recognition

Recognition is a method of accepting certain factual situations and endowing them with legal significance, but this relationship is a complicated one. In the context of the creation of statehood, recognition may be viewed as constitutive or declaratory, as will be noted in more detail in chapter 9. The former theory maintains that it is only through recognition that a state comes into being under international law, whereas the latter approach maintains that once the factual criteria of statehood have been satisfied, a new state exists as an international person, recognition becoming merely a political and not a legal act in this context. Various modifications have been made to these theories, but the role of recognition, at the least in providing strong evidential demonstration of satisfaction of the relevant criteria, must be acknowledged. In many situations, expressed requirements for recognition may be seen as impacting upon the question of statehood as the comments in the previous section on the EC Guidelines indicate. There is also an integral relationship between recognition and

[50] For the text see 31 ILM, 1992, pp. 1486–7 and 92 ILR, p. 173.

the criteria for statehood in the sense that the more overwhelming the scale of international recognition is in any given situation, the less may be demanded in terms of the objective demonstration of adherence to the criteria. Conversely, the more sparse international recognition is, the more attention will be focused upon proof of actual adherence to the criteria concerned.

Extinction of statehood[51]

Extinction of statehood may take place as a consequence of merger, absorption or, historically, annexation. It may also occur as a result of the dismemberment of an existing state.[52] In general, caution needs to be exercised before the dissolution of a state is internationally accepted.[53] While the disappearance, like the existence, of a state is a matter of fact,[54] it is a matter of fact that is legally conditioned in that it is international law that will apportion particular legal consequences to particular factual situations and the appreciation of these facts will take place within a certain legal framework.

While it is not unusual for governments to disappear, it is rather rarer for states to become extinct. This will not happen in international law as a result of the illegal use of force, as the Kuwait crisis of August 1990 and the consequent United Nations response clearly demonstrates,[55] nor as a consequence of internal upheavals within a state,[56] but it may occur by consent. Three recent examples may be noted. On 22 May 1990, North and South Yemen united, or merged, to form one state, the Republic of Yemen,[57] while on 3 October 1990, the two German states reunified as a result of the constitutional accession of the *Länder* of the German

[51] See e.g. Crawford, *Creation of States*, pp. 700 ff., and *Oppenheim's International Law*, p. 206. See also H. Ruiz-Fabri, 'Genèse et Disparition de l'État à l'Époque Contemporaine', AFDI, 1992, p. 153.

[52] *Oppenheim's International Law*, pp. 206–7. Extinction of statehood may also take place as a consequence of the geographical disappearance of the territory of the state: see e.g. with regard to the precarious situation of Tuvalu, *Guardian*, 29 October 2001, p. 17.

[53] See e.g. Yugoslav Arbitration Commission, Opinion No. 8, 92 ILR, pp. 199, 201.

[54] *Ibid.* [55] See further below, chapter 22, p. 941.

[56] Such as Somalia since the early 1990s: see e.g. Security Council resolutions 751 (1992); 767 (1992); 794 (1992); 814 (1993); 837 (1993); 865 (1993); 885 (1993) and 886 (1993). See also Crawford, *Creation of States*, pp. 412 ff.

[57] See *Keesing's Record of World Events*, p. 37470 (1990). See also 30 ILM, 1991, p. 820, and R. Goy, 'La Réunification du Yémen', AFDI, 1990, p. 249.

Democratic Republic to the Federal Republic of Germany.[58] The dissolution of Czechoslovakia[59] on 1 January 1993 and the establishment of the two new states of the Czech Republic and Slovakia constitutes a further example of the dismemberment, or disappearance, of a state.[60]

During 1991, the process of disintegration of the Soviet Union gathered force as the Baltic states reasserted their independence[61] and the other Republics of the USSR stated their intention to become sovereign. In December of that year, the Commonwealth of Independent States was proclaimed, and it was stated in the Alma Ata Declaration[62] that, with the establishment of the CIS, 'the Union of Soviet Socialist Republics ceases to exist'. The states of the CIS agreed 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 organisations'.[63] It has been commonly accepted that Russia constitutes a continuation of the USSR, with consequential adjustments to take account of the independence of the other former Republics of the Soviet Union.[64] It is therefore a case of dismemberment basically consisting of the transformation of an existing state. The disappearance of the USSR was accompanied by the claim, internationally accepted, of the Russian Federation to be the continuation of that state. While the element of continuity is crucial in the framework of the rules of state succession,[65] it does constitute a complication in the context of extinction of states.

By way of contrast, not all the relevant parties accepted that the process of dissolution of the former Socialist Federal Republic of Yugoslavia during 1991–2 resulted in the dissolution of that state.[66] The Federal Republic of Yugoslavia, comprising the former Republics of Serbia and Montenegro, saw itself as the continuation of the former state within reduced boundaries, while the other former Republics disputed this and maintained rather that the Federal Republic of Yugoslavia (Serbia and

[58] See below, p. 227. See also C. Schrike, 'L'Unification Allemande', AFDI, 1990, p. 47, and W. Czaplinski, 'Quelques Aspects sur la Réunification de l'Allemagne', AFDI, 1990, p. 89.

[59] Termed at that stage the Czech and Slovak Federal Republic.

[60] See e.g. J. Malenovsky, 'Problèmes Juridiques Liés à la Partition de la Tchécoslovaquie', AFDI, 1993, p. 305.

[61] See L. Kherad, 'La Reconnaissance Internationale des États Baltes', RGDIP, 1992, p. 843.

[62] See 31 ILM, 1992, pp. 148–9.

[63] *Ibid.*, p. 151.

[64] See further below, p. 960.

[65] See below, chapter 17.

[66] See also A. Pellet, 'La Commission d'Arbitrage de la Conférence Européenne pour la Paix en Yougaslavie', AFDI, 1991, p. 329; AFDI, 1992, p. 220, and AFDI, 1993, p. 286.

Montenegro) was a successor to the former Yugoslavia precisely on the same basis as the other former Republics such as Croatia, Slovenia and Bosnia and Herzegovina. The matter was discussed by the Yugoslav Arbitration Commission. In Opinion No. 1 of 29 November 1991, it was noted that at that stage the Socialist Federal Republic of Yugoslavia was 'in the process of dissolution'.[67] However, in Opinion No. 8, adopted on 4 July 1992, the Arbitration Commission stated that the process of dissolution had been completed and that the Socialist Federal Republic of Yugoslavia (SFRY) no longer existed. This conclusion was reached on the basis of the fact that Slovenia, Croatia and Bosnia and Herzegovina had been recognised as new states, the republics of Serbia and Montenegro had adopted a new constitution for the 'Federal Republic of Yugoslavia' and UN resolutions had been adopted referring to 'the former SFRY'.[68] The Commission also emphasised that the existence of federal states was seriously compromised when a majority of the constituent entities, embracing a majority of the territory and population of the federal state, constitute themselves as sovereign states with the result that federal authority could no longer be effectively exercised.[69] The UN Security Council in resolution 777 (1992) stated that 'the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist'. This was reiterated in resolution 1022 (1995) in which the Security Council, in welcoming the Dayton Peace Agreement (the General Framework Agreement for Peace in Bosnia and Herzegovina) between the states of the former Yugoslavia and suspending the application of sanctions, stated that the Socialist Federal Republic of Yugoslavia 'has ceased to exist'. On 1 November 2000, Yugoslavia was admitted to the UN as a new member,[70] following its request sent to the Security Council on 27 October 2000.[71]

[67] 92 ILR, pp. 164–5. One should note the importance of the federal structure of the state in determining the factual situation regarding dissolution. The Arbitration Commission pointed out that in such cases 'the existence of the state implies that the federal organs represent the components of the Federation and wield effective power', *ibid.*, p. 165.

[68] See e.g. Security Council resolutions 752 and 757 (1992). See also the resolution adopted by the European Community at the Lisbon Council on 27 June 1992, quoted in part in Opinion No. 9, 92 ILR, pp. 204–5.

[69] 92 ILR, p. 201. In Opinions Nos. 9 and 10, the Arbitration Commission noted that the Federal Republic of Yugoslavia (Serbia and Montenegro) could not consider itself as the continuation of the SFRY, but was instead one of the successors to that state on the same basis as the recognised new states, *ibid.*, pp. 205 and 208.

[70] General Assembly resolution 55/12.

[71] See the *Application for Revision of the Judgment of 11 July 1996 (Bosnia and Herzegovina* v. *Yugoslavia)*, ICJ Reports, 2003, p. 7.

The fundamental rights of states

The fundamental rights of states exist by virtue of the international legal order, which is able, as in the case of other legal orders, to define the characteristics of its subjects.[72]

Independence[73]

Perhaps the outstanding characteristic of a state is its independence, or sovereignty. This was defined in the Draft Declaration on the Rights and Duties of States prepared in 1949 by the International Law Commission as the capacity of a state to provide for its own well-being and development free from the domination of other states, providing it does not impair or violate their legitimate rights.[74] By independence, one is referring to a legal concept and it is no deviation from independence to be subject to the rules of international law. Any political or economic dependence that may in reality exist does not affect the legal independence of the state, unless that state is formally compelled to submit to the demands of a superior state, in which case dependent status is concerned.

A discussion on the meaning and nature of independence took place in the *Austro-German Customs Union* case before the Permanent Court of International Justice in 1931.[75] It concerned a proposal to create a free trade customs union between the two German-speaking states and whether this was incompatible with the 1919 Peace Treaties (coupled with a subsequent protocol of 1922) pledging Austria to take no action to compromise its independence. In the event, and in the circumstances of the case, the Court held that the proposed union would adversely affect Austria's sovereignty. Judge Anzilotti noted that restrictions upon a state's liberty, whether arising out of customary law or treaty obligations, do not as such affect its independence. As long as such restrictions do not place

[72] See e.g. A. Kiss, *Répertoire de la Pratique Française en Matière de Droit International Public*, Paris, 1966, vol. II, pp. 21–50, and *Survey of International Law*, prepared by the UN Secretary-General, A/CN.4/245.

[73] *Oppenheim's International Law*, p. 382. See also N. Schrijver, 'The Changing Nature of State Sovereignty', 70 BYIL, 1999, p. 65; C. Rousseau, 'L'Indépendance de l'État dans l'Ordre International', 73 HR, 1948 II, p. 171; H. G. Gelber, *Sovereignty Through Independence*, The Hague, 1997; Brownlie, *Principles*, pp. 287 ff., and Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 422.

[74] *Yearbook of the ILC*, 1949, p. 286. Judge Huber noted in the *Island of Palmas* case that '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', 2 RIAA, pp. 829, 838 (1928); 4 AD, p. 3.

[75] PCIJ, Series A/B, No. 41, 1931; 6 AD, p. 26.

the state under the legal authority of another state, the former maintains its status as an independent country.[76]

The Permanent Court emphasised in the *Lotus* case[77] that '[r]estrictions upon the independence of states cannot therefore be presumed'. A similar point in different circumstances was made by the International Court of Justice in the *Nicaragua* case,[78] where it was stated that 'in international law there are no rules, other than such rules as may be accepted by the state concerned, by treaty or otherwise, whereby the level of armaments of a sovereign state can be limited, and this principle is valid for all states without exception'. The Court also underlined in the *Legality of the Threat or Use of Nuclear Weapons*[79] that '[s]tate practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorisation but, on the contrary, is formulated in terms of prohibition'. The starting point for the consideration of the rights and obligations of states within the international legal system remains that international law permits freedom of action for states, unless there is a rule constraining this. However, such freedom exists within and not outside the international legal system and it is therefore international law which dictates the scope and content of the independence of states and not the states themselves individually and unilaterally.

The notion of independence in international law implies a number of rights and duties: for example, the right of a state to exercise jurisdiction over its territory and permanent population, or the right to engage upon an act of self-defence in certain situations. It implies also the duty not to intervene in the internal affairs of other sovereign states. Precisely what constitutes the internal affairs of a state is open to dispute and is in any event a constantly changing standard. It was maintained by the Western powers for many years that any discussion or action by the United Nations[80] with regard to their colonial possessions was contrary to international law.

[76] PCIJ, Series A/B, No. 41, 1931, p. 77 (dissenting); 6 AD, p. 30 See also the *North Atlantic Coast Fisheries* case (1910), Scott, *Hague Court Reports*, p. 141 at p. 170, and the *Wimbledon* case, PCIJ, Series A, No.1, 1923, p. 25; 2 AD, p. 99.

[77] PCIJ, Series A, No. 10, 1927, p. 18; 4 AD, pp. 153, 155.

[78] ICJ Reports, 1986, pp. 14, 135; 76 ILR, pp. 349, 469. See also the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp. 226, 238–9; 110 ILR, p. 163.

[79] ICJ Reports, 1996, pp. 226, 247; 110 ILR, p. 163.

[80] Article 2(7) of the UN Charter provides that 'nothing in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state'. On the relationship between this article and the general international law provision, see Brownlie, *Principles*, pp. 290 ff.

However, this argument by the European colonial powers did not succeed and the United Nations examined many colonial situations.[81] In addition, issues related to human rights and racial oppression do not now fall within the closed category of domestic jurisdiction. It was stated on behalf of the European Community, for example, that the 'protection of human rights and fundamental freedoms can in no way be considered an interference in a state's internal affairs'. Reference was also made to 'the moral right to intervene whenever human rights are violated'.[82]

This duty not to intervene in matters within the domestic jurisdiction of any state was included in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States adopted in October 1970 by the United Nations General Assembly. It was emphasised that

> [n]o state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are in violation of international law.

The prohibition also covers any assistance or aid to subversive elements aiming at the violent overthrow of the government of a state. In particular, the use of force to deprive peoples of their national identity amounts to a violation of this principle of non-intervention.[83]

The principles surrounding sovereignty, such as non-intervention, are essential in the maintenance of a reasonably stable system of competing states. Setting limits on the powers of states vis-à-vis other states contributes to some extent to a degree of stability within the legal order. As the International Court of Justice pointed out in the *Corfu Channel* case

[81] See Higgins, *Development*, pp. 58–130; M. Rajan, *United Nations and Domestic Jurisdiction*, 2nd edn, London, 1961, and H. Kelsen, *Principles of International Law*, 2nd edn, London, 1966.

[82] E/CN.4/1991/SR. 43, p. 8, quoted in UKMIL, 62 BYIL, 1991, p. 556. See also statement of the European Community in 1992 to the same effect, UKMIL, 63 BYIL, pp. 635–6. By way of contrast, the Iranian *fatwa* condemning the British writer Salman Rushdie to death was criticised by the UK government as calling into question Iran's commitment to honour its obligations not to interfere in the internal affairs of the UK, *ibid.*, p. 635. See also M. Reisman, 'Sovereignty and Human Rights in Contemporary International Law', 84 AJIL, 1990, p. 866.

[83] See also the use of force, below, chapter 20.

in 1949, 'between independent states, respect for territorial sovereignty is an essential foundation of international relations'.[84]

By a similar token a state cannot purport to enforce its laws in the territory of another state without the consent of the state concerned. However, international law would seem to permit in some circumstances the state to continue to exercise its jurisdiction, notwithstanding the illegality of the apprehension.[85] It also follows that the presence of foreign troops on the territory of a sovereign state requires the consent of that state.[86]

Equality[87]

One other crucial principle is the legal equality of states, that is equality of legal rights and duties. States, irrespective of size or power, have the same juridical capacities and functions, and are likewise entitled to one vote in the United Nations General Assembly. The doctrine of the legal equality of states is an umbrella category for it includes within its scope the recognised rights and obligations which fall upon all states.

This was recognised in the 1970 Declaration on Principles of International Law. This provides that:

> All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.
>
> In particular, sovereign equality includes the following elements:
>
> (a) States are juridically equal;
> (b) Each state enjoys the rights inherent in full sovereignty;
> (c) Each state has the duty to respect the personality of other states;
> (d) The territorial integrity and political independence of the state are inviolable;
> (e) Each state has the right freely to choose and develop its political, social, economic and cultural systems;
> (f) Each state has the duty to comply fully and in good faith with its international obligations and to live in peace with other states.[88]

[84] ICJ Reports, 1949, pp. 4, 35; 16 AD, pp. 155, 167. See below, p. 575.

[85] See e.g. the *Eichmann* case, 36 ILR, p. 5. But see further below, p. 680.

[86] See the statement made on behalf of the European Community on 25 November 1992 with regard to the presence of Russian troops in the Baltic states, UKMIL, 63 BYIL, 1992, p. 724.

[87] *Oppenheim's International Law*, p. 339, and Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 428.

[88] See also Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1975, Cmnd 6198, pp. 2–3. See also O'Connell, *International Law*, pp. 322–4; P. Kooijmans,

In many respects this doctrine owes its origins to Natural Law thinking. Just as equality was regarded as the essence of man and thus contributed philosophically to the foundation of the state, so naturalist scholars treated equality as the natural condition of states. With the rise in positivism, the emphasis altered and, rather than postulating a general rule applicable to all and from which a series of rights and duties may be deduced, international lawyers concentrated upon the sovereignty of each and every state, and the necessity that international law be founded upon the consent of states.

The notion of equality before the law is accepted by states in the sense of equality of legal personality and capacity. However, it would not be strictly accurate to talk in terms of the equality of states in creating law. The major states will always have an influence commensurate with their status, if only because their concerns are much wider, their interests much deeper and their power more effective.[89]

Within the General Assembly of the United Nations, the doctrine of equality is maintained by the rule of one state, one vote.[90] However, one should not overlook the existence of the veto possessed by the USA, Russia, China, France and the United Kingdom in the Security Council.[91]

Peaceful co-existence

This concept has been formulated in different ways and with different views as to its legal nature by the USSR, China and the Third World. It was elaborated in 1954 as the Five Principles of Peaceful Co-existence by India and China, which concerned mutual respect for each other's territorial integrity and sovereignty, mutual non-aggression, non-interference in each other's affairs and the principle of equality.[92]

The idea was expanded in a number of international documents such as the final communiqué of the Bandung Conference in 1955 and in various resolutions of the United Nations.[93] Its recognised constituents also appear

The Doctrine of the Legal Equality of States, Leiden, 1964, and Marshall CJ, *The Antelope*, 10 Wheat., 1825, pp. 66, 122.

89 See Nguyen Quoc Dinh *et al.*, *Droit International Public*, pp. 1062–3.

90 See e.g. L. Sohn, *Cases on UN Law*, 2nd edn, Brooklyn, 1967, pp. 232–90, and G. Clark and L. Sohn, *World Peace Through World Law*, 3rd edn, New York, 1966, pp. 399–402.

91 The doctrine of equality of states is also influential in areas of international law such as jurisdictional immunities, below, chapter 13, and act of state, above, chapter 4, p. 179.

92 See e.g. Tunkin, *Theory*, pp. 69–75. See also B. Ramondo, *Peaceful Co-existence*, Baltimore, 1967, and R. Higgins, *Conflict of Interests*, London, 1965, pp. 99–170.

93 See e.g. General Assembly resolutions 1236 (XII) and 1301 (XIII). See also *Yearbook of the UN*, 1957, pp. 105–9; *ibid.*, 1961, p. 524 and *ibid.*, 1962, p. 488.

in the list of Principles of the Charter of the Organisation of African Unity. Among the points enumerated are the concepts of sovereign equality, non-interference in the internal affairs of states, respect for the sovereignty and territorial integrity of states, as well as a condemnation of subversive activities carried out from one state and aimed against another. Other concepts that have been included in this category comprise such principles as non-aggression and the execution of international obligations in good faith. The Soviet Union had also expressed the view that peaceful co-existence constituted the guiding principle in contemporary international law.[94]

Protectorates and protected states[95]

A distinction is sometimes made between a protectorate and a protected state. In the former case, in general, the entity concerned enters into an arrangement with a state under which, while separate legal personality may be involved, separate statehood is not. In the case of a protected state, the entity concerned retains its status as a separate state but enters into a valid treaty relationship with another state affording the latter certain extensive functions possibly internally and externally. However, precisely which type of arrangement is made and the nature of the status, rights and duties in question will depend upon the circumstances and, in particular, the terms of the relevant agreement and third-party attitudes.[96] In the case of Morocco, the Treaty of Fez of 1912 with France gave the latter the power to exercise certain sovereign powers on behalf of the former, including all of its international relations. Nevertheless, the ICJ emphasised that Morocco had in the circumstances of the case remained a sovereign state.[97]

In the case of sub-Saharan Africa in the colonial period, treaties of protection were entered into with tribal entities that were not states. Such institutions were termed 'colonial protectorates' and constituted internal

[94] Tunkin, *Theory*, pp. 35–48.

[95] See *Oppenheim's International Law*, p. 266; Crawford, *Creation of States*, pp. 286 ff.; O'Connell, *International Law*, pp. 341–4, and Verzijl, *International Law*, pp. 412–27.

[96] See the *Tunis and Morocco Nationality Decrees* case, (1923) PCIJ, Series B, No. 4, p. 27; 2 AD, p. 349. See also the question of the Ionian Islands, M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law*, London, 1926, pp. 181–2.

[97] *Rights of Nationals of the United States of America in Morocco*, ICJ Reports, 1952, pp. 176, 188; 19 ILR, pp. 255, 263. See also to the same effect, *Benaïm* c. *Procureur de la République de Bordeaux*, AFDI, 1993, p. 971.

colonial arrangements. They did not constitute international treaties with internationally recognised states.[98]

The extent of powers delegated to the protecting state in such circumstances may vary, as may the manner of the termination of the arrangement. In these cases, formal sovereignty remains unaffected and the entity in question retains its status as a state, and may act as such in the various international fora, regard being had of course to the terms of the arrangement. The obligation may be merely to take note of the advice of the protecting state, or it may extend to a form of diplomatic delegation subject to instruction, as in the case of Liechtenstein. Liechtenstein was refused admission to the League of Nations since it was held unable to discharge all the international obligations imposed by the Covenant in the light of its delegation of sovereign powers, such as diplomatic representation, administration of post, telegraph and telephone services and final decisions in certain judicial cases.[99] Liechtenstein, however, has been a party to the Statute of the International Court of Justice and was a party to the *Nottebohm*[100] case before the Court, a facility only open to states. Liechtenstein joined the United Nations in 1990.

Federal states[101]

There are various forms of federation or confederation, according to the relative distribution of power between the central and local organs. In some states, the residue of power lies with the central government, in others with the local or provincial bodies. A confederation implies a more flexible arrangement, leaving a considerable degree of authority and competence with the component units to the detriment of the central organ.[102]

The Yugoslav Arbitration Commission noted in Opinion No. 1 that in the case of a federal state embracing communities possessing a degree of autonomy where such communities participate in the exercise of political

[98] See *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 303, 404–7. See also the *Island of Palmas* case, 2 RIAA, pp. 826, 858–9, and Shaw, *Title*, chapter 1.

[99] See Crawford, *Creation of States*, pp. 479 ff.; Report of the 5th Committee of the League, 6 December 1920, G. Hackworth, *Digest of International Law*, Washington, 1940, vol. I, pp. 48–9, and Higgins, *Development*, p. 34, note 30.

[100] ICJ Reports, 1955, p. 4; 22 ILR, p. 349.

[101] See *Oppenheim's International Law*, p. 245. See also I. Bernier, *International Legal Aspects of Federalism*, London, 1973, and 17 *Revue Belge de Droit International*, 1983, p. 1.

[102] See also below, p. 219.

power within the framework of institutions common to the federation, the 'existence of the state implies that the federal organs represent the components of the federation and wield effective power'.[103] In addition, the existence of such a federal state would be seriously compromised 'when a majority of these entities, embracing the greater part of the territory and population, constitute themselves as sovereign states with the result that federal authority may no longer be effectively exercised'.[104]

The division of powers inherent in such arrangements often raises important questions for international law, particularly in the areas of personality, responsibility and immunity. Whether the federation dissolves into two or more states also brings into focus the doctrine of self-determination in the form of secession. Such dissolution may be the result of an amicable and constitutional agreement or may occur pursuant to a forceful exercise of secession. In the latter case, international legal rules may be pleaded in aid, but the position would seem to be that (apart from recognised colonial situations) there is no right of self-determination applicable to independent states that would justify the resort to secession. There is, of course, no international legal duty to refrain from secession attempts: the situation remains subject to the domestic law. However, should such a secession prove successful in fact, then the concepts of recognition and the appropriate criteria of statehood would prove relevant and determinative as to the new situation.[105]

The federal state will itself, of course, have personality, but the question of the personality and capability of the component units of the federation on the international plane can really only be determined in the light of the constitution of the state concerned and state practice. For instance, the then Soviet Republics of Byelorussia and the Ukraine were admitted as members of the United Nations in 1945 and to that extent possessed international personality.[106] Component states of a federation that have been provided with a certain restricted international competence may thus be accepted as having a degree of international personality. The issue has arisen especially with regard to treaties. Lauterpacht, in his Report on the Law of Treaties, for example, noted that treaties concluded by component units of federal states 'are treaties in the meaning of international law',[107] although Fitzmaurice adopted a different approach in his Report on the

[103] 92 ILR, p. 165. [104] Opinion No. 8, *ibid.*, p. 201. [105] See below, p. 256.

[106] See e.g. Bernier, *Federalism*, pp. 64–6. These entities were also members of a number of international organisations and signed treaties.

[107] *Yearbook of the ILC*, 1953, vol. II, p. 139.

Law of Treaties by stating that such units act as agents for the federation which alone possesses international personality and which is the entity bound by the treaty and responsible for its implementation.[108] Article 5(2) of the International Law Commission's Draft Articles on the Law of Treaties provided that

> [s]tates members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down

but this was ultimately rejected at the Vienna Conference on the Law of Treaties,[109] partly on the grounds that the rule was beyond the scope of the Convention itself. The major reasons for the rejection, however, were that the provision would enable third states to intervene in the internal affairs of federal states by seeking to interpret the constitutions of the latter and that, from another perspective, it would unduly enhance the power of domestic law to determine questions of international personality to the detriment of international law. This perhaps would indeed have swung the balance too far away from the international sphere of operation.

Different federations have evolved different systems with regard to the allocation of treaty-making powers. In some cases, component units may enter into such arrangements subject to varying conditions. The Constitution of Switzerland, for example, enables the cantons to conclude treaties with foreign states on issues concerning public economy, frontier relations and the police, subject to the provision that the Federal Council acts as the intermediary.[110] In the case of the United States, responsibility for the conduct of foreign relations rests exclusively with the Federal Government,[111] although American states have entered into certain compacts with foreign states or component units (such as Manitoba and Quebec, provinces of Canada) dealing with the construction and maintenance of highways and international bridges, following upon consultations with the foreign state conducted by the federal authorities. In any event, it is

[108] *Yearbook of the ILC*, 1958, vol. II, p. 24. Cf. Waldock, *ibid.*, 1962, vol. II, p. 36.

[109] A/CONF.39/SR.8, 28 April 1969.

[110] See e.g. A. Looper, 'The Treaty Power in Switzerland', 7 *American Journal of Comparative Law*, 1958, p. 178.

[111] See e.g. Article I, Section 10 of the US Constitution; *US* v. *Curtiss-Wright Export Corp.* 299 US 304 (1936); 8 AD, p. 48, and *Zachevning* v. *Miller* 389 US 429 (1968). See also generally, Brownlie, *Principles*, pp. 58–9; Whiteman, *Digest*, vol. 14, pp. 13–17, and Rousseau, *Droit International Public*, pp. 138–213 and 264–8.

clear that the internal constitutional structure is crucial in endowing the unit concerned with capacity. What, however, turns this into international capacity is recognition.

An issue recently the subject of concern and discussion has been the question of the domestic implementation of treaty obligations in the case of federations, especially in the light of the fact that component units may possess legislative power relating to the subject-matter of the treaty concerned. Although this issue lies primarily within the field of domestic constitutional law, there are important implications for international law. In the US, for example, the approach adopted has been to insert 'federal' reservations to treaties in cases where the states of the Union have exercised jurisdiction over the subject-matter in question, providing that the Federal Government would take appropriate steps to enable the competent authorities of the component units to take appropriate measures to fulfil the obligations concerned.[112] In general, however, there have been few restrictions on entry into international agreements.[113]

The question as to divided competence in federations and international treaties has arisen in the past, particularly with regard to conventions of the International Labour Organisation, which typically encompass areas subject to the law-making competence of federal component units. In Canada, for example, early attempts by the central government to ratify ILO conventions were defeated by the decisions of the courts on constitutional grounds, supporting the views of the provinces,[114] while the US has a poor record of ratification of ILO conventions on similar grounds of local competence and federal treaty-making.[115] The issue that arises therefore is either the position of a state that refuses to ratify or sign a treaty on grounds of component unit competence in the area in question or alternatively the problem of implementation and thus responsibility where ratification does take place. In so far as the latter is concerned, the issue has been raised in the context of article 36 of the Vienna Convention on Consular Relations, 1963, to which the US is a party, and which requires, among other things, that states parties inform a foreigner under arrest of his or her right to communicate with the relevant consulate. The International Court of Justice has twice held the US in violation of this

[112] See e.g. the proposed reservations to four human rights treaties in 1978, *US Ratification of the Human Rights Treaties* (ed. R. B. Lillich), Charlottesville, 1981, pp. 83–103.

[113] See e.g. *Missouri* v. *Holland* 252 US 416 (1920); 1 AD, p. 4.

[114] See especially, *Attorney-General for Canada* v. *Attorney-General for Ontario* [1937] AC 326; 8 AD, p. 41.

[115] Bernier, *Federalism*, pp. 162–3, and A. Looper, 'Federal State Clauses in Multilateral Instruments', 32 BYIL, 1955–6, p. 162.

requirement, noting that the domestic doctrine known as the procedural default rule, preventing a claimant from raising an issue on appeal or on review if it had not been raised at trial, could not excuse or justify that violation.[116] The US Supreme Court has held that while the International Court's decisions were entitled to 'respectful consideration', they were not binding.[117] This was so even though the US President in a memorandum dated 28 February 2005 had declared that the US would fulfil its obligations under the *Avena* decision by having states' courts give effect to it.[118] The Texas Court of Criminal Appeals, however, held that neither the *Avena* decision of the ICJ nor the President's memorandum constituted binding federal law pre-empting Texas law, so that Medellin (the applicant) would not be provided with the review called for by the International Court and by the President.[119]

In Australia, the issue has turned on the interpretation of the constitutional grant of federal power to make laws 'with respect to . . . external affairs'.[120] Two recent cases have analysed this, in the light particularly of the established principle that the Federal Government could under this provision legislate on matters, not otherwise explicitly assigned to it, which possessed an intrinsic international aspect.[121]

In *Koowarta* v. *Bjelke-Petersen*[122] in 1982, the Australian High Court, in dealing with an action against the Premier of Queensland for breach of the Racial Discrimination Act 1975 (which incorporated parts of the International Convention on the Elimination of All Forms of Racial

[116] The *LaGrand* case, ICJ Reports, 2001, p. 104 and the *Avena* case, ICJ Reports, 2004, p. 12; 134 ILR, p. 120.

[117] *Medellin* v. *Dretke* 118 S.Ct. 1352 (2005) and *Sanchez-Llamas* v. *Oregon* 126 S.Ct. 2669 (2006); 134 ILR, p. 719.

[118] 44 ILM, 2005, p. 964.

[119] *Medellin* v. *Dretke*, Application No. AP-75,207 (Tex. Crim. App. 15 November 2006). Note that the US Supreme Court held that a writ of certiorari to consider the effect of the International Court's decision had been 'improvidently granted' prior to the Texas appeal: see 44 ILM, 2005, p. 965. However, the Supreme Court did grant certiorari on 30 April 2007 (after the Texas decision) to consider two questions: '1. Did the President of the United States act within his constitutional and statutory foreign affairs authority when he determined that the states must comply with the United States' treaty obligation to give effect to the Avena judgment in the cases of the 51 Mexican nationals named in the judgment? [and] 2. Are state courts bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the Avena judgment in the cases that the judgment addressed?' See now *Medellin* v. *Texas*, 128 S.Ct. 1346 and above, p. 164, note 178.

[120] See e.g. L. R. Zines, *The High Court and the Constitution*, Sydney, 1981, and A. Byrnes and H. Charlesworth, 'Federalism and the International Legal Order: Recent Developments in Australia', 79 AJIL, 1985, p. 622.

[121] *R* v. *Burgess, ex parte Henry* 55 CLR 608 (1936); 8 AD, p. 54.

[122] 68 ILR, p. 181.

Discrimination adopted in 1965), held that the relevant legislation was valid with respect to the 'external affairs' provision under section 51(29) of the Constitution. In other words, the 'external affairs' power extended to permit the implementation of an international agreement, despite the fact that the subject-matter concerned was otherwise outside federal power. It was felt that if Australia accepted a treaty obligation with respect to an aspect of its own internal legal order, the subject of the obligation thus became an 'external affair' and legislation dealing with this fell within section 51(29), and was thereby valid constitutionally.[123] It was not necessary that a treaty obligation be assumed: the fact that the norm of non-discrimination was established in customary international law was itself sufficient in the view of Stephen J to treat the issue of racial discrimination as part of external affairs.[124]

In *Commonwealth of Australia* v. *Tasmania*,[125] the issue concerned the construction of a dam in an area placed on the World Heritage List established under the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage, to which Australia was a party. The Federal Government in 1983 wished to stop the scheme by reference *inter alia* to the 'external affairs' power as interpreted in *Koowarta*, since it possessed no specific legislative power over the environment. The majority of the Court held that the 'external affairs' power extended to the implementation of treaty obligations. It was not necessary that the subject-matter of the treaty be inherently international.

The effect of these cases seen, of course, in the context of the Australian Constitution, is to reduce the problems faced by federal states of implementing international obligations in the face of local jurisdiction.

The difficulties faced by federal states have also become evident with regard to issues of state responsibility.[126] As a matter of international law, states are responsible for their actions, including those of subordinate organs irrespective of domestic constitutional arrangements.[127] The

[123] *Ibid.*, pp. 223–4 (Stephen J); p. 235 (Mason J) and p. 255 (Brennan J).

[124] *Ibid.*, pp. 223–4.

[125] *Ibid.*, p. 266. The case similarly came before the High Court.

[126] See e.g. R. Higgins, 'The Concept of "the State": Variable Geometry and Dualist Perceptions' in *The International Legal System in Quest of Equity and Universality* (eds. L. Boisson de Chazournes and V. Gowland-Debas), The Hague, 2001, p. 547.

[127] Article 4(1) of the International Law Commission's Articles on State Responsibility, 2001, provides that: 'The conduct of any State organ shall 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 organisation of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.'

International Court in the *Immunity from Legal Process of a Special Rapporteur* case stated that it was a well-established rule of customary international law that 'the conduct of any organ of a State must be regarded as an act of that State'[128] and this applies to component units of a federal state. As the Court noted in its Order of 3 March 1999 on provisional measures in the *LaGrand* case, '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'. In particular, the US was under an obligation to transmit the Order to the Governor of the State of Arizona, while the Governor was under an obligation to act in conformity with the international undertakings of the US.[129] Similarly, the Court noted in the *Immunity from Legal Process of a Special Rapporteur* case that the government of Malaysia was under an obligation to communicate the Court's Advisory Opinion to the Malaysian courts in order that Malaysia's international obligations be given effect.[130]

Thus, international responsibility of the state may co-exist with an internal lack of capacity to remedy the particular international wrong. In such circumstances, the central government is under a duty to seek to persuade the component unit to correct the violation of international law,[131] while the latter is, it seems, under an international obligation to act in accordance with the international obligations of the state.

Federal practice in regulating disputes between component units is often of considerable value in international law. This operates particularly in cases of boundary problems, where similar issues arise.[132] Conversely, international practice may often be relevant in the resolution of conflicts between component units.[133]

See also J. Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge, 2002, pp. 94 ff.

128 ICJ Reports, 1999, pp. 62, 87; 121 ILR, p. 367.

129 ICJ Reports, 1999, pp. 9, 16; 118 ILR, p. 37. See also e.g. the *Pellat* case, 5 RIAA, p. 534 (1929).

130 ICJ Reports, 1999, pp. 62, 88; 121 ILR, p. 367.

131 Such issues arise from time to time with regard to human rights matters before international or regional human rights bodies: see e.g. *Toonen* v. *Australia*, Human Rights Committee, Communication No. 488/1992, 112 ILR, p. 328, and *Tyrer* v. *UK*, 2 European Human Rights Reports 1. See also *Matthews* v. *UK*, 28 European Human Rights Reports 361, and *RMD* v. *Switzerland*, *ibid.*, 224.

132 See e.g. E. Lauterpacht, 'River Boundaries: Legal Aspects of the Shatt-Al-Arab Frontier', 9 ICLQ, 1960, pp. 208, 216, and A. O. Cukwurah, *The Settlement of Boundary Disputes in International Law*, Manchester, 1967.

133 See also below, chapters 13 and 14.

Sui generis territorial entities

Mandated and trust territories[134]

After the end of the First World War and the collapse of the Axis and Russian empires, the Allies established a system for dealing with the colonies of the defeated powers that did not involve annexation. These territories would be governed according to the principle that 'the well-being and development of such peoples form a sacred trust of civilisation'. The way in which this principle would be put into effect would be to entrust the tutelage of such people to 'advanced nations who by reason of their resources, their experience or their geographical position' could undertake the responsibility. The arrangement would be exercised by them as mandatories on behalf of the League.[135]

Upon the conclusion of the Second World War and the demise of the League, the mandate system was transmuted into the United Nations trusteeship system under Chapters XII and XIII of the UN Charter.[136] The strategic trust territory of the Pacific, taken from Japan, the mandatory power, was placed in a special category subject to Security Council rather than Trusteeship Council supervision for security reasons,[137] while South

[134] See generally H. Duncan Hall, *Mandates, Dependencies and Trusteeships*, London, 1948; Whiteman, *Digest*, vol. I, pp. 598–911 and vol. XIII, pp. 679 ff.; C. E. Toussaint, *The Trusteeship System of the United Nations*, New York, 1957; Verzijl, *International Law*, vol. II, pp. 545–73; Q. Wright, *Mandates Under the League of Nations*, New York, 1930; J. Dugard, *The South West Africa/Namibia Dispute*, Berkeley, 1973, and S. Slonim, *South West Africa and the United Nations*, Leiden, 1973. See also *Oppenheim's International Law*, pp. 295 and 308, and Crawford, *Creation of States*, pp. 565 ff.

[135] See article 22 of the Covenant of the League of Nations. See also the *International Status of South West Africa*, ICJ Reports, 1950, pp. 128, 132; 17 ILR, p. 47; the *Namibia* case, ICJ Reports, 1971, pp. 16, 28–9; 49 ILR, pp. 2, 18–19; *Certain Phosphate Lands in Nauru*, ICJ Reports, 1992, pp. 240, 256; 97 ILR, pp. 1, 23 and *Cameroon* v. *Nigeria*, ICJ Reports, 2002, para. 212.

[136] See e.g. *Certain Phosphate Lands in Nauru*, ICJ Reports, 1992, pp. 240, 257; 97 ILR, pp. 1, 24. See also the discussion by Judge Shahabuddeen in his Separate Opinion, ICJ Reports, 1992, pp. 276 ff.; 97 ILR, p. 43. Note that the Court in this case stated that the arrangements whereby Nauru was to be administered under the trusteeship agreement by the governments of the UK, Australia and New Zealand together as 'the administering authority' did not constitute that authority an international legal person separate from the three states so designated: ICJ Reports, 1992, p. 258; 97 ILR, p. 25. See also *Cameroon* v. *Nigeria*, ICJ Reports, 2002, para. 212.

[137] See O. McHenry, *Micronesia: Trust Betrayed*, New York, 1975; Whiteman, *Digest*, vol. I, pp. 769–839; S. A. de Smith, *Micro-States and Micronesia*, New York, 1970; DUSPIL, 1973, pp. 59–67; *ibid.*, 1974, pp. 54–64; *ibid.*, 1975, pp. 94–104; *ibid.*, 1976, pp. 56–61; *ibid.*, 1977, pp. 71–98 and *ibid.*, 1978, pp. 204–31.

Africa refused to place its mandated territory under the system. Quite who held sovereignty in such territories was the subject of extensive debates over many decades.[138]

As far as the trust territory of the Pacific was concerned, the US signed a Covenant with the Commonwealth of the Northern Mariana Islands and Compacts of Free Association with the Federated States of Micronesia and with the Republic of the Marshall Islands. Upon their entry into force in autumn 1986, it was determined that the trusteeship had been terminated. This procedure providing for political union with the US was accepted by the Trusteeship Council as a legitimate exercise of self-determination.[139] However, the proposed Compact of Free Association with the Republic of Palau (the final part of the former trust territory) did not enter into force as a result of disagreement over the transit of nuclear-powered or armed vessels and aircraft through Palauan waters and airspace and, therefore, the US continued to act as administering authority under the trusteeship agreement.[140] These difficulties were eventually resolved.[141]

South West Africa was administered after the end of the First World War as a mandate by South Africa, which refused after the Second World War to place the territory under the trusteeship system. Following this, the International Court of Justice in 1950 in its Advisory Opinion on the *International Status of South West Africa*[142] stated that, while there was no legal obligation imposed by the United Nations Charter to transfer a mandated territory into a trust territory, South Africa was still bound by the terms of the mandate agreement and the Covenant of the League of Nations, and the obligations that it had assumed at that time. The Court emphasised that South Africa alone did not have the capacity to modify the international status of the territory. This competence rested with South Africa acting with the consent of the United Nations, as successor to the League of Nations. Logically flowing from this decision was the ability of the United Nations to hear petitioners from the territory in consequence of South Africa's refusal to heed United Nations decisions and in pursuance of League of Nations practices.[143]

[138] See in particular Judge McNair, *International Status of South West Africa*, ICJ Reports, 1950, pp. 128, 150 and the Court's view, *ibid*., p. 132; 17 ILR, pp. 47, 49.

[139] See Security Council resolution 683 (1990).

[140] See 'Contemporary Practice of the United States Relating to International Law', 81 AJIL, 1987, pp. 405–8. See also *Bank of Hawaii* v. *Balos* 701 F.Supp. 744 (1988).

[141] See Security Council resolution 956 (1994).

[142] ICJ Reports, 1950, pp. 128, 143–4; 17 ILR, pp. 47, 57–60.

[143] ICJ Reports, 1955, p. 68; 22 ILR, p. 651 and ICJ Reports, 1956, p. 23; 23 ILR, p. 38.

In 1962 the ICJ heard the case brought by Ethiopia and Liberia, the two African members of the League, that South Africa was in breach of the terms of the mandate and had thus violated international law. The Court initially affirmed that it had jurisdiction to hear the merits of the dispute.[144] However, by the Second Phase of the case, the Court (its composition having slightly altered in the meanwhile) decided that Ethiopia and Liberia did not have any legal interest in the subject-matter of the claim (the existence and supervision of the mandate over South West Africa) and accordingly their contentions were rejected.[145] Having thus declared on the lack of standing of the two African appellants, the Court did not discuss any of the substantive questions which stood before it.

This judgment aroused a great deal of feeling, particularly in the Third World, and occasioned a shift in emphasis in dealing with the problem of the territory in question.[146]

The General Assembly resolved in October 1966 that since South Africa had failed to fulfil its obligations, the mandate was therefore terminated. South West Africa (or Namibia as it was to be called) was to come under the direct responsibility of the United Nations.[147] Accordingly, a Council was established to oversee the territory and a High Commissioner appointed.[148] The Security Council in a number of resolutions upheld the action of the Assembly and called upon South Africa to withdraw its administration from the territory. It also requested other states to refrain from dealing with the South African government in so far as Namibia was concerned.[149]

The Security Council ultimately turned to the International Court and requested an Advisory Opinion as to the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*.[150] The Court concluded that South Africa's presence in Namibia was indeed illegal in view of the series of events culminating in the United Nations resolutions on the grounds of a material breach of a treaty (the mandate agreement) by South Africa, and further that 'a binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence'. South Africa was obligated to withdraw its

[144] ICJ Reports, 1962, pp. 141 and 143. [145] ICJ Reports, 1966, p. 6; 37 ILR, p. 243.
[146] See e.g. Dugard, *South West Africa/Namibia*, p. 378. [147] Resolution 2145 (XXI).
[148] See General Assembly resolutions 2145 (XXI) and 2248 (XXII).
[149] See e.g. Security Council resolutions 263 (1969), 269 (1969) and 276 (1970).
[150] ICJ Reports, 1971, p. 16; 49 ILR, p. 3.

administration from the territory, and other states members of the United Nations were obliged to recognise the illegality and the invalidity of its acts with regard to that territory and aid the United Nations in its efforts concerning the problem.[151]

The opinion was approved by the Security Council in resolution 301 (1971), which also reaffirmed the national unity and territorial integrity of Namibia. In 1978 South Africa announced its acceptance of proposals negotiated by the five Western contact powers (UK, USA, France, Canada and West Germany) for Namibian independence involving a UN supervised election and peace-keeping force.[152] After some difficulties,[153] Namibia finally obtained its independence on 23 April 1990.[154]

Germany 1945

With the defeat of Germany on 5 June 1945, the Allied Powers assumed 'supreme authority' with respect to that country, while expressly disclaiming any intention of annexation.[155] Germany was divided into four occupation zones with four-power control over Berlin. The Control Council established by the Allies acted on behalf of Germany and in such capacity entered into binding legal arrangements. The state of Germany continued, however, and the situation, as has been observed, was akin to legal representation or agency of necessity.[156] Under the 1952 Treaty between the three Western powers and the Federal Republic of Germany, full sovereign powers were granted to the latter subject to retained powers concerning the making of a peace treaty, and in 1972 the Federal Republic of Germany and the German Democratic Republic, established in 1954 by the Soviet Union in its zone, recognised each other as sovereign states.[157]

However, following a series of dramatic events during 1989 in Central and Eastern Europe, deriving in essence from the withdrawal of

[151] ICJ Reports, 1971, pp. 52–8.

[152] 17 ILM, 1978, pp. 762–9, and DUSPIL, 1978, pp. 38–54. See Security Council resolution 435 (1978). See also *Africa Research Bulletin*, April 1978, p. 4829 and July 1978, p. 4935.

[153] See S/14459; S/14460/Rev.1; S/14461 and S/14462.

[154] See 28 ILM, 1989, p. 944.

[155] See Whiteman, *Digest*, vol. I, pp. 325–6, and R. W. Piotrowicz, 'The Status of Germany in International Law', 38 ICLQ, 1989, p. 609. See also Crawford, *Creation of States*, p. 523.

[156] Brownlie, *Principles*, p. 107. See also Whiteman, *Digest*, p. 333, and I. D. Hendry and M. C. Wood, *The Legal Status of Berlin*, Cambridge, 1987.

[157] 12 AD, p. 16. Note also *Kunstsammlungen zu Weimar v. Elicofon* 94 ILR, p. 135. Both states became members of the UN the following year. See Crawford, *Creation of States*, pp. 523–6, and F. A. Mann, *Studies in International Law*, Oxford, 1973, pp. 634–59 and 660–706.

Soviet control, the drive for a reunified Germany in 1990 became unstoppable.[158] A State Treaty on German Economic, Monetary and Social Union was signed by the Finance Ministers of the two German states on 18 May and this took effect on 1 July.[159] A State Treaty on Unification was signed on 31 August, providing for unification on 3 October by the accession to the Federal Republic of Germany of the *Länder* of the German Democratic Republic under article 23 of the Basic Law of the Federal Republic, with Berlin as the capital.[160] The external obstacle to unity was removed by the signing on 12 September of the Treaty on the Final Settlement with Respect to Germany, between the two German states and the four wartime allies (UK, USA, USSR and France).[161] Under this treaty, a reunified Germany agreed to accept the current Oder–Neisse border with Poland and to limit its armed forces to 370,000 persons, while pledging not to acquire atomic, chemical or biological weapons. The Agreement on the Settlement of Certain Matters Relating to Berlin between the Federal Republic and the three Western powers on 25 September 1990 provided for the relinquishment of Allied rights with regard to Berlin.[162]

Condominium

In this instance two or more states equally exercise sovereignty with respect to a territory and its inhabitants. There are arguments as to the relationship between the states concerned, the identity of the sovereign for the purposes of the territory and the nature of the competences involved.[163] In the case of the New Hebrides, a series of Anglo-French agreements established a region of joint influence, with each power retaining sovereignty over its nationals and neither exercising separate authority

[158] See e.g. J. Frowein, 'The Reunification of Germany', 86 AJIL, 1992, p. 152; Schrike, 'L'Unification Allemande', p. 47; Czaplinski, 'Quelques Aspects', p. 89, and R. W. Piotrowicz and S. Blay, *The Unification of Germany in International and Domestic Law*, Amsterdam, 1997.

[159] See *Keesing's Record of World Events*, p. 37466 (1990). See also 29 ILM, 1990, p. 1108.

[160] *Keesing's*, p. 37661. See also 30 ILM, 1991, pp. 457 and 498.

[161] See 29 ILM, 1990, p. 1186.

[162] See 30 ILM, 1991, p. 445. See also the Exchange of Notes of the same date concerning the presence of allied troops in Berlin, *ibid.*, p. 450.

[163] Brownlie, *Principles*, pp. 113–14. See also O'Connell, *International Law*, pp. 327–8; A. Coret, *Le Condominium*, Paris, 1960; *Oppenheim's International Law*, p. 565, and V. P. Bantz, 'The International Legal Status of Condominia', 12 *Florida Journal of International Law*, 1998, p. 77.

over the area.[164] A Protocol listed the functions of the condominial government and vested the power to issue joint regulations respecting them in a British and a French High Commissioner. This power was delegated to resident commissioners who dealt with their respective nationals. Three governmental systems accordingly co-existed, with something of a legal vacuum with regard to land tenure and the civil transactions of the indigenous population.[165] The process leading to the independence of the territory also reflected its unique status as a condominium.[166] It was noted that the usual independence Bill would not have been appropriate, since the New Hebrides was not a British colony. Its legal status as an Anglo-French condominium had been established by international agreement and could only be terminated in the same fashion. The nature of the condominium was such that it assumed that the two metropolitan powers would always act together and unilateral action was not provided for in the basic constitutional documents.[167] The territory became independent on 30 July 1980 as the state of Vanuatu. The entity involved prior to independence grew out of an international treaty and established an administrative entity arguably distinct from its metropolitan governments but more likely operating on the basis of a form of joint agency with a range of delegated powers.[168]

The Central American Court of Justice in 1917[169] held that a condominium existed with respect to the Gulf of Fonseca providing for rights of co-ownership of the three coastal states of Nicaragua, El Salvador and Honduras. The issue was raised in the *El Salvador/Honduras* case before

[164] See e.g. 99 BFSP, p. 229 and 114 BFSP, p. 212.

[165] O'Connell, *International Law*, p. 328.

[166] Lord Trefgarne, the government spokesman, moving the second reading of the New Hebrides Bill in the House of Lords, 404 HL Deb., cols. 1091–2, 4 February 1980.

[167] See Mr Luce, Foreign Office Minister, 980 HC Deb., col. 682, 8 March 1980 and 985 HC Deb., col. 1250, 3 June 1980. See also D. P. O'Connell, 'The Condominium of the New Hebrides', 43 BYIL, p. 71.

[168] See also the joint Saudi Arabian–Kuwaiti administered Neutral Zone based on the treaty of 2 December 1922, 133 BFSP, 1930 Part II, pp. 726–7. See e.g. *The Middle East* (ed. P. Mansfield), 4th edn, London, 1973, p. 187. Both states enjoyed an equal right of undivided sovereignty over the whole area. However, on 7 July 1965, both states signed an agreement to partition the neutral zone, although the territory apparently retained its condominium status for exploration of resources purposes: see 4 ILM, 1965, p. 1134, and H. M. Albaharna, *The Legal Status of the Arabian Gulf States*, 2nd rev. edn, Beirut, 1975, pp. 264–77. See also F. Ali Taha, 'Some Legal Aspects of the Anglo-Egyptian Condominium over the Sudan: 1899–1954', 76 BYIL, 2005, p. 337.

[169] 11 AJIL, 1917, p. 674.

the International Court of Justice.[170] The Court noted that a condominium arrangement being 'a structured system for the joint exercise of sovereign governmental powers over a territory' was normally created by agreement between the states concerned, although it could be created as a juridical consequence of a succession of states (as in the Gulf of Fonseca situation itself), being one of the ways in which territorial sovereignty could pass from one state to another. The Court concluded that the waters of the Gulf of Fonseca beyond the three-mile territorial sea were historic waters and subject to a joint sovereignty of the three coastal states. It based its decision, apart from the 1917 judgment, upon the historic character of the Gulf waters, the consistent claims of the three coastal states and the absence of protest from other states.[171]

International administration of territories

In such cases a particular territory is placed under a form of international regime, but the conditions under which this has been done have varied widely, from autonomous areas within states to relatively independent entities.[172] The UN is able to assume the administration of territories in specific circumstances. The trusteeship system was founded upon the supervisory role of the UN,[173] while in the case of South West Africa, the General Assembly supported by the Security Council ended South Africa's mandate and asserted its competence to administer the territory pending independence.[174] Beyond this, UN organs exercising their powers may assume a variety of administrative functions over particular territories where issues of international concern have arisen. Attempts were made to create such a regime for Jerusalem under the General Assembly partition resolution for Palestine in 1947 as a '*corpus separatum* under a special international regime . . . administered by the United Nations', but this never materialised for a number of reasons.[175] Further, the Security Council

[170] ICJ Reports, 1992, pp. 351, 597 ff.; 97 ILR, pp. 266, 513 ff. El Salvador and Nicaragua were parties to the 1917 decision but differed over the condominium solution. Honduras was not a party to that case and opposed the condominium idea.

[171] ICJ Reports, 1992, p. 601; 97 ILR, p. 517.

[172] See e.g. R. Wilde, *International Territorial Administration*, Oxford, 2008; M. Ydit, *Internationalised Territories*, Leiden, 1961; Crawford, *Creation of States*, pp. 501 ff.; Brownlie, *Principles*, pp. 60 and 167, and Rousseau, *Droit International Public*, vol. II, pp. 413–48.

[173] See further above, p. 224. [174] See above, p. 225.

[175] Resolution 18(II). See e.g. E. Lauterpacht, *Jerusalem and the Holy Places*, London, 1968, and Ydit, *Internationalised Territories*, pp. 273–314.

in 1947 adopted a Permanent Statute for the Free Territory of Trieste, under which the Council was designated as the supreme administrative and legislative authority of the territory.[176]

More recently, the UN has become more involved in important administrative functions, authority being derived from a mixture of international agreements, domestic consent and the powers of the Security Council under Chapter VII to adopt binding decisions concerning international peace and security, as the case may be. For example, the 1991 Paris Peace Agreements between the four Cambodian factions authorised the UN to establish civil administrative functions in that country pending elections and the adoption of a new constitution. This was accomplished through the UN Transitional Authority in Cambodia (UNTAC), to which were delegated 'all powers necessary to ensure the implementation' of the peace settlement and which also exercised competence in areas such as foreign affairs, defence, finance and so forth.[177]

Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Agreement)[178] established the post of High Representative with extensive powers with regard to the civilian implementation of the peace agreement and with the final authority to interpret the civilian aspects of the settlement.[179] This was endorsed and confirmed by the Security Council in binding resolution 1031 (1995). The relatively modest powers of the High Representative under Annex 10 were subsequently enlarged in practice by the Peace Implementation Council, a body

[176] See Security Council resolution 16 (1947). Like the Jerusalem idea, this never came into being. See also the experiences of the League of Nations with regard to the Saar and Danzig, Ydit, *Internationalised Territories*, chapter 3.

[177] See Article 6 and Annex I of the Paris Peace Settlement. See also C. Stahn, 'International Territorial Administration in the Former Yugoslavia: Origins, Developments and Challenges Ahead', ZaöRV, 2001, p. 107. UNTAC lasted from March 1992 to September 1993 and involved some 22,000 military and civilian personnel: see www.un.org/Depts/dpko/dpko/co_mission/untac.htm. Note also e.g. the operations of the UN Transition Group in Namibia which, in the process leading to Namibian independence, exercised a degree of administrative power: see Report of the UN Secretary-General, A/45/1 (1991), and the UN Transitional Administration for Eastern Slavonia (UNTAES), which facilitated the transfer of the territory from Serb to Croat rule over a two-year period: see Security Council resolution 1037 (1996).

[178] Initialled at Dayton, Ohio, and signed in Paris, 1995.

[179] The final authority with regard to the military implementation of the agreement remains the commander of SFOR: see article 12 of the Agreement on the Military Aspects of the Dayton Peace Agreement. Note also the establishment of the Human Rights Chamber, the majority of whose members are from other states: see below, chapter 7, p. 379, and the Commission for Displaced Persons and Refugees: see Annexes 6 and 7 of the Peace Agreement.

with fifty-five members established to review progress regarding the peace settlement, in the decisions it took at the Bonn Summit of December 1997 (the Bonn Conclusions).[180] These provided, for example, for measures to be taken against persons found by the High Representative to be in violation of legal commitments made under the Peace Agreement. This has included removal from public office, the competence to impose interim legislation where Bosnia's institutions had failed to do so[181] and 'other measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities, as well as the smooth running of the common institutions'.[182] The High Representative has taken a wide-ranging number of decisions, from imposing the Law on Citizenship of Bosnia and Herzegovina in December 1997[183] and imposing the Law on the Flag of Bosnia and Herzegovina in February 1998[184] to enacting the Law on Changes and Amendments to the Election Law in January 2006 to mark the ongoing process of transferring High Representative powers to the domestic authorities in the light of the improving situation.[185] This unusual structure with regard to an independent state arises, therefore, from a mix of the consent of the parties and binding Chapter VII activity by the Security Council.

In resolution 1244 (1999), the Security Council authorised the Secretary-General to establish an interim international civil presence in Kosovo (UNMIK),[186] following the withdrawal of Yugoslav forces from

[180] See e.g. the documentation available at www.ohr.int/pic/archive.asp?so=d&sa=on. See also Security Council resolutions 1144 (1997), 1256 (1999) and 1423 (2002).

[181] www.ohr.int/pic/default.asp?content_id=5182. The competence of the High Representative to adopt binding decisions with regard to interim measures when the parties are unable to reach agreement remains in force until the Presidency or Council of Ministers has adopted a decision consistent with the Peace Agreement on the issue concerned.

[182] Paragraph XI of the Bonn Conclusions. See also Security Council resolutions 1247 (1999), 1395 (2000), 1357 (2001), 1396 (2002) and 1491 (2003).

[183] www.ohr.int/statemattersdec/default.asp?content_id=343.

[184] www.ohr.int/statemattersdec/default.asp?content_id=344.

[185] www.ohr.int/statemattersdec/default.asp?content_id=36465.

[186] See Stahn, 'International Territorial Administration', p. 111; T. Garcia, 'La Mission d'Administration Intérimaire des Nations Unies au Kosovo', RGDIP, 2000, p. 61, and M. Ruffert, 'The Administration of Kosovo and East Timor by the International Community', 50 ICLQ, 2001, p. 613. See also *Kosovo and the International Community: A Legal Assessment* (ed. C. Tomuschat), The Hague, 2002; B. Knoll, 'From Benchmarking to Final Status? Kosovo and the Problem of an International Administration's Open-Ended Mandate', 16 *European Journal of International Law*, 2005, p. 637; *Kosovo: KFOR and Reconstruction*, House of Commons Research Paper 99/66, 1999; A. Yannis, 'The UN as Government in Kosovo', 10 *Global Governance*, 2004, p. 67; International Crisis Group (ICG), *Kosovo: Towards Final Status*, January 2005, ICG, *Kosovo: The Challenge of Transition*,

that part of the country consequent upon NATO action. Under this resolution, UNMIK performed a wide range of administrative functions, including health and education, banking and finance, post and telecommunications, and law and order. It was tasked *inter alia* to promote the establishment of substantial autonomy and self-government in Kosovo, to co-ordinate humanitarian and disaster relief, support the reconstruction of key infrastructure, maintain civil law and order, promote human rights and assure the return of refugees. Administrative structures were established and elections held. The first regulation adopted by the Special Representative of the UN Secretary-General appointed under resolution 1244 vested all legislative and executive authority in Kosovo in UNMIK as exercised by the Special Representative.[187] This regulation also established that the law in the territory was that in existence in so far as this did not conflict with the international standards referred to in section 2 of the regulation, the fulfilment of the mandate given to UNMIK under resolution 1244, or the present or any other regulation issued by UNMIK. A Constitutional Framework for Provisional Self-Government was promulgated by the Special Representative in May 2001.[188] This comprehensive administrative competence was founded upon the reaffirmation of Yugoslavia's sovereignty and territorial integrity (and thus continuing territorial title over the province) and the requirement for 'substantial autonomy and meaningful self-administration for Kosovo'.[189] Accordingly, this arrangement illustrated a complete division between title to the territory and the exercise of power and control over it. It flowed from a binding Security Council resolution, which referred to Yugoslavia's consent to the essential principles therein contained.[190]

The United Nations Transitional Administration in East Timor (UNTAET) was established by Security Council resolution 1272 (1999) acting under Chapter VII. It was 'endowed with overall responsibility for the administration of East Timor' and 'empowered to exercise all legislative and executive authority, including the administration of justice'.[191]

February 2006, ICG, *Kosovo: No Good Alternatives to the Ahtisaari Plan*, 14 May 2007, and ICG, *Kosovo Countdown: A Blueprint for Transition*, 6 December 2007. Resolution 1244 also authorised an international military presence.

[187] Regulation 1 (1999). This was backdated to the date of adoption of resolution 1244.

[188] See UNMIK Regulation 9 (2001).

[189] Resolution 1244 (1999).

[190] See S/1999/649 and Annex 2 to the resolution. Kosovo declared independence on 17 February 2008: see below, p. 452 and above, p. 201.

[191] East Timor, a Portuguese non-self-governing territory, was occupied by Indonesia in 1974. These two states agreed with the UN on 5 May 1999 to a process of popular consultation

Its widespread mandate included, in addition to public administration, humanitarian responsibilities and a military component and it was authorised to take all necessary measures to fulfil its mandate. UNTAET's mandate was extended to 20 May 2002, the date of East Timor's independence as the new state of Timor-Leste.[192] It was thereafter succeeded by the United Nations Mission of Support in East Timor (UNMISET).[193]

Taiwan[194]

This territory was ceded by China to Japan in 1895 by the treaty of Shimonoseki and remained in the latter's hands until 1945. Japan undertook on surrender not to retain sovereignty over Taiwan and this was reaffirmed under the Peace Treaty, 1951 between the Allied Powers (but not the USSR and China) and Japan, under which all rights to the island were renounced without specifying any recipient. After the Chinese Civil War, the Communist forces took over the mainland while the Nationalist regime installed itself on Taiwan (Formosa) and the Pescadores. Both the US and the UK took the view at that stage that sovereignty over Taiwan was uncertain or undetermined.[195] The key point affecting status has been that both governments have claimed to represent the whole of China. No claim of separate statehood for Taiwan has been made and in such a case it is difficult to maintain that such an unsought status exists. Total lack of recognition of Taiwan as a separate independent state merely reinforces this point. In 1979 the US recognised the People's Republic of China as the sole and legitimate government of China.[196] Accordingly, Taiwan would

in the territory over its future. The inhabitants expressed a clear wish for a transitional process of UN authority leading to independence. Following the outbreak of violence, a multinational force was sent to East Timor pursuant to resolution 1264 (1999): see also the Report of the Secretary-General, S/1999/1024; www.un.org/peace/etimor/etimor.htm.

192 See resolutions 1388 (2001) and 1392 (2002).

193 See resolution 1410 (2002).

194 See e.g. Crawford, *Creation of States*, pp. 198 ff.; *China and the Question of Taiwan* (ed. H. Chiu), New York, 1979; W. M. Reisman, 'Who Owns Taiwan?', 81 *Yale Law Journal*, p. 599; F. P. Morello, *The International Legal Status of Formosa*, The Hague, 1966; V. H. Li, *De-Recognising Taiwan*, Washington, DC, 1977, and L. C. Chiu, 'The International Legal Status of the Republic of China', 8 *Chinese Yearbook of International Law and Affairs*, 1990, p. 1. See also *The International Status of Taiwan in the New World Order* (ed. J. M. Henckaerts), London, 1996; *Let Taiwan be Taiwan* (eds. M. J. Cohen and E. Teng), Washington, 1990, and J. I. Charney and J. R. V. Prescott, 'Resolving Cross-Strait Relations Between China and Taiwan', 94 AJIL, 2000, p. 453.

195 See Whiteman, *Digest*, vol. III, pp. 538, 564 and 565.

196 See Crawford, *Creation of States*, pp. 209 ff. Note that the 1972 USA–China communiqué accepted that Taiwan was part of China, 11 ILM, pp. 443, 445. As to the 1979 changes, see 73 AJIL, p. 227. See also 833 HC Deb., col. 32, 13 March 1972, for the new British

appear to be a non-state territorial entity which is capable of acting independently on the international scene, but is most probably *de jure* part of China. It is interesting to note that when in early 1990 Taiwan sought accession to the General Agreement on Tariffs and Trade (GATT), it did so by requesting entry for the 'customs territory' of 'Taiwan, Penghu, Kinmen and Matsu', thus avoiding an assertion of statehood.[197] The accession of 'Chinese Taipei' to the World Trade Organisation was approved by the Ministerial Conference in November 2001.[198]

The 'Turkish Republic of Northern Cyprus' (TRNC)[199]

In 1974, following a coup in Cyprus backed by the military regime in Greece, Turkish forces invaded the island. The Security Council in resolution 353 (1974) called upon all states to respect the sovereignty, independence and territorial integrity of Cyprus and demanded an immediate end to foreign military intervention in the island that was contrary to such respect. On 13 February 1975 the Turkish Federated State of Cyprus was proclaimed in the area occupied by Turkish forces. A resolution adopted at the same meeting of the Council of Ministers and the Legislative Assembly of the Autonomous Turkish Cypriot Administration at which the proclamation was made, emphasised the determination 'to oppose resolutely all attempts against the independence of Cyprus and its partition or union with any other state' and resolved to establish a separate administration until such time as the 1960 Cyprus Constitution was amended to provide for a federal republic.[200]

approach, i.e. that it recognised the Government of the People's Republic of China as the sole legal Government of China and acknowledged the position of that government that Taiwan was a province of China, and see e.g. UKMIL, 71 BYIL, 2000, p. 537. See also *Reel* v. *Holder* [1981] 1 WLR 1226.

197 See *Keesing's Record of World Events*, p. 37671 (1990). This failed, however, to prevent a vigorous protest by China: *ibid.* Note also the Agreements Concerning Cross-Straits Activities between unofficial organisations established in China and Taiwan in order to reach functional, non-political agreements, 32 ILM, 1993, p. 1217. A degree of evolution in Taiwan's approach was evident in the Additional Articles of the Constitution adopted in 1997.

198 See www.wto.org/english/news_e/pres01_e/pr253_e.htm. As to Rhodesia (1965–79) and the Bantustans, see above, pp. 206 and 202.

199 See Z. M. Necatigil, *The Cyprus Question and the Turkish Position in International Law*, 2nd edn, Oxford 1993; G. White, *The World Today*, April 1981, p. 135, and Crawford, *Creation of States*, pp. 143 ff.

200 Resolution No. 2 in Supplement IV, Official Gazette of the TFSC, cited in Nadjatigil, *Cyprus Conflict*, p. 123.

On 15 November 1983, the Turkish Cypriots proclaimed their independence as the 'Turkish Republic of Northern Cyprus'.[201] This was declared illegal by the Security Council in resolution 541 (1983) and its withdrawal called for. All states were requested not to recognise the 'purported state' or assist it in any way. This was reiterated in Security Council resolution 550 (1984). The Committee of Ministers of the Council of Europe decided that it continued to regard the government of the Republic of Cyprus as the sole legitimate government of Cyprus and called for respect for the independence and territorial integrity of Cyprus.[202] The European Court of Human Rights in its judgment of 10 May 2001 in *Cyprus* v. *Turkey* concluded that, 'it is evident from international practice . . . that the international community does not recognise the "TRNC" as a state under international law' and declared that 'the Republic of Cyprus has remained the sole legitimate government of Cyprus'.[203] In the light of this and the very heavy dependence of the territory upon Turkey, it cannot be regarded as a sovereign state, but remains as a *de facto* administered entity within the recognised confines of the Republic of Cyprus and dependent upon Turkish assistance.[204]

The Saharan Arab Democratic Republic[205]

In February 1976, the Polisario liberation movement conducting a war to free the Western Saharan territory from Moroccan control declared the independent sovereign Saharan Arab Democratic Republic (SADR).[206] Over the succeeding years, many states recognised the new entity, including a majority of Organisation of African Unity members. In February 1982, the OAU Secretary-General sought to seat a delegation from SADR on that basis, but this provoked a boycott by some nineteen states and a major crisis. However, in November 1984 the Assembly of Heads of State and Government of the OAU did agree to seat a delegation from SADR,

[201] See *The Times*, 16 November 1983, p. 12, and 21(4) *UN Chronicle*, 1984, p. 17.
[202] Resolution (83)13 adopted on 24 November 1983.
[203] Application No. 25781/94; 120 ILR, p. 10. See *Loizidou* v. *Turkey (Preliminary Objections)*, Series A, No. 310, 1995; 103 ILR, p. 622, and *Loizidou* v. *Turkey (Merits)*, Reports 1996-VI, p. 2216; 108 ILR, p. 443. See also to the same effect, *Autocephalous Church of Cyprus* v. *Goldberg* 917 F.2d 278 (1990); 108 ILR, p. 488, and *Caglar* v. *Billingham* [1996] STC (SCD) 150; 108 ILR, p. 510.
[204] See also Foreign Affairs Committee, Third Report, Session 1986–7, Cyprus: HCP 23 (1986–7).
[205] See Shaw, *Title*, chapter 3.
[206] *Africa Research Bulletin*, June 1976, p. 4047 and July 1976, pp. 4078 and 4081.

despite Morocco's threat of withdrawal from the organisation.[207] This, therefore, can be taken as OAU recognition of statehood and, as such, of evidential significance. However, although in view of the reduced importance of the effectiveness of control criterion in such self-determination situations a credible argument can now be made regarding SADR's statehood, the issue is still controversial in view of the continuing hostilities and what appears to be effective Moroccan control. It is to be noted that the legal counsel to the UN gave an opinion in 2002 to the effect that Western Sahara continued as a non-self-governing territory and that this status was unaffected by the transfer of administrative authority to Morocco and Mauritania in 1975. The view was also taken that exploration and exploitation activities undertaken in disregard of the interests and wishes of the people of Western Sahara would violate international law.[208]

Various secessionist claimants

A number of secessionist claims from recognised independent states exist. The former territory of British Somaliland, being the northern part of the new state of Somalia after its independence in 1960, asserted its own independence on 17 May 1991.[209] A constitution was adopted in 2001, but the Organisation of African Unity refused to support any action that would affect the unity and sovereignty of Somalia.[210] 'Somaliland' is unrecognised by any state or international organisation, although a number of dealings with the authorities of that entity have taken place.[211] Following an armed conflict between Armenia and Azerbaijan in the early 1990s, Armenian forces captured and occupied the area of Nagorno-Karabakh (and seven surrounding districts) from Azerbaijan. Nagorno-Karabakh, an area with

[207] See *Keesing's Contemporary Archives*, pp. 33324–45.

[208] S/2002/161. The UK has stated that it regards the 'the sovereignty of Western Sahara as undetermined pending United Nations efforts to find a solution to the dispute over the territory', UKMIL, 76 BYIL, 2005, p. 720.

[209] See e.g. Crawford, *Creation of States*, pp. 412 ff., and *Somalia: A Country Study* (ed. H. C. Metz), 4th edn, Washington, 1993. See generally P. Kolsto, 'The Sustainability and Future of Unrecognized Quasi-States', 43 *Journal of Peace Research*, 2006, p. 723.

[210] See Report of the UN Secretary-General on the Situation in Somalia, S/2001/963, paras. 16 ff. (2001).

[211] See e.g. the provision of assistance to the authorities of the area by the UK and the visit to the UK and meetings with UK government officials by the 'president of Somaliland' in July 2006: see FCO Press Release, 16 August 2006. See also UKMIL, 76 BYIL, 2005, p. 715.

a majority ethnic Armenian population, declared its independence from Azerbaijan. However, it has not been recognised by any state (including Armenia) and the UN Security Council adopted resolutions 822, 853, 874 and 884 reaffirming the sovereign and territorial integrity of Azerbaijan and calling for withdrawal from the occupied territories of Azerbaijan.[212] The former USSR republic of Moldova became independent on 23 June 1990 as the USSR dissolved. On 2 September 1990 the 'Moldavian Republic of Transdniestria' was proclaimed as an independent state in an area of Moldova bordering Ukraine. This entity has been able to maintain itself as a result of Russian assistance. However, it has not been recognised by any state.[213] Similarly, the areas of South Ossetia and Abkhazia in Georgia have sought to establish separate *de facto* governments and independence respectively with Russian support and have similarly not been recognised by any state.[214]

Associations of states

There are a number of ways in which states have become formally associated with one another. Such associations do not constitute states but have a certain effect upon international law. Confederations, for example, are probably the closest form of co-operation and they generally involve several countries acting together by virtue of an international agreement, with some kind of central institutions with limited functions.[215] This is to be contrasted with federations. A federal unit is a state with strong

[212] See e.g. the Reports of the International Crisis Group on Nagorno-Karabakh of 14 September 2005, 11 October 2005 and 14 November 2007. See also resolution 1416 of the Council of Europe Parliamentary Assembly, 2005.

[213] See the Reports of the International Crisis Group on Moldova of 12 August 2003, 17 June 2004 and 17 August 2006. See also *Ilascu* v. *Moldova and Russia*, European Court of Human Rights, judgment of 8 July 2004, pp. 8–40.

[214] See the Reports of the International Crisis Group on South Ossetia of 26 November 2004, 19 April 2005 and 7 June 2007, and the Reports on Abkhazia of 15 September 2006 and 18 January 2007.

[215] Note, for example, the Preliminary Agreement Concerning the Establishment of a Confederation between the Federation of Bosnia and Herzegovina and the Republic of Croatia, 1994, 33 ILM, 1994, p. 605. This Agreement 'anticipated' the creation of a Confederation, but provides that its 'establishment shall not change the international identity or legal personality of Croatia or of the Federation'. The Agreement provided for co-operation between the parties in a variety of areas and for Croatia to grant the Federation of Bosnia and Herzegovina free access to the Adriatic through its territory. This Confederation did not come about.

centralised organs and usually a fairly widespread bureaucracy with extensive powers over the citizens of the state, even though the powers of the state are divided between the different units.[216] However, a state may comprise component units with extensive powers.[217]

There are in addition certain 'associated states' which by virtue of their smallness and lack of development have a close relationship with another state. One instance is the connection between the Cook Islands and New Zealand, where internal self-government is allied to external dependence.[218] Another example was the group of islands which constituted the Associated States of the West Indies. These were tied to the United Kingdom by the terms of the West Indies Act 1967, which provided for the latter to exercise control with regard to foreign and defence issues. Nevertheless, such states were able to and did attain their independence.[219]

The status of such entities in an association relationship with a state will depend upon the constitutional nature of the arrangement and may in certain circumstances involve international personality distinct from the metropolitan state depending also upon international acceptance. It must, however, be noted that such status is one of the methods accepted by the UN of exercising the right to self-determination.[220] Provided that an acceptable level of powers, including those dealing with domestic affairs, remain with the associated state, and that the latter may without undue difficulty revoke the arrangement, some degree of personality would appear desirable and acceptable.

The Commonwealth of Nations (the former British Commonwealth) is perhaps the most well known of the loose associations which group together sovereign states on the basis usually of common interests and historical ties. Its members are all fully independent states who cooperate through the assistance of the Commonwealth Secretariat and periodic conferences of Heads of Government. Regular meetings of particular ministers also take place. The Commonwealth does not constitute

[216] See Crawford, *Creation of States*, pp. 479 ff., and above, p. 217. See also with regard to the proposed arrangement between Gambia and Senegal, 21 ILM, 1982, pp. 44–7.

[217] See e.g. the Dayton Peace Agreement 1995, Annex 4 laying down the constitution of Bosnia and Herzegovina as an independent state consisting of two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska. The boundary between the two Entities was laid down in Annex 2.

[218] Crawford, *Creation of States*, pp. 625 ff. See also as regards Puerto Rico and Niue, *ibid.*

[219] See e.g. J. E. S. Fawcett, *Annual Survey of Commonwealth Law*, London, 1967, pp. 709–11.

[220] See, with regard to the successors of the trust territory of the Pacific, above, p. 224.

a legally binding relationship, but operates as a useful forum for discussions. Relations between Commonwealth members display certain special characteristics, for example, ambassadors are usually referred to as High Commissioners. It would appear unlikely in the circumstances that it possesses separate international personality.[221] However, the more that the Commonwealth develops distinctive institutions and establishes common policies with the capacity to take binding decisions, the more the argument may be made for international legal personality.

Following the dissolution of the Soviet Union and the coming to independence of the constituent Republics, with the Russian Federation being deemed the continuation of the Soviet Union, it was decided to establish the Commonwealth of Independent States.[222] Originally formed by Russia, Belarus and Ukraine on 8 December 1991, it was enlarged on 21 December 1991 to include eleven former Republics of the USSR. Georgia joined the CIS on 8 October 1993. Thus all the former Soviet Republics, excluding the three Baltic states, are now members of that organisation.[223] The agreement establishing the CIS provided for respect for human rights and other principles and called for co-ordination between the member states. The Charter of the CIS was adopted on 22 June 1993 as a binding international treaty[224] and laid down a series of principles ranging from respect for the sovereignty and territorial integrity of states, self-determination of peoples, prohibition of the use or threat of force and settlement of disputes by peaceful means. It was noted that the CIS was neither a state nor 'supranational' (article 1) and a number of common co-ordinating institutions were established. In particular, the Council of Heads of State is the 'highest body of the Commonwealth' and it may 'take decisions on the principal issues relating to the activity of the member states in the field of their mutual interests' (article 21), while the Council of the Heads of Government has the function of co-ordinating co-operation among executive organs of member states (article 22). Both Councils may

[221] See J. E. S. Fawcett, *The British Commonwealth in International Law*, London, 1963; *Oppenheim's International Law*, p. 256; O'Connell, *International Law*, pp. 346–56; Whiteman, Digest, vol. I, pp. 476–544; Rousseau, *Droit International Public*, vol. II, pp. 214–64, and Sale, *The Modern Commonwealth*, 1983. See also, as regards the French Community, Whiteman, *Digest*, pp. 544–82, and O'Connell, *International Law*, pp. 356–9.

[222] See e.g. J. Lippott, 'The Commonwealth of Independent States as an Economic and Legal Community', 39 German YIL, 1996, p. 334.

[223] See 31 ILM, 1992, pp. 138 and 147, and 34 ILM, 1995, p. 1298.

[224] See 34 ILM, 1995, p. 1279.

take decisions on the basis of consensus (article 23). A Council of Foreign Ministers was also established together with a Co-ordination and Consultative Committee, as a permanent executive and co-ordinating body of the Commonwealth.[225] The CIS has adopted in addition a Treaty on Economic Union[226] and a Convention on Human Rights and Fundamental Freedoms.[227] The increasing development of the CIS as a directing international institution suggests its possession of international legal personality.

The European Union[228] is an association, of twenty-seven states, which has established a variety of common institutions and which has the competence to adopt not only legal acts binding upon member states but also acts having direct effect within domestic legal systems. The Union consists essentially of the European Community (itself an amalgam of the European Coal and Steel Community, EURATOM and the European Economic Community) and two additional pillars, viz. the Common Foreign and Security Policy, and Justice and Home Affairs. Only the European Coal and Steel Community Treaty provided explicitly for international legal personality (article 6), but the case-law of the European Court of Justice demonstrates its belief that the other two communities also possess such personality.[229] It is also established that Community law has superiority over domestic law. The European Court of Justice early in the history of the Community declared that the Community constituted 'a new legal order of international law'.[230] In the circumstances, it seems hard to deny that the Community possesses international legal personality, but

[225] Note also the creation of the Council of Defence Ministers, the Council of Frontier Troops Chief Commanders, an Economic Court, a Commission on Human Rights, an Organ of Branch Co-operation and an Interparliamentary Assembly (articles 30–5).

[226] 24 September 1993, 34 ILM, 1995, p. 1298.

[227] 26 May 1995, see Council of Europe Information Sheet No. 36, 1995, p. 195.

[228] Established as such by article A, Title I of the Treaty on European Union (Maastricht) signed in February 1992 and in force as from 1 January 1993. See also the Treaty of Amsterdam, 1997, the Treaty of Nice, 2001 and the Treaty of Lisbon, 2007.

[229] See e.g. *Costa* v. *ENEL* [1964] ECR 585, 593; *Commission* v. *Council* [1971] ECR 263, 274; *Kramer* [1976] ECR 1279, 1308 and *Protection of Nuclear Materials* [1978] ECR 2151, 2179; *The Oxford Encyclopaedia of European Community Law* (ed. A. Toth), Oxford, 1991, p. 351; D. Lasok and J. Bridge, *Law and Institutions of the European Union* (ed. P. Lasok), 6th edn, London, 1994, chapter 2, and S. Weatherill and P. Beaumont, *EU Law*, 3rd edn, London, 1999. See also A. Peters, 'The Position of International Law Within the European Community Legal Order', 40 German YIL, 1997, p. 9, and D. Chalmers and A. Tomkins, *European Union Public Law*, Cambridge, 2007.

[230] *Van Gend en Loos* v. *Nederlandse Administratie des Belastingen* [1963] ECR 1.

unlikely that the co-operative processes involved in the additional two pillars are so endowed.[231] The European Community has the power to conclude and negotiate agreements in line with its external powers, to become a member of an international organisation and to have delegations in non-member countries. However, the Treaty on European Union contained no provision on the legal personality of the Union. The Union does not have institutionalised treaty-making powers, but is able to conclude agreements through the Council of the European Union or by asserting its position on the international stage, especially in connection with the Common Foreign and Security Policy. However, article 55 of the Treaty of Lisbon, 2007 provides for the insertion into the Treaty on European Union of a new article 46A, which expressly asserts that the European Union has legal personality.[232]

Conclusions

Whether or not the entities discussed above constitute international persons or indeed states or merely part of some other international person is a matter for careful consideration in the light of the circumstances of the case, in particular the claims made by the entity in question, the facts on the ground, especially with regard to third-party control and the degree of administrative effectiveness manifested, and the reaction of other international persons. The importance here of recognition, acquiescence and estoppel is self-evident. Acceptance of some international personality need not be objective so as to bind non-consenting states nor unlimited as to time and content factors. These elements will be considered below. It should, however, be noted here that the international community itself also has needs and interests that bear upon this question as to international status. This is particularly so with regard to matters of responsibility and the protection of persons via the rules governing the recourse to and conduct of armed conflicts.[233]

[231] See e.g. the Second Legal Adviser of the Foreign and Commonwealth Office, UKMIL, 63 BYIL, 1992, p. 660. But see also *Oppenheim's International Law*, p. 20. Note also the European Court of Justice's *Opinion No. 1/94, Community Competence to Conclude Certain International Agreements* [1994] ECR I-5276; 108 ILR, p. 225.

[232] The Treaty of Lisbon, 2007 is not yet in force.

[233] As to the specific regime established in the Antarctica Treaty, 1959, see below, p. 535. See also below, p. 628, with regard to the International Seabed Authority under the Law of the Sea Convention, 1982.

Special cases

The Sovereign Order of Malta

This Order, established during the Crusades as a military and medical association, ruled Rhodes from 1309 to 1522 and was given Malta by treaty with Charles V in 1530 as a fief of the Kingdom of Sicily. This sovereignty was lost in 1798, and in 1834 the Order established its headquarters in Rome as a humanitarian organisation.[234] The Order already had international personality at the time of its taking control of Malta and even when it had to leave the island it continued to exchange diplomatic legations with most European countries. The Italian Court of Cassation in 1935 recognised the international personality of the Order, noting that 'the modern theory of the subjects of international law recognises a number of collective units whose composition is independent of the nationality of their constituent members and whose scope transcends by virtue of their universal character the territorial confines of any single state'.[235] This is predicated upon the functional needs of the entity as accepted by third parties. It is to be noted, for example, that the Order maintains diplomatic relations with or is recognised by over eighty states and has observer status in the UN General Assembly.[236] It is not a state and it is questionable whether it has general international personality beyond those states and organisations expressly recognising it.[237]

The Holy See and the Vatican City[238]

In 1870, the conquest of the Papal states by Italian forces ended their existence as sovereign states. The question therefore arose as to the status

[234] *Oppenheim's International Law*, p. 329, note 7; O'Connell, *International Law*, pp. 85–6, and Whiteman, *Digest*, vol. I, pp. 584–7. See also Crawford, *Creation of States*, pp. 231 ff., and B. J. Theutenberg, *The Holy See, the Order of Malta and International Law*, Skara, 2003.

[235] *Nanni* v. *Pace and the Sovereign Order of Malta* 8 AD, p. 2. See also *Scarfò* v. *Sovereign Order of Malta* 24 ILR, p. 1; *Sovereign Order of Malta* v. *Soc. An. Commerciale* 22 ILR, p. 1, and Cassese, *International Law*, pp. 132–3.

[236] Crawford, *Creation of States*, p. 231.

[237] *Ibid.*, p. 233.

[238] See *Oppenheim's International Law*, p. 325; Crawford, *Creation of States*, pp. 221 ff.; J. Duursma, *Fragmentation and the International Relations of Microstates: Self-determination and Statehood*, Cambridge, 1996, pp. 374 ff.; Rousseau, *Droit International Public*, vol. II, pp. 353–77; *Le Saint-Siège dans les Relations Internationales* (ed. J. P. D'Onorio), Aix-en-Provence, 1989, and R. Graham, *Vatican Diplomacy: A Study of Church and State on the International Plane*, Princeton, 1959. See also Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 455.

in international law of the Holy See, deprived, as it then was, of normal territorial sovereignty. In 1929 the Lateran Treaty was signed with Italy which recognised the state of the Vatican City and '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'.[239] The question thus interrelates with the problem of the status today of the Vatican City. The latter has no permanent population apart from Church functionaries and exists only to support the work of the Holy See. Italy carries out a substantial number of administrative functions with regard to the City. Some writers accordingly have concluded that it cannot be regarded as a state.[240] Nevertheless, it is a party to many international treaties and is a member of the Universal Postal Union and the International Telecommunications Union. It would appear that by virtue of recognition and acquiescence in the context of its claims, it does exist as a state. The Vatican City is closely linked with the Holy See and they are essentially part of the same construct.

The Holy See, the central organisational authority of the Catholic Church, continued after 1870 to engage in diplomatic relations and enter into international agreements and concordats.[241] Accordingly its status as an international person was accepted by such partners. In its joint eleventh and twelfth report submitted to the UN Committee on the Elimination of Racial Discrimination in 1993,[242] the Holy See reminded the Committee of its 'exceptional nature within the community of nations; as a sovereign subject of international law, it has a mission of an essentially religious and moral order, universal in scope, which is based on minimal territorial dimensions guaranteeing a basis of autonomy for the pastoral ministry of the Sovereign Pontiff'.[243] Crawford has concluded that the Holy See is both an international legal person in its own right and the government of a state (the Vatican City).[244]

[239] 130 BFSP, p. 791. See also O'Connell, *International Law*, p. 289, and *Re Marcinkus, Mennini and De Strobel* 87 ILR, p. 48.

[240] See M. Mendelson, 'The Diminutive States in the United Nations', 21 ICLQ, 1972, p. 609. See also Brownlie, *Principles*, p. 64.

[241] See e.g. the Fundamental Agreement between the Holy See and the State of Israel of 30 December 1993, 33 ILM, 1994, p. 153.

[242] CERD/C/226/Add. 6 (15 February 1993).

[243] See also the decision of the Philippines Supreme Court (en banc) in *The Holy See* v. *Starbright Sales Enterprises Inc.* 102 ILR, p. 163.

[244] Crawford, *Creation of States*, p. 230. The International Committee of the Red Cross also appears on the basis of state practice, particularly its participation in international

Insurgents and belligerents

International law has recognised that such entities may in certain circumstances, primarily dependent upon the *de facto* administration of specific territory, enter into valid arrangements.[245] In addition they will be bound by the rules of international law with respect to the conduct of hostilities and may in due course be recognised as governments. The traditional law is in process of modification as a result of the right to self-determination, and other legal principles such as territorial integrity, sovereign equality and non-intervention in addition to recognition will need to be taken into account.[246]

National liberation movements (NLMs)

The question of whether or not NLMs constitute subjects of international law and, if so, to what extent, is bound up with the development of the law relating to non-self-governing territories and the principle of self-determination. What is noticeable is not only the increasing status of NLMs during the decolonisation period, but also the fact that in many cases the international community turned to bodies other than the NLMs in controversial situations.

The UN trusteeship system permitted the hearing of individual petitioners and this was extended to all colonial territories. In 1977, the General Assembly Fourth Committee voted to permit representatives of certain NLMs from Portugal's African territories to participate in its work dealing with such territories.[247] The General Assembly endorsed the concept of observer status for liberation movements recognised by the Organisation of African Unity in resolution 2918 (XVII). In resolution 3247 (XXIX), the Assembly accepted that NLMs recognised by the OAU or

agreements, to be an international legal person to a limited extent: see Cassese, *International Law*, pp. 133–4.

245 See *Oppenheim's International Law*, p. 165; Lauterpacht, *Recognition*, pp. 494–5; Brownlie, *Principles*, p. 63, and T. C. Chen, *Recognition*, London, 1951. See also Cassese, *International Law*, pp. 124 ff.; S. C. Neff, 'The Prerogatives of Violence – In Search of the Conceptual Foundations of Belligerents' Rights', 38 German YIL, 1995, p. 41, and Neff, *The Rights and Duties of Neutrals*, Manchester, 2000, pp. 200 ff.

246 See below, p. 251.

247 See M. N. Shaw, 'The International Status of National Liberation Movements', 5 *Liverpool Law Review*, 1983, p. 19, and R. Ranjeva, 'Peoples and National Liberation Movements' in *International Law: Achievements and Prospects* (ed. M. Bedjaoui), Paris, 1991, p. 101. See also Cassese, *International Law*, pp. 140 ff., and H. Wilson, *International Law and the Use of Force by National Liberation Movements*, Oxford, 1988.

the Arab League could participate in Assembly sessions, in conferences arranged under the auspices of the Assembly and in meetings of the UN specialised agencies and the various Assembly organs.[248]

The inclusion of the regional recognition requirement was intended both to require a minimum level of effectiveness with regard to the organisation concerned before UN acceptance and to exclude in practice secessionist movements. The Economic and Social Committee of the UN has also adopted a similar approach and under its procedural rules it may invite any NLM recognised by or in accordance with General Assembly resolutions to take part in relevant debates without a vote.[249]

The UN Security Council also permitted the Palestine Liberation Organisation (PLO) to participate in its debates with the same rights of participation as conferred upon a member state not a member of the Security Council, although this did raise serious constitutional questions.[250] Thus the possibility of observer status in the UN and related organs for NLMs appears to have been affirmatively settled in international practice. The question of international personality, however, is more complex and more significant, and recourse must be made to state practice.[251] Whether extensive state recognition of a liberation movement is of itself sufficient to confer such status is still a controversial issue.

The position of the PLO, however, began to evolve considerably with the Israel–PLO Declaration of Principles on Interim Self-Government Arrangements signed in Washington on 13 September 1993.[252] By virtue of

[248] While the leader of the PAIGC was not permitted to speak at the Assembly in 1973, the leader of the PLO was able to address the body in 1974: see A/C.4/SR.1978 p. 23 and resolution 3237 (XXIX).

[249] ECOSOC resolution 1949 (LVII), 8 May 1975, rule 73. See also, as regards the Human Rights Commission, CHR/Res.19 (XXIX). The General Assembly and ECOSOC have also called upon the specialised agencies and other UN-related organisations to assist the peoples and NLMs of colonial territories: see e.g. Assembly resolutions 33/41 and 35/29.

[250] See *Yearbook of the UN*, 1972, p. 70 and 1978, p. 297; S/PV 1859 (1975); S/PV 1870 (1976); *UN Chronicle*, April 1982, p. 16, and DUSPIL, 1975, pp. 73–5. See also Shaw, 'International Status'.

[251] See the *UN Headquarters Agreement* case, ICJ Reports, 1988, p. 12; 82 ILR, p. 225.

[252] 32 ILM, 1993, p. 1525. Note that letters of mutual recognition and commitment to the peace process were exchanged between the Prime Minister of Israel and the Chairman of the PLO on 9 September 1993. See e.g. K. Calvo-Goller, 'L'Accord du 13 Séptembre 1993 entre L'Israël et l'OLP: Le Régime d'Autonomie Prévu par la Déclaration Israël/OLP', AFDI, 1993, p. 435. See also Crawford, *Creation of States*, pp. 442 ff.; *New Political Entities in Public and Private International Law* (eds. A. Shapira and M. Tabory), The Hague, 1999; E. Benvenisti, 'The Status of the Palestinian Authority' in *Arab–Israeli Accords: Legal Perspectives* (eds. E. Cotrain and C. Mallat), The Hague, 1996, p. 47, and Benvenisti,

this Declaration, the PLO team in the Jordanian–Palestinian delegation to the Middle East Peace Conference was accepted as representing the Palestinian people. It was agreed to establish a Palestinian Interim Self-Government Authority as an elected Council for the Palestinian people in the West Bank and Gaza (occupied by Israel since 1967) for a transitional period of up to five years leading to a permanent solution. Its jurisdiction was to cover the territory of the West Bank and Gaza, save for issues to be negotiated in the permanent status negotiations. Upon the entry into force of the Declaration, a transfer of authority was to commence from the Israel military government and its civil administration. The Cairo Agreement of 4 May 1994[253] provided for the immediate withdrawal of Israeli forces from Jericho and the Gaza Strip and transfer of authority to a separately established Palestinian Authority. This Authority, distinct from the PLO it should be emphasised, was to have certain specified legislative, executive and judicial powers. The process continued with a transfer of further powers and responsibilities in a Protocol of 27 August 1995 and with the Interim Agreement on the West Bank and Gaza of 28 September 1995, under which an additional range of powers and responsibilities was transferred to the Palestinian Authority pending the election of the Council and arrangements were made for Israeli withdrawal from a number of cities and villages on the West Bank.[254] An accord concerning Hebron followed in 1997[255] and the Wye River agreement in 1998, both marking further Israeli redeployments, while the Sharm el Sheikh memorandum and a later Protocol of 1999 concerned safe-passage arrangements between the Palestinian Authority areas in Gaza and the West Bank.[256] The increase in the territorial and jurisdictional competence of the Palestinian Authority established as a consequence of these arrangements raised the question of legal personality. While Palestinian statehood has clearly not been accepted by the international community, the Palestinian Authority can be regarded as possessing some form of limited international

'The Israeli–Palestinian Declaration of Principles: A Framework for Future Settlement', 4 EJIL, 1993, p. 542, and P. Malanczuk, 'Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law', 7 EJIL, 1996, p. 485.

253 33 ILM, 1994, p. 622.

254 See e.g. M. Benchikh, 'L'Accord Intérimaire Israélo-Palestinien sur la Cisjordanie et la bande de Gaza du 28 September 1995', AFDI, 1995, p. 7, and *The Arab–Israeli Accords: Legal Perspectives* (eds. E. Cotran and C. Mallat), The Hague, 1996.

255 See e.g. A. Bockel, 'L'Accord d'Hebron (17 janvier 1997) et la Tentative de Relance du Processus de Paix Israélo-Palestinien', AFDI, 1997, p. 184.

256 See A. Bockel, 'L'Issue du Processus de Paix Israélo-Palestinien en Vue?', AFDI, 1999, p. 165.

personality.[257] Such personality, however, derives from the agreements between Israel and the PLO and exists separately from the personality of the PLO as an NLM, which relies upon the recognition of third parties.[258]

As far as Namibia was concerned, the territory was regarded as having an international status[259] and there existed an NLM recognised as the authentic representative of the people[260] but it was, theoretically, administered by the UN Council for Namibia. This body was established in 1967 by the General Assembly in order to administer the territory and to prepare it for independence; it was disbanded in 1990. There were thirty-one UN member states on the Council, which was responsible to the General Assembly.[261] The Council sought to represent Namibian interests in international organisations and in conferences, and issued travel and identity documents to Namibians which were recognised by most states.[262] In 1974, the Council issued Decree No. 1 which sought to forbid the exploitation under South African auspices of the territory's resources, but little was in practice achieved by this Decree, which was not drafted in the clearest possible manner.[263] The status of the Council was unclear, but it was clearly recognised as having a role within the UN context and may thus have possessed some form of qualified personality. It was, of course, distinct from SWAPO, the recognised NLM.

International public companies

This type of entity, which may be known by a variety of names, for example multinational public enterprises or international bodies

[257] See e.g. K. Reece Thomas, 'Non-Recognition, Personality and Capacity: The Palestine Liberation Organisation and the Palestinian Authority in English Law', 29 *Anglo-American Law Review*, 2000, p. 228; *New Political Entities in Public and Private International Law With Special Reference to the Palestinian Entity* (eds. A. Shapiro and M. Tabory), The Hague, 1999, and C. Wasserstein Fassberg, 'Israel and the Palestinian Authority', 28 *Israel Law Review*, 1994, p. 319.

[258] See e.g. M. Tabory, 'The Legal Personality of the Palestinian Autonomy' in Shapira and Tabory, *New Political Entities*, p. 139.

[259] The *Namibia* case, ICJ Reports, 1971, p. 16; 49 ILR, p. 3.

[260] Assembly resolution 3295 (XXIX), recognising the South-West Africa People's Organisation (SWAPO) as the authentic representative of the Namibian people.

[261] The UK did not recognise the Council: see 408 HL Deb., col. 758, 23 April 1980.

[262] See e.g. J. F. Engers, 'The UN Travel and Identity Documents for Namibia', 65 AJIL, 1971, p. 571.

[263] See *Decolonisation*, No. 9, December 1977.

corporate, is characterised in general by an international agreement providing for co-operation between governmental and private enterprises.[264] One writer, for example, defined such entities as corporations which

> have not been constituted by the exclusive application of one national law; whose members and directors represent several national sovereignties; whose legal personality is not based, or at any rate not entirely, on the decision of a national authority or the application of a national law; whose operations, finally, are governed, at least partially, by rules that do not stem from a single or even from several national laws.[265]

Such enterprises may vary widely in constitutional nature and in competences. Examples of such companies would include INTELSAT, established in 1973 as an intergovernmental structure for a global commercial telecommunications satellite system; Eurofima, established in 1955 by fourteen European states in order to lease equipment to the railway administrations of those states, and the Bank of International Settlement, created in 1930 by virtue of a treaty between five states, and the host country, Switzerland. The personality question will depend upon the differences between municipal and international personality. If the entity is given a range of powers and is distanced sufficiently from municipal law, an international person may be involved, but it will require careful consideration of the circumstances.

Transnational corporations

Another possible candidate for international personality is the transnational or multinational enterprise. Various definitions exist of this important phenomenon in international relations.[266] They in essence constitute

[264] See e.g. D. Fligler, *Multinational Public Corporations*, Washington, DC, 1967; Brownlie, *Principles*, pp. 65–6, and D. A. Ijalaye, *The Extension of Corporate Personality in International Law*, Leiden, 1978, pp. 57–146. See also P. Muchlinski, *Multinational Enterprises and the Law*, updated edn, Oxford, 1999.

[265] Cited in Ijalaye, *Corporate Personality*, p. 69.

[266] See e.g. C. W. Jenks, in *Transnational Law in a Changing Society* (eds. W. Friedman, L. Henkin and O. Lissitzyn), New York, 1972, p. 70; H. Baade, in *Legal Problems of a Code of Conduct for Multinational Enterprises* (ed. N. Horn), Boston, 1980; J. Charney, 'Transnational Corporations and Developing Public International Law', *Duke Law Journal*, 1983, p. 748; F. Rigaux, 'Transnational Corporations' in Bedjaoui, *International Law: Achievements and Prospects*, p. 121, and Henkin *et al.*, *International Law: Cases*

private business organisations comprising several legal entities linked together by parent corporations and are distinguished by size and multinational spread. In the years following the *Barcelona Traction* case,[267] an increasing amount of practice has been evident on the international plane dealing with such corporations. What has been sought is a set of guidelines governing the major elements of the international conduct of these entities.[268] However, progress has been slow and several crucial issues remain to be resolved, including the legal effect, if any, of such guidelines.[269] The question of the international personality of transnational corporations remains an open one.[270]

and Materials, p. 368. See also Muchlinski, *Multinational Enterprises*; C. M. Vazquez, 'Direct vs Indirect Obligations of Corporations under International Law', 43 *Columbia Journal of Transnational Law*, 2005, p. 927; F. Johns, 'The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory', 19 *Melbourne University Law Review*, 1993–4, p. 893; D. Eshanov, 'The Role of Multinational Corporations from the Neoinstitutionalist and International Law Perspectives', 16 *New York University Environmental Law Journal*, 2008, p. 110, and S. R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 111 *Yale Law Journal*, 2001, p. 443.

267 ICJ Reports, 1970, pp. 3, 46–7; 46 ILR, pp. 178, 220–1.

268 See e.g. OECD Guidelines for Multinational Enterprises, 75 US Dept. State Bull., p. 83 (1976), and ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 17 ILM, pp. 423–30. See also Baade, *Legal Problems*, pp. 416–40. Note the OECD Principles of Corporate Governance, 1998 and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 2000. See also the Draft Norms on Responsibilities for Transnational Corporations and Other Business Enterprises with Regard to Human Rights produced by the UN Sub-Commission on the Promotion and Protection of Human Rights' Sessional Working Group on the working methods and activities of transnational corporations, E/CN.4/Sub.2/2002/13, August 2002, and *Human Rights Standards and the Responsibilities of Transnational Corporations* (ed. M. Addo), The Hague, 1999.

269 See the Draft Code of Conduct produced by the UN Commission on Transnational Corporations, 22 ILM, pp. 177–206; 23 ILM, p. 627 and *ibid.*, p. 602 (Secretariat report on outstanding issues); E/1990/94 (1990) and the World Bank Guidelines on the Treatment of Foreign Direct Investment, 31 ILM, 1992, p. 1366. The Commission ceased work in 1993. The Sub-Commission on the Promotion and Protection of Human Rights adopted 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' in 2003: see E/CN.4/Sub.2/2003/12/Rev.2. Note the Andean Group commission decision 292 on a uniform code on Andean multinational enterprises, 30 ILM, 1991, p. 1295, and the Eastern and Southern African states charter on a regime of multinational industrial enterprises, *ibid.*, p. 696. See also the previous footnote.

270 The *Third US Restatement of Foreign Relations Law*, St Paul, 1987, p. 126 notes that the transnational corporation, while an established feature of international life, 'has not yet achieved independent status in international law'.

The right of all peoples to self-determination[271]

The establishment of the legal right

This principle, which traces its origin to the concepts of nationality and democracy as evolved primarily in Europe, first appeared in major form after the First World War. Despite President Wilson's efforts, it was not included in the League of Nations Covenant and it was clearly not regarded as a legal principle.[272] However, its influence can be detected in the various provisions for minority protection[273] and in the establishment of the mandates system based as it was upon the sacred trust concept. In the ten years before the Second World War, there was relatively little practice regarding self-determination in international law. A number of treaties concluded by the USSR in this period noted the principle,[274] but in the *Aaland Islands* case it was clearly accepted by both the International Commission of Jurists and the Committee of Rapporteurs dealing with the situation that the principle of self-determination was not a legal rule of international law, but purely a political concept.[275] The situation,

[271] See in general e.g. A. Cassese, *Self-Determination of Peoples*, Cambridge, 1995; K. Knop, *Diversity and Self-Determination in International Law*, Cambridge, 2002; U. O. Umozurike, *Self-Determination in International Law*, Hamden, 1972; A. Rigo-Sureda, *The Evolution of the Right of Self-Determination*, Leiden, 1973; M. Pomerance, *Self-Determination in Law and Practice*, Leiden, 1982; Shaw, *Title to Territory*, pp. 59–144; A. E. Buchanan, *Justice, Legitimacy and Self-Determination*, Oxford, 2004; D. Raic, *Statehood and the Law of Self-Determination*, The Hague, 2002; Crawford, *Creation of States*, pp. 107 ff., and Crawford, 'The General Assembly, the International Court and Self-Determination' in *Fifty Years of the International Court of Justice* (eds. A. V. Lowe and M. Fitzmaurice), Cambridge, 1996, p. 585; Rousseau, *Droit International Public*, vol. II, pp. 17–35; Wilson, *International Law*; Tunkin, *Theory*, pp. 60–9; and Tomuschat, *Modern Law of Self-Determination*. See also M. Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', 43 ICLQ, 1994, p. 241; H. Quane, 'The UN and the Evolving Right to Self-Determination', 47 ICLQ, 1998, p. 537, and W. Ofuatey-Kodjoe, 'Self Determination' in *United Nations Legal Order* (eds. O. Schachter and C. Joyner), Cambridge, 1995, vol. I, p. 349.

[272] See A. Cobban, *The Nation-State and National Self-Determination*, London, 1969; D. H. Miller, *The Drafting of the Covenant*, New York, 1928, vol. II, pp. 12–13; S. Wambaugh, *Plebiscites since the World War*, Washington, 1933, vol. I, p. 42, and Pomerance, *Self-Determination*.

[273] See e.g. I. Claude, *National Minorities*, Cambridge, 1955, and J. Lador-Lederer, *International Group Protection*, Leiden, 1968.

[274] See e.g. the Baltic States' treaties, Martens, *Recueil Général de Traités*, 3rd Series, XI, pp. 864, 877 and 888, and Cobban, *Nation-State*, pp. 187–218. See also Whiteman, *Digest*, vol. IV, p. 56.

[275] LNOJ Supp. No. 3, 1920, pp. 5–6 and Doc. B7/21/68/106[VII], pp. 22–3. See also J. Barros, *The Aaland Islands Question*, New Haven, 1968, and Verzijl, *International Law*, pp. 328–32.

which concerned the Swedish inhabitants of an island alleged to be part of Finland, was resolved by the League's recognition of Finnish sovereignty coupled with minority guarantees.

The Second World War stimulated further consideration of the idea and the principle was included in the UN Charter. Article 1(2) noted as one of the organisation's purposes the development of friendly relations among nations based upon respect for the principle of equal rights and self-determination, and article 55 reiterated the phraseology. It is disputed whether the reference to the principle in these very general terms was sufficient to entail its recognition as a binding right, but the majority view is against this. Not every statement of a political aim in the Charter can be regarded as automatically creative of legal obligations. On the other hand, its inclusion in the Charter, particularly within the context of the statement of purposes of the UN, provided the opportunity for the subsequent interpretation of the principle both in terms of its legal effect and consequences and with regard to its definition. It is also to be noted that Chapters XI and XII of the Charter deal with non-self-governing and trust territories and may be seen as relevant within the context of the development and definition of the right to self-determination, although the term is not expressly used.[276]

Practice since 1945 within the UN, both generally as regards the elucidation and standing of the principle and more particularly as regards its perceived application in specific instances, can be seen as having ultimately established the legal standing of the right in international law. This may be achieved either by treaty or by custom or indeed, more controversially, by virtue of constituting a general principle of law. All these routes are relevant, as will be seen. The UN Charter is a multilateral treaty which can be interpreted by subsequent practice, while the range of state and organisation practice evident within the UN system can lead to the formation of customary law. The amount of material dealing with self-determination in the UN testifies to the importance of the concept and some of the more significant of this material will be briefly noted.

Resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted in 1960 by eighty-nine votes to none, with nine abstentions, stressed that:

[276] See e.g. O'Connell, *International Law*, p. 312; N. Bentwich and A. Martin, *Commentary on the Charter of the UN*, New York, 1950, p. 7; D. Nincic, *The Problem of Sovereignty in the Charter and the Practice of States*, The Hague, 1970, p. 221; H. Kelsen, *Law of the United Nations*, London, 1950, pp. 51–3, and H. Lauterpacht, *International Law and Human Rights*, The Hague, 1950, pp. 147–9. See also Judge Tanaka, *South-West Africa* cases, ICJ Reports, 1966, pp. 288–9; 37 ILR, pp. 243, 451–2.

> 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.

Inadequacy of political, social, economic or educational preparedness was not to serve as a protest for delaying independence, while attempts aimed at the partial or total disruption of the national unity and territorial integrity of a country were deemed incompatible with the UN Charter. The Colonial Declaration set the terms for the self-determination debate in its emphasis upon the colonial context and its opposition to secession, and has been regarded by some as constituting a binding interpretation of the Charter.[277] The Declaration was reinforced by the establishment of a Special Committee on Decolonisation, which now deals with all dependent territories and has proved extremely active, and by the fact that virtually all UN resolutions dealing with self-determination expressly refer to it. Indeed, the International Court has specifically referred to the Colonial Declaration as an 'important stage' in the development of international law regarding non-self-governing territories and as the 'basis for the process of decolonisation'.[278]

In 1966, the General Assembly adopted the International Covenants on Human Rights. Both these Covenants have an identical first article, declaring *inter alia* that '[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status', while states parties to the instruments 'shall promote the realisation of the right of self-determination and shall respect that right in conformity with the provisions of the Charter of the United Nations'. The Covenants came into force in 1976 and thus constitute binding provisions as between the parties, but in addition they also may be regarded as authoritative interpretations of several human rights provisions in the Charter, including self-determination. The 1970 Declaration on Principles of International Law Concerning Friendly Relations can be regarded as constituting an authoritative interpretation of the seven Charter provisions it expounds. The Declaration states *inter alia* that 'by virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all people have the right freely to determine . . . their political status' while all states are under the duty to respect this right in accordance with the Charter. The Declaration was specifically intended

[277] See e.g. O. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, The Hague, 1966, pp. 177–85, and Shaw, *Title*, chapter 2.

[278] The *Western Sahara* case, ICJ Reports, 1975, pp. 12, 31 and 32; 59 ILR, pp. 14, 49.

to act as an elucidation of certain important Charter provisions and was indeed adopted without opposition by the General Assembly.[279]

In addition to this general, abstract approach, the UN organs have dealt with self-determination in a series of specific resolutions with regard to particular situations and this practice may be adduced as reinforcing the conclusions that the principle has become a right in international law by virtue of a process of Charter interpretation. Numerous resolutions have been adopted in the General Assembly and also the Security Council.[280] It is also possible that a rule of customary law has been created since practice in the UN system is still state practice, but the identification of the *opinio juris* element is not easy and will depend upon careful assessment and judgment.

Judicial discussion of the principle of self-determination has been relatively rare and centres on the *Namibia*[281] and *Western Sahara*[282] advisory opinions by the International Court. In the former case, the Court emphasised 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'.[283] The *Western Sahara* case reaffirmed this point.[284] This case arose out of the decolonisation of that territory, controlled by Spain as the colonial power but subject to irredentist claims by Morocco and Mauritania. The Court was asked for an opinion with regard to the legal ties between the territory at that time and Morocco and the Mauritanian entity. The Court stressed that the request for an opinion arose out of the consideration by the General Assembly of the decolonisation of Western Sahara and that the right of the people of the territory to self-determination constituted a basic assumption of the questions put to the Court.[285] After

[279] Adopted in resolution 2625 (XXV) without a vote. See e.g. R. Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations', 65 AJIL, 1971, pp. 16, 111 and 115.

[280] See e.g. Assembly resolutions 1755 (XVII); 2138 (XXI); 2151 (XXI); 2379 (XXIII); 2383 (XXIII) and Security Council resolutions 183 (1963); 301 (1971); 377 (1975) and 384 (1975).

[281] ICJ Reports, 1971, p. 16; 49 ILR, p. 3.

[282] ICJ Reports, 1975, p. 12; 59 ILR, p. 30. See also M. N. Shaw, 'The Western Sahara Case', 49 BYIL, p. 119.

[283] ICJ Reports, 1971, pp. 16, 31; 49 ILR, pp. 3, 21.

[284] ICJ Reports, 1975, pp. 12, 31; 59 ILR, pp. 30, 48.

[285] ICJ Reports, 1975, p. 68; 59 ILR, p. 85. See in particular the views of Judge Dillard that 'a norm of international law has emerged applicable to the decolonisation of those non-self-governing territories which are under the aegis of the United Nations', ICJ Reports, 1975, pp. 121–2; 59 ILR, p. 138. See also Judge Petren, ICJ Reports, 1975, p. 110; 59 ILR, p. 127.

analysing the Charter provisions and Assembly resolutions noted above, the Court concluded that the ties which had existed between the claimants and the territory during the relevant period of the 1880s were not such as to affect the application of resolution 1514 (XV), the Colonial Declaration, in the decolonisation of the territory and in particular the right to self-determination. In other words, it is clear that the Court regarded the principle of self-determination as a legal one in the context of such territories.

The Court moved one step further in the *East Timor (Portugal* v. *Australia)* case[286] when it declared that '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 Court emphasised that the right of peoples to self-determination was 'one of the essential principles of contemporary international law'.[287] However, in that case, the Court, while noting that for both Portugal and Australia, East Timor (under Indonesian military occupation since the invasion of 1975) constituted a non-self-governing territory and pointing out that the people of East Timor had the right to self-determination, held that the absence of Indonesia from the litigation meant that the Court was unable to exercise its jurisdiction.[288] These propositions were all reaffirmed by the International Court in the *Construction of a Wall* advisory opinion.[289]

The issue of self-determination came before the Supreme Court of Canada in *Reference Re Secession of Quebec* in 1998 in the form of three questions posed. The second question asked whether there existed in international law a right to self-determination which would give Quebec the right unilaterally to secede.[290] The Court declared that the principle of self-determination 'has acquired a status beyond "convention" and is considered a general principle of international law'.[291]

[286] ICJ Reports, 1995, pp. 90, 102; 105 ILR, p. 226. [287] *Ibid.*

[288] ICJ Reports, 1995, pp. 105–6. The reason related to the principle that the Court is unable to exercise jurisdiction over a state without the consent of that state. The Court took the view that Portugal's claims against Australia could not be decided upon without an examination of the position of Indonesia, which had not consented to the jurisdiction of the Court. See further below, chapter 19, p. 1078.

[289] ICJ Reports, 2004, pp. 136, 171–2; 129 ILR, pp. 37, 89–91.

[290] (1998) 161 DLR (4th) 385; 115 ILR, p. 536. The first question concerned the existence or not in Canadian constitutional law of a right to secede, and the third question asked whether in the event of a conflict constitutional or international law would have priority. See further below, chapter 10, p. 522, on the question of secession and self-determination.

[291] (1998) 161 DLR (4th) 434–5.

The definition of self-determination

If the principle exists as a legal one, and it is believed that such is the case, the question arises then of its scope and application. As noted above, UN formulations of the principle from the 1960 Colonial Declaration to the 1970 Declaration on Principles of International Law and the 1966 International Covenants on Human Rights stress that it is the right of 'all peoples'. If this is so, then all peoples would become thereby to some extent subjects of international law as the direct repositories of international rights, and if the definition of 'people' used was the normal political–sociological one,[292] a major rearrangement of international law perceptions would have been created. In fact, that has not occurred and an international law concept of what constitutes a people for these purposes has been evolved, so that the 'self' in question must be determined within the accepted colonial territorial framework. Attempts to broaden this have not been successful and the UN has always strenuously opposed any attempt at the partial or total disruption of the national unity and territorial integrity of a country.[293] The UN has based its policy on the proposition that 'the territory of a colony or other non-self-governing territory has under the Charter a status separate and distinct from the territory of the state administering it' and that such status was to exist until the people of that territory had exercised the right to self-determination.[294] Self-determination has also been used in conjunction with the principle of territorial integrity so as to protect the territorial framework of the colonial period in the decolonisation process and to prevent a rule permitting secession from independent states from arising.[295] The Canadian Supreme Court noted in the *Quebec* case that 'international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of

[292] See e.g. Cobban, *Nation-State*, p. 107, and K. Deutsche, *Nationalism and Social Communications*, New York, 1952. See also the *Greco-Bulgarian Communities* case, PCIJ, Series B, No. 17; 5 AD, p. 4.

[293] See e.g. the Colonial Declaration 1960; the 1970 Declaration on Principles and article III [3] of the OAU Charter.

[294] 1970 Declaration on Principles of International Law. Note also that resolution 1541 (XV) declared that there is an obligation to transmit information regarding a territory 'which is geographically separate and is distinct ethnically and/or culturally from the country administering it'.

[295] See e.g. T. M. Franck, *The Power of Legitimacy Among Nations*, Oxford, 1990, pp. 153 ff.; Franck, 'Fairness in the International Legal and Institutional System', 240 HR, 1993 III, pp. 13, 127–49; Higgins, *Problems and Process*, chapter 11, and Shaw, *Title*, chapters 3 and 4.

those states'.[296] Self-determination as a concept is capable of developing further so as to include the right to secession from existing states,[297] but that has not as yet convincingly happened.[298] It clearly applies within the context, however, of decolonisation of the European empires and thus provides the peoples of such territories with a degree of international personality.

The principle of self-determination provides that the people of the colonially defined territorial unit in question may freely determine their own political status. Such determination may result in independence, integration with a neighbouring state, free association with an independent state or any other political status freely decided upon by the people concerned.[299] Self-determination also has a role within the context of creation of statehood, preserving the sovereignty and independence of states, in providing criteria for the resolution of disputes, and in the area of the permanent sovereignty of states over natural resources.[300]

Individuals[301]

The question of the status in international law of individuals is closely bound up with the rise in the international protection of human rights.

[296] (1998) 161 DLR (4th) 385, 436; 115 ILR, p. 536.

[297] Note that the Canadian Supreme Court did refer to 'exceptional circumstances' in which a right of secession 'may' arise: see further below, chapter 10, p. 289.

[298] But see further below, chapter 6, p. 522, with regard to the evolution of self-determination as a principle of human rights operating within independent states.

[299] *Western Sahara* case, ICJ Reports, 1975, pp. 12, 33 and 68. See also Judge Dillard, *ibid.*, p. 122; 59 ILR, pp. 30, 50, 85, 138. See Assembly resolution 1541 (XV) and the 1970 Declaration on Principles of International Law.

[300] See the *East Timor* case, ICJ Reports, 1995, pp. 90, 102; 105 ILR, p. 226, where Portugal claimed *inter alia* that Australia's agreement with Indonesia dealing with the exploration and exploitation of the continental shelf in the 'Timor Gap' violated the right of the people of East Timor to self-determination.

[301] See e.g. *Oppenheim's International Law*, chapter 8; Higgins, *Problems and Process*, pp. 48–55; Brownlie, *Principles*, chapter 25; O'Connell, *International Law*, pp. 106–12; C. Norgaard, *Position of the Individual in International Law*, Leiden, 1962; Cassese, *International Law*, pp. 142 ff.; Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 643; R. Müllerson, 'Human Rights and the Individual as a Subject of International Law: A Soviet View', 1 EJIL, 1990, p. 33; P. M. Dupuy, 'L'individu et le Droit International', 32 *Archives de Philosophie du Droit*, 1987, p. 119; H. Lauterpacht, *Human Rights in International Law*, London, 1951, and *International Law: Collected Papers*, vol. II, p. 487, and *The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights*, study prepared by Daes, 1983, E/CN.4/Sub.2/432/Rev.2. See also below, chapter 6.

This section will be confined to some general comments about the former. The object theory in this regard maintains that individuals constitute only the subject-matter of intended legal regulation as such. Only states, and possibly international organisations, are subjects of the law.[302] This has been a theory of limited value. The essence of international law has always been its ultimate concern for the human being and this was clearly manifest in the Natural Law origins of classical international law.[303] The growth of positivist theories, particularly in the nineteenth century, obscured this and emphasised the centrality and even exclusivity of the state in this regard. Nevertheless, modern practice does demonstrate that individuals have become increasingly recognised as participants and subjects of international law. This has occurred primarily but not exclusively through human rights law.

The link between the state and the individual for international law purposes has historically been the concept of nationality. This was and remains crucial, particularly in the spheres of jurisdiction and the international protection of the individual by the state. It is often noted that the claim of an individual against a foreign state, for example, becomes subsumed under that of his national state.[304] Each state has the capacity to determine who are to be its nationals and this is to be recognised by other states in so far as it is consistent with international law, although in order for other states to accept this nationality there has to be a genuine connection between the state and the individual in question.[305]

Individuals as a general rule lack standing to assert violations of international treaties in the absence of a protest by the state of nationality,[306] although states may agree to confer particular rights on individuals which will be enforceable under international law, independently of municipal law. Under article 304(b) of the Treaty of Versailles, 1919, for example, nationals of the Allied and Associated Powers could bring cases against Germany before the Mixed Arbitral Tribunal in their own names for

[302] See e.g. O'Connell, *International Law*, pp. 106–7.

[303] See e.g. Grotius, *De Jure Praedae Commentarius*, 1604, cited in Daes, *Individual's Duties*, p. 44, and Lauterpacht, *Human Rights*, pp. 9, 70 and 74.

[304] See the *Panevezys–Saldutiskis* case, PCIJ, Series A/B, No. 76; 9 AD, p. 308. See also the *Mavrommatis Palestine Concessions* case (Jurisdiction), PCIJ, Series A, No. 2 (1924); 2 AD, p. 27. See also below, chapter 14, p. 808.

[305] See the *Nottebohm* case, ICJ Reports, 1955, pp. 4, 22–3; 22 ILR, p. 349, and below, chapter 14, p. 808.

[306] See e.g. *US* v. *Noriega* 746 F.Supp. 1506, 1533 (1990); 99 ILR, pp. 143, 175.

compensation, while the Treaty of 1907 between five Central American states establishing the Central American Court of Justice provided for individuals to bring cases directly before the Court.[307]

This proposition was reiterated in the *Danzig Railway Officials* case[308] by the Permanent Court of International Justice, which emphasised that under international law treaties did not as such create direct rights and obligations for private individuals, although particular treaties could provide for the adoption of individual rights and obligations enforceable by the national courts where this was the intention of the contracting parties. Under the provisions concerned with minority protection in the 1919 Peace Treaties, it was possible for individuals to apply directly to an international court in particular instances. Similarly the Tribunal created under the Upper Silesia Convention of 1922 decided that it was competent to hear cases by the nationals of a state against that state.[309]

Since then a wide range of other treaties have provided for individuals to have rights directly and have enabled individuals to have direct access to international courts and tribunals. One may mention as examples the European Convention on Human Rights, 1950; the European Communities treaties, 1957; the Inter-American Convention on Human Rights, 1969; the Optional Protocol to the International Covenant on Civil and Political Rights, 1966; the International Convention for the Elimination of All Forms of Racial Discrimination, 1965 and the Convention on the Settlement of Investment Disputes, 1965.

However, the question of the legal personality of individuals under international law extends to questions of direct criminal responsibility also. It is now established that international law proscribes certain heinous conduct in a manner that imports direct individual criminal responsibility. This is dealt with in chapter 8.

International organisations

International organisations have played a crucial role in the sphere of international personality. Since the nineteenth century a growing number of such organisations have appeared and thus raised the issue of international legal personality. In principle it is now well established that international organisations may indeed possess objective international legal

[307] See Whiteman, *Digest*, vol. I, p. 39. [308] PCIJ, Series B, No. 15 (1928); 4 AD, p. 287.
[309] See e.g. *Steiner and Gross* v. *Polish State* 4 AD, p. 291.

personality.[310] Whether that will be so in any particular instance will depend upon the particular circumstances of that case. Whether an organisation possesses personality in international law will hinge upon its constitutional status, its actual powers and practice. Significant factors in this context will include the capacity to enter into relations with states and other organisations and conclude treaties with them, and the status it has been given under municipal law. Such elements are known in international law as the indicia of personality. International organisations will be dealt with in chapter 23.

The acquisition, nature and consequences of legal personality – some conclusions

The above survey of existing and possible subjects of international law demonstrates both the range of interaction upon the international scene by entities of all types and the pressures upon international law to come to terms with the contemporary structure of international relations. The International Court clearly recognised the multiplicity of models of personality in stressing that 'the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights'.[311] There are, however, two basic categories – objective and qualified personality. In the former case, the entity is subject to a wide range of international rights and duties and it will be entitled to be accepted as an international person by any other international person with which it is conducting relations. In other words, it will operate *erga omnes*. The creation of objective international personality will of necessity be harder to achieve and will require the action in essence of the international community as a whole or a substantial element of it. The Court noted in the *Reparation* case that:

> fifty states, representing the vast majority of the members of the international community, have the power, in conformity with international law, to bring into being an entity possessing objective international personality and not merely personality recognised by them alone, together with capacity to bring international claims.[312]

[310] See the *Reparation for Injuries* case, ICJ Reports, 1949, p. 174; 16 AD, p. 318. See also the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* case, ICJ Reports, 1980, pp. 73, 89–90; 62 ILR, pp. 450, 473–4.

[311] ICJ Reports, 1949, p. 178; 16 AD, p. 321.

[312] ICJ Reports, 1949, p. 185; 16 AD, p. 330. H. Lauterpacht wrote that, '[I]n each particular case the question whether . . . a body is a subject of international law must be answered in a pragmatic manner by reference to actual experience and to the reason of the law as

The attainment of qualified personality, on the other hand, binding only the consenting subject, may arise more easily and it is clear that in this respect at least theory ought to recognise existing practice. Any legal person may accept that another entity possesses personality in relation to itself and that determination will operate only *in personam*.

States are the original and major subjects of international law. Their personality derives from the very nature and structure of the international system. Statehood will arise as a result of the factual satisfaction of the stipulated legal criteria. The constitutive theory of recognition is not really acceptable, although recognition, of course, contributes valuable evidence of adherence to the required criteria. All states, by virtue of the principle of sovereign equality, will enjoy the same degree of international legal personality. It has been argued that some international organisations, rather than being derivative subjects of international law, will as sovereign or self-governing legal communities possess an inherent personality directly from the system and will thus constitute general and even objective subjects of international law. Non-sovereign persons, including non-governmental organisations and individuals, would be derived subjects possessing only such international powers as conferred exceptionally upon them by the necessary subjects of international law.[313] This view may be questioned, but it is true that the importance of practice via the larger international organisations cannot be underestimated.

Similarly the role of the Holy See (particularly prior to 1929) as well as the UN experience demonstrates that the derivative denomination is unsatisfactory. The significance of this relates to their ability to extend their international rights and duties on the basis of both constituent instruments and subsequent practice and to their capacity to affect the creation of further international persons and to play a role in the norm-creating process.

Recognition, acquiescence and estoppel are important principles in the context of international personality, not only with regard to states and international organisations but throughout the range of subjects. They will affect not only the creation of new subjects but also the definition of their nature and rights and duties.

Personality may be acquired by a combination of treaty provisions and recognition or acquiescence by other international persons. For

distinguished from a preconceived notion as to who can be subjects of international law', *International Law and Human Rights*, p. 12.

313 See e.g. F. Seyersted, 'International Personality of Intergovernmental Organisations', 4 IJIL, 1964, p. 19.

instance, the International Committee of the Red Cross, a private non-governmental organisation subject to Swiss law, was granted special functions under the 1949 Geneva Red Cross Conventions and has been accepted as being able to enter into international agreements under international law with international persons, such as with the EEC under the World Food Programme.[314] Another possible method of acquiring international personality is by subjecting an agreement between a recognised international person and a private party directly to the rules of international law. This would have the effect of rendering the latter an international person in the context of the arrangement in question so as to enable it to invoke in the field of international law the rights it derives from that arrangement.[315] While this currently may not be entirely acceptable to Third World states, this is probably because of a perception of the relevant rules of international law which may very well alter.[316] Personality may also be acquired by virtue of being directly subjected to international duties. This would apply to individuals in specific cases such as war crimes, piracy and genocide, and might in the future constitute the method by which transnational corporations may be accepted as international persons.

Community needs with regard to the necessity to preserve international stability and life may well be of relevance in certain exceptional circumstances. In the case of non-state territorial entities that are not totally dominated by a state, there would appear to be a community need to ensure that at least the rules relating to the resort to force and the laws of war operate. Not to accept some form of qualified personality in this area might be to free such entities from having to comply with such rules and that clearly would affect community requirements.[317] The determining point here, it is suggested, must be the degree of effective control maintained by the entity in its territorial confines. However, even so, recognition may overcome this hurdle, as the recognition of Byelorussia

[314] See e.g. Whiteman, *Digest*, vol. I, p. 48, and *Yearbook of the ILC*, 1981, vol. II, p. 12.

[315] See in particular the *Texaco* v. *Libya* case, 53 ILR, pp. 389, 457–62.

[316] Note the intriguing suggestion raised in the study prepared for the Economic Commission for Asia and the Far East, that an agreement between autonomous public entities (not being subjects of international law) might create an international person: UNJYB, 1971, pp. 215–18. The study was very cautious about this possibility.

[317] See the *Namibia* case, ICJ Reports, 1971, pp. 16, 56, 134 and 149; 49 ILR, pp. 3, 46, 124, 139. See also Security Council resolutions 326 (1973), 328 (1973), 403 (1977), 406 (1977), 411 (1977) and 424 (1978) in which the Council condemned Rhodesian attacks against neighbouring states and recognised that the entity was subject to the norms relating to the use of force.

and the Ukraine as non-sovereign state entities prior to the demise of the Soviet Union and the emergence of these entities as the independent states of Belarus and Ukraine demonstrated.[318]

All these entities may be easily contained within the category of qualified personality, possessing a limited range of rights and duties valid as against those accepting their personality. There are no preset rules governing the extent of rights and duties of international persons. This will depend upon the type of entity concerned, its claims and expectations, functions and attitude adopted by the international community. The exception here would be states which enter upon life with an equal range of rights and obligations. Those entities with objective personality will, it is suggested, benefit from a more elastic perception of the extent of their rights and duties in the form of a wider interpretation of implied powers through practice. However, in the case of qualified subjects implied powers will be more difficult to demonstrate and accept and the range of their rights and duties will be much more limited. The presumption, thus, will operate the other way.

The precise catalogue of rights and duties is accordingly impossible to list in advance; it will vary from case to case. The capacity to function on the international scene in legal proceedings of some description will not be too uncommon, while the power to make treaties will be less widespread. As to this the International Law Commission noted that 'agreements concluded between entities other than states or than international organisations seem too heterogeneous a group to constitute a general category, and the relevant body of international practice is as yet too exiguous for the characteristics of such a general category to be inferred from it'.[319] The extent to which subjects may be internationally responsible is also unclear, although in general such an entity will possess responsibility to the extent of its rights and duties; but many problem areas remain. Similarly controversial is the norm-creating role of such diverse entities, but the practice of all international persons is certainly relevant material upon which to draw in an elucidation of the rules and principles of international law, particularly in the context of the entity in question.

International personality thus centres, not so much upon the capacity of the entity as such to possess international rights and duties, as upon

[318] See e.g. UKMIL, 49 BYIL, 1978, p. 340. Byelorussia and the Ukraine were separate members of the UN and parties to a number of conventions: *ibid.*

[319] *Yearbook of the ILC*, 1981, vol. II, pp. 125–6.

the actual attribution of rights and/or duties on the international plane as determined by a variety of factors ranging from claims made to prescribed functions. Procedural capacity with regard to enforcement is important but not essential,[320] but in the case of non-individual entities the claimant will have to be in 'such a position that it possesses, in regard to its members, rights which it is entitled to ask them to respect'.[321] This, noted the International Court, expressed 'the essential test where a group, whether composed of states, of tribes or of individuals, is claimed to be a legal entity distinct from its members'.[322]

A wide variety of non-subjects exist and contribute to the evolution of the international system. Participation and personality are two concepts, but the general role played in the development of international relations and international law by individuals and entities of various kinds that are not international legal subjects as such needs to be appreciated.

Suggestions for further reading

A. Cassese, *Self-Determination of Peoples*, Cambridge, 1995
J. Crawford, *The Creation of States in International Law*, 2nd edn, Oxford, 2006
R. Higgins, *Problems and Process*, Oxford, 1994
N. Schrijver, 'The Changing Nature of State Sovereignty', 70 BYIL, 1999, p. 65

[320] See e.g. Norgaard, *Position of the Individual*, p. 35. See also the *Peter Pázmány University* case, PCIJ, Series A/B, No. 61 (1933); 7 AD, p. 490.
[321] *Reparation for Injuries* case, ICJ Reports, 1949, pp. 174, 178; 16 AD, pp. 318, 321.
[322] *Western Sahara* case, ICJ Reports, 1975, pp. 12, 63; 59 ILR, pp. 14, 80.