CHAPTER 11

Succession to rights and obligations

1. SUCCESSION IN GENERAL

The subject discussed in the present chapter is more frequently treated in the textbooks under the titles of 'State Succession'[1] and 'Succession of Governments', although this terminology is somewhat inappropriate.[2]

In the former case of so-called 'State Succession' we are principally concerned with the transmission of rights or obligations from states which have altered or lost their identity to other states or entities, such alteration or loss of identity occurring primarily when complete or partial changes of sovereignty take place over portions of territory. In article 2 of the Vienna Convention of 23 August 1978, on Succession of States in respect of Treaties, and in article 2 of the Vienna Convention of 7 April 1983, on Succession of States in respect of State Property, Archives and Debts (as to both conventions, see below in this chapter), 'succession of states' was defined to mean 'the replacement of one state by another in the responsibility for the international relations of territory'. This is somewhat confusing, and would be unacceptable regarded as an absolute proposition to cover all cases where, by operation of law, international rights and obligations may pass to a successor state, eg, the case where the sovereignty of a lessee state over particular territory reverts to the lessor state, as will be the position in 1997 when China resumes sovereignty over Hong Kong territories, now exercised by Great Britain as the lessee from China. The questions of international law involved may be summarised as:

1. The standard work on succession in international law is O'Connell *State Succession in Municipal Law and International Law* (2 vols, 1967). The subject has also been covered in a number of valuable studies and documents prepared or circulated by the United Nations Secretariat, and submitted to the International Law Commission for the purpose of its work on succession; the earlier documentation is listed in the *Report* of the Commission on the Work of its *22nd Session* (1970) para 36, and the lengthy footnote 53 to this para, and see generally the *Report* of the Commission on the Work of its *24th Session*.
2. It bears the title 'Succession of States and Governments' in the *Report* of the International Law Commission on the Work of its *21st Session* (1969) (see title of Chapter III), and the title 'Succession of States' in the *Report* of the Commission on the Work of its *22nd Session* (1970) (see title of chapter III), and in *Reports* subsequent to the 1970 Report.

1. To what extent are the existing rights and obligations of the predecessor state extinguished, or—where there is a change of sovereignty over portion only of the territory of that state—to what extent do they remain vested in that state?
2. To what extent does the successor state, ie the state to which sovereignty has passed wholly or partially, become entitled to such rights or subject to such obligations?

In this connection the term 'state succession' is a misnomer, as it presupposes that the analogies of private law, where on death or bankruptcy, etc, rights and obligations pass from extinct or incapable persons to other individuals, are applicable as between states. The truth, however, is that there is no general principle in international law of succession as between states, no complete juridical substitution of one state for the old state which has lost or altered its identity. What is involved is primarily a change of sovereignty over territory, through concurrent acquisition and loss of sovereignty, loss to the states formerly enjoying sovereignty, and acquisition by the states to which it has passed wholly or partially. It is not feasible to carry over to international law analogies concerned with the transmission of a universitas juris under domestic law. So far as rights and duties under international law are concerned, no question whatever of succession to these is involved. The state which has taken over is directly subject to international law, simply by virtue of being a state, not by reason of any doctrine of succession.

In the second case of the so-called 'Succession of Governments', a different problem is involved. The change of sovereignty is purely *internal*, whether it takes place through constitutional or revolutionary processes. A new government takes up the reins of office, and the question is to what extent are the rights and obligations of the former government extinguished, and to what extent does the new government become entitled to such rights or bound by such obligations.

In more correct terminology, the two cases therefore resolve themselves into:

a. The passing of rights and obligations upon *external* changes of sovereignty over territory.[3]
b. The passing of rights and obligations upon *internal* changes of sovereignty, irrespective of territorial changes.

Each of these cases will be discussed in turn.

3. The case must involve a real external change of sovereignty; thus when Austria was liberated from German control in April 1945, that liberation did not create a new state for the purposes of succession to Germany; see *Jordan v Austrian Republic and Taubner* (1947) Annual Digest of Public International Law Cases 1947, No 15.

2. PASSING OF RIGHTS AND OBLIGATIONS UPON EXTERNAL CHANGES OF SOVEREIGNTY OVER TERRITORY

The most common situations in which external changes of sovereignty over territory take place are these:

i. Part of the territory of state A becomes incorporated in that of state B, or is divided between several states, B, C, D, and others.
ii. Part of the territory of state A is formed as the basis of a new state.
iii. The whole of the territory of state A becomes incorporated in that of state B, state A in effect becoming extinguished.
iv. The whole of the territory of state A becomes divided between several states, B, C, D, and others, again involving the extinction of state A.
v. The whole of the territory of state A forms the basis of several new states, state A again becoming extinguished.
vi. The whole of the territory of state A becomes part of the territory of a single new state, again involving the extinction of state A.

These cases of external changes of sovereignty by no means exhaust the multifarious situations which may arise. Changes of sovereignty over territory may take place not only from states to states, but also from states to non-state entities, for example, international institutions,[4] or from lessee state to lessor state, as will occur in 1997 when sovereignty over Hong Kong territories reverts from Great Britain to China; and non-state entities, for example, trust territories and protectorates, may themselves acquire sovereignty on attaining statehood. Besides, the diversity of situations and factors involved must not be overlooked. There may be variations in the *mode* of the change of sovereignty, which may be by annexation, adjudication by international Conference, voluntary cession, secession or revolution. Much may depend also on the size of the territory concerned, the number of inhabitants affected, and the social and economic interests involved, which inevitably play a role in these days of modern states with their complex structure. Finally, the nature of the particular rights and obligations, which are alleged to pass, must be considered.

For all these reasons, it is difficult to present the subject as a body of coherent principles. No facile criteria can be offered as a guide.[5] As Professor H.A. Smith said:[6]

4. Eg, the temporary legal sovereignty of the League of Nations, 1920–1935, over the German territory of the Saar.
5. Suggested tests or distinctions in the literature have included: (a) the distinction between *universal* and *partial* succession; (b) whether the international personality of the predecessor state has substantially continued through the change of sovereignty; (c) the distinction between *personal* and *territorial* rights and obligations.
6. *Great Britain and the Law of Nations* (1932) Vol I, p 334.

> '... The complexity and variety of the problems which arise in practice are such as to preclude accurate and complete analysis within narrow limits.'

Nonetheless, a consideration of the practice, and of judicial authority and doctrine,[7] as well as of the above-mentioned Vienna Convention of 23 August 1978, on Succession in respect of Treaties and of the above-mentioned Vienna Convention of 7 April 1983, on Succession of States in respect of State Property, Archives and Debts, suggests a tendency to pay regard to the question whether it is just, reasonable, equitable, or in the interests of the international community that rights or obligations should pass upon external changes of sovereignty over territory. It is significant that criteria of justice and reasonableness seem to have been applied in modern succession practice, for example, in the understandings of 1947–8 between Pakistan and India on the occasion of the division of the Indian Empire and their emergence as two new states.[8] Moreover, treaties providing expressis verbis for the transfer of certain obligations upon changes of sovereignty have generally been interpreted by international tribunals in the light of considerations of reason and justice.[9]

Yet state practice on the subject is unsettled and full of inconsistencies, nor, in that connection, have all the difficulties been removed by the provisions of the two above-mentioned conventions, viz. the Convention of 23 August 1978 on Succession of States in respect of Treaties, and the Convention of 7 April 1983 on Succession of States in respect of State Property, Archives and Debts. Possibly, owing to the uncertainty of the international law of succession, the modern tendency is to deal expressly with all possible cases under a treaty between the parties affected (the so-called 'voluntary succession').[10]

7. See, eg, Opinion on *Claims against Hawaii* (1899) of US Attorney-General Griggs *Opinions of Attorneys-General* Vol 22, pp 583 et seq, *Advisory Opinion on the Settlers of German Origin in Territory ceded by Germany to Poland* (1923) PCIJ Series B, No 6, pp 36 et seq, and Hurst *International Law* (Collected Papers, 1950) p 80. Cf upon the aspect of whether it is reasonable that obligations should pass, *Szcupak v Agent Judiciaire du Trésor Public* (1966) 41 ILR 20.
8. Eg, in the solution adopted of India remaining a member of the United Nations and Pakistan applying separately for membership. See memorandum prepared by the United Nations Secretariat in 1962 on succession of states in relation to United Nations membership; *Yearbook of the ILC*, 1962, Vol II, pp 101–103. See, eg, cl 3 of the Anglo-Chinese Agreement of 19 December 1984 dealing with the recovery by China from Great Britain as lessee of Hong Kong territories to occur in 1997, designed to permit Hong Kong to continue for a certain period its current activities as an economic and financial centre, a transitional provision which is pragmatically just and reasonable. The Agreement was in the form of a Joint Declaration with three Annexes.
9. See, eg, the *Case of Certain German Interests in Polish Upper Silesia* (1926) Pub PCIJ Series A, No 7.
10. The particular treaty concerned may, or may not, provide for succession to rights or obligations; see, eg, art 37, para 1 of the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome on 7 October 1952, according to which, when the whole or part of the territory of a contracting state is transferred to a non-contracting state the Convention is to cease to apply to the territory

It is, however, a sound general working rule, and one applied in the case law, to look at the texts of any relevant laws, treaties, declarations, and other arrangements accompanying the change of sovereignty, and ascertain what was the intention of the state or states concerned as to the continuance or passing of any rights or obligations.

The nature of the subject requires that each of the categories of rights and obligations be dealt with in turn.

(1) Succession to treaty rights and obligations[11]

There is no general rule that all treaty rights and obligations pass, nor any generally accepted principle favouring the greatest possible continuity of treaty relations.

The absence of any general or generally accepted principle in respect to succession to treaty rights and obligations may be discerned from consideration of the practice of states and of the views expressed by writers on international law, while it also finds support in the provisions of the above-mentioned Vienna Convention of 23 August 1978 on Succession of States in respect of Treaties, which instrument was based upon draft articles adopted prior to 1977 by the International Law Commission. The Convention was intended to codify the rules of customary international law on the subject, but closer examination shows that a number of its provisions are not in point of fact declaratory of such law. Nonetheless, it is necessary in the present chapter to set out in juxtaposition what appear, on the one hand, to be accepted principles as to certain situations involving treaties, and, on the other hand, the provisions of the Convention formulated for like situations. It should be pointed out, too, that the Convention is expressly confined to international agreements in written form and governed by international law[11] (see article 2) and that rules of customary international law will continue to govern questions not regulated by the Convention (see the preamble).

One must also add, not unfairly, that a number of the provisions of the Convention seem to have little to do with succession stricto sensu, that is to say, succession by operation of law, and that in these no distinctly clear line appears to be drawn between the passing of rights or obligations by such operation of law, on the one hand, and, on the other hand, the passing of rights or obligations by assignment, or novation (ie a fresh agreement between the predecessor state, the successor state and

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so transferred as from the date of transfer. A good example of voluntary succession is the Agreement of 7 August 1965, relating to the Separation of Singapore from Malaysia as an Independent and Sovereign State; cf S. Jayakamur 'Singapore and State Succession. International Relations and Internal Law' (1970) 19 ICLQ 398–423.

11. Under art 4 of the Convention of 1978 on Succession in respect of Treaties, treaties to which the Convention applies are to include treaties which are the constituent instruments of international organisations and treaties adopted within an international organisation.

the other party or other parties to the treaty concerned), or fresh treaty arrangement. An illustration is paragraph 1 of article 9 which reads as follows:

> '1. Obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States parties to those treaties by reason only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.'

Does this paragraph mean any more than that it takes two or more parties to make a treaty, and that there must be a novation before the successor state is bound?

Where a state becomes extinguished by the loss of all its territory, prima facie no rights and obligations of an executory[12] character under treaties pass to the successor state, with the exception of:

a. Such treaties as pertain directly to the territory that has changed masters, for example, treaties creating a boundary régime, a servitude[13] or quasi-servitude such as a right of passage, or treaties neutralising or demilitarising the territory concerned. In this connection, articles 11 and 12 of the Vienna Convention of 1978 provide, in effect, that a 'succession of states' is not, as such, to affect a boundary established by treaty, a régime of rights and obligations established by treaty relating to a boundary, and rights, obligations or restrictions (as defined) involved in a territorial régime for the benefit of the territory concerned and attaching thereto. These provisions are not to apply to agreements for the establishment of foreign military bases, so that the state owning such bases cannot claim that the agreements are binding on a successor state.
b. Multilateral conventions relative to health, narcotics, human rights and similar matters, which are intended to apply, notwithstanding such changes, in respect of the territory. It is to be noted that under Annexe 1 of the Anglo-Chinese Agreement of 19 December 1984 as to the return of sovereignty to China over Hong Kong territories (Annexe 1 of the Joint Declaration; see n 8 above), the two International Covenants of 1966 on Civil and Political Rights and on Economic, Social and Cultural Rights are to continue to be applicable to Hong Kong when China resumes sovereignty in 1977.

This prima facie rule may have to give way to controlling facts or circumstances rendering it reasonable or equitable that certain treaty rights and obligations should pass; for example, if the particular treaty

12. In the case of *executed* obligations under certain treaties, eg, treaties of cession or boundary demarcation, where there is a subsequent change of sovereignty, no question of succession of treaty rights is involved, but the territory, boundary, etc, simply passes to the successor state.
13. See above, pp 196–198.

were one under which the consideration had been executed in favour of the extinct state, and the successor state had taken the benefit of that consideration, the latter would become liable to perform the corresponding obligations.[14] Semble, also, if the successor state represents merely an enlargement of the predecessor state (as in the case of the incorporation of Prussia into the German Empire), prior treaty rights and obligations would pass in principle.

Where the predecessor state does not become extinguished, for instance, where part only of its territory is lost to it, prima facie the passing of treaty rights and obligations depends on the nature of the treaty. As regards succession in respect of a part of a territory, article 15 of the Vienna Convention of 1978 provides that where such part is incorporated in another state:

a. treaties of the predecessor state are to cease to be in force in relation to the territory thus passing; and
b. treaties of the successor state are to be in force in respect of the territory thus passing, unless it 'appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation'.

The rule thus formulated in article 15 of the Convention is often referred to as the 'moving treaty-frontiers rule'. Rights or obligations under political treaties, for example, of alliance, or as to landing and pick-up rights for foreign scheduled air services,[15] are as a rule deemed not to pass, and this on the whole seems reasonable, particularly where the treaty presupposes that the predecessor state shall be the only entity with which the other states parties were prepared to enter into a political arrangement or air services agreement. There is, however, an absence of agreement as to what constitutes a political treaty. Rights or obligations under multilateral conventions intended to be of universal application on health, technical, and similar matters may pass,[16] except those conventions which are the constituent instruments of international organisations, and which require the admission of the successor state by decision of an international organ before it can become a party,[17] or conventions which by their express or implied terms preclude the successor state from

14. Cf Opinion of US Attorney-General Griggs, p 324, n 7 above, that the successor state 'takes the burdens with the benefits'.
15. Article IX of Annexe 1 of Anglo-Chinese Agreement of 19 December 1984 as to the recovery by China of sovereignty over Hong Kong territories (Annexe 1 of the Joint Declaration; see n 8 above) specifically makes reference to air services agreements.
16. Thus, after becoming separated from India in 1947, Pakistan was recognised as becoming party automatically to certain multilateral conventions of universal application binding India. See memorandum prepared by the United Nations Secretariat in 1962, *Yearbook of the ILC*, 1962, Vol II, pp 101–103.
17. See below, pp 615–616.

becoming a party to the convention, or from becoming a party except with the consent of all existing parties. In the same way as provided in articles 11–12 of the Vienna Convention of 1978, obligations under treaties creating a boundary régime or creating servitudes or quasi-servitudes, or obligations pertaining to, or for the benefit of the territory subject of the change of sovereignty or adjoining territory, may also pass.[18] Treaties outside these categories, such as of commerce, and extradition, do not pass unless some strong consideration requires this. In the case of a treaty of extradition, it would generally be unreasonable to bind the successor state under it, because normally such a treaty relates to special offences and procedure under the municipal criminal law of the predecessor state, and a different penal code may be in force in the case of the successor state.[19]

Part IV of the Vienna Convention of 1978 (articles 31–38) contains special provisions relating to the cases where two or more states unite to form one successor state, or where a part or parts of the territory of a state should separate to form one or more states. The general principle adopted here is that the relevant existing treaties continue in force, in regard to both the successor state and predecessor state, unless the parties concerned otherwise agree, or it appears from the treaty in question or is otherwise established that the application of the treaty to the successor state or to the predecessor state, as the case may be, would be incompatible with the object and purpose of the treaty or would radically change the conditions of its application. In certain cases, eg, where a treaty has a restricted operation in regard to certain territory only, provision is made for a written notification by the successor state that the treaty may apply in regard to the whole of the territory.

Most of what is provided otherwise in articles 31–38 of the Convention appears to be descriptive of what would be ordinary practice upon changes of sovereignty. It is difficult to conceive instances in which states would be constrained expressly to invoke or rely upon the provisions as to such practice in complicated situations of unions of states or separations of territory to form new states.

The extensive decolonisation or emancipation of dependent and trust

18. For a detailed treatment of doctrine and practice on the point, see the commentary on draft arts 11 and 12 on succession in respect of treaties, adopted by the International Law Commission at its 26th Session, 1974; these articles deal respectively with boundary régimes, and other 'territorial' régimes (see *Report* of the Commission on the Work of its *26th Session* (1974)). Cf also the *Case of the Free Zones of Upper Savoy and Gex* (1932) Pub PCIJ Series A/B, No 46, p 145, under which France was regarded as having succeeded to Sardinia in the matter of an obligation to respect a territorial arrangement between Sardinia and Switzerland.
19. For three exceptional decisions (unreported) upholding the continued application of an extradition treaty, see *Report of the 53rd Conference of the International Law Association* 1968, p 628.

territories in the period since 1953, produced a welter of practice concerning the extent to which:

a. treaties formerly applying to them, eg, under 'territories clauses' of conventions, continued to apply to them in their new international capacity;
b. treaty rights and obligations generally of the parent or tutelary state passed to them.[20]

It is a bewilderingly hopeless exercise to seek to spell out from this practice any new *general* customary principles of international law; one circumstance alone would be sufficient to negate the value and significance of any such effort, namely the number and nature of the different expedients adopted by newly emerged states to deal with the question of what treaties they would either recognise or refuse to acknowledge as applicable to them; among such expedients were 'devolution agreements' and 'inheritance agreements' with the parent or tutelary state,[1] or unilateral declarations,[2] including the 'declaration of succession' (eg, that made by Tuvalu in March 1986 of succession as party to the Convention of 1951 relating to the status of Refugees) and the so-called 'temporising declaration' whereby the newly emerged state agreed to accept, wholly or partially, upon a basis of reciprocity, the former treaty régime pending a treaty-by-treaty review, and a final decision based upon such investigation.[3] In principle, devolution agreements between the parent tutelary state and the emancipated territory becoming a state could not automatically operate to bind third states, parties to the treaties concerned. Some newly emerged states preferred indeed to give general notice that they were beginning with a 'clean slate', so far as their future treaty relations were concerned, or to give so-called 'pick-and-choose' notifications as to treaties that were formerly applicable to it through its dependence on the parent tutelary state. Indeed the work of the International Law Commission on succession from 1972 onwards and debates

20. On post-decolonisation succession practice in the Pacific region, see Peter Sack (ed) *Pacific Constitutions* (1982) p 65 (article by Professor I.A. Shearer) and 189 (article by G.E. Fry).

1. For the practice concerning these agreements, see the *Report of the 53rd Conference of the International Law Association* 1968, pp 610–627.

2. See Report, op cit, p 624, describing the practice in regard to Conventions of the International Labour Organisation (ILO) previously in force in a dependent territory; upon attaining independence, the new state should make a declaration that such conventions will continue to be respected.

3. An example of such a 'temporising' declaration is the note sent by Nauru on 28 May 1968, to the United Nations Secretary-General, some four months after attaining independence. The similar Lesotho declaration of 1967 was considered by the Privy Council in *Molefi v Principal Legal Adviser* [1971] AC 182, [1970] 3 All ER 724, to be more than a mere declaration of policy, and as an acceptance of temporary obligations rather than a mere offer to other state parties to continue such obligations on a basis of reciprocity.

in the United Nations General Assembly revealed considerable support for a 'clean slate' or 'free choice' doctrine applicable to newly emancipated states—a doctrine closely linked to the principles of self-determination, and of sovereignty of the new state over its own resources, and as will be seen, the 'clean slate' doctrine was ultimately adopted in the relevant provisions of the Vienna Convention of 1978.

This very diversity of action, apart from other considerations, appears inconsistent with the proposition that the practice has given rise to rules of general customary law as to succession stricto sensu. Moreover, when it is claimed, for example, that a devolution agreement may, with regard to a particular treaty, operate by way of novation between the parent state, the new state, and the other state party, or that a unilateral declaration or notification of accession may have effect upon the basis of estoppel or preclusion so as to bind the new state, these are not illustrations of the application of principles of succession, but rather of the incidence of the law of treaties or of the rules as to estoppel. Some devolution agreements are, on their true interpretation, no more than purported assignments of treaty rights and obligations, without relevance to the passing of such rights and obligations by way of state succession. Not to be overlooked also is the practical problem in many cases of determining, in the light of the law of treaties and of general principles of international law, whether a former treaty is inherently or by its terms invokable against the new state; in this connection, the provisions of the devolution agreement or unilateral declaration may be legally irrelevant.[4]

In regard to this subject, Part III of the Vienna Convention of 1978 (articles 16–30) contains special provisions dealing with 'newly independent States', defined in article 2 as those which immediately before the date of the succession of states were dependent territories for the international relations of which the predecessor states were responsible. The general rule for newly independent states laid down in the Convention is that of the 'clean slate', or as it is expressed in article 16 (representing section 1 of Part III) such a newly independent state 'is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates'. Strictly speaking, this is a rule not of succession, but of non-succession. Sections 2, 3, 4 and 5 of Part III deal respectively with multilateral treaties, bilateral treaties, provisional application and newly independent states formed from two or more treaties. Largely, the provisions thereof are framed in facultative terms, not in the phraseology of obligations under international law, and for the most part set out what may be done by a newly independent state and/or by other parties to the relevant treaty to enable

4. On this matter of the practical difficulties, see Lawford 'The Practice Concerning Treaty Succession in the Commonwealth', Can YIL (1967) 3–13.

the burden or bounty of the treaty to pass to the newly independent state; an illustration is that of the provisions in articles 17, 18 and 22 as to written notifications to be given by such states of accession to a multilateral treaty. The device of a notification of succession represents, of course, a useful addition to treaty practice, but as may be appreciated, to the extent that it represents a *consensual* measure on the part of the state assuming obligations or acquiring rights, it is inconsistent with any doctrine of succession by operation of law.

Part VI of the Vienna Convention of 1978 deals with the settlement of disputes over the interpretation or application of the Convention, and does not call for any special examination in the present chapter.

(2) Succession to non-fiscal contractual rights and obligations

The extent to which these pass is highly debatable. The following principles may perhaps be formulated:

a. A contractual right which is solely of the nature of a claim to unliquidated damages, and which cannot be alternatively enforced as a quasi-contractual right against the predecessor or successor state (for example, by reason of some benefit taken over by such state) does not survive the change of sovereignty. But if some element of quasi-contract is involved, for example, unjustified enrichment to the predecessor or successor state, the right and corresponding obligation may survive.[5]

b. A contractual right which is of the nature of a *vested* or *acquired* right ought to be respected by the successor state. To be such a vested or acquired right, it must be liquidated in nature and correspond to some undertaking, or enterprise, or investment of a more or less established character;[6] or—in more general terms—the right must be such that it would be unjust for the successor state not to give effect to it. Hence a merely executory contractual right, without more, is not a vested or acquired right. This concept of vested or acquired rights has been accepted by municipal and international tribunals,[7] although in view of the element of appreciation involved, there still remains some uncertainty regarding its scope, while latterly it has not escaped criticism. On the one hand, it is claimed that the concept of vested or

5. There was some difference of opinion in the International Law Commission at its Session in 1969 concerning the current applicability of the principle of unjust enrichment, particularly its applicability in the context of decolonisation, having regard to the possible necessity for new states to nationalise and exploit their natural resources in the manner best suited to their economic development; see *Report* of the Commission on the Work of its *21st Session* (1969) paras 47–55.

6. Cf *Jablonsky v German Reich* Annual Digest of Public International Law Cases, 1935–7, Case No 42.

7. See, eg, *Advisory Opinion on the Settlers of German Origin in Territory ceded by Germany to Poland* (1923) Pub PCIJ Series B, No 6, and *United States v Percheman* (1833) 7 Peters 51.

acquired rights cannot be applied except subject to certain qualifications, one such qualification being that rights not in conformity with the public and social order of the successor state, even if vested or acquired, ought not to be binding upon that state. On the other hand, some would reject the concept altogether, or at least altogether in relation to newly emerged states having problems of development, except in very special cases (eg debts of public utility).[8]

The doctrine of vested or acquired rights did operate to temper the stringency of earlier rules relating to succession to contractual rights and obligations, including the rule of non-succession laid down by the English Court of Appeal in *West Rand Central Gold Mining Co v R*[9] in 1905 to the effect that in the case of extinction of a predecessor state by conquest and annexation, the successor state as conqueror remains entirely free to decide whether or not to become subrogated to the contractual rights and duties of its predecessor. The latter view was indeed to some extent inconsistent with prior opinion and practice, and semble would not be followed today as an absolute principle.

(3) Succession and concessionary contracts

The general weight of practice and opinion[10] lies in the direction of holding that obligations under concessionary contracts are terminated upon changes of sovereignty resulting in the extinction of the predecessor state,[11] unless indeed the successor state renews the concession.[12] It is not clear why this is necessarily so in every case,[13] because even the executory rights and obligations under the concession may correspond to some substantial benefit which has accrued to the successor state, making it only just and reasonable that the concessionaire should continue to enjoy

8. See *Report* of the International Law Commission on the Work of its *21st Session* (1969) paras 43–46 and 52–55.
9. [1905] 2 KB 391.
10. See First Report of 1968 by the Special Rapporteur of the International Law Commission on succession in respect of non-treaty rights and duties, para 139, YILC (1968) Vol II, p 115. See also paras 144–145, where the views are propounded that the economic conditions in which the concession was granted and the requirements of the new economic policy of the successor state should be taken into consideration, and that the right of new states to carry out nationalisations cannot be impeded by concessionary contracts. In respect to the rights of a successor state to succeed to the title of a predecessor state as to public property covered by a concession in the territory which has undergone a change of sovereignty, see Sixth Report by Mr Bedjaoui to the International Law Commission on Succession of States in Respect of Matters other than Treaties, 1973, commentary on draft art 10.
11. If only part of the territory of the predecessor state is transferred, and the concession relates to the resources of the remaining territory, presumably the concessionaire retains his rights against the predecessor state.
12. In practice successor states have frequently renewed concessions, although it could not be inferred from this that they acknowledged a legal obligation to do so.
13. The intentions of the predecessor and successor states may in fact be that the concession should continue; see Hyde *International Law* (2nd edn, 1947) Vol I, pp 425–8.

his rights. As against that consideration, the concessionaire is in theory always entitled to obtain compensation on just terms for the loss of his rights, including the loss of executory rights, so that these rights would terminate subject only to an obligation upon the successor state to make due compensation. The concessionaire is often said to retain an interest in the money invested and the labour expended, and this, whether classified as an acquired right or otherwise, should be respected by a successor state.[14]

(4) Succession and public debts

Both practice and doctrine reveal great divergencies on the question whether the successor state is obliged to take over public debts, and also on the question whether the creditor rights of a predecessor state pass to the successor.[15]

On the face of it, the successor state, having obtained the benefit of the loan by the very fact of taking over the territory, should be responsible for the public debts of the predecessor state relating to the territory that has passed. This principle of responsibility, resting on the basis of 'taking the burden with the benefits' has been repeatedly upheld by the United States.[16] The same principle applies with particular force where the visible benefits of the loan are directly associated with the territory that has passed, for instance, if the proceeds of the loan have been devoted to the erection of permanent improvements on the territory.[17]

At the same time, regard must be paid to the terms of the actual contract of loan, and if the debt be secured on the revenues of the predecessor state, and in respect of the territory which passed, it would be unreasonable to make the successor state liable beyond the taxable capacity of the territory which has changed sovereigns.[18]

No obligation accrues for a successor state in respect of a public debt

14. Cf also with regard to a concessionary contract, although the case rests on its own peculiar facts, the *Mavrommatis Palestine Concessions Case* (1924) Pub PCIJ Series A, No 2, p 28, and (1925), Series A, No 5.
15. See generally on the subject, Feilchenfeld *Public Debts and State Succession* (1931). Under draft art 11 on Succession to State Property, adopted by the International Law Commission (see *Report* of the Commission on the Work of its *27th Session* (1975) para 76), 'debts owed to the predecessor State by virtue of its sovereignty over, or its activity in, the territory to which the succession of States relates shall pass to the successor State'.
16. Eg, in 1938 when it claimed that Nazi Germany, having absorbed Austria by bloodless conquest, was liable to service former Austrian loans; see Hyde, op cit, Vol I, pp 418–9. Cf O'Connell *State Succession in Municipal Law and International Law* (1967) Vol 1, pp 373, 375.
17. See Hyde, op cit, Vol I, pp 409–10.
18. See Hyde, op cit, Vol I, pp 413–4 and 416–7.

incurred for a purpose hostile to the successor state, or for the benefit of some state other than the predecessor state.[19]

A difficult problem is that of the incidence of a public debt of the predecessor state, the territory of which becomes separated into several parts, each under the sovereignty of new or existing states. The rule that the debt becomes divided among the successors is favoured by doctrine, although not supported by the award in the *Ottoman Debt Arbitration* (1925).[20] In practice, the debts of a predecessor state have been apportioned by treaty[1] among the successor states according to some equitable method of distribution, for example, proportionately to the revenues of each parcel of transferred territory or rateably in some other reasonable manner.

Part IV of the recently concluded Vienna Convention of 7 April 1983, on Succession of States in respect of State Property, Archives and Debts contains provisions as to the obligations of the successor state in respect of state debts. It is there laid down as a general rule (in article 36) that a succession of states does not as such affect the rights and obligations of creditors; thus an agreement between the predecessor state and the successor state governing the parts of state debts that are to pass cannot be relied on against a creditor third state or a creditor international organisation. On the transfer of part of the territory of a state, in the absence of agreement, an 'equitable' proportion is to pass, having regard to the property, rights and interests passing to the successor state in relation to the relevant debt (article 37). If the successor state is a newly independent state, no debt passes, unless an agreement provides otherwise in view of the link between the debt, on the one hand, and, on the other hand, the property, rights and interests passing to the newly independent state, which agreement is not to infringe the principle of the permanent sovereignty of a people over its wealth and natural resources, nor should its implementation endanger the fundamental economic equilibria of that state (article 38). When part of the territory of a state separates to form a new state, or a state ceases to exist and parts of its territory form two or more states, an 'equitable' proportion of the predecessor's state debt, having regard to the property, rights and interests accruing to the successor state in relation to the debt concerned, is to pass to the successor state or to each of the successor states, as the case may be (articles 40–41).

19. Thus in 1898 at the peace negotiations between Spain and the United States, which gained control over Cuba during its successful war with Spain, the American Peace Commissioners refused to recognise a so-called Cuban public debt, which had been raised by Spain for its own national purposes, and for interests in some respects adverse to those of Cuba.
20. See *United Nations Reports of International Arbital Awards* Vol I, pp 571–2.
1. See, eg, art 254 of the Treaty of Versailles, 1919.

(5) Succession and private[2] or municipal law rights

Such of these rights as have crystallised into vested or acquired rights must be respected by the successor state, more especially where the former municipal law of the predecessor state has continued to operate, as though to guarantee the sanctity of the rights.[3]

However, the continuance of any such rights is subject to any alterations affecting them made to the former municipal law by the successor state, for there is no rule of international law obliging the latter to maintain the former municipal legal system. The successor state can always displace existing rights and titles by altering the former municipal law, unless in doing so, it breaks some other independent duty under international law, for instance, by expropriating the property of aliens arbitrarily, and not for a public purpose.

(6) Succession and claims in tort (or delict)

There is no general principle of succession to delictual liabilities.

According to the principles enunciated in two well-known cases, the *Robert E. Brown Claim*[4] and the *Hawaiian Claims*,[5] the successor state is not bound to respect an unliquidated claim for damages in tort.[6] If, however, the amount of the claim has become liquidated by agreement of the parties or through a judgment or award of a tribunal, then in the absence of any suggestion of injustice or unreasonableness, the successor state may be bound to settle the amount of this liquidated claim. This rule is irrespective of whether the change of sovereignty is forcible or voluntary. It is not clear even from the justifications given for the rule, why it should apply as an invariable proposition; for instance, where a tort relates to territory, as where there has been a wrongful diversion of water, or where some permanent benefit has accrued to the successor state, it may in some circumstances be reasonable to bind the successor state to respect the unliquidated claim against its predecessor.[7]

(7) Succession and public funds and public property

It is generally recognised that the successor state takes over the public funds and public property, whether movable or immovable, of the predecessor state, if such property is linked with or located in the territory

2. The traditional view regarding *public* law rights is that the public law of the predecessor state is not automatically taken over by the successor state. However, some writers are of the view that there is a rebuttable presumption that the predecessor state's public law is incorporated into the legal system of the successor state.
3. See *Advisory Opinion on Settlers of German Origin, etc* (1923) Pub PCIJ Series B No 6.
4. See 19 AJIL (1925) 193 et seq.
5. See 20 AJIL (1926) 381 et seq, and O'Connell *State of Succession in Municipal and International Law* (1967) Vol 1, pp 482–486.
6. See also *Kishangarh Electric Supply Co Ltd v United States of Rajasthan* (1959) 54 AJIL (1960) 900–901.
7. See Hyde, op cit, Vol 1, pp 437–40.

to which the question of succession relates.[8] This principle of succession extends to public franchises and privileges, as well as to rights of a proprietorial or pecuniary character.

Part II of the above-mentioned Vienna Convention of 7 April 1983 on State Succession in respect of State Property, Archives and Debts contains provisions as to the passing of state property. In general, the successor state is to take over the predecessor's state property without compensation (article 11). When part of the territory of a state is transferred to another state, in the absence of agreement, immovable property situated in the territory taken over by the successor state is to pass to it, as does also movable property connected with the activity of the predecessor state in relation to the territory taken over. When the successor state is a newly independent state, the following rules apply (article 15):

i. Immovable state property of the predecessor state situated in the territory passing, is to pass to the successor state.
ii. Immovable property, having belonged to the territory passing, the immovable property being situated outside such territory, but both becoming property of the predecessor state, are to pass to the successor state.
iii. Immovable state property not within (ii) and situated outside the territory passing, and movable property, to the creation of both of which the dependent territory has contributed, are to pass to the successor state in proportion to its contribution.
iv. Movable state property connected with the activity of the predecessor state in regard to the territory passing, is to pass to the successor state.

There are also special rules in Part II covering the cases of separation of part or parts of a state's territory, or of a dissolution of a state. In the former case, the rules, in the absence of agreement, are as follows (article 17):

a. Immovable state property of the predecessor state is to pass to the successor state in the territory of which it is situated.
b. Movable state property of the predecessor state connected with the activity of the predecessor state in respect of the territory passing, is to pass to the successor state.
c. Movable state property of the predecessor state other than property within (b) is to pass to the successor state in an equitable proportion.

In the latter case, when the parts of the territory of the dissolved state

8. See the *Peter Pázmány University Case* (1933) Pub PCIJ Series A/B, No 61 237, and see draft art 5 on Succession to States adopted by the International Law Commission (*Report* of the Commission on the Work of its *27th Session* (1975), para 76). As to the relevance of a distinction between movables and immovables in that connection, see Mr Bedjaoui's Eighth Report to the Commission on Succession of States in Respect of Matter other than Treaties, April 1976, para 30 et seq.

form two or more states, and unless the successor states otherwise agree, the rules are as follows (article 18):

a. Immovable state property of the predecessor state is to pass to the successor state in the territory of which it is situated.
b. Immovable state property of the predecessor state situated outside its territory is to pass to the successor states in equitable proportions.
c. Movable state property of the predecessor state connected with the activity of the predecessor state in respect of the territories passing, is to pass to the successor state concerned.
d. Movable state property of the predecessor state other than that within (c) is to pass to the successor states in 'equitable' proportions.

(8) Succession and state archives

Elaborate provisions concerning succession in respect to state archives are contained in Part III of the above-mentioned Vienna Convention of 7 April 1983, on Succession of States in respect of State Property, Archives and Debts. Detailed consideration of these lies beyond the scope of the present chapter. More often, the matter will be one for negotiation. The provisions reflect the general principle that archives pertinent to the territory that passes or to the normal administration of that territory, or (in cases of transfers or separations of part or parts of territory) that part of the archives relating exclusively or principally to the territory passing, is to pass to the successor state.

(9) Succession and nationality

The problem here is whether and to what extent the successor state can claim as its nationals citizens of the predecessor state.[9] Prima facie, persons living or domiciled in the territory subject of change, acquire the nationality of the successor. Difficulty arises in formulating rules concerning the position of citizens of the predecessor, normally living or domiciled in such territory, but outside it at the time of change.

There is no duty at international law upon the successor state to grant any right of option as to citizenship, nor, correspondingly, is there any duty upon the predecessor state to withdraw its nationality from persons normally living or domiciled in the transferred territory. Most cases, it will be found, have been regulated in detail by treaty or agreement.

(10) Succession and customary rights relating to territory

In principle, a customary right relating to territory, which has become established in favour of one state against the predecessor state, must be respected by the successor state in whom the particular territory subject to the right becomes vested. The decision of the International Court of Justice in the *Right of Passage over Indian Territory Case* (1960)[10] to the

9. See Weis *Nationality and Statelessness in International Law* (1956) pp 149–154.
10. [1960] ICJ 6.

effect that Portugal was entitled to a certain right of passage over Indian territory, which had first become established by custom during British rule over India, is not a clear authority for this proposition, because the practice constituting the custom had continued as such for some time after India succeeded to Great Britain so as in effect to amount to a custom as between India and Portugal.[11]

3. PASSING OF RIGHTS AND OBLIGATIONS UPON INTERNAL CHANGES OF SOVEREIGNTY

The principle which applies here is known as the principle of *continuity*, namely, that notwithstanding internal alterations in the organisation of government, or in the constitutional structure of a particular state, the state itself continues to be bound by its rights and obligations under international law, including treaty rights and obligations.[12] Hence each successive government is, as a rule, liable for the acts of its predecessors.

This principle received an extended application in 1947 in the view which commanded general support that, despite the considerable alterations to its constitution when India emerged as an independent state, it continued as an original member of the United Nations with all former rights and obligations. That opinion prevailed in practice, the new India being automatically recognised as a member of the United Nations.[13]

The principle of continuity is not to be applied unreasonably. Hence, if the provisions of a treaty binding upon the state are predicated, expressly or impliedly, on the assumption of a specific form of government or a specific constitution continuing, and the latter are altered, the treaty may cease to bind the new government. Besides, there may be such fundamental revolutionary changes with the advent of the new government, politically, economically, or socially, that it is impossible in fact to hold the government to certain serious or burdensome obligations.[14]

11. It was held that the right was subject to regulation and control by India, and that under the circumstances in question, passage might be refused.
12. See the *Tinoco Arbitration* (1923) *United Nations Reports of International Arbitral Awards* Vol I, 369 at p 377.
13. See memorandum prepared by the United Nations Secretariat in 1962 on succession of states in respect to United Nations membership; YILC (1962) Vol II, pp 101–103. Quaere whether if a predecessor government withdraws from membership of an international organisation, the successor government is necessarily bound by such withdrawal and even after a period of inactive non-participation in the organisation is entitled to enjoy rights of continued membership. The point recently arose in regard to the present government of mainland China and the membership of GATT (the General Agreement on Tariffs and Trade of 30 October 1947), from which the Nationalist Chinese Government withdrew in 1950. Semble, all the circumstances should be considered, including the views of the members and of competent organs of the organisation concerned.
14. For discussion of the refusal of the Soviet Government to be bound by Tsarist treaties, see Taracouzio *The Soviet Union and International Law* (1935) pp 235–290.

A problem of a special nature may arise in regard to a government which usurped office by illegal or unconstitutional means, and established de facto control for a period during which various obligations were incurred towards other states. If such other states had notice from the displaced government that no new treaty engagements entered into by the usurpring government would be recognised if the displaced government re-established control, then prima facie such treaties would be entered into at the peril of the parties concerned, and the government displaced could claim not to be bound thereby when it resumed office.

Another special case arises where an insurgent government is established temporarily as the de facto government in control of a portion of the territory of the whole state and is subsequently suppressed by the parent government, as occurred in the American Civil War when the Confederate Government of the Southern States was overthrown. In such a case, the parent government is not responsible for the debts or delinquencies of the insurgent government[15] unless, perhaps, the debt be one incurred for the benefit of the state as a whole, and in regard to alleged delinquencies, unless the parent government has itself broken some independent duty of international law, for example, by facilitating the commission of the delinquency.

15. For opinion of Sir Robert Phillimore to this effect, see Smith *Great Britain and the Law of Nations* (1932) Vol I, pp 412 et seq. Cf also draft arts 14–15 on state responsibility adopted by the International Law Commission, and commentary thereon, in the Commission's *Report* on the Work of its *27th Session*, (1975) pp 12, 44–47 and 51–53. These articles deal respectively with the question of responsibility for the conduct of organs of an insurrectional movement, and the attribution to the state of the act of an insurrectional movement which becomes the new government of a state, or which results in the formation of a new state.

CHAPTER 12

The state and the individual

1. NATIONALITY

Nationality is the most frequent and sometimes the only link between an individual and a state, ensuring that effect be given to that individual's rights and obligations at international law. It may be defined as the legal status of membership of the collectivity of individuals whose acts, decisions, and policy are vouchsafed through the legal concept of the state representing those individuals. One of the best passages descriptive of the status is that contained in the judgment of the British-Mexican Claims Commission in *Re Lynch*:[1]

> 'A man's nationality forms a continuing state of things and not a physical fact which occurs at a particular moment. A man's nationality *is a continuing legal relationship between the sovereign State on the one hand and the citizen on the other. The fundamental basis of a man's nationality is his membership of an independent political community.* This legal relationship involves rights and corresponding duties upon both—on the part of the citizen no less than on the part of the State.'

Most of the rules as to nationality are the sole concern of municipal law. It has long been conceded that it is the prerogative of each state to 'determine for itself, and according to its own constitution and laws what classes of persons shall be entitled to its citizenship'.[2]

Under changes in 1948 to the legislation of each of the member states of the British Commonwealth, the law as to British nationality was

1. Annual Digest of Public International Law Cases, 1929–1930, p 221 at 223. See also definition by the International Court of Justice in the *Nottebohm Case (Second Phase)* ICJ 1955, 23.
2. Per Gray J in *United States v Wong Kim Ark* 169 US 649 (1898) at 668, and see *Oppenheimer v Cattermole* [1973] Ch 264 at 270, 273, per Buckley LJ. Nonetheless no state may arbitrarily impress its nationality on persons outside its territory, having no genuine connection with it, or on persons residing in its territory without any intention of permanently living there; see Moore *Digest of International Law* (1906) Vol III, pp 302–310, and *Nottebohm Case (Second Phase)* ICJ 1955, 4. Nor are states under a duty to recognise a nationality acquired by fraudulent misrepresentation or non-disclosure of essential facts.

revised.[3] Each member state had its own 'citizens' (ie nationals), but in addition there was the status of British 'subject' which denoted membership of this Commonwealth and comprised certain privileges. The terminology in the 1948 Commonwealth-wide legislation was perhaps open to the objection that it might serve to cause confusion. If the objection were valid, the position appears to have been compounded by the provisions of the British Nationality Act 1981 which, inter alia, in addition to providing for a class of British citizens belonging to the United Kingdom, introduced other categories, namely, citizens of British dependent territories, and British 'overseas' citizens, that is to say, persons belonging to a territory previously subject to British sovereignty and who had retained their British nationality upon the dependent territory in question attaining independence.

Varied indeed are the different rules on nationality found in state laws, this lack of uniformity being most manifest in the divergencies relating to original acquisition of nationality. Thus the laws of one group of states provide that a person's nationality is determined by that of his parents at birth (jus sanguinis), those of a second group equally by parentage (jus sanguinis) and by the state of the territory of birth (jus soli), those of a third group principally by parentage (jus sanguinis) and partly by the state of territory of birth (jus soli), and those of a fourth group principally by the state of territory of birth (jus soli) and partly by parentage (jus sanguinis).

The lack of uniformity in state nationality laws has resulted in troublesome problems of multiple nationality, statelessness, and disputed nationality of married women. An attempt to cope with such problems was made in 1930, when the Hague Codification Conference adopted a Convention on the Conflict of Nationality Laws, two ancillary Protocols on, respectively, Military Obligations and Double Nationality, and a Certain Case of Statelessness, and a Special Protocol with regard to Statelessness. More recent instruments include the Convention on the Nationality of Married Women opened for signature on 20 February 1957, the Convention relating to the Status of Stateless Persons of 28 September 1954, and the Convention on the Reduction of Statelessness of 30 August 1961.

Nationality should be distinguished from the following:

a. Race.[4]
b. Membership or citizenship of the states or provinces of a federation.

3. For a general treatise on the law of nationality in the Commonwealth, see Parry *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* Vol 1 (1957) and Vol 2 (1960). On the law of nationality generally, see V. Bevan *The Development of British Immigration Law* (1986) ch 3, 'Citizenship', pp 104–163, and at pp 112 et seq for the legislation as to British nationality.
4. Note in this connection para 2 of art 1 of the Convention of 1965 on the Elimination of all Forms of Racial Discrimination: 'This Convention shall not apply to distinction

This local citizenship falls short of the international status of nationality, although it may entitle the holder eventually to claim these fuller and wider rights.

c. The right to diplomatic protection. For example, under United States law and practice many persons enjoy a right to protection without being American subjects.[5] Similarly, it has been held that French protected subjects do not necessarily become French nationals.[6]
d. Rights of citizenship, which may be denied to persons who are nationals. Disabilities in citizenship, even of a serious nature, do not involve loss of nationality. This is shown by the case of *Kahane v Parisi and the Austrian State*[7] where it was held that Jews in Rumania who were denied many privileges and subjected to many severe restrictions were none the less Rumanian nationals.

International importance of nationality

It is always material to know of which state a particular person is a national. The reason is that nationality has various important incidents at international law:

i. Entitlement to diplomatic protection abroad is an essential attribute of nationality. We have already seen that in questions of state responsibility, it is regarded as a vital right of each state that it should be entitled to protect its subjects abroad. The English common law conception of nationality coincides with this principle; as early as *Calvin's Case*,[8] it was ruled that allegiance and protection were the correlative aspects of nationality—'*Protectio trahit subjectionem et subjectio protectionem*'.
ii. The state of which a particular person is a national may become responsible to another state if it has failed in its duty of preventing certain wrongful acts committed by this person or of punishing him after these wrongful acts are committed.[9]
iii. Generally, a state does not refuse to receive back on its territory its own nationals. Paragraph 4 of article 12 of the International Covenant on Civil and Political Rights of 1966 provides: 'No one shall be arbitrarily deprived of the right to enter his own country'.
iv. Nationality imports allegiance, and one of the principal incidents of

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exclusions, restrictions or preferences made by a State Party to this Convention *between citizens and non-citizens*'.

5. See *The Costello Case* Annual Digest of Public International Law Cases, 1929–1930, pp 188–9.
6. Decision of the Franco-German Mixed Arbitral Tribunal in *Djevahirdjhian v Germany* Annual Digest of Public International Law Cases, 1927–1928, pp 310 et seq.
7. Decision of the Austro-German Mixed Arbitral Tribunal, Annual Digest of Public International Law Cases, 1929–1930, pp 213 et seq.
8. (1608) 7 Co Rep 1a. Yet, semble, there is no legally enforceable right to be granted diplomatic protection; cf *China Navigation Co Ltd v A-G* [1932] 2 KB 197.
9. See, however, above, pp 305–309.

allegiance is the duty to perform military service for the state to which such allegiance is owed.

v. A state has a general right, in the absence of a specific treaty binding it to do so, to refuse to extradite its own nationals to another state requesting surrender.

vi. Enemy status in time of war may be determined by the nationality of the person concerned.

vii. States may frequently exercise criminal or other jurisdiction on the basis of nationality.[10]

Clearly difficulties may arise in many cases where the nationality of a particular individual is in doubt. The authorities have long established that the question is to be decided by the municipal law of the state whose nationality such person is alleged to possess; according to Russell J in *Stoeck v Public Trustee*:[11]

> 'The question of what State a person belongs to must ultimately be decided by the municipal law of the State to which he claims to belong or to which it is alleged that he belongs.'

This principle is supported by articles 1 and 2 of the Hague Convention of 1930 on the Conflict of Nationality Laws. These provisions are as follows:

> '*Article* 1. It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international Conventions, international custom, and the principles of law generally recognised with regard to nationality.
> *Article* 2. Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.'

It should be added that there are authorities to the effect that a duly authorised passport is prima facie evidence of nationality,[12] but there have also been decisions, both reported and unreported, that a passport is not to be relied on except in conjunction with other evidence of nationality, and is not conclusive on the question in the absence of such other evidence.

10. See above, pp 232–233.
11. [1921] 2 Ch 67 at 78; applied by Buckley LJ in *Oppenheimer v Cattermole* [1973] Ch 264 at 270, 273.
12. See Sandifer *Evidence Before International Tribunals* (1939) pp 154–5; Luke T. Lee *Consular Law and Practice* (1961) p 175; *R v Brailsford* [1905] 2 KB 730 at 745; and cf *Joyce v DPP* [1946] AC 347. The subject of passports is not as yet governed by international law or by any definitive international practice; see Bevan, op cit, n 3 above at pp 141 et seq. Moreover, at common law the limiits marking the prerogative to issue passports are uncertain; cf *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935.

Acquisition of nationality

The practice of states shows that nationality may be acquired in the following principal ways:

1. By birth either according to jus soli—the territory of birth—or jus sanguinis—the nationality of the parents at birth—or according to both.
2. By naturalisation, either by marriage, as when a wife assumes her husband's nationality, or by legitimation, or by official grant of nationality on application to the state authorities. According to the decision of the International Court of Justice in the *Nottebohm Case (Second Phase)*,[13] states are not under a duty to recognise a nationality acquired by a person who has no genuine link or connection with the naturalising state.
3. The inhabitants of a subjugated or conquered or ceded territory may assume the nationality of the conquering state, or of the state to which the territory is ceded.[14] Quaere, also, whether a state may purport to naturalise persons who do not have their habitual residence in that state's territory.

Loss of nationality

According to the practice of states, nationality may be lost by:

1. Release, or renunciation, for example, by deed signed and registered at a consulate, or by declaration of alienage upon coming of age.
2. Deprivation, for example, under special denationalisation laws passed by the state of which the person concerned is a national.[15]
3. Long residence abroad.

So far as both international law and municipal law are concerned, there is a presumption against the loss of one nationality that has been held for some time, and a heavy onus of proof must be discharged before the loss is recognised. For instance, by article 7 of the Hague Convention of 1930 on the Conflict of Nationality Laws, the mere grant of an expatriation permit is not to entail the loss of nationality of the state issuing the permit. Under English law, an individual seeking to establish loss of nationality of a particular state must not merely satisfy the court

13. ICJ 1955, 4.
14. Other methods of acquiring nationality are by option, entry into the public service of the state concerned, and by registration.
15. According to *R v Home Secretary, ex p L* [1945] KB 7, the municipal courts of a belligerent state are not bound in time of war to give effect to the denationalisation laws of an enemy belligerent state. Contra, *United States ex rel Schwarzkopf v Uhl* 137 F (2d) 898 (1943). English courts will only refuse to recognise a change in the status of an enemy alien effected under the law of the enemy country during wartime so long as the war subsists; *Oppenheimer v Cattermole* [1973] Ch 264, [1975] 1 All ER 538. Semble, a denationalisation decree, which is a grave infringement of human rights, ought not to be recognised by English courts; ibid.

by positive evidence as to the facts of the municipal law under which he alleges such loss,[16] but must also prove that nationality has been lost for all purposes and with all its incidents, and any possibility that a right of protection or a chance of resumption of nationality still exists will prevent the onus being discharged.[17]

Double nationality, statelessness, and nationality of married women

Owing to the conflict of nationality laws and their lack of uniformity, it often arises that certain individuals possess double nationality.[18] A frequent instance is the case of a woman who, marrying somebody not of her own nationality, may retain her nationality according to the law of the state of which she is a national and acquire the nationality of her husband according to the law of the state of which her husband is a national. Double nationality may also result from birth in the territory of a state, not the state of which the parents are nationals, although usually a minor is given a chance to opt for one or the other nationality on the attainment of his majority. A right of option, otherwise, may be conferred by treaty.

Articles 3 to 6 of the Hague Convention of 1930 on the Conflict of Nationality Laws deal with some difficulties arising out of double nationality. Of particular importance is article 5, which provides that within a third state a person of more than one nationality shall be treated as if he only had one nationality, and such third state shall recognise exclusively either:

a. the nationality of the country in which he is habitually and principally resident, or
b. the nationality of the country with which in the circumstances he appears to be in fact most closely connected.

Articles 8–11 of the Convention deal with the nationality of married women, containing provisions mitigating the artificial and technical principle that their nationality follows that of their husbands, and enabling them under certain conditions to retain premarital nationality. An advance on these provisions was made in the Convention on the Nationality of Married Women opened for signature on 20 February 1957, under which each contracting state agrees that neither the celebration nor the dissolution of marriage between one of its nationals and an alien, nor a

16. *Hahn v Public Trustee* [1925] Ch 715.
17. *Stoeck v Public Trustee* [1921] 2 Ch 67; *Ex p Weber* [1916] 1 AC 421 at 425.
18. For general treatise on this subject, see Bar-Yaacov *Dual Nationality* (1961). International law recognises the possibility of dual nationality (see below), although where a question of nationality of claims is involved, an international tribunal will not admit the locus standi of a claimant state if that state relies on one of the nationalities which is not the 'real and effective' nationality of the individual concerned; see p 317, n 2. Nor does international law prevent states passing legislation to prohibit dual nationality; eg, dual nationality is prohibited by Zimbabwe's Citizenship Act 1984.

change of nationality by the husband during marriage, shall have any automatic effect on the wife's nationality, and provision is made for facilitating, through naturalisation, the voluntary acquisition by an alien wife of her husband's nationality. Article 5 of the Declaration on the Elimination of Discrimination against Women, adopted by the United Nations General Assembly in November 1967 provided more broadly: 'Women shall have the same rights as men to acquire, change or retain their nationality. Marriage to an alien shall not automatically affect the nationality of the wife either by rendering her stateless or by forcing upon her the nationality of the husband'. This proposed principle was spelled out in more elaborate terms in article 9 of the Convention of 1979 on the Elimination of All Forms of Discrimination Against Women. Paragraph 1 of the article provided: '1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of husband'. Paragraph 2 was in these terms: '2. States Parties shall grant women equal rights with men with respect to the nationality of the children'.

Statelessness is a condition recognised both by municipal law[19] and by international law. It has indeed become in recent years a major problem of international law, the very urgency and acuteness of which prompted the insertion of article 15 in the Universal Declaration of Human Rights of December, 1948, that 'everyone has the right to a nationality', and that 'no one shall be arbitrarily deprived of his nationality'. Statelessness may arise through conflicts of municipal nationality laws, through changes of sovereignty over territory, and through denationalisation by the state of nationality.[20] It is a condition which not only means great hardship and lack of security for individuals; but involves the existence of a serious gap in the application of international law.[1]

Remedial action for the condition lies in:

a. Imposing duties upon states to regard a certain nationality as acquired, or not to regard a certain nationality as lost, or to grant a nationality upon special grounds or subject to special conditions. Limited progress in this field was achieved by certain treaty provisions adopted in 1930 at the Hague Codification Conference,[2] and later by the Convention

19. See *Stoeck v Public Trustee* [1921] 2 Ch 67.
20. See 'A Study of Statelessness' (United Nations Department of Social Affairs, 1949), Weis *Nationality and Statelessness at International Law* (2nd edn, 1979), and A. P. Mutharika *The Regulation of Statelessness under International and National Law* (2 vols, 1980).
1. See *Report* of the International Law Commission on the work of its *5th Session* (1953) para 22.
2. See arts 13 and 15 of the Convention on the Conflict of Nationality Laws, the Protocol on a Certain Case of Statelessness, and the Special Protocol with regard to Statelessness.

on the Reduction of Statelessness, adopted at New York on 30 August 1961.[3]

b. Obliging states to refrain from denationalisation measures unless there be just cause.
c. The conferment by liberal-minded states of their nationality upon stateless persons. Many states have begrudged this solution.
d. Relief from the disadvantages of this unprotected status through international conventions allowing the use of identity or travel documents, and privileges of admission by foreign states with rights of residence, of practising an occupation, etc. In this regard, the Convention on the Status of Refugees signed at Geneva on 25 July 1951,[4] and the Convention relating to the Status of Stateless Persons signed at New York on 28 September 1954, conferred important benefits on stateless persons.

The subject of statelessness, and of remedial action in regard to it, was under study for some time by the International Law Commission,[5] and by the General Assembly of the United Nations.

Nationality of corporations and unincorporated associations

The nationality of corporations and unincorporated associations is entirely a modern conception, and becomes relevant when it is necessary to determine the nationality of such corporations or associations for the purpose of applying the 'nationality of claims' principle[6] in a case before an international tribunal, or for giving effect to a treaty applying to 'nationals' of a state.

There is no unanimity of opinion regarding the tests to be applied for ascertaining the nationality of these bodies. Prima facie, the nationality of a corporation or limited company is that of the state of incorporation, and this test is also adopted by some treaties. However, for different purposes, other tests of the nationality of a corporation have been adopted; eg, the principal place of business test for exchange control purposes, and the location of central control test for the purpose of determining the right to take advantage of double taxation treaties.[7] The national status of the individual corporators or shareholders is not

3. This Convention contains, inter alia, provisions enabling persons who would otherwise be stateless to acquire the nationality of the country of birth, or of one of the parents at the date of birth, and also provides that a loss of nationality, which would otherwise take place under certain circumstances, is to be conditional upon the acquisition of another nationality.
4. Note also the Protocol of 31 January 1967, in extension of this Convention.
5. See *The Work of the International Law Commission* (3rd edn, 1980) pp 33–36.
6. See pp 314–318 above.
7. See M. Tedeschi 'The Determination of Corporate Nationality' (1976) 50 ALJ 521. The location of central control test, coupled with the test of location of primary profit-making functions, was applied for double taxation treaty purposes in *Compagnie Financière de Suez, etc v United States* 492 F (2d) 798 (1974).

generally a material consideration in this connection.[8] Prima facie, also, the nationality of an unincorporated association is that of the state in which the association has been constituted, or of the state in which the governing body of the association is normally located for administrative purposes.

2. RIGHTS AND DUTIES OF STATES WITH REGARD TO ALIENS

Admission of aliens

Four principal opinions have been held regarding the admission of aliens into countries not of their nationality:

a. A state is under a duty to admit all aliens.
b. A state is under a duty to admit all aliens, subject to the qualification that it is entitled to exclude certain classes, for example drug addicts, persons with diseases, and other undesirables.
c. A state is bound to admit aliens but may impose conditions with regard to their admission.
d. A state is fully entitled to exclude all aliens at will.

So far as state practice is concerned, it may be said that the first view has never been accepted as a general rule of international law.

Most states claim in legal theory to exclude all aliens at will, affirming that such unqualified right is an essential attribute of sovereign government.[9] The courts of Great Britain and the United States have laid it down that the right to exclude aliens at will is an incident of territorial sovereignty.[10] Unless bound by an international treaty to the contrary, states are not subject to a duty under international law to admit aliens or any duty thereunder not to expel them. Nor does international law impose any duty as to the period of stay of an admitted alien.

The absence of any duty at international law to admit aliens is supported by an examination of state immigration laws, showing that scarcely any states freely admit aliens. If further evidence be necessary, it is supplied by the several agreements and conventions concluded since 1920, providing for the admission of refugees, of which an important example

8. As to the question of the legal capacity of the national state of the shareholders to espouse a claim by them for injury done to the company itself, see *Case Concerning the Barcelona Traction, Light and Power Co Ltd (Second Phase)* ICJ 1970, 3 discussed pp 316–317 above.
9. See Nafziger 'General Admission of Aliens under International Law' (1983) 77 AJIL 804.
10. As to Great Britain, see *Musgrove v Chung Teeong Toy* [1891] AC 272, and as to the United States, see *Nishimura Ekiu v United States* 142 US 651 (1892) and *Fong Yue Ting v United States* 149 US 698 (1893). See also Henkin, Pugh, Schachter and Smit *International Law: Cases and Materials* (2nd edn, 1987) p 1040.

is the Geneva Convention on the Status of Refugees of 25 July 1951, as extended by the Protocol of 31 January 1967.[11]

While theoretically almost all states claim the right to exclude aliens, in practice they do not exercise this right to its fullest extent.[12] As a general rule, conditions are imposed on admission, or only certain classes, for example, tourists, or students, are freely admitted. Moreover, there is one practical limitation on the full exercise of the right which every state must carefully take into account, namely, that the entire prohibition of the citizens of one particular state would diplomatically be regarded as an affront or as an unfriendly act towards that state.

Most frequently the case of reciprocal admission or exclusion of aliens by different states is dealt with by bilateral treaties of commerce and navigation, or of establishment.[13] Usually states do not press their rights under such treaties because to do so might restrict their own freedom of action.

Legal position of aliens when admitted

An alien entering the territory of a state becomes subject to its laws in the same way exactly as citizens of that state. Most states, however, place aliens under some kind of disability or some measure of restrictions of varying severity. Frequently they are denied voting rights or the right to practise certain professions or the power of holding real estate.

In 1924, the Economic Committee of the League of Nations classified the treatment of aliens abroad under the following headings:

a. Fiscal treatment, for example, in respect of taxation.
b. Rights as to the exercise of professions, industries, or occupations.
c. Treatment in such matters as residence, the holding of property, and civil privileges and immunities.
d. Conditions of admission and immigration.

As to (a) unless possessing diplomatic immunity, resident aliens are not exempt from ordinary civil taxes or customs dues. Leading English and American decisions have also affirmed the right of all states at international law to tax property physically within their jurisdiction belonging to non-resident aliens.[14]

As to (c), aliens are exempt from any compulsory obligation to serve in the armed forces of the country in which they reside, unless the state

11. See generally on the subject of the principles of international law as to refugees, G. S. Goodwin-Gill *The Refugee in International Law* (1983).
12. Certain states, eg, Great Britain and the Netherlands, indeed insist on a right to grant territorial asylum to refugees from countries where they are subject to persecution on political, racial, or religious grounds.
13. The Treaty of Rome of 25 March 1957, establishing the European Economic Community (Common Market), provides for the free movement of nationals of the states parties in the area of the Community.
14. *Winans v A-G* [1910] AC 27; *Burnet v Brooks* 288 US 378 (1933).

to which they belong consents to waive this exemption.[15] This rule, however, does not prevent compulsory service in a local police force, or, apparently, compulsory service for the purpose of maintaining public order or repelling a sudden invasion.[16] During the Second World War most belligerent states compelled resident aliens to perform some kind of service connected with the war effort, even to the extent of making voluntary service in the armed forces an alternative to the performance of compulsory civilian duties. In certain instances, this was sanctioned by agreement or treaty between the states concerned.

As noted above in Chapter 10 on State Responsibility, an alien carries with him a right of protection by his national state, although the latter is not duty bound to exercise that right. Grossly unfair discrimination or outright arbitrary confiscation of the alien's property would, for example, be legitimate ground for intervention by that state. An alien's *vested rights* in his country of residence are also entitled to protection. But as the decision of the Permanent Court of International Justice in the *Oscar Chinn Case*[17] shows, protection of vested rights does not mean that the state of residence is duty bound to abstain from providing advantages for local enterprises, which may cause loss to an alien in his business. A number of states, including the Afro-Asian group, hold that the national standard of treatment should apply, inasmuch as an alien entering impliedly submits to that standard, otherwise he could elect not to enter.

A resident alien owes temporary allegiance or obedience to his state of residence, sufficient at any rate to support a charge of treason.[18]

Expulsion and reconduction[19] of aliens

States are generally recognised as possessing the power to expel, deport, and reconduct aliens. Like the power to refuse admission, this is regarded as an incident of a state's territorial sovereignty. Not even a state's own citizens are immune from this power, as witness the denationalisation and expulsion by certain states in recent times of their own nationals.

The *power* to expel and the *manner* of expulsion are, however, two distinct matters. Expulsion (or reconduction) must be effected in a reason-

15. In the US, aliens can be called up for service, but have the right to opt out, in which event: (a) if they subsequently leave the US, they cannot return; and (b) if they stay, they will not be granted US citizenship. The position as to alien migrants, as distinct from temporarily resident aliens, is at least open to doubt. In 1966, the Australian Government purported to make alien migrants subject to compulsory service, formal protests being received from the USSR, Italy, Spain, and other countries.
16. See judgment of Latham CJ in decision of Australian High Court, *Polites v The Commonwealth* (1945) 70 CLR 60 at 70–71.
17. Pub PCIJ (1934), Series A/B, No 63. For certain prohibitions against discrimination in regard to resident refugee aliens, see arts 3, 4, 14 and 16 of the Geneva Convention on the Status of Refugees, of 25 July 1951.
18. *De Jager v Attorney-General* [1907] AC 326.
19. As distinct from expulsion, reconduction amounts to a police measure whereby the alien is conducted to the frontier under escort.

able manner and without unnecessary injury to the alien affected. Article 13 of the International Covenant of 1966 on Civil and Political Rights provides that an alien lawfully in the territory of a state party to the Covenant may be expelled only pursuant to a decision reached by law, and, except where compelling reasons of national security otherwise require, is to be allowed to submit the reasons against his expulsion and to have his case reviewed by, and to be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority. Detention prior to expulsion should be avoided, unless the alien concerned refuses to leave the state or is likely to evade the authorities. Also an alien should not be deported to a country or territory where his person or freedom would be threatened on account of his race, religion, nationality, or political views.[20] Nor should he be exposed to unnecessary indignity.

International law does not prohibit the expulsion en masse of aliens, although this is resorted to usually by way of reprisals only. It may, however, be treated as an unfriendly act, and certainly would represent a breach of human rights.

3. EXTRADITION, RENDITION AND ASYLUM

The liberty of a state to accord asylum to a person overlaps to a certain extent with its liberty to refuse extradition or rendition of him at the request of some other state, an overlapping best seen in the grant, commonly, of asylum to political offenders, who correspondingly are not as a rule extraditable. Asylum stops, as it were, where extradition or rendition begins, and this interdependence[1] makes it convenient to consider the two subjects together.

20. See art 33 of the Geneva Convention on the Status of Refugees, of 25 July 1951, and cf *United States ex rel Weinberg v Schlotfeldt* 26 F Supp 283 (1938). This article embodies the so-called principle of 'non-refoulement' (ie non-rejection), and was applied in effect by the House of Lords in *Bugdaycay v Secretary of State for the Home Department* [1987] 1 All ER 940, illustrating the necessity to take into account all relevant facts regarding the alien's claim of the threat to his life and freedom. Article 33 differs from art 1 of the Convention, defining a 'refugee' (a well-founded fear of persecution); see *R v Secretary of State for the Home Department, ex p Sivakumaran* [1988] 1 All ER 193, HL.

1. No question of asylum, and therefore of interdependence between it and extradition, arises, however, where a state is requested to extradite its own resident nationals. Also, art 1 of the Declaration on Territorial Asylum adopted by the United Nations General Assembly on 14 December 1967, recommends that all states should 'respect' (this would include refraining from an application for extradition) asylum granted to persons who have sought refuge from persecution, including persons struggling against colonialism. On extradition under international law, see generally Bassiouni *International Extradition* (1983) and Henkin, Pugh, Schachter and Smit *International Law: Cases and Materials* (2nd edn, 1987) pp 885–890.

Extradition

The term 'extradition' denotes the process whereby under treaty or upon a basis of reciprocity one state surrenders to another state at its request a person accused or convicted of a criminal offence committed against the laws of the requesting state, such requesting state being competent to try the alleged offender. Normally, the alleged offence has been committed within the territory or aboard a ship[2] flying the flag of the requesting state, and normally it is within the territory of the surrendering state that the alleged offender has taken refuge. Requests for extradition are usually made and answered through the diplomatic channel.

The following rational considerations have conditioned the law and practice as to extradition:

a. The general desire of all states to ensure that serious crimes do not go unpunished. Frequently a state in whose territory a criminal has taken refuge cannot prosecute or punish him purely because of some technical rule of criminal law or for lack of jurisdiction. Therefore to close the net round such fugitive offenders, international law applies the maxim, '*aut punire aut dedere*', ie the offender must be punished by the state of refuge or surrendered to the state which can and will punish him.
b. The state on whose territory[3] the crime has been committed is best able to try the offender because the evidence is more freely available there, and that state has the greatest interest in the punishment of the offender, and the greatest facilities for ascertaining the truth. It follows that it is only right and proper that to the territorial state should be surrendered such criminals as have taken refuge abroad.

With the increasing rapidity and facility of international transport and communications, extradition began to assume prominence in the nineteenth century, although actually extradition arrangements date from the eighteenth century. Because of the negative or neutral attitude[4] of customary international law on the subject, extradition was at first dealt with by bilateral treaties. These treaties, inasmuch as they affected the rights of private citizens, required in their turn alterations to the laws and statutes of the states which had concluded them. Hence the general principle became established that without some formal authority either

2. *R v Governor of Brixton Prison, ex p Minervini* [1959] 1 QB 155, [1958] 3 All ER 318.
3. 'Territory' can cover, for this purpose, also ships and aircraft registered with the requesting state; see, eg, art 16 of the Tokyo Convention of 14 September 1963 on Offences and Certain Other Acts Committed on Board Aircraft (offences committed on board aircraft in flight to be treated for purposes of extradition as if committed also in country of registration).
4. On the one hand, customary international law imposed no duty upon states to surrender alleged or convicted offenders to another state, while on the other hand, it did not forbid the state of refuge to deliver over the alleged delinquent to the state requesting his surrender.

by treaty or by statute, fugitive criminals would not be surrendered nor would their surrender be requested. There was at international law neither a duty to surrender, nor a duty not to surrender. For this reason, extradition was called by some writers a matter 'of imperfect obligation'. In the absence of treaty or statute, the grant of extradition depended purely on reciprocity or courtesy.[5]

As regards English municipal law, the special traditions of the common law conditioned the necessity for treaty and statute. At common law the Crown had no power to arrest a fugitive criminal who was a foreign subject and to surrender him to another state; furthermore, so far as the surrender of subjects of the Crown was concerned, treaties as to extradition were deemed to derogate from the private law rights of English citizens, and required legislation before they could come into force in England.[6] Thus from both points of view legislation was essential, and the solution adopted was to pass a general extradition statute—the Extradition Act 1870—which applies only in respect of countries with which an arrangement for the surrender of fugitive offenders has been concluded, and to which the Act itself has been applied by Order-in-Council.[7]

International law concedes that the grant of and procedure as to extradition are most properly left to municipal law, and does not, for instance, preclude states from legislating so as to preclude the surrender by them of fugitives, if it appears that the request for extradition had been made in order to prosecute the fugitive on account of his race, religion, or political opinions, or if he may be prejudiced thereby upon his eventual trial by the courts of the requesting state. There are some divergences on the subject of extradition between the different state laws, particularly as to the following matters: extraditability of nationals of the state of asylum; evidence of guilt required by the state of asylum; and the relative powers of the executive and judicial organs in the procedure of surrendering the fugitive criminal.

5. Reference should be made to the European Convention on Extradition, 13 December 1957 (Council of Europe) as an illustration of a multilateral extradition treaty. On the necessity of a treaty to confer a right on a state to request the surrender of a fugitive from justice and to impose a correlative duty on the requested state to hand the fugitive over see *Factor v Laubenheimer* 290 US 276 (1933) at 287. A bilateral extradition treaty should be liberally and pragmatically interpreted, eg, as to the time-limit for adducing evidence to the local court; see *Belgian Government v Postlethwaite* [1987] 2 All ER 985, HL.
6. See above, pp 81–83. See also Shearer 'Extradition without Treaty' (1975) 49 ALJ 116 at 118.
7. For an analysis of the effect of, and the procedure related to the British Extradition Act 1870 and subsequent Extradition Acts 1973–1932, see the speech of Lord Diplock in *Re Nielsen* [1984] AC 606 at 614–616, and see also *Government of Federal Republic of Germany v Sotiriadis* [1975] AC 1.

Before an application for extradition is made through the diplomatic channel, two conditions are as a rule required to be satisfied:

a. There must be an extraditable person.
b. There must be an extradition crime.

We shall discuss each of these conditions.

(a) Extraditable persons

There is uniformity of state practice to the effect that the requesting state may obtain the surrender of its own nationals or nationals of a third state. But many states usually refuse the extradition of their own nationals who have taken refuge in their territory, although as between states who observe absolute reciprocity of treatment in this regard, requests for surrender are sometimes acceded to. This does not necessarily mean that the fugitive from justice escapes prosecution by the country of his nationality.

(b) Extradition crimes

The ordinary practice as to extradition crimes is to list these in each bilateral extradition treaty.

Generally, states extradite only for serious crimes,[8] and there is an obvious advantage in thus limiting the list of extradition crimes since the procedure is so cumbrous and expensive. Certain states, for example, France, extradite only for offences which are subject to a definite *minimum* penalty, both in the state requesting and in the state requested to grant extradition. In the case of Great Britain, extradition crimes are scheduled to the Extradition Act 1870 and subsequent Extradition Acts.

As a general rule, the following offences are not subject to extradition proceedings:

i. political crimes;
ii. military offences, for example, desertion;
iii. religious offences.

The principle of non-extradition of political offenders crystallised in the nineteenth century, a period of internal convulsions, when tolerant, liberal states such as Holland, Switzerland, and Great Britain, insisted on their

8. Recent practice shows a general disposition of states to treat alleged 'war crimes' as extradition crimes. However, there are a number of decisions of municipal courts treating war crimes as political offences for the purpose of extradition (cf *Karadzole v Artukovic* 247 F (2d) 198 (1957)), so that extradition is refused. In one decision, *Re Wilson, ex p the witness T* (1976) 50 ALJR 762, the High Court of Australia declined to treat war crimes as being offences of a political character; and see also *Re Gross, ex p Treasury Solicitor* [1968] 3 All ER 804. As to when the evidence before the court to which application for extradition is made falls short of establishing the commission of an extradition crime within the meaning of the description of the crime in the relevant extradition treaty, see *Re Gail Jennings* (1982) Times, 21 April.

right to shelter political refugees. At the same time, it is not easy to define a 'political crime', although a clear case would be that where it is evident that the fugitive is to be punished for his politics rather than for the offence itself.[9] Different criteria have been adopted:

a. the motive of the crime;
b. the circumstances of its commission;
c. that it embraces specific offences only, eg, treason or attempted treason;[10]
d. that the act is directed against the political organisation, as such, of the requesting state;
e. the test followed in the English cases, *Re Meunier*,[11] and *Re Castioni*,[12] that there must be two parties striving for political control in the state where the offence is committed, the offence being committed in pursuance of that goal, thereby excluding anarchist and terrorist acts from the category of 'political crimes'.

In *R v Governor of Brixton Prison, ex p Kolczynski*,[13] the court favoured an even more extended meaning, holding in effect that offences committed in association with a political object (eg anti-Communism), or with a view to avoiding political persecution or prosecution for political defaults, are 'political crimes', notwithstanding the absence of any intention to overthrow an established government. Whether an alleged crime is 'political' is a question to be determined by reference to the circumstances attending its alleged commission at the material time, and not in the light of the motives of those who have instituted the prosecution proceedings and the corresponding application for extradition.[14]

A number of decisions by municipal courts show that extradition will not be denied for actual offences, including crimes of violence, having no direct and close relation to political aims, although committed in the course of political controversy, or by persons politically opposed to the requesting government.[15] In this connection, the question of war crimes

9. Cf *R v Governor of Winson Green Prison, ex p Littlejohn* [1975] 3 All ER 208.
10. A number of bilateral and other treaties after the Second World War, including the Paris Peace Treaties of 1946 with Italy, Rumania, Bulgaria, Hungary, and Finland, provided for the surrender of 'quislings', persons guilty of treason, and so-called 'collaborationists' with the enemy occupying authorities.
11. [1894] 2 QB 415.
12. [1891] 1 QB 149.
13. [1955] 1 QB 540.
14. See *Re Extradition of Locatelli* 468 F Supp 568 (1979).
15. Cf *Schtraks v Government of Israel* [1964] AC 556 esp at 591–592, per Viscount Radcliffe, upholding the view that to be a political offence, the relevant act must be committed in the course of political opposition to a government; or in the course of political disturbances. See also *Cheng v Governor of Pentonville Prison* [1973] AC 931, [1973] 1 All ER 935. There is a recent trend to exclude from the 'political crime' exception crimes of violence typically committed by terrorists, international or otherwise; note, eg, in that connection the Supplementary Extradition Treaty of June 1985 between the

gives rise to difficulties; to some extent the issues involved are matters of degree, insofar as a war crime may or may not transcend its political implications.[16]

International law leaves to the state of asylum the sovereign right of deciding, according to its municipal law and practice, the question whether or not the offence which is the subject of a request for extradition is a political crime.[17]

As regards the character of the crime, most states follow the rule of *double criminality*, ie that it is a condition of extradition that the crime is punishable according to the law both of the state of asylum and of the requesting state. The application of the rule to peculiar circumstances came before the United States Supreme Court in 1933 in the case of *Factor v Laubenheimer*.[18] There, proceedings were taken by the British authorities for the extradition of Jacob Factor on a charge of receiving in London money which he knew to have been fraudulently obtained. At the time extradition was applied for, Factor was residing in the State of Illinois, by the laws of which the offence charged was not an offence in Illinois. It was held by the Supreme Court that this did not prevent extradition if, according to the criminal law generally of the United States, the offence was punishable; otherwise extradition might fail merely because the fugitive offender would succeed in finding in the country of refuge some province in which the offence charged was not punishable. Substantial similarity of the alleged extradition crime to the crime punishable according to the legal system of the state of refuge is sufficient to bring into effect the double criminality rule so as to justify a grant of extradition.[19]

United States and the United Kingdom and, earlier, the European Convention of 1977 on the Suppression of Terrorism (Council of Europe).

16. Cf *Re Wilson, ex p the Witness T* (1976) 50 ALJR 762 (decision of High Court of Australia), and *Re Gross, ex p Treasury Solicitor* [1968] 3 All ER 804.
17. Quaere, whether an English court should accept an unconditional undertaking by the requesting state not to apply a particular law to the extraditee; see *Armah v Government of Ghana* [1966] 3 All ER 177. An English court will assume that the requesting government will honour its obligations under law or any arrangement; see *Royal Government of Greece v Brixton Prison Governor* [1971] AC 250 at 278–279.
18. 290 US 276.
19. *R v Governor of Pentonville Prison, ex p Budlong* [1980] 1 All ER 701; there the alleged extradition offence was burglary, and it was held to be immaterial that entry as a trespasser was not an essential element of the crime in the District of Columbia (USA), whereas it was an essential element under s 9(a) of the British Theft Act 1968. Cf also *Re Locatelli* 468 F Supp 568 (1979). The House of Lords held in *Re Nielson* [1984] AC 606, followed in *United States Government v McCaffery* [1984] 2 All ER 570, that on the true construction of the Extradition Act 1870 an English committing magistrate is, in the absence of special provision in the relevant extradition treaty, concerned with English law alone in determining whether the conduct of the accused amounted to an extradition crime, and has no jurisdiction to inquire into or receive evidence of the substantive criminal law of the requesting state so as to determine, for the purposes of the double criminality rule, whether the offence for which extradition is sought is

A further principle sometimes applied is known as the *principle of specialty*, ie the requesting state is under a duty not, without the consent of the state of refuge, to try or punish the offender for any other offence than that for which he was extradited. This principle is frequently embodied in treaties of extradition and is approved by the Supreme Court of the United States. In Great Britain its application is a little uncertain; in *R v Corrigan*[20] the Extradition Act was held to prevail over a Treaty of Extradition with France embodying the specialty principle, and it was ruled that the accused there could be tried for an offence for which he was not extradited, but one which was referable to the same facts as alleged in the extradition proceedings.[1]

Rendition

This more generic term 'rendition' covers instances where an offender may be returned to a state to be tried there, under ad hoc special arrangement, or on the basis of reciprocity[2] in the absence of an extradition treaty, or even if there be such a treaty between the states concerned, and irrespective of whether or not the alleged offence is an extraditable crime.

A deportation or refusal of asylum may have the *effect* of a rendition, although from the point of view of the deporting state or state of purported entry, it is not of this nature stricto sensu.[3] As pointed out by Barwick CJ in a decision of the High Court of Australia,[4] 'there are obvious objections to the use of immigration or expulsive powers as a substitute for extradition'.[5]

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substantially similar in both countries. To that extent, *ex p Budlong* (above) is overruled in part.

20. [1931] 1 KB 527.

1. Cf *R v Aubrey-Fletcher, ex p Ross-Munro* [1968] 1 QB 620, [1968] 1 All ER 99. Moreover, in *R v Davidson* (1976) 64 Cr App Rep 209, the court did not pay regard to the treaty in question as compelling the application of the speciality principle.
2. See *Barton v Commonwealth of Australia* (1974) 48 ALJR 161 (High Court of Australia) where the question or reciprocity was discussed, in relation to an Australian request to Brazil for extradition, the Brazilian extradition law being based on either bilateral treaty or assured reciprocity of treatment; and cf Shearer 'Extradition Without Treaty' (1975) 49 ALJ 116.
3. Cf *R v Governor of Brixton Prison, ex p Soblen* [1963] 2 QB 243 (deportation allowable under aliens legislation, even though alleged offence is non-extraditable, and even if there be a request for rendition).
4. *Barton v The Commonwealth of Australia* (1974) 48 ALJR 161 at 162.
5. Cf O'Higgins 'Disguised Extradition' (1964) 27 MLR 521, 539; *Shearer Extradition in International Law* (1971) pp 19, 87–90. It would seem to follow from the decision of the European Court of Human Rights in *Bozano v France* (1987) 9 EHRR 297 that deportation, preceded by detention, when obviously employed as a 'disguised' form of non-treaty extradition, may be illegal, either on the ground of breach of human rights to lawful procedures or because it would constitute an improper exercise of the administrative discretion to exclude aliens.

Asylum

The conception of asylum[6] in international law involves two elements:

a. shelter, which is more than merely temporary refuge; and
b. a degree of active protection on the part of the authorities in control of the territory of asylum.

Asylum may be *territorial* (or internal), ie granted by a state on its territory; or it may be *extra-territorial*, ie granted for and in respect of legations, consular premises, international headquarters and warships to refugees from the authorities of the territorial state. The differences between the principles applying to the two kinds of asylum flow from the fact that the power to grant *territorial* asylum is an incident of territorial sovereignty itself, whereas the granting of *extra-territorial* asylum is rather a derogation from the sovereignty of the territorial state insofar as that state is required to acquiesce in fugitives from its authorities enjoying protection from apprehension.[7]

Consistently with this distinction, the general principle is that every state has a plenary right to grant territorial asylum unless it has accepted some particular restriction in this regard, while the right to grant extra-territorial asylum is exceptional and must be established in each case.

Both types of asylum have this in common, that they involve an adjustment between the legal claims of state sovereignty, and the demands of humanity.

(1) Territorial asylum

A state's liberty to grant asylum in its territory is of ancient origins, and extends not only to political, social, or religious refugees, but to all persons from abroad, including criminal offenders; it is merely one aspect of a state's general power of admission or exclusion from its territory. Normally, however, persons not being nationals of the territorial state, and who are held in custody on foreign vessels within that state's waters, will not be granted asylum. It is a matter of controversy whether a state may grant asylum to prisoners of war detained by it, but unwilling to be repatriated.[8] In the light of recent events it has been claimed that territorial asylum should be sub-classified into: (a) 'political asylum', eg, for so-called 'defectors'; (b) 'refugee asylum', for refugees with a well-founded fear of persecution in their own country; and (c) 'general asylum', ie for persons who have fled from their country to seek economic betterment, but do not have the status of immigrants.

6. See for treatment of various aspects of asylum, Report of the 51st Conference of the International Law Association, Tokyo (1964), pp 215–293, and for an excellent, more recent examination of the subject in the light of new developments, V. Bevan *The Development of British Immigration Law* (1986) pp 213–223, and R. C. Hingovani (ed) *Humanitarian Law* (1987) pp 121–131 (mass trans-border flow of refugees in Asia).
7. See *Asylum Case* ICJ 1950, 274–275.
8. See also below, pp 559–560.

It is sometimes said that the fugitive has a 'right of asylum'.[9] This is inaccurate, as fugitives have no enforceable right in international law to enjoy asylum. The only *international* legal right involved is that of the state of refuge itself to grant asylum. Municipal legal systems (see, for example, the constitutions of France and Italy) do indeed sometimes provide for a right of asylum to individuals fleeing from persecution, and an example of the provision of a modern international instrument (not being a binding convention) providing for an individual right of asylum from persecution is article 14 of the Universal Declaration of Human Rights 1948 which rather weakly refers to a right to 'seek' asylum. But, so far, no such individual right is guaranteed by international law, although a Declaration on Territorial Asylum adopted by the United Nations General Assembly on 14 December 1967, recommended that, in their practices, states should follow a number of standards and desiderata, among which are the following:

a. A person seeking asylum from persecution (see article 14, above, of the Universal Declaration of Human Rights) should not be subject to rejection at the frontier, or if he has already entered the territory in which he seeks asylum, to expulsion or compulsory return. If there are overriding reasons of national security, or if it be necessary to safeguard the population, as in the case of a mass influx, asylum may be refused, but the state concerned should consider granting the person seeking refuge an opportunity, by way of provisional asylum or otherwise, of going to another state (art 3).
b. Where a state finds difficulty in granting or continuing to grant asylum, states individually or jointly or through the United Nations should consider, 'in a spirit of international solidarity', appropriate measures to lighten the burden on that state (article 2).
c. Asylum granted to persons seeking refuge from persecution should be respected by all other states (article 1).

The liberty of states to grant asylum may, of course, be cut down by treaties of the states concerned of which, as we have seen, extradition treaties are the commonest illustration. In principle, asylum ought not to be granted to any person, with respect to whom there are well-founded reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity (see article 1, paragraph 2 of the Declaration on Territorial Asylum, referred to above).

A draft Convention on Territorial Asylum emerged in 1974–1975 from discussions in the United Nations General Assembly, and the work of a

9. It has been claimed that there is such an individual right of asylum because the fugitive is not usually surrendered, in the absence of an extradition treaty, and because if his offence is political, he is not generally subject to extradition, but the flaw in this proposition is that it takes account only of persons to whom asylum has been granted, not of those to whom asylum has been refused.

group of experts and of the United Nations Secretariat. This draft instrument spelled out with more precision the principles enunciated in the Declaration on Territorial Asylum, and likewise stopped short of conferring an *absolute* right to asylum. Article 1 of the draft convention recognised that the grant of asylum pertained to the sovereign rights of a state, but that states parties should use their 'best endeavours' in a 'humanitarian spirit' to grant asylum in their territory to persons eligible under the draft convention, by reason of fear of persecution or punishment for reasons set out in article 2.

The text of the draft convention constituted the basis of discussions at the United Nations Conference on Territorial Asylum, in which 85 countries participated, held at Geneva from 10 January to 4 February 1977, and which was convened in order to adopt a convention on the subject. However, the Conference came to a close without reaching consensus; a 'Committee of the Whole' of the Conference succeeded in adopting the text of five articles on the grant of asylum, the non-rejection of persons seeking it, and the standards of conduct to be observed by asylees in countries of refuge, but no final or definitive vote was taken on these articles. The consequence may be said to be one of confirmation of the untrammelled nature of the discretionary right of a State of proposed refuge to grant or withhold the grant of asylum, as the case may be, according to its own domestic laws, policies, and practices.

Although the concept of a semi-obligatory grant of asylum, permanent or quasi-permanent, appears to have fallen by the wayside, there is a current of opinion, supported by some international lawyers specialising in the subject of refugee status and the rights of refugees, and which has been prompted by the recent massive trans-border flows of refugees in certain parts of Asia and Africa, favouring 'non-refoulement' (ie non-rejection at the frontier) and the grant of 'temporary refuge' that would fall short of asylum in its generally understood sense. The concept of 'temporary refuge' would at least serve to minimise, if not eliminate, confusion over the concept of 'asylum' in the strict sense, which carries an implication of permanence, and would enable states to admit persons fleeing from their own countries for a limited stay, pending resettlement, without any binding or moral commitment to grant 'asylum'.

International law has yet to cope effectively with the massive exodus of refugees or quasi-refugees, occurring in the past decade. Most recently, it has been advocated that states should recognise the principle of international solidarity, ie all states should co-operate in the resettlement of those persons, this being viewed as of concern to the international community as a whole. Moreover, refugees should not be denied certain human rights, even if they should be illegal immigrants under domestic law.

(2) Extra-territorial asylum

(a) Asylum in legations. Modern international law recognises no general right of a head of mission to grant asylum in the premises of the legation.[10] Such grant seems rather prohibited by international law where its effect would be to exempt the fugitive from the regular application of laws and administration of justice by the territorial state. The lack of any such general right of diplomatic asylum was affirmed by the International Court of Justice in the *Asylum Case*,[11] which dealt with the application of alleged regional Latin-American rules of international law concerning such asylum. It has been claimed that the Latin-American practice and doctrine of diplomatic asylum 'operated in large measure not through treaties alone [such as the Montevideo Convention of 1933 on Political Asylum] but by common unarticulated understandings'[12] and should not be regarded as capable of generalisation. In any event such asylum was usually granted for only a limited time.

Exceptionally, but without acknowledgment of any absolute right in a fugitive to require this, asylum may be granted in legation premises:

i. As a temporary measure, to individuals physically in danger from mob disorder or mob rule, or where the fugitive is in peril because of extreme political corruption in the local state, the justification being presumably that by the grant of asylum, an urgent threat is temporarily tided over. In certain instances, the legation would not provide asylum without the authority of the accrediting government
ii. Where there is a binding local custom, long recognised, that such diplomatic asylum is permissible.
iii. Under a special treaty (usually allowing such right in respect of political offenders only) between the territorial state and the state which is represented by the legation concerned.

There is, in the light of recent events, a need for clarification of the rules and practice as to diplomatic asylum. At its 29th Session in 1974, the United Nations General Assembly adopted a Resolution inviting member states to communicate their views on diplomatic asylum to the United Nations Secretary-General, and requesting the latter to circulate a report containing an analysis of the subject. The Secretary-General's report on diplomatic asylum is a valuable study which, in conjunction

10. See Satow *Guide to Diplomatic Practice* (1957) (ed Bland) p 219. It is significant that the Vienna Convention on Diplomatic Relations of 18 April 1961 provides for no such right, and see article 41(3) of the Convention providing that the premises of a mission shall not be used in a manner 'incompatible' with the functions of the mission.
11. See ICJ 1950, 266 et seq. In the *Haya de la Torre Case* ICJ 1951, 71 et seq, arising out of the same facts, the court held that where asylum in legation premises has been granted without justification, the head of the mission concerned is not obliged to deliver the fugitive to the local authorities, in the absence of a treaty binding him to do so.
12. Mr Surena, United States delegate to the Sixth Committee of the United Nations General Assembly, speaking on the subject on 29 November 1974; see 69 AJIL (1975) 389.

with General Assembly discussions, has paved the way for further clarification and development. Some countries have continued to favour and to press for such clarification and development of the principles and practice as to diplomatic asylum, and it may be hoped that such a desirable result on the scale and at the level sought will ultimately be achieved.

(b) *Asylum in consulates or consular premises.* Similar principles, subject to the same exceptions, apply as in the case of legation premises.

(c) *Asylum in the premises of international institutions.* The Headquarters Agreements of the United Nations and of the specialised agencies reveal no general right of international institutions to grant asylum or even refuge in their premises to offenders as against the territorial state, and semble not even a right of protection on humanitarian grounds. It is difficult to conceive, however, that a right to grant temporary refuge in an extreme case of danger from mob rule would not be asserted and conceded.

(d) *Asylum in warships.* This has been discussed in a previous chapter.[13]

(e) *Asylum in merchant vessels.* Merchant vessels are not exempt from the local jurisdiction, and therefore cannot grant asylum to local offenders.

4. HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS[14]

At the date of writing, the formulation and due implementation of binding general rules of international law for the protection of human rights and fundamental freedoms by adequate machinery for their enforcement still remain more a promise than an achievement. It is true that in Europe there have been established an international administrative body and an international court for the purpose of protecting human rights, namely

13. See above, p 225.
14. See on the whole subject A.L. del Russo *International Protection of Human Rights* (1971); L.B. Sohn and T. Buergenthal *International Protection of Human Rights* (1973); John P. Humphrey 'The International Law of Human Rights in the Middle Twentieth Century' in Professor M. Bos (ed) *The Present State of International Law and Other Essays* (1973) p 75; John Carey *UN Protection of Civil and Political Rights* (1970); P.N. Drost *Human Rights as Legal Rights* (1965); E. Kamenka and A. Erh-Soon Tay (eds) *Human Rights* (1978); and Nagendra Singh *Human Rights and International Co-operation* (1969). For general bibliography, see Rhyne *International Law* (1971) p 391 n 1, and p 395 n 3, and for critical analysis, see Richard Falk *Human Rights and State Sovereignty* (1981). A comprehensive work is Sieghart *The International Law of Human Rights* (Oxford, 1983). See also now Meron *Human Rights Law-Making in the United Nations: A Critique of Instruments and Processes* (1986); Nagendra Singh *Enforcement of Human Rights in Peace and War and the Future of Humanity* (1986); and Henkin, Pugh, Schachter and Smit *International Law: Cases and Materials* (2nd edn, 1987) ch 12, pp 980–1039.

the European Commission of Human Rights and the European Court of Human Rights, but these two organs operate under jurisdictional and procedural restrictions, and in respect to that limited number of states only which have accepted their competence. There are also a large number of international conventions, mentioned below, including the Covenant on Economic, Social and Cultural Rights, and the Covenant on Civil and Political Rights adopted 16 December 1966, both of which came into force in 1976, when each had been ratified by the required number of 35 ratifications (the absence of ratification by a larger number of states after ten years was in itself significant). Apart therefrom, however, there has been limited concrete progress in the direction of establishing effective international machinery to protect individual rights beyond the point of proclaiming conceptions, attempting definitions, making programmatic statements or hortatory declarations, establishing organs with limited powers of promotion, investigation, bringing pressure to bear on governments, or recommendatior,[15] and encouraging the mass communication of the aims and ideals to be realised.[16] A number of human rights and fundamental freedoms are not the subject of protection by any binding general international convention or conventions, while it would of course be wrong to maintain that there is in existence a complete body of general or universal norms of international law binding all states to protect human rights.

One material achievement, however, is the general recognition today that a state, qua the protection of the human rights of its subjects, does not possess in this regard an absolute sphere of reserved jurisdiction into which international law or outside diplomacy may not penetrate. Moreover, to the extent that states do observe human rights standards, individuals receive protection regardless of whether or not they are nationals of the conforming state.

The following are the principal instruments in which attempts have been made to enunciate or guarantee human rights standards:

(1) The United Nations Charter[17] and the constitutions of the specialised agencies. These neither impose binding obligations on member states to

15. Eg, the Human Rights Commission, a Functional Commission of the United Nations Economic and Social Council, and its Sub-Commission on the Prevention of Discrimination and Protection of Minorities. Another example is the Inter-American Commission on Human Rights established in August 1959, by the Organisation of American States (OAS).
16. For pertinent criticism of the position, see the *United States Department of State Bulletin* 27 December 1976, pp 745–749. A special matter calling for improvements is the more general application by national courts of international human rights standards and principles; this was the subject of an international Colloquium, 'The Domestic Application of International Human Rights Norms', at Bangalore, India in February 1988.
17. See as to the effect of these provisions in United States municipal law, above, p 84, n 12.

observe human rights, nor concretely define such rights. Pledges are expressed in the most general language, and the powers of the United Nations and its organs laid down in terms only of recommendation, promotion, and encouragement. It could not really be said that there was any binding obligation on member states *immediately* to protect and respect human rights.

(2) The Paris Peace Treaties of 1946 with Italy, Rumania, Bulgaria, Hungary, and Finland. These contained general pledges only to respect human rights, unsupported by any court or machinery to enforce them. They proved of little value in 1948–1950 when the matter of alleged breaches of human rights by Rumania, Bulgaria, and Hungary was raised in the United Nations General Assembly.[18]

(3) The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in December 1948. This Declaration represented the first of three stages of a programme designed to achieve an International Bill of Rights, based upon universally binding obligations of states, and reinforced by effective curial and administrative machinery. Chronologically, the three stages were to be: (i) a Declaration defining the various human rights which ought to be respected; (ii) a series of binding covenants on the part of states to respect such rights as defined; and (iii) measures and machinery for implementation.

Consequently, the Declaration could not and did not purport to be more than a manifesto, a statement of ideals, a 'pathfinding' instrument.[19] To that extent, it has achieved as much as could be expected. Its most important contribution lies in the pioneering formulation of the principal human rights and fundamental freedoms that ought to be recognised. To reproach the Declaration for the absence of provision of enforcement machinery or for the fact that it is not a binding legal instrument, is to misconstrue its original limited purpose—to provide a generally acceptable catalogue of man's inalienable rights. Yet it has had a remarkable influence on further developments, at both the international and domestic levels, as is reflected in the number of instances of conventions and other instruments referring to, or invoking its provisions.

(4) The European Convention for the Protection of Human Rights and Fundamental Freedoms signed by the member states of the Council of

18. As to which see Renouf 'Human Rights in the Soviet Balkans' *World Affairs* (1950) pp 168–80; and Advisory Opinion of the International Court of Justice on the *Interpretation of the Peace Treaties* ICJ 1950, 65, 221.
19. Although the Teheran United Nations Conference of 1968 on Human Rights was able to declare that the Declaration constituted 'an obligation' for the members of the international community.

Europe at Rome, 4 November 1950.[20] Sponsored by the Council of Europe, this important regional Charter of human rights went beyond the Universal Declaration of Human Rights in: (a) imposing binding commitments to provide effective domestic remedies in regard to a number of the rights specified in the Universal Declaration; (b) the close and elaborate definition of such rights as it embraced, and of the exceptions and restrictions to each of such rights; (c) the establishment of a European Commission of Human Rights to investigate and report on violations of human rights at the instance of states parties, or—if the state against which complaint is laid, has so accepted—upon the petition of any person, non-governmental organisation, or group of individuals within that state's jurisdiction. In time of war or other public emergency threatening the life of a nation, a state party may take measures derogating from the Convention. The Commission became competent to receive applications of the latter type in July 1955, after (as required by the Convention) six states had accepted the right of individual recourse; the number of accepting states has since increased. The Convention also provided for a European Court of Human Rights with compulsory jurisdiction, to come into being upon at least eight states accepting such jurisdiction.[1] This was achieved in September 1958, and the Court was set up in January 1959; it delivered its first judgment on 14 November 1960, in the *Lawless Case*. On 21 December 1965, the British Government accepted the relevant optional provisions, so recognising the right of recourse to the Commission, and the jurisdiction of the Court.

Although the Commission has been very active and has dealt with hundreds of applications, the great majority of these have been declared inadmissible under the Convention because of failure to exhaust local remedies, lapse of a period of six months or more after final decision by a domestic court (article 26), activities of applicants aimed at the destruction of the rights and freedoms guaranteed by the Convention (article 17),[2] and other grounds, such as the anonymity of the applicant. Since

20. The Convention has since been amended by a number of Protocols, adding to the list of rights protected by the Convention, enabling the European Court of Human Rights, inter alia, to give advisory opinions on the interpretation of the Convention, for improving the internal procedure of the European Commission of Human Rights, eg, allowing the use of special chambers, abolishing the death penalty and providing procedural safeguards as to the expulsion of aliens. On the operation and application of the Convention, see A.L. del Russo *International Protection of Human Rights* (1971) Chs IV–IX, passim, F.G. Jacobs *The European Convention of Human Rights* (1975) and D.H. Ott *Public International Law in the Modern World* (1987) ch 14, 'Human Rights in Europe' pp 260–288.

1. An abortive move was made in 1946 at the Paris Peace Conference to create a European Court of Human Rights.

2. In 1957, the Commission held that, for this reason, the German Communist party was not entitled to make an application against the German Federal Republic complaining of a violation of the right to freedom of association, in that an order for its dissolution had been made in 1956 by the Federal Constitutional Court. On the other hand, in the

1981–1982, however, the Commission has followed a policy of referring some cases to the Court even where the Commission itself has reached the conclusion that there had been no breach of the Convention. If the application is admissible, or is deemed referable, the Commission's primary action, if it has been unable to dispose of the matter by conciliation, is to transmit its report on the question of a breach of a right under the Convention to the Committee of Ministers of the Council of Europe, which may decide on the measures[3] to be taken if there has been a breach, unless the matter is referred to the Court within a period of three months. As to the Court, only the states accepting its jurisdiction and the Commission, and not individuals, have the right to bring a case before it.[4] The technicalities and limitations which surround the exercise of jurisdiction by the Court in a matter referred to it by the Commission are well illustrated in its two rulings in the *Lawless Case*,[5] one dealing with questions of procedure concerning inter alia the complainant's right to receive a copy of the Commission's report, the other with the merits of the application, that is to say the allegation of breach of human rights.[6] Yet the influence of the Court is not to be minimised; the possibility of proceedings has contributed towards a settlement in advance of a Court hearing, as in the *Knechtl Case* of 1969–1971 (access of prisoner to legal advice); while both directly and indirectly, it has led to changes in legislation,[7] and this has occurred, in particular, where a government

Lawless Case in 1961, the Court held that even if the applicant were a member of the Irish Republican Army and this organisation were engaged in such destructive activities as mentioned, this did not absolve the respondent state, Ireland, from observing those provisions of the Convention conferring freedom from arbitrary arrest and from detention without trial.

3. These measures may include requiring action to correct the breach; if satisfactory action has not been taken in the prescribed period, the Committee of Ministers is to decide what effect should be given to its decision.
4. Cf *Guilfoyle v Home Office* [1981] QB 309 at 316, 319, 322.
5. Considerations of space preclude discussion of this case. See AJIL (1962) 187–210 for the Court's ruling on the merits.
6. On the questions of procedure, the Court ruled that the complainant was entitled to receive a copy of the report, but not to publish it, and that the complainant's point of view could be put before the Court, not directly by himself, but through delegates of the Commission, or in the Commission's report, or in his evidence, if called as a witness. On the merits, the Court held that the complainant's arrest and detention without trial were justified by a public emergency threatening the life of the respondent country, Ireland, within the meaning of article 15 of the Convention, and that this emergency had been duly notified under this article to the Secretary-General of the Council of Europe. Under a revision of the Court's procedural rules in 1981–1982, it is possible now for individual complainants to be separately represented in proceedings before the Court.
7. The *De Becker Case*, as to which see *Yearbook of European Convention on Human Rights* 1962 (1963) pp 320–337, resulted in a change of legislation, namely amendments to the Belgian Penal Code. So also as a consequence of the Belgian *Vagrancy Cases* (1966–1972), Belgian law was amended, revising the former rules under which vagrants might be imprisoned without right of appeal.

sought to avoid an anticipated adverse decision. In other cases which have come before it, raising questions as to the scope and effect of rights in the Convention and the Protocols thereto, the Court has given important rulings, to which due respect will be and has already been paid by the domestic courts and legislators of states parties.[8]

Some of the more important decisions 1975–1983 of the European Court of Human Rights—important because of the wide general reach of the implications of the Court's pronouncements—have included the following:

a. *Golder v United Kingdom* (1975). In that case the Court ruled, inter alia, that the right to a fair and public hearing before an independent and impartial tribunal under article 6 of the 1950 Convention involved necessarily a right of a prisoner to have free communication with, and access to legal advisers for the purpose of instituting legal proceedings.[9] The *Golder* ruling was followed in *Silver v United Kingdom*, in which the Court held that the Convention was violated by censorship of prisoners' letters to solicitors and relatives, with respect to prison conditions, etc.

b. *Tyrer v United Kingdom* (1978) 2 EHHR 1. There, among other points, the Court held that the infliction of corporal punishment by birching (on the Isle of Man) amounted to 'degrading punishment', thereby violating article 3 of the 1950 Convention, which article prohibited 'inhuman or degrading treatment or punishment'.[10]

c. *The Sunday Times (Thalidomide) Case* (1979). The Court in this case ruled that an injunction, upheld by the House of Lords in *A-G v Times Newspapers Ltd* [1974] AC 273, [1973] 3 All ER 54, restraining the newspaper, *The Sunday Times*, from publishing critical material on the detrimental effects of the drug thalidomide, upon the ground of alleged contempt of court in view of pending civil litigation, contravened the provisions of article 10 of the 1950 Convention, conferring, inter alia, a right to freedom of expression.

8. As, eg, in 1968 in the *Wemhoff* and *Neumeister Cases* (right to trial within a reasonable time, and questions of length of detention pending trial), and in the *Belgian 'Linguistic' Case* (the right to education does not oblige governments to educate in a particular language, and what constitutes discriminatory treatment). Cf the later *Stögmüller* and *Matznetter Cases* of 1972 and the *Ringeisen Case* of 1973 (whether the preventive detention of the complainants extended beyond a reasonable time).
9. For discussion of the *Golder Case*, see G. Triggs' article in (1975) 50 ALJ 229–245. See also generally N. S. Rodley *The Treatment of Prisoners under International Law* (1986).
10. However, a threat of corporal punishment for juveniles in Scottish schools did not, in the circumstances of the case, represent 'degrading treatment' within the meaning of article 3; see the *Campbell and Cosans Case* (1982) 4 EHRR 293 decided by the Court in 1982. The subject of alleged inhuman and degrading treatment was also considered by the Court in its decision of 1978 in *Ireland v United Kingdom* (alleged ill-treatment for purposes of interrogation).

d. *The Dudgeon Case* (1981). There the Court took the view that legislation in Northern Ireland rendering homosexual relations between consulting adults a crime contravened article 8 of the 1950 Convention which required respect for a 'person's private and family life', and that the legislation was 'not necessary in a democratic society . . . for the protection of . . . morals' within the meaning of the article.

e. *The Case of Young, James and Webster* (1981). In this decision the Court held that the dismissal by British Rail of three railwaymen because of their refusal to join a union when a new 'closed shop' arrangement came into force represented a breach of article 11(1) of the 1950 Convention, providing for a right of freedom of association. The Court, however, stressed that it was not called upon to review the legality of the 'closed shop' system generally. It was significant that the breach had occurred through action by a governmental entity.

Since 1983 there have been a great variety of decisions of the Court covering a wide range of alleged breaches of the Convention and Protocols thereto, including *Malone* (1984) on the privacy of mail and telephone calls, *Barthold* (1985) on the right of freedom and expression, *Gillow* (1986) on the right to respect for one's home, *H v Belgium* (1987) on the right to a fair and public hearing, *Bozano* (1987) on the right not to be illegally detained and deported and *Berrehab* (1988) on the right of respect for the family life of resident aliens. Due, however, to considerations of space, it is not possible in the present book to deal with all the significant decisions in detail, and readers are referred to textbooks containing analyses of cases considered by the Court.[11]

(5) The Covenant on Economic, Social and Cultural Rights, and the Covenant on Civil and Political Rights adopted by the United Nations General Assembly on 16 December 1966 and opened for signature on 19 December 1966. These two Covenants which came into force in 1976 have represented an attempt to complete the second stage, referred to above, of binding covenants to observe human rights. A single Covenant was first contemplated, but the United Nations General Assembly reversed its directive to the Human Rights Commission, requesting it to prepare two separate covenants dealing respectively with economic, social, and cultural rights, and with civil and political rights. These instruments were the subject of continuous consideration and revision by the General Assembly.

Although the two Covenants recognise different sets of rights, they contain some common provisions, for instance as to the recognition of the right of self-determination, and as to the prohibition of discrimination. On the other hand, they differ in respect to the machinery set up under each. The Covenant on Civil and Political Rights provides for a committee

11. See, eg, D. H. Ott *Public International Law in the Modern World* (1987) pp 264–285.

with the responsibility of considering reports from states parties, and of addressing comments, if necessary, to these states and to the Economic and Social Council of the United Nations. Inasmuch as it was felt that economic, social and cultural rights could be achieved less quickly than civil and political rights, because the latter could be safeguarded by immediate legislation, whereas the former depended upon resources becoming progressively available to each state, the Covenant on Economic, Social, and Cultural Rights provided merely for the submission of periodical reports to the Economic and Social Council upon the progress made and measures taken to advance the rights concerned. Thus, the rights and obligations under the Covenant on Civil and Political Rights are more immediate. In 1987 there was established a Committee on Economic Social and Cultural Rights to monitor compliance with the terms of the other Covenant, particularly so far as concerns duties of states vis-à-vis developing states.

(6) Obligations to respect or enforce certain human rights are contained in the Convention for the Suppression of Traffic in Persons and of the Exploitation or the Prostitution of Others opened for signature on 31 March 1950, the Convention on the Status of Refugees of 25 July 1951, the Supplementary Geneva Convention of 7 September 1956, for Abolishing Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (eg serfdom, debt bondage), and the International Convention on the Suppression and Punishment of the Crime of Apartheid adopted on 30 November 1973; in five conventions adopted by Conferences of the International Labour Organisation, namely, the Freedom of Association and Protection of the Right to Organise Convention 1948,[12] the Right to Organise and Collective Bargaining Convention 1949, the Equal Remuneration Convention 1951, the Abolition of Forced Labour Convention 1957, and the Discrimination (Employment and Occupation) Convention 1958; and in the important International Convention on the Elimination of All Forms of Racial Discrimination, of 21 December 1965. Under the last-mentioned convention, provision was made for the establishment of a Committee on the Elimination of Racial Discrimination, consisting of eighteen experts serving in their personal capacity, to deal with allegations of violations of human rights, and to consider reports from states parties on measures adopted to give effect to the Convention. The committee commenced work in 1970, after the entry

12. In implementation of this Convention, the International Labour Organisation established special investigatory and supervisory machinery, consisting, inter alia, of the Freedom of Association Committee of the Governing Body of the Organisation, to examine alleged infringements of the freedom of association. It is claimed that during the period 1951–1971 more than 700 complaints were examined by the Committee, in many cases with 'positive results'; see *ILO Information*, October 1973, p 6. Since 1971, a large number of complaints have also been investigated under the above-mentioned procedure.

into force of the Convention in 1969. In December 1979, the United Nations General Assembly also adopted the Convention on the Elimination of All Forms of Discrimination against Women, and in November 1981 the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.[13] Following the adoption by the United Nations General Assembly in 1975 of a Declaration of Torture, in 1984 the General Assembly opened for signature a Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention serves to amplify the provisions of article 7 of the International Covenant of 1966 on Civil and Political Rights.

Reference should also be made to:

a. The influence upon municipal law of these Charters and instruments relating to human rights; for example, as revealed in the decisions of certain municipal courts, that contracts which conflict with human rights should be held illegal and invalid on the ground of public policy,[14] and as shown in the guarantees for human rights contained in the constitutions of certain new states which attained independence after 1945.[15]
b. The undertakings by Italy and Yugoslavia under the Memorandum of Understanding of 5 October 1954, as to Trieste, to apply the Universal Declaration of Human Rights in their respective administrative zones in Trieste.
c. The formulations or definitions of human rights in such programmatic statements as the American Declaration of the Rights and Duties of Man of 1948, the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959, and the Fifteen General Principles on Freedom and Non-Discrimination in the Matter of Political Rights adopted by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in January 1962.[16]

13. On discrimination, see generally McKean *Equality and Discrimination under International Law* (1983).
14. See, eg, *Re Drummond Wren* [1945] 4 OR 778.
15. See, eg, ss 17–32 of the Constitution of Nigeria, which became independent in 1960.
16. Reference should also be made to the various Resolutions, from time to time, of the Human Rights Commission for promoting and developing human rights throughout the world. These are transmitted for approval or other action to the Economic and Social Council. The Commission has evolved a procedure (known as the '1503' procedure because of its latest authorisation by Council Resolution No 1503), whereby a Working Group of its Sub-Commission on Prevention of Discrimination and Protection of Minorities meets in separate session to consider human rights complaints reaching the United Nations, for the purpose of referring to the Sub-Commission those complaints revealing a consistent pattern of gross violations of human rights; see John Carey *U.N. Protection of Civil and Political Rights* (1970) pp 91–92 and Dr M. Schreiber *Law Society Gazette* 29 September 1976, p 776. This procedure was authorised by Council Resolutions of 1967 and 1970; prior to these Resolutions the Commission was not

d. The Inter-American Convention on Human Rights, opened for signature on 22 November 1969, coming into force in 1978. In addition to detailed definitions of over twenty human rights, provision is made for establishing an Inter-American Court of Human Rights; states parties wishing to accept the Court's jurisdiction may make declarations to this effect when ratifying or adhering to the Convention (see article 62). In this connection, reference may be made also to the revision by the 1967 Protocol of Buenos Aires to the Charter of the Organisation of American States (OAS), establishing the Inter-American Commission on Human Rights (originaly set up by the OAS in 1960) as a principal organ of OAS, with the function of promoting respect for the human rights declared in the American Declaration of the Rights and Duties of Man of 1948.[17] With the coming into operation of the above-mentioned Inter-American Convention, the Inter-American Commission became one of two organs having competence in regard to the investigation of matters relating to the fulfilment of the obligations of states parties to the Convention (see articles 33 and 48 of the Convention). The Inter-American Court of Human Rights exercises both an advisory and a contentious jurisdiction, and in the latter jurisdiction has power to award damages and, as well, to make declaratory decrees or orders.

e. Under the Helsinki Declaration adopted on 1 August 1975, by over 30 European states, together with Canada, the Holy See, and the United States, at the Conference on Security and Co-operation in Europe, the participating states reaffirmed in Part VII pledges to respect human rights and fundamental freedoms, to respect the rights of minorities to equality before the law, and to endeavour jointly and separately, including in co-operation with the United Nations, to promote universal and effective respect for such rights and freedoms. One significant affirmation was that in the penultimate paragraph of Part VII: 'They [the participating States] confirm the right of the individual to know and act upon his rights and duties in this field'. Even if the Helsinki Declaration is not to be deemed a binding international treaty, these statements represent an acknowledgment that the subject of human rights is not one within the sphere of a state's reserved jurisdiction, but is of international concern. Human rights problems were further discussed at the Madrid meeting of 1980–1983, held by way of a follow-up to the Helsinki Conference.[18]

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entitled to take action upon individual human rights complaints. The Commission also has recourse to other expedients; eg fact-finding, negotiation, conciliation, and inducing governments to initiate legislation.

17. See T. Buergenthal 'The Revised OAS Charter and the Protection of Human Rights' 69 AJIL (1975) 828–836 and Buergenthal and Maier *Public International Law* (1985) pp 131–138.

18. See generally A. Blood and P. Van Dijk (eds) *Essays on Human Rights in the Helsinki Process* (1985).

f. Fundamental human rights have been recognised both in the Treaties of the European Communities (eg, freedom of movement and freedom of establishment in, respectively, articles 48 et seq, and articles 52 et seq of the Treaty of Rome of 25 March 1957, establishing the European Economic Community) and by the Court of Justice of the Communities.[19]

g. Since 1967–1968, as will be seen below in Chapter 18, a process has been set in motion of importing human rights rules and standards into that branch of international law traditionally known as the 'law of war' or the 'law of armed conflict', so that the expression 'international humanitarian law applicable in armed conflicts' has come now to replace these phrases 'law of war' and 'law of armed conflict'. A bridge has in effect been created between the doctrine of human rights and the rules of international law applicable in armed conflicts;[20] this indeed represents one of the most significant contributions of the human rights movement to the development of international law.

h. The protection of the right of privacy to a certain extent by the Guidelines Governing the Protection of Privacy and the Trans-Border Flows of Personal Data, adopted in 1980 in the form of a Recommendation by the Council of the Organisation for Economic Co-operation and Development (OECD) in Paris.

i. The adoption in 1981 of the African Charter of Human Rights by the Organisation of African Unity (OAU), providing, inter alia, for an African Commission on Human and Peoples' Rights, which is a body of a quasi-judicial character, empowered to deal with inter-state and individual petitions.

One point is that a number of important human rights are not rights of individuals, but collective rights, ie the rights of groups or of peoples.[1] This is clear so far as concerns the right of self-determination, which has been considered in Chapter 5, above. Apart from this right, there is the right of an ethnic group or of a people to physical existence as such, a right which is implicit in the provisions of the Genocide Convention of December 1948. Then also there is the right of certain groups or minorities to maintain their own identity; thus article 27 of the Covenant on Civil and Political Rights provides: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall

19. See *The Protection of Fundamental Rights in the European Community*, Bulletin of the European Communities Supplement 5/76, at p 47.

20. See G.I.A.D. Draper 'Human Rights and the Law of War' (1972) 12 Virginia JIL 326 at 337.

1. See Y. Dinstein 'Collective Human Rights of Peoples and Minorities' (1976) 25 ICLQ 102–120. As to the rights of ethnic groups to the protection of their cultural identity, heritages and relics, see articles 2 and 14 of the Algiers Declaration of the Rights of Peoples, 4 July 1976; O'Keefe and Prott, *Law and the Cultural Heritage* Vol I (1984) pp 28–29; and *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27.

not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'. A further illustration is that of the emerging principle that states should co-operate in the relief of peoples affected by disasters or disaster situations,[2] such as those due to volcanic eruptions, drought and the shortage of food supplies.

Finally, reference should be made briefly to the moves to bring about general recognition, as human rights, of the right to peace and the right to development, in particular by the adoption of Declarations to that effect by the United Nations General Assembly as, for example, in 1984, 1985 and 1986. These moves have not been universally favoured by states. It is questioned whether these two suggested rights can be regarded as 'human rights' in the accepted sense of that expression, more particularly as the concepts of peace and development are in themselves of some complexity and of a scope difficult to define.

2. See generally P. Macalister-Smith *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organisation* (1985).

CHAPTER 13

The state and economic interests—international economic and monetary law[1]

Modern states exercise wide control over the economy, including such aspects of private economic enterprise as the export and import trade, internal and external investment, shipping, agricultural production, and private banking. It is only natural that they should enter into agreements with each other to regulate inter partes those economic and monetary matters which affect two or more of them jointly. Most of these agreements are bilateral, eg, trade treaties, or treaties of commerce and navigation, or treaties of establishment, but there have been also treaties and multilateral agreements of a more general character, including the Articles of Agreement, respectively, of the International Monetary Fund, of the International Bank for Reconstruction and Development, and of the International Finance Corporation,[2] the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, the Treaty of Rome of 25 March 1957, establishing the European Economic Community, the General Agreement on Tariffs and Trade (GATT) of 30 October 1947, the Constitution of the Food and Agriculture Organisation (FAO), the Convention of 1985 establishing the Multilateral Investment Guarantee Agency (MIGA), and the international commodity agreements that are continually under revision and re-evaluation, such as those in regard to tin, sugar, dairy products, cocoa, meat, coffee, rubber, wheat, jute and jute products and tropical timber.[3]

There has thus developed a new field of the regulation by treaty of

1. Jackson and Davey, *Legal Problems of International Economic Relations* (2nd edn, 1986); D. Carreau, P. Juillard and T. Flory *Droit International Economique* (1978); Sir Joseph Gold *Legal and International Aspects of the International Monetary System: Selected Essays* Vol I (1979) and Vol II (1984); K. W. Ryan *International Trade Law* (1976); P. T. B. Kohona *The Regulation of Economic Relations Through Law* (1985); and E. McGovern *International Trade Regulation* (2nd edn, 1986).
2. The Articles of Agreement of the Fund and of the Bank were adopted at the Bretton Woods Conference, 1–22 July 1944, while the Articles of Agreement of the International Finance Corporation were adopted at Washington on 25 May 1955. The First and Second Amendments to the Articles of Agreement of the Fund became effective, respectively, in 1969 and 1978.
3. As to the principles involved in these commodity agreements, see Kabir-ur-Rahman Khan *The Law and Organisation of International Commodity Agreements* (1982) and

international economic matters.[4] Apart from these economic and monetary treaties, the period since 1972 has seen the adoption also of a number of declaratory or hortatory instruments, representing not binding engagements, but rather a series of blueprints for the evolution in due course of a new economic order. These texts have included the United Nations General Assembly's Consensus Declaration of 1974 on the Establishment of a New International Economic Order, the Charter of Economic Rights and Duties of States adopted by the Assembly by Resolution of 12 December 1974, the Final Statement Resolution adopted by it at its Seventh Special Session on economic co-operation and development in September 1975, the Rambouillet Declaration adopted on 17 November 1975, by an economic 'summit' Conference of the major industrial powers (Canada, France, West Germany, Italy, Japan, the United Kingdom, and the United States), and reaffirmed by them in a Joint Declaration in Puerto Rico on 28 June 1976, the joint statements and joint communiqués by the same powers at subsequent conferences, including those at Versailles, France, in 1982, at Williamsburg, USA, in 1983, at Tokyo, Japan, in 1986, at Venice, Italy, in 1987 and at Toronto, Canada, in 1988, and the *Revised Program of Action Towards Reform of the International Monetary and Financial System*, adopted in 1984 by the Ministers of the Group of Twenty-Four. The difficulty, however, is to extract from these numerous treaty provisions and manifesto-type instruments principles of general application, which can truly be postulated as binding rules of international

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E. McGovern *International Trade Regulation* (2nd edn, 1986) ch 15, 'Commodity Arrangements', pp 461 et seq.

4. The importance of this field of regulation of international economic matters was recognised by the United Nations General Assembly in its Resolution of 17 December 1966, establishing the United Nations Commission on International Trade Law (UNCITRAL) with the functions, inter alia, of harmonising and unifying the law of international trade, promoting wider participation in international conventions and preparing new conventions, and promoting the codification of international trade customs and practices. The Commission held its first session in January–February, 1968. The substantive work of UNCITRAL has since been carried out through Working Groups preparing draft uniform laws and conventions in various specialised fields. Among the conventions that have emerged from the labours of UNCITRAL have been the Convention of 1974 on the Limitation Period in the International Sale of Goods, the Convention adopted at Hamburg in 1978 on the Carriage of Goods by Sea, the Convention adopted at Vienna in 1980 on Contracts for the International Sale of Goods, the Convention adopted at Geneva in 1980 on the International Multimodal Transport of Goods, and the Model Law on International Arbitration adopted in 1985. On the work of UNCITRAL in formulating rules and procedures to govern arbitration and conciliation in the field of international trade, see I. I. Dore *Arbitration and Conciliation under the UNCITRAL Rules: A Textual Analysis* (1986). Also active in this field of harmonisation and unification of international commercial law have been the Rome Institute for the Unification of Private Law (UNIDROIT), the Hague Conference on Private International Law, and the International Chamber of Commerce (ICC), which latter body promulgated in 1978 a set of Uniform Rules for Contract Guarantees (ICC Publication No 325).

law. It is really only possible to indicate the main directions in which progress is being made towards an international economic legal order.

First, a principle appears to be taking shape, imposing upon every state a duty not to institute discriminatory trade restrictions, or discriminatory taxes or levies upon trade against another state, unless genuinely justified by balance-of-payments difficulties. There does not appear to be any distinction in this connection between wilful and unintentional discrimination, as it is sufficient if there be discrimination de facto. In either event, as the practice of the contracting parties to the General Agreement on Tarriffs and Trade (GATT) of 30 October 1947 shows, it is the duty of states to correct or remove the element of discrimination. Reference should be made also to article 4 of the above-mentioned Charter of the Economic Rights and Duties of States of 12 December 1974, which provides:

> 'Every State has the right to engage in international trade and other forms of economic co-operation irrespective of any differences in political, economic and social systems. No State shall be subject to discrimination of any kind based solely on such differences.'

Unfortunately, there is bound to be controversy as to what constitutes discrimination. If under a trade treaty between State A and State B, the parties agree to grant to each other special reciprocal state privileges, eg, by way of reduced customs duties, is State X entitled to complain of discrimination if goods exported from its territory to these states continue to be subject to the former amount of duty? If State X were a party to a treaty with these states, providing for most-favoured-nation treatment, the inequality of customs privileges would clearly amount to discrimination.[5] In the absence of any such treaty with a most-favoured-nation clause or obligation, it is difficult to accept the view that the grant of reciprocal trade privileges between two states inter partes can represent a discrimination as against a third state, and the decision of the Permanent Court of International Justice in the *Oscar Chinn Case*[6] provides persuasive authority against such a view. It was the object of the General Agreement on Tariffs and Trade, above, to extend the most-favoured-nation obligation,[7] so as to ensure non-discrimination generally in

5. See *Case Concerning Rights of Nationals of the United States of America in Morocco* ICJ 1952, 176 at 192 et seq. Two respects in which the standard of non-discrimination is not identical with that of most-favoured-nation treatment (MFN) may be noted: (1) MFN can hardly be applied to quantitative restrictions except by allocating equal quotas to all countries, which could result in unfairness. (2) Non-discrimination could allow favours to be given to some states in a special relationship, whereas this would not be admissible under MFN. See E. McGovern *International Trade Regulation* (2nd edn, 1986) p 254.
6. Pub (1934) PCIJ Series A/B, No 63.
7. *Most-favoured-nation clause:* The most-favoured-nation clause which, notwithstanding erosions under recent developments, still governs a large part of the world trade, was

customs and taxation matters (see article I). In the Final Act of the Conference on Security and Co-operation in Europe adopted at Helsinki on 1 August 1975, the participating states recognised 'the beneficial effects which can result for the development of trade from the application of the most-favoured-nation treatment'. At the same time, there has been developing an emergent, intermediate principle that states or associations of states, taking measures in their own interests by way of extending most-favoured-nation treatment or applying discrimination even legitimately, should have regard to the possible harmful effects of such steps upon the economies of other countries.

Second, insofar as private foreign investment is concerned, there is emerging a principle that the state in which such investment is made should not by its exchange control laws and regulations hamper or prevent the payment of profits or income to the foreign investors, or the repatriation of the capital invested (although there is no absolute or unconditional right to repatriate capital), unless: (a) such restrictions are essential for the maintenance of monetary reserves; or (b) semble, the restrictions are temporarily necessary for reasons of the health and welfare of the people of the country of investment. Any such restrictions should also be non-discriminatory.[8] With regard to the *entry* of capital, although the general trend of international law is towards the promotion of investment, investment-receiving states are not debarred from prescribing requirements for the screening, approval, and registration of any capital inflow.[9] It is to be observed that article 2, paragraph 2 (a) of the above-mentioned Charter of Economic Rights and Duties of States of 12 December 1974, provides: 'Each State has the right: (a) to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment'.

A number of proposals have been made for the protection and encour-

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the subject of consideration and study by the International Law Commission from 1967 onwards. The reports to the Commission and the discussions by it in 1967–1980 reflected the fact that the clause could not be studied in isolation from other economic developments (eg, the needs of developing countries, customs unions, and free trade areas); see *The Work of the International Law Commission* (3rd edn, 1980) pp 73–77. The possibility of the conclusion of a convention on the subject of the clause has been under consideration within the United Nations General Assembly.

8. Although discriminations in favour of the foreign investor, eg, by granting specially attractive terms, are not prohibited.

9. See *The Protection and Encouragement of Private Foreign Investment* (Butterworths, 1966, ed J. G. Starke) on the subject of foreign investments legislation and practice, and cf Schwarzenberger *Foreign Investments and International Law* (1969), *International Investment and Multinational Enterprises* (OECD, Paris, 1979); S. Sekiguchi *Japanese Direct Foreign Investment* (1979) and B. Zagaris *Foreign Investment in the United States* (1980).

agement of private foreign investment, including a suggested international convention defining the fundamental mutual rights of private foreign investors and capital-importing countries,[10] a project for an international investments tribunal, and a code of multilateral investment insurance. These proposals provided the background for the first major step taken in investment protection under international law, namely the above-mentioned Convention of 18 March 1965 for the Settlement of Investment Disputes between States and Nationals of Other States, setting up international conciliation and arbitration machinery on a consensual basis so that private foreign investors might have direct access thereto to settle legal disputes with investment-receiving states.[11] On the aspect of investment-promotion, there should not be overlooked the expansion of the activities in this area since 1977 of the International Finance Corporation (IFC), established originally in 1956 for the purposes, among others, of stimulating productive investment.[12] A major step in the direction of the protection of foreign investment was the adoption in 1985 of the Convention establishing the Multilateral Investment Guarantee Agency (MIGA), representing the culmination of efforts spanning a period of over thirty years to implement the concept of a multilateral investment guarantee scheme in respect of non-commercial risks, which scheme would be both protective and promotional of foreign investment.

As pointed out by the International Court of Justice in the *Barcelona Traction Case*,[13] one overriding general principle is that an investment-receiving state, while bound to extend some protection in law to the investments concerned, does not thereby become an insurer of that part of the investing state's wealth corresponding to such investments. Certain risks must remain.

A trend of the past decade, reflecting the above-mentioned developments concerning private foreign investment, is towards the negotiation of bilateral treaties for the mutual encouragement and protection of investments; one example of this is the United States-Morocco Treaty of

10. See as to the Abs-Shawcross Draft Convention on Investments Abroad, of April 1959, *The Encouragement and Protection of Investment in Developing Countries* (1961) (British Institute of International and Comparative Law) pp 10–11.
11. Conciliation and arbitration proceedings are administered by the International Centre for Settlement of Investment Disputes (ICSID) set up under the Convention. See, for authoritative treatment of the Convention, lectures by Aron Broches on the Convention, published in (1972) I. Hague Recueil 337–410, and more recently the article by Ibrahim F. I. Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA [Multilateral Investment Guarantee Agency]' (1986) 1 Foreign Investment Law Journal 1, especially at pp 3–12.
12. See article by Carl Bell 'Promoting private investment: the role of the International Finance Corporation' (1981) 18 Finance and Development 16–19.
13. *Case Concerning the Barcelona Traction, Light and Power Co Ltd (Second Phase)* ICJ 1970, 3 (see para 87 of the judgment of the Court)

July 1985 Governing the Encouragement and Reciprocal Protection of Investments, with ancillary Protocol, signed at Washington.

Third, the international commodity agreements, mentioned at the commencement of this chapter, indicate a movement towards rules of international law, obliging producing and purchasing states to co-operate in ensuring the stability of commodity prices, and in equating supply with demand by, inter alia, controlling and regulating the maintenance of desirable levels of production in each producing country or territory. Negatively, they show that there is no rule of international law, which prevents a state from restricting production, having regard to economic exigencies. However, as a different regulatory system is followed by the contracting states in each of the commodity agreements, lack of uniformity precludes the drawing of any more general conclusions.[14]

A broad principle governing the obligations of states in regard to international commodity supplies was proclaimed in article 6 of the above-mentioned 1974 Charter of Economic Rights and Duties of States, as follows:

> 'It is the duty of States to contribute to the development of international trade of goods particularly by means of arrangements and by the conclusion of long-term multilateral commodity arrangements, where appropriate, and taking into account the interests of producers and consumers. All States share the responsibility to promote the regular flow and access of all commercial goods traded at stable, remunerative and equitable prices, thus contributing to the equitable development of the world economy, taking into account in particular the interests of developing countries.'

As was reflected in the terms of this article, current emphasis in this connection was placed upon the needs and interests of developing countries. Such emphasis was also apparent in the proposals of UNCTAD (United Nations Conference on Trade and Development) at the Nairobi Conference of May, 1976, involving, inter alia, the establishment of buffer stocks, financed by a common fund for all products, and a system of export controls and production controls. These proposals received Conference endorsement, but not all developed countries were prepared to accept them unreservedly. On 13 June 1976, a United Nations Conference adopted an Agreement creating the International Fund for Agricultural Development, one of the purposes of which was the improvement and mobilisation of additional resources to be furnished on a concessional basis for agricultural development in developing states, members of the Fund. Then, on 29 June 1980 the parties concerned adopted an Agreement for a Common Fund for Commodities to be established, in effect implementing the Nairobi proposals, in order to provide finance for buffer

14. Cf article by Kenneth Klein 'International Commodity Agreements' (1976) 6 Georgia JIL 275–307.

stocking and other commodity stabilisation measures, in the context of producer-consumer agreements.

Fourth, there appears to be an emerging principle[15] that states should avoid practices such as dumping and the unrestricted disposal of accumulated stocks that may interfere with the industrial development of developing countries. This principle is no doubt merely a particular illustration of the rule of economic good neighbourliness which should be followed by all states; it underlies the basic purposes of the International Monetary Fund and of the Meeting of the Contracting Parties to the General Agreement on Tariffs and Trade of 30 October 1947, that the growth of international trade should be facilitated in order to contribute to the promotion of full employment and the development of national productivity. In general, states taking measures for their own economic protection should have regard to the possible harmful effects upon the economies of other states,[16] a principle reflected in article 24 of the above-mentioned Charter on Economic Rights and Duties of States of 12 December 1974, which provides:

> 'All States have the duty to conduct their mutual economic relations in a manner which takes into account the interests of other countries. In particular, all States should avoid prejudicing the interests of developing countries.'

Fifth, international law is moving towards the abolition of quantitative restrictions on imports and exports, except where these are temporarily and urgently required to solve problems of maintenance of currency reserves (see articles XI to XIV of the General Agreement on Tariffs and Trade, above) or for other legitimate special reasons.

Sixth, states appear ready to recognise a principle that in matters not materially involving the revenue, or balance-of-payments issues, customs formalities should be simplified, and administrative restrictions on, or barriers to trade, whether in goods or in services, should be minimised. This is illustrated not only by the General Agreement on Tariffs and Trade of 30 October 1947, but by conventions such as the International Convention to Facilitate Importation of Commercial Samples and Advertising Material signed at Geneva on 7 November 1952, by the Resolution of 20 December 1965 of the United Nations General Assembly favouring the 'progressive unification and harmonisation of the law of international trade', and the betterment of conditions to facilitate trade, and much

15. See the Resolution of the United Nations General Assembly of 19 December 1961, on International Trade as the Primary Instrument for Economic Development.
16. This principle to some extent underlies the work of the Organisation for Economic Co-operation and Development (OECD), established in 1961, as a permanent institution for the harmonisation of national economic policies, with the express purpose of making available to its members all knowledge relevant to the formulation of rational policy in every economic field, and of sharing experiences through meetings at ministerial and official levels.

more recently the communiqúe of the ministerial meeting of the Organisation for Economic Co-operation and Development (OECD), of 10 May 1983, expressing a joint resolve 'to relax and dismantle progressively trade restrictions and trade-distorting measures' (paragraph 14 of the communiqúe). Indeed the OECD is continually updating, for this purpose, its Code of Liberalisation of Invisible Transactions and its Code of Liberalisation of Capital Movements. At their 'economic summit' held in Venice in June 1987, the seven major industrial powers (Canada, France, West Germany, Italy, Japan, the United Kingdom and the United States) made a call for the preservation of 'an open world trading system by reducing trade barriers'.

Seventh, there are indications that an important branch of international economic law in the future will consist of rules to regulate and oversee the sharing of natural resources such as energy, raw materials, and food.[17] The necessity for establishing such a sharing régime in the case of oil and oil products was brought home to the nations of the world in the energy crisis of 1973–1974 with the restrictions on oil exports by producing countries and the unprecedented increase in oil prices. These circumstances led to the World Energy Conference in September, 1974, and the establishment by OECD of the International Energy Agency in 1974, with the function, inter alia, of ensuring a rationalised sharing and distribution of energy base products. Further, in August 1981, a United Nations Conference on New and Renewable Energy Sources was held at Nairobi, resulting, inter alia, in the acceptance of an Agreed Programme of Action which could serve as a possible platform for the eventual formation of new rules of international law concerning energy-sharing. The keynote of such future rules would appear to be, above all, international co-operation in the identification of new energy sources (such as geothermal and wind power, tidal power, wave power and the thermal gradient of the sea, etc), and in the development of mature technologies, involving as far as possible the utilisation of renewable sources. The necessity for co-operation between nations in respect to these and other crucial matters has clearly been one of the main preoccupations of the Governing Board of the International Energy Agency at the Board's periodical meetings.

Studies have been initiated of areas in which sharing will involve critical problems, as, eg, in the case of uranium.[18] At the United Nations Conference held at Geneva in March–April 1987 (attended by 106 states) there was emphasis by states on the assurance of supply of nuclear materials and equipment by states able to provide these, and more specific-

17. Cf address by Joseph A. Greenwald 'Sharing the World's Natural Resources; Prospects for International Co-operation' *Department of State Bulletin* 30 August 1976, pp 294–299.
18. See OECD study, *Uranium Resources, Production and Demand* (1976).

ally attention was drawn to article IV of the Nuclear Non-Proliferation Treaty of 1968 requiring that parties to the Treaty facilitate to the fullest possible extent the exchange of materials for the peaceful uses of nuclear energy, with due consideration for the needs of the world's developing areas. The question of sharing is closely linked to international monetary law and practice, as was reflected in the proposal by the United States, put to the UNCTAD Conference at Nairobi in May 1976, and not approved by that Conference, of an International Resources Bank. Producing and consuming States would doubtless accept the existence of a rule of international law that there is at least a duty to consult about sharing problems, and consuming countries might acknowledge an obligation inter se to share equitably resources in short supply, and if necessary for the purposes of conservation to reduce consumption jointly on an equitable basis, but otherwise no firm rules can be postulated.

Eighth, the principle that the developing (or under-developed) countries are entitled to special economic assistance and special trade preferences is firmly established, and is reflected in the provisions of the new Part IV, added by the Protocol of 8 February 1965 to the General Agreement on Tariffs and Trade, referred to above, in the current and continuing work of the United Nations Conference on Trade and Development (UNCTAD), and as well of the International Bank for Reconstruction and Development and its affiliates, and the Development Assistance Committee (DAC) of the Organisation for Economic Co-operation and Development (OECD), in numerous subsequent instruments and reports including the Report of the Independent Commission on International Development Issues (the Brandt Report) presented on 12 February 1980, and in the continuing discussions between the world of developed countries and the 'Third World' of developing countries, that has become known as the 'North-South dialogue'. Indeed, it may be said that by way of exception to the concept of development of free and open trading relationships, the extension of new preferences, subject to consultation with the countries significantly affected, as an expedient for encouraging the export of selected products from less-developed countries, is not excluded by any general rules of international law; this seems to be shown by the 'waivers' granted by the GATT Contracting Parties in 1966 and 1971 to enable Australia and other developed countries to grant tariff preferences to under-developed states, and in the steps taken by the Organisation for Economic Co-operation and Development (OECD) in 1970–1971 and since to procure the introduction of, and extend as far as possible, a generalised system of trade preferences in favour of developing countries, so as to increase their export earnings and make possible further economic development, preferences being in this case an instrument for promoting rather than for restricting trade.

In 1974–1976, in particular, the subject of assistance to developed countries obtained emphatic expression in various resolutions adopted.

In the above-mentioned Charter of Economic Rights and Duties of 12 December 1974, article 18 provided that 'developed countries should extend, improve and enlarge the system of generalised non-reciprocal and non-discriminatory tariff preferences to the developing countries consistent with the relevant agreed conclusions and relevant decisions as adopted on this subject in the framework of the competent international organisations', and that 'developed countries should also give serious consideration to the adoption of other differential measures, in areas where this is feasible and appropriate and in ways which will provide special and more favourable treatment, in order to meet trade and development needs of the developing countries'. Article 19 of the same Charter provided, in more general terms, that 'with a view to accelerating the economic growth of developing countries and bridging the economic gap between developed and developing countries, developed countries should grant generalised preferential, non-reciprocal and non-discriminatory treatment to developing countries in those fields of international economic co-operation where it may be feasible'. The Resolution adopted by the Seventh Special Session of the United Nations General Assembly on 16 September 1975, reaffirmed an earlier commitment of the developed countries to provide 0·7% of their gross national product (GNP) by way of development assistance to developing countries. At the UNCTAD Conference at Nairobi in May 1976, Resolutions were adopted, inter alia, to the effect that there should be duty-free entry into developed countries for the manufactured exports of developing countries, that the continuing multilateral trade negotiations should provide special and more favourable treatment for developing countries, and that an expert group should meet to draft a code of conduct for the transfer of technology to developing countries.

The subject of assistance to developing countries ought not to be viewed in isolation, inasmuch as since 1974 it has represented one element of a wider movement, continually growing in reach and strength, for the establishment of what is designated as the 'New International Economic Order' (NIEO), to involve a radical restructuring of the rules and institutions of international economic law.[19] The initial formal starting points of the NIEO were the two Resolutions adopted in 1974 by consensus at the Sixth Special Session of the United Nations General Assembly, namely, the Declaration on the Establishment of a New International Economic Order, and the Programme of Action on the Establishment of a New

19. There is already an immense bibliography on the NIEO; however reference may be made to four valuable studies relative thereto, namely, Robert F. Meagher *An International Redistribution of Wealth and Power: a Study of the Charter of Economic Rights and Duties of States* (1979); M. Bedjaoui *Towards a New International Economic Order* (1979); K. Hossain (ed) *Legal Aspects of the New International Economic Order* (1980); and A. Akinsanya and A. Davies 'Third World Quest for a New International Economic Order: An Overview' (1984) 33 ICLQ 208.

International Economic Order. These two Resolutions have set the pattern for the intensified efforts since 1974, continuing at the date of writing, both within and outside the framework of the United Nations, to provide firmer foundations for, and to extend the scope of the NIEO. For instance, in June 1978, the United Nations Commission on International Trade Law (UNCITRAL) establishing a Working Group on the NIEO, which Group met for the first time in January 1980 and has held further meetings since. The precise scope of the régime of the NIEO remains to be finalised, but it consists at least of the principles, considered above in this chapter, to the extent that they serve to further the advancement of developing countries (eg, preferential treatment, stabilisation of export earnings, and access to technology), and embraces also the participatory equality of developing countries in international economic relations and the right to nationalise. Even if the proclaimed rules and precepts of the NIEO have not yet attained the force of law, binding non-developing countries, the latter must nonetheless be influenced by the content of the NIEO in their negotiations and arrangements with developing countries. At their above-mentioned 'economic summit' in Venice in June 1987 the seven major industrial powers declared that they attached 'particular importance to fostering stable economic progress in developing countries', while the United Nations General Assembly at its sessions in 1986 and subsequently has had under consideration the progressive development of principles and norms, to be part of international law, relating to the NIEO.

The matter of access of developing countries to the technology of developed countries has been one to which the developing countries attach cardinal importance. It forms in fact one of the key doctrines of the NIEO. On one level, it is regarded as primarily referable to the obligation, legal or moral, of states to promote international co-operation in scientific and technological questions, although ultimately bearing upon the economic developments of developing countries. Thus in paragraph 1 and 2 of article 13 of the above-mentioned Charter of Economic Rights and Duties of States of 12 December 1974, it was provided that 'every State has the right to benefit from the advances and developments in science and technology for the acceleration of its economic and social development' and that 'all States should facilitate the access of developing countries to the achievements of modern science and technology, the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies and their needs'. A more recent illustration is that of the provisions for the transfer of technology contained in article 144 of the United Nations Convention on the Law of the Sea of 10 December 1982, which Convention was considered in detail in Chapter 9, above. There has continued to be pressure for a code of binding rules or principles for the transfer of technology to developing

countries; however, this is not favoured by some states not classified as 'developing', partly because it is considered that the complexities of trade and industry are such as to warrant guidelines rather than binding rules, partly because they are themselves to some extent importers of technology, and binding rules could discriminate against them in favour of developing countries.

In the matter of consultation, it may be added that economic good-neighbourliness makes it incumbent upon states to consult with each other, and to be accessible for the receipt of representations, in connection with the application of the above-mentioned principles. All this is, however, expressed or implied in the provisions of the Articles of Agreement of the International Monetary Fund, of the General Agreement on Tariffs and Trade, and of other multilateral and bilateral instruments. As will be seen (p 388, below), regular consultations between the International Monetary Fund (IMF) and member states constitute an important part of the process of surveillance by the IMF of the policies of members, and by a decision of the Fund's Executive Board in 1986, the influence of IMF-member consultations was strengthened by a requirement of direct contact, at the conclusion of a consultation, between the Managing Director of the IMF and the member state's Finance Minister in those cases where such high-level contact was deemed particularly necessary.

These are among the evolving principles of international economic law of general significance, and they embrace only a limited field, leaving a whole range of international economic questions not even subject to emergent doctrines.

Apart from these areas of tentative acceptance, there are a number of growing international economic doctrines, eg, the promotion by international action of policies conducive to balanced economic growth, and the obligation on a state, in technical economic terms, to keep demand at an appropriate level and to graduate national expenditure in line with the growth of production, that may be yet translated into ruling principles of international law.[20] It would, however, be bold to predict that this will take place in the very near future.

This overview of international economic law would be incomplete

20. These doctrines are to some extent reflected in s 1 of art IV of the Articles of Agreement of the International Monetary Fund, as amended in 1976 (see below in this chapter) stipulating in sub-ss (i) and (ii) that member states of the Fund should endeavour to direct their economic and financial policies towards fostering orderly economic growth, with reasonable price stability, and that they should seek to promote stability by encouraging orderly economic and financial conditions. See also the Joint Declaration of Puerto Rico of 28 June 1976, of the major industrial powers (Canada, France, West Germany, Italy, Japan, the United Kingdom, and the United States) who had subscribed to the earlier Rambouillet Declaration of 17 November 1975, and the communiqué issued by the same powers on the occasion of their 'summit' meeting at Versailles on 6 June 1982.

without some particularisation of the role of the General Agreement on Tariffs and Trade (GATT) which, to illustrate its durability, celebrated its 40th anniversary in 1987. GATT is not in the strict sense an international organisation, but an association of the contracting parties to the Agreement providing a régime with many of the features of an international institution; it serves pragmatically as a forum for international trade regulation and international trade law initiatives. It was originally conceived as no more than a temporary measure pending the formation of an international trade organisation, the ITO, and was based on the same rationale as would have provided the core justification for the ITO, namely, that, as proclaimed in the Atlantic Charter of 1941, all countries, great or small, should enjoy access on equal terms to the trade and to the raw materials of the world. GATT has been metaphorically described as furnishing the 'highway rules' for the free flow of the 'traffic' of world trade. Thus, inter alia, the GATT rules, broadly speaking, provide for non-discrimination, fair competition, the rational settlement of international trade disputes, the liberalisation of trade and the use of tariffs rather than quotas or other non-tariff barriers to trade. Altogether 122 countries operate under GATT rules, of which 90 are full contracting parties, one state applies the Agreement provisionally, and 31 apply GATT rules de facto, while benefiting from treatment under GATT rules by full contracting parties. Most of the states other than these 122 benefit from GATT rules under the 'umbrella' of the most-favoured-nation rule (MFN).

GATT has also been involved in multilateral trade negotiations for the purposes, inter alia, of the progressive lowering of tariffs and of the elimination or mitigation of non-tariff barriers, as for instance with the sponsorship of the so-called 'Tokyo Round' of negotiations, 1973–1979, and currently with an involvement in the 'Uruguay Round' initiated in 1986. In its efforts to increase the momentum of trade liberalisation and trade growth, GATT has during the past fifteen years been hampered by an unprecedented conjunction of disastrous features of the global economy, including unstable exchange rates, massive debts incurred by developing countries, trade and budgetary imbalances, rising fuel prices and curtailments in economic growth. Not unnaturally, there have been claims that, although GATT provides the principal machinery for the international surveillance of trade liberalisation, there is room for improvement in its policies if existing problems are to be solved and difficulties surmounted. GATT can, however, hardly be blamed for not coping with situations such as those created by the rapid movements of capital around the world and the large-scale subsidisation of commodity producers. Early in 1985, a group headed by Dr Fritz Leutwiler (and therefore known as the Leutwiler Group) produced a report, recommending reforms designed to ensure clearer and fairer rules for international trade, revision of the rules governing state subsidies, and

liberalisation of the trade in services, as distinct from goods. At the above-mentioned Venice 'economic summit' in June 1987, the seven major industrial states declared that the functioning of the GATT system should be strengthened through better co-operation between, on the one hand, GATT, and, on the other hand, the International Monetary Fund and the International Bank for Reconstruction and Development. Such closer co-ordination would serve to facilitate more appropriate surveillance of trade policies.

International monetary law

International monetary law consists of the complex of international rules and guidelines which have been created, largely upon the basis of traditional banking and trading practices, in an effort to ensure fair and efficient methods of conducting international financial transactions, to promote international monetary co-operation, and to maintain an orderly exchange system. It includes, for example, the following:

a. the rules and principles embodied in the Articles of Agreement of the International Monetary Fund (IMF), referred to above, the principal object of which is to establish a system for stabilising and regulating in an orderly manner international currency relationships;
b. the provisions of the Articles of Agreement of the Fund and of the General Agreement on Tariffs and Trade (GATT), under which restrictions on trade and on current payments are generally allowable only in situations of balance-of-payments difficulties and are subjected to international control;
c. the provisions of the Articles of Agreement of the Fund, and related arrangements and practices, designed to mitigate the effect of exchange controls and restrictions, and so far as possible, without making this an absolute goal, to foster the interconvertibility of currencies;
d. the de facto arrangements implementing the above-mentioned rules, and serving to preserve monetary stability.

One keystone of the system is the International Monetary Fund established under the above-mentioned Articles of Agreement, and of which the purposes are, inter alia, to serve as a permanent institution for providing the machinery for consultation and collaboration on international monetary problems, to promote exchange stability, to maintain orderly exchange arrangements among members, to avoid competitive exchange depreciation (see article 1, s (iii) of the Articles of Agreement), to make its resources available to members for correcting maladjustments in their balance of payments without detriment to their economies and social structures, and to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members. The Fund, which is independent of other international organisations and cannot delegate its functions to other international agencies, is prohibited

from intervening in the domestic or social policies of its members, and must, particularly having regard to the diversity of its membership, treat all members of the Fund uniformly.[1] Throughout the history of the Fund to date, notwithstanding new year-by-year developments, there has been a measure of consistency in the discharge of its functions and in its practices, almost equivalent to a set of established international norms, namely regular consultations by the Fund with its members, the financing of balance of payments shortfalls, the exercise of surveillance or regulatory authority over international monetary affairs and constant attention to exchange rates.

It will be apparent that there is a large measure of interdependence between international economic law and international monetary law. As was implicit in the above-mentioned Rambouillet Declaration of 17 November 1975, and Joint Declaration of Puerto Rico of 28 June 1976, and as reflected in s 1 of article IV, as amended, of the Articles of Agreement of the International Monetary Fund, a stable system of exchange rates is a pre-requisite for the development of stable underlying economic and financial conditions, and in their turn stable national economic and financial policies provide a good basis for stable monetary conditions. The principles of stability of monetary exchange and of co-operation with the International Monetary Fund in, inter alia, the Fund's surveillance activities, were also affirmed at the 'summit' conferences of the major industrial powers (Canada, France, West Germany, Italy, Japan, the United Kingdom and the United States) at Versailles in 1982, Williamsburg in 1983, Tokyo in 1986, Venice in 1987 and Toronto in 1988, supporting also the theme that orderly economic and financial conditions and policies of international co-ordination could contribute to better stability of exchange rates.

The interdependence between international economic law and international monetary law may be illustrated also by the de facto development in more recent years of a closer working relationship between the International Monetary Fund and the World Bank (the International Bank for Reconstruction and Development), the principal respective fields of which are, for the Fund, acting as guardian of the international monetary system, eliminating competitive exchange depreciations practices and promoting orderly exchange arrangements, on the one hand, and, for the Bank, development programmes and the promotion of private foreign investment and international trade, on the other hand; eg, the Fund has recently given increasing attention to savings, investment, and production in

1. See discussion of these points by Sir Joseph Gold in the *IMF Survey*, 23 May 1983, pp 146–148. Also for valuable discussions of the role of the Fund, see Margaret G. de Vries *The IMF in a Changing World* 1945–1985, and J. H. Boyd, D. S. Dahl and Carolyn P. Line 'A Primer on the International Monetary Fund' Quarterly Review (Federal Reserve Bank of Minneapolis) Summer 1983, pp 6–14.

programmes supported by its lending activities so as to foster economic growth, which is a World Bank function.[2]

However, it is not to be doubted that international monetary law has during the past twenty years continued to be to some extent at the cross-roads. The fragility of the system was demonstrated in a series of international crises from 1968 to 1974, which included the gold crisis of March 1968, the dollar-mark crisis in Western Europe in April–May 1971, the crisis in August 1971, arising out of the United States Government's decision to cease conversion into gold of foreign-held dollars, the British Government's decision in June 1972, to 'float' the pound sterling from 23 June and to suspend currency trading in London for four days, the disruption of exchanges in February–March 1973, leading to joint and separate 'floating' exchange rates, and the crisis produced by the curtailing of oil exports and the rise in oil prices, coupled with a surging world-wide inflation, in 1973–1974. It was generally accepted that the recurrence of these crises attested the breakdown of the original International Monetary Fund par value system under which each member was to maintain a fixed value of its currency relative to gold and other currencies, with alterations of the value being confined to circumstances of fundamental disequilibrium, and generally requiring the consent of the Fund. There were those who maintained that as soon as national economies came out of alignment by reason of different degrees of inflation and economic productivity, exchange rates were thrown out of gear and financial crises occurred, giving rise to urgent demands for additional liquidity, and encouraging movements of capital, partly speculative and partly conditioned by a natural desire to obtain security or a higher return. A par value régime depends essentially on a reasonable measure of certainty and confidence, but these conditions tend to disappear when exchange rates become unstable for more than a reasonable period or when inflation continues unchecked. It was claimed indeed that the par value régime would have broken down earlier if it had not been for practices such as stringent national action to reduce excess of internal spending, and the increasing recourse to transactions by way of 'Euro-dollars' ('Euro-dollars' are in effect no more than the dollar liabilities of banks in certain Western European countries, including the United Kingdom).

In July 1972, mainly as a consequence of the above-mentioned events of 1971–1972, a resolution of the Board of Governors of the International Monetary Fund created a Committee of Twenty with the mandate of producing a plan for a new international monetary order, and of reporting on all aspects of international monetary reform. This Committee, the

2. See article on this relationship by Sir Joseph Gold in (1982) 15 Creighton Law Review 499–521. The importance of co-operation between the Fund and the Bank, and, as well, between these two bodies and GATT, was stressed by the seven major industrial powers at the Venice 'economic summit' in 1987.

formal title of which was the Committee on Reform of the International Monetary System and Related Issues, began work at the end of September 1972. It was hopefully envisaged that two years would suffice for the formulation of a new comprehensive code of rules of international monetary behaviour. A First Outline of Reform, presented at a Fund meeting in Nairobi in September 1973, reflected some measure of agreement upon certain basic principles of a reconstructed monetary order, namely, allowance for greater flexibility of exchange rates, acceptance of a certain role within limits for 'floating' exchange rates, acknowledgment of the status of the Fund's new liquidity facility created in 1969 following a decision reached in 1967—special drawing rights—as the principal reserve asset, and of the declining position of gold and reserve currencies, and recognition of the principle that import and export controls ought not to be used for balance-of-payments purposes.

The energy crisis which arose in October 1973, with the curtailment of oil exports and the increase in oil prices, involving a possibility of unpredictable movements of capital and consequent uncertainty, rendered imperative the deferment of the process of general revision of the international monetary system. It was also clear that, under the new conditions, states would not be prepared to accept any long-term binding monetary commitment of a changed nature. At the end of March 1974, it was officially announced[3] that the process of putting a reformed international monetary system into practice would be 'evolutionary', and was not to be achieved within the two-year period first envisaged, and would be conducted with 'some aspects of reform ... pushed forward and implemented early, while other aspects could be developed over time'.

In the result, the Committee of Twenty concluded its work at Washington in meetings of 12 and 13 June 1974. It recommended a programme of immediate action, which included the establishment of an Interim Committee of the Board of Governors and the formulation of guidelines for the management of floating exchange rates, and it transmitted to the Governors a final Report on its work, together with an *Outline of Reform* and Annexes,[4] recording the outcome of the Committee's discussions, indicating the general direction in which the Committee believed the international monetary system could evolve in the future, and treating in the Annexes a number of technical and other points. Thus goals only of future 'evolutionary' reform were fixed.

Subsequently, discussions within the framework of the Fund centred on what immediate reforms could be made by amendment of the Fund's Articles of Agreement, leaving other general and particular aspects to be

3. By the Chairman of the Deputies of the Committee of Twenty on 29 March 1974, at Washington; see *IMF Survey*, 8 April 1974, p 97.
4. For text, see *Supplement* to *IMF Survey*, 17 June 1974.

dealt with in the future. At Jamaica in January 1976, the Interim Committee, which had been established as recommended, reached agreement on a set of reforms as a basis of a proposed amendment of the articles, and this amendment, known as the Second Amendment,[5] was approved by the Board of Governors at the end of April 1976, and the machinery for bringing the amendment into force was set in motion.

This Second Amendment, which entered into force on 1 April 1978, represented the immediate steps required to be taken to initiate the 'evolutionary' process of reform of the international monetary system recommended by the Committee of Twenty. In some degree, the Second Amendment constituted a root and branch adjustment of some of the main elements of the original International Monetary Fund structure; nevertheless, certain basic principles were to remain intact, and the Fund was to continue as one cornerstone of the revised system.

First, significant changes were made to the par value régime. Under the amended provisions, members of the Fund are to have the right to maintain exchange arrangements of their own choice, whereas previously they undertook to maintain exchange rates on the basis of fixed par values, adjustable within certain margins, with alterations in value being confined to circumstances of fundamental disequilibrium, subject generally to the consent of the Fund. As pointed out on 2 April 1976, by the then Managing Director of the Fund, Mr Witteveen, this change would 'legalise the present situation in which some countries are having independently floating currencies; others are floating jointly; others are pegged to a currency or to some combination of currencies or to the special drawing right'. It would also, according to him, terminate for the purposes of the articles the par values established under the articles in their present form. The change was nevertheless to remain subject to the general obligation of member states to collaborate with the Fund in order to ensure orderly exchange arrangements and to promote a stable system of exchange rates. According to Mr Witteveen's statement on the same above mentioned date, there was to be 'a freedom of choice of exchange arrangements, but not a freedom of behaviour'.

Under the new system, the Fund was given power by a decision taken by an 85% majority of total voting power to 'recommend' exchange arrangements that accord with the development of the international monetary system, and by a similar majority—in all probability unlikely to be achieved except at economic crisis point—the Fund might determine that international economic conditions permit the introduction of a system based on stable but adjustable par values, whereupon each member would establish a par value unless it intends to apply other arrangements. The Fund was also given an overseeing role in order to ensure the effective

5. The First Amendment was that constituted by the alterations of 1969 to the Articles of Agreement for the creation of special drawing rights.

operation of the international monetary system, and the performance by member states of their obligations. The effectiveness of these safety valves against the hazards involved in the dropping of the par value régime depended essentially upon the willingness of the members of the Fund to co-operate.

Second, the Amendment involved the reduction of the role of gold in the international monetary system. The following were the main points:

a. the function of gold was no longer to be that of the 'common denominator' of the par value régime;
b. gold would also not be the 'common denominator' of any future par value régime decided upon by the Fund;
c. there would no longer be obligatory payments of gold by members to the Fund, or by the Fund to members, and the Fund might be able to accept gold only in payments from members under decisions taken by a very substantial majority of the total voting power of the Fund; and
d. the Fund would be required, in its dealings (if any) with gold, to avoid the management of the price or the establishment of a fixed price of gold in the gold market.

Correlative to these changes for diminishing the role of gold were the alterations for the enhancement of the functions of special drawing rights, designed to assist such special drawing rights to become the principal reserve asset of the international monetary system, and better to ensure the international supervision of global liquidity. Possible uses of special drawing rights in operations and transactions of the Fund were to be expanded, and the Fund was empowered to determine the mode of valuation of such rights. These alterations were largely confirmatory of the developments of the previous years.

When the consequences of the changes wrought by the Second Amendment to the Articles of Agreement of the Fund fully took effect, it was hoped that a pattern would be set for further progress in the 'evolutionary' method of international monetary reform contemplated by the Committee of Twenty, and accepted by the members of the Fund. Since 1976 some of the major steps and decisions taken within the framework of the Fund have included the following:

a. The establishment in August 1977 of a supplementary financing facility.
b. The decision in April 1980 that assistance for the adjustment and financing of imbalances in payments should be provided for over larger periods and in larger amounts.
c. The decision in September 1980 to unify and simplify the currency 'baskets' that determine and govern the value of, and the interest on special drawing rights.
d. More attention being given in recent years to the importance of the promotion of balance of payments adjustments and to the Fund's

surveillance functions. There was general consensus at the Fund Annual Meeting in September 1983 (a consensus confirmed in the review, concluded by the Executive Board of the Fund in February 1986) on the need to strengthen surveillance.

e. The establishment by the Fund in March 1986 of a Structural Adjustment Facility (SAF) and in December 1987 of an Enhanced Structural Adjustment Facility (ESAF), each funded from a different source, to provide balance of payments assistance upon concessional terms to low-income developing countries according to separate criteria.

f. The call in April 1986 by the Interim Committee of the Fund's Board of Governors on the International Monetary System for improved policy co-ordination among member countries to improve the functioning of the floating exchange rate system.

Nevertheless, there has continued to prevail a feeling that more should be done to strengthen the international monetary system, so as to cope with future contingencies. This has been reflected in a number of reports since 1983, including the above mentioned Report in September 1984 of the Ministers of the Group of Twenty-Four, bearing the title the *Revised Program of Action towards Reform of the International Monetary and Financial System*, and in a notable IMF paper on the reform of the system.[6] Proposals have also been put forward for restricting the area within which there is latitude for currencies to float[7], as distinct from the 'pegging' of exchange rates. The debate is not about whether the Fund should cease to operate, but about its future role and responsibilities in the context of more orderly economic and financial conditions due to better co-ordination between member states.

By way of completion of this brief account of international monetary law, reference should be made to the key role, different from that of the International Monetary Fund, played by the Bank for International Settlements (BIS) at Basle, founded in 1930, and the current principal function of which are, inter alia, to promote the co-operation of Central Banks, to provide a clearing-house for facilitating inter-Bank settlements, and to act as a trustee in respect to certain international financial operations.[8] In the last two decades, the BIS has grown from strength to

6. Andrew Crockett and Morris Goldstein *Strengthening the International Monetary System: Exchange Rates, Surveillance and Objective Indicators* (1987: Occasional Paper No. 50).

7. One proposal is to adopt so-called 'target zones'; major states would agree to criteria to govern their rates of exchange relationships, and then set bands of up to 20% on the basis of these criteria. Corrective action would be taken whenever rates edged towards the outer limits of the 'zones'.

8. See passim *BIS Handbook* (1980), published by the Bank for International Settlements. As to the regulation of international banking, see R. Dale *Regulation of International Banking* (1986).

strength, and will and must continue to be a permanent element in the infrastructure of international monetary law. Its influential annual reports have done much to clarify the needs and defects of the international monetary system in measure as these emerge.

CHAPTER 14

Development and the environment

1. GENERAL

Two of the most pressing problems confronting the international community at the present time are those of development, and of the protection and improvement of the human environment; and, as will appear, both problems have been given priority within the framework of the United Nations and other international bodies.

The link between these two areas in which international law is currently feeling its way may not be immediately obvious. It could be said, for instance, that the former topic of development is concerned with the situation of developing countries, whereas the degradation of the environment is a state of affairs with which, primarily, the developed, and not the developing countries, are afflicted. In such a statement, a number of relevant matters are overlooked. First, any multilateral agency responsible for the promotion of development projects, involving large scale financial aid, must concern itself with the ecological effects of the projects in developing countries, otherwise ecological detriments would have to be set off against the benefits to accrue to the developing country concerned.[1] Second, so far as development has been treated as a branch of the general science of economics, and so far as criteria and indicators of the quality, as distinct from the quantity of development have been evolved, one of the accepted indicators of development quality is the standard of environment of the country subject of development.[2] Third, it may be remembered, as referred to in Chapter 5, that the General Assembly has in a number of Resolutions proclaimed the inalienable right of all countries (particularly developing countries) to exercise permanent sovereignty over

1. In 1970, the President of the International Bank for Reconstruction and Development instructed the Bank's staff to evaluate the ecological consequences of Bank-financed development projects; see *Finance and Development*, Part No 3, 1970, p 3. Seventeen years later, in May 1987, the current President of the Bank announced the creation of a new Environmental Department in the Bank to help set the direction of Bank policy, planning and research on the environment so as to integrate environmental considerations into Bank activities. Moreover, Bank resources would be devoted, inter alia, to programmes to help governments assess environmental threats, to arresting desertification and to the encouragement of forest conservation; cf John Cleave 'Environmental Assessments' in *Finance and Development* No 1, March 1988, p 44.
2. See *Department of State Bulletin* 24 August 1970, pp 230–231.

their natural resources in the interest of their national development; in the 1966 Resolution, such proclamation was made in the context of a recital in the preamble that 'natural resources are limited and in many cases exhaustible and that their proper exploitation determines the conditions of the economic development of the developing countries both at present and in the future'. But the depletion of exhaustible natural resources represents one of the identifiable problems involved in the protection of the human environment. Thus Principles 2 and 3 of the Declaration on the Human Environment adopted by the historic Stockholm Conference of June 1972 (see below in this chapter) provided that the natural resources of the earth must be safeguarded for the benefit of present and future generations through careful planning or management, and that the capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved. Fourth, as was said by writers of a notable article published in 1986[3]: 'Sound management of the environment and natural resource base has come to be seen as a prerequisite, not an obstacle, to sustainable economic development, and a vital element in any program designed to raise the living standards of the poor'. In particular, the writers said: 'Proper management of the natural resource base is especially important in developing countries', because, inter alia, such countries can least afford efforts to remedy environmental damage'.

Further acknowledgment of the close relationship between development and environmental protection is to be found in certain recitals in the preamble of, and in a number of Principles of the Stockholm Conference's Declaration on the Human Environment. To take only two examples, recital 4 declared that 'in the developing countries most of the environmental problems are caused by under-development', while Principle 8 proclaimed that 'economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth necessary for the improvement of the quality of life'.

In the International Development Strategy for the Third United Nations Development Decade (1981–1990) adopted by the United Nations General Assembly at its Eleventh Special Session in August–September 1980, the following was said:

> 'Accelerated development in the developing countries could enhance their capacity to improve their environment. The environmental implications of poverty and under-development and the interrelationships between development, environment, population and resources must be taken into account in the process of development. ... There is need to ensure an economic development process which is environmentally sustainable over the long run

3. See James Lee and Robert Goodland 'Economic Development and the Environment' *Finance and Development* December 1986, p 36.

and which protects the ecological balance. Determined efforts must be made to prevent deforestation, erosion, soil degradation and desertification."[4]

It is for these reasons that the two subjects of development and of the human environment are treated together in the present chapter.

2. DEVELOPMENT

The international law of development has not yet reached the stage where it can be set down as a substantial body of binding rules, conferring specific rights upon developing states and imposing duties on developed countries.[5] For the most part, it is best described as institutional law, that is to say the law of the various bodies and agencies through which development is promoted and development aid is channelled.[6] At the same time, a large number of standards and guidelines have been defined or proclaimed, and these enter into the province of international law no less than do the Recommendations adopted by the International Labour Conference, or the Recommendations adopted by the Antarctic Treaty Powers. The special needs of development of developing countries have nevertheless had an impact upon certain general principles of international economic law, and have served to reduce the stringency of the duty of non-discrimination between states, and to exclude in favour of the doctrine of 'national treatment' the international standard of treatment of resident aliens in developing countries from the point of view of local mercantile operations, and international trading. Development represents in point of fact a key objective of the New International Economic Order (NIEO), referred to in Chapter 13, above.

The definition of 'development' presents insuperable difficulties by reason of the range of operations encompassed. This largely explains the lack of acceptance of the view that there is a 'right to development' which can be characterised as a human right in the strict sense. According to the Report in 1970 of the United Nations Committee for Development, containing proposals for the Second United Nations Development

4. Similar views are reflected in the Report of the United Nations Secretary-General on Problems of the Human Environment, 26 May 1969, para 74, and in recital 7 of the preamble of the Declaration on the Human Environment adopted by the Stockholm Conference of June 1972 (see below in this chapter).
5. For an analysis of the emerging rules in this area, see M. Bulajic *Principles of International Development Law* (1986).
6. An illustration is that of the United Nations Industrial Development Organisation (UNIDO), established in 1966, and restructured as a specialised agency with a constitution that came into force in mid-1985, in which year its first General Conference of over 100 members was held. Its principal functions are to promote and accelerate the industrialisation of developing countries, and to raise the world share of developing countries in manufacturing production. See Henkin, Pugh, Schachter and Smit *International Law; Cases and Materials* (2nd edn, 1987) pp 1229–1230.

Decade:[7] 'It cannot be over-emphasised that what development implies for the developing countries is not simply an increase in productive capacity but major transformations in their social and economic structures'. The Report went on to point out that 'the ultimate purpose of development is to provide opportunities for a better life to all sections of the population',[8] and to achieve this, it would be necessary in developing countries to eliminate inequalities in the distribution of income and wealth, and mass poverty and social injustice, including the disparities between regions and groups, while there would have to be arrangements for new employment opportunities, greater supplies of food and more nourishing food, and better education and health facilities. On a different level, there should be international co-operative measures to establish, strengthen, and promote scientific research and technological activities which have a bearing upon the expansion and modernisation of the economies of developing countries.[9] The Committee recognised that 'at the present state of knowledge, the intricate links permeating the process of development are not all amenable to quantification on the basis of a common framework'.[10] Ten years later, in 1980, the Report of the Independent Commission on International Developments Issues (the Brandt Commission) dealt with the matter under the heading 'What Does Development Mean?', stating that 'the focus has to be not on machines or institutions but on people', and added: 'One must avoid the persistent confusion of growth with development, and we strongly emphasise that the prime objective of development is to lead to self-fulfilment and creative partnership in the use of a nation's productive forces and its full human potential'.[11]

As these general objectives have to be tailored to the requirements of each individual developing country, the difficulty in framing general rules of law as to development can be appreciated.

Ten objectives, which may be regarded as standards of development, were proposed in the Report in 1969 of the Commission on International Development[12] established by the President of the World Bank Group, namely:

1. The creation of a framework for free and equitable trade, involving the abolition by developed countries of import duties and excessive taxes on those primary commodities which they themselves do not produce.

7. Report, p 5.
8. Report, p 11. See also passim the *World Development Report 1982* (1982), published by the World Bank (International Bank for Reconstruction and Development).
9. Report, p 38.
10. Report, p 14.
11. See Report, p 23.
12. The Report has become known as the 'Pearson Report', by reason of Mr Lester Pearson's chairmanship of the Commission.

2. The promotion of private foreign investment, with offsetting of special risks for investors.
3. Increases in aid should be directed at helping the developing countries to reach a path of self-sustained growth.
4. The volume of aid should be increased to a target of 1% of the gross national product of the donor countries.
5. Debt relief should be a legitimate form of aid.
6. Procedural obstacles should be identified and removed.
7. The institutional basis of technical assistance should be strengthened.
8. Control of the growth of population.
9. Greater resources should be devoted to education and research.
10. Development aid should be increasingly multilateralised. Such multilateralisation would contribute to a uniform development of the principles governing the grant and receipt of aid.

To these objectives, there should be added that of the alleviation of the plight of the poor and underfed in developing countries—an objective which the World Bank has kept in the forefront of its policies throughout the 1980s

On 24 October 1970, the United Nations General Assembly adopted a policy statement under the title of the 'International Development Strategy', to be applied during the Second Development Decade (1971–1980). This laid down desiderata consistent with the above-mentioned ten objectives, including the requirement that economically advanced countries should endeavour to provide by 1972, if possible, 1% of their gross national product in aid to the developing countries. In the light of experience during the Second Development Decade, the United Nations General Assembly, at its Eleventh Special Session in August–September 1980, in proclaiming a Third United Nations Development Decade to commence on 1 January 1981, adopted a similar policy statement, namely, an International Development Strategy for that Decade, in which far-reaching policy measures and methods for achieving optimum development were outlined. The facts that a Third Decade was proclaimed and a new Strategy for that Decade was adopted serve to emphasise that development is and will be a continuing problem for the international community for many years to come.

The cornerstone of the present evolving law of development is the institutional structure, heterogeneous as it is, which contributes to making possible development on an international scale. The various principal organisations, bodies, and agencies involved in the process include the United Nations, working through such organs and channels as the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Development Programme (UNDP), the related agencies of the United Nations including the International Bank for Reconstruction and Development and its affiliates, the United Nations Industrial Develop-

ment Organisation (UNIDO) the Development Assistance Committee of the Organisation for Economic Co-operation and Development (OECD), the European Economic Community, and the Committee of the Colombo Plan for Co-operative and Economic and Social Development in Asia and the Pacific (which Plan was inaugurated in July 1951). In addition, an important role is played by the regional development banks, such as the Asian Development Bank, the Inter-American Development Bank and the African Development Bank. One area of the international law of development is represented by the rules and practice that are evolving for the co-ordination of the efforts of these different agencies. Not to be overlooked also, in this connection, are the regulations governing the various funds and financial facilities involved in the process, either of development assistance or of trade stabilisation in respect to developing countries.

The problem of development concerns not only developing countries, but also under-developed regions in developed countries. This is well illustrated by the efforts made within the framework of the European Communities, by such measures as the establishment of a European Regional Development Fund and a European Investment Bank, to provide finance, resources and other assistance for under-developed areas in Community member countries.[13]

Development, while it has primarily concerned the operations of the World Bank, has also required support from the other Bretton Woods institution, the International Monetary Fund (IMF). While the Bank and the IMF do not exactly work in tandem, their roles in the domain of development are characterised by what is said to be 'complementarity'. In the course of the last two decades, during which the world economy has suffered afflictions with an inevitable impact upon developing countries, three important concepts have emerged in the development work of both the Bank and the Fund, namely: (i) adjustment; (ii) structural adjustment; and (iii) conditionality.

The term 'adjustment' denotes a process or programme in the particular developing country receiving support, whereby that country is encouraged to follow policies aimed at achieving a better balance of payments equilibrium and more lasting economic growth; this would involve normally greater domestic price stability, control over budget deficits, and rational allocation of resources.[14] The aim is more orderly economic management warranting assistance from the IMF and, if necessary, from the Fund.

'Structural adjustment' refers to a programme of reforms designed to enable the developing country to achieve a more permanent ability to cope with the external economic environment, including sustained growth,

13. See *Regional Development and the Economic Community* (European Community Doc 8/81, European File series, April 1981).
14. See passim *Theoretical Aspects of the Design of Fund-Supported Adjustment Programs* IMF Occasional Paper No. 55, September 1987.

rationalisation of the scope of the public sector, providing incentives for the private sector, and increasing the efficiency of use of resources.[15] The reforms can extend to institutions and to technology.

'Conditionality' signifies a requirement by the IMF that a country making use of the Fund's resources should carry out an economic policy programme aimed at producing a 'viable' balance of payments position over an appropriate period of time.[16] The requirement is not rigid and absolute, but tailored to the specific set of circumstances.

3. PROTECTION AND IMPROVEMENT OF THE HUMAN ENVIRONMENT

It is a commonplace now that a crisis of global proportions is, and has been affecting the human environment, through pollution of the atmosphere and of maritime, coastal, and inland waters, through degradation of rural lands, through destruction of the ecological balance of natural areas, through the effect of biocides upon animal and plant life, and through the uncontrolled depletion and ravaging of the world's natural resources, partly by reason of the explosive growth of human populations and partly as a result of the demands of industrial technology. The problems involved in this environmental crisis, and the various causes and factors which brought it about were analysed in detail some twenty years ago by the Secretary-General of the United Nations in a Report on the Problems of the Human Environment, dated 26 May 1969 (Document E/4667), prepared in relation to the summoning of the Stockholm Conference of June 1972 on the Human Environment (see below), pursuant to a Resolution of the United Nations General Assembly of 3 December 1968. In a subsequent Resolution of 15 December 1969, the United Nations General Assembly endorsed the Report, assigned to the Secretary-General overall responsiblity for organising and preparing the Conference, and established a 27-member Preparatory Committee to assist him.

The Report identified three basic causes as responsible for the deterioration of the environment, namely, accelerated population growth, increased urbanisation, and an expanded and efficient new technology, with their associated increase in demands for space, food, and natural resources (see paragraph 8 of the Report).

As was stressed by the Secretary-General, the subject had to date been dealt with by international law-making conventions in only a fragmentary manner, with room for much progress. Illustrations of such piecemeal measures were at that time provided by article IX of the Treaty of 1967 on the Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and Celestial Bodies, obliging

15. *Finance and Development* June 1987, p 12 (article by Marcelo Selowsky).
16. *IMF Survey, Supplement on the fund* September 1985, p 1.

states parties to conduct space studies and exploration in such manner as to avoid adverse changes in the environment of the earth from the introduction of extraterrestrial matter, by the African Convention on the Conservation of Natural Resources adopted by the Organisation for African Unity (OAU) in 1968, by the International Convention of 1954, as amended, for the Prevention of the Pollution of the Sea by Oil, by the International Plant Protection Convention of 1951, by the two Brussels Conventions of 29 November 1969, relating to Intervention on the High Seas in cases of Oil Pollution Casualties and on Civil Liability for Oil Pollution Damage,[17] and by a number of arrangements designed to control pollution in particular river systems. The Nuclear Weapons Tests Ban Treaty of 1963,[18] the Treaty of 1967 for the Prohibition of Nuclear Weapons in Latin America, the Treaty of 1968 on the Non-Proliferation of Nuclear Weapons,[19] and the Treaty of 1971 on the Prohibition of the Emplacement of Nuclear Weapons on the Seabed and Ocean Floor and Subsoil Thereof,[20] could at that time also be regarded as measures of environmental protection, insofar as their object was to prevent radio-active contamination of the environmental areas to which they related. Also paragraph 11 of the General Assembly's Declaration of 17 December 1970, of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof beyond the Limits of National Jurisdiction,[1] affirmed that states were to take appropriate measures for, and co-operate in establishing a régime to govern the prevention of pollution and contamination to the marine evironment, and of interference with the ecological balance of this environment, and to govern also the protection and conservation of the natural resources of the seas, and the prevention of damage to the flora and fauna of the marine environment. As pointed out in Chapter 9, above, this Declaration contributed towards the developments which led ultimately to the adoption on 10 December 1982 of the United Nations Convention on the Law of the Sea, which contained Part XII on the Protection and Preservation of the Marine Environment (articles 192–237).

The Secretary-General's Report also detailed the various activities of the related or specialised agencies of the United Nations, bearing upon the human environment (see Annex to the Report). These included, for example, various standard-setting instruments (Recommendations and Codes) of the International Labour Organisation (ILO) for protection of workers against pollution of the working atmospheric environment, or against radio-active contamination (eg the Convention on Protection of

17. See pp 255–256 above.
18. See p 175 above.
19. See pp 313–314 above.
20. See pp 256–257 above.
1. See pp 258–259 above.

Workers against Ionising Radiations); the work of the Food and Agriculture Organisation of the United Nations (FAO) in the domain of water development, management, and conservation, of conservation and development of plant resources, and of the scientific aspects of marine pollution; the studies on the scientific problems of the environment under the auspices of the United Nations Scientific, Educational and Cultural Organisation (UNESCO), including the Conference of 1968 convened by it on the Scientific Basis for Rational Use and Conservation of the Resources of the Biosphere; the work of the World Health Organisation (WHO) in the definition of environmental standards, the identification of environmental hazards, and the study of induced changes in the environment; and investigations by the International Civil Aviation Organisation (ICAO) of the problems of aircraft noises in the vicinity of airports, and of sonic boom due to supersonic aircraft.

It emerged from the Secretary-General's Report that international regulatory action was in principle appropriate for the following:

a. Problems of pollution and contamination of the oceans and atmosphere, partly because these might be the object of general use, partly because of the impossibility in certain cases of localising the effects of polluting or contaminating agents.
b. Wild species and nature reserves, upon the basis that these are a common heritage of mankind. International agreement might be necessary to control the export, import, and sale of endangered species.
c. The depletion of marine resources, having regard to the dependence of mankind upon the sea as a source of protein.
d. The monitoring of changes in the earth's atmosphere, climate, and weather conditions.
e. The definition of international standards of environmental quality.
f. Reciprocal controls of, and restraints upon certain industrial operations in all countries, where such operations could endanger the environment, so as to remove inducements to obtain competitive advantages by ignoring the consequences of the processes which were a hazard to the environment.[2] Precedents for international action in this case were represented by International Labour Conventions, one of the aims of which is to ensure that economic competition between states does not thwart the realisation of proper standards of working conditions.

4. STOCKHOLM CONFERENCE OF 1972 ON THE HUMAN ENVIRONMENT

The historic United Nations Conference on the Human Environment

2. See Report, para 75.

which met at Stockholm from 5–16 June 1972, pursuant to the United Nations General Assembly's above-mentioned Resolution of 3 December 1968, represented the first major effort to solve the global problem of protection and improvement of the human environment by international agreement on as universal a level as possible.

The main work of the Conference was done through three principal committees, open to all participating states, namely: the First Committee, concerned with human settlements and non-economic aspects; the Second Committee, concerned with natural resources and development aspects; and the Third Committee, concerned with pollutants and organisational aspects. Nevertheless, the Conference approved a number of recommendations in plenary session, without preliminary approval or adoption by any of the committees. Also governments and organisations were able to present their views and explain their policies in the general debates held in the Conference.

Apart from the three Conference Committees, the Conference established a Working Group to examine and consider the draft Declaration on the Human Environment placed before the Conference (see below). This was by way of a concession to those governments who were dissatisfied with the draft text, or who felt that they had had no opportunity to make known their views during the preparatory period. The Working Group was in principle open to all states participating in the Conference.

The principal decisions, resolutions, and recommendations of the Conference were as follows:

1. A resolution in plenary session condemning nuclear weapons tests, especially those carried out in the atmosphere, and calling on states intending to carry out such tests to refrain from doing so, as these might lead to further contamination of the environment.[3]

2. A unanimous recommendation that a World Environment Day be observed on 5 June each year.

3. A so-called 'Action Plan' for the protection and enhancement of the environment. This Plan was in effect a grouping in a more or less logical fashion of all recommendations for international action adopted by the Conference. The rearrangement involved three parts, an 'Earthwatch' programme to identify problems of international significance so as to warn against impending environmental crises; recommendations concerning 'environmental management', or in other words the application in practice of what was shown to be desirable or necessary in regard to the environment; and 'supporting measures' such as education, training, public information, and finance. 'Earthwatch' was to encompass not only

3. See also the first sentence of Principle 26 of the Declaration on the Human Environment adopted by the Conference: 'Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction'.

a projected network of atmospheric monitoring stations, but also existing programmes of international bodies for the detection of climatic changes and of marine pollution. An interesting recommendation was that for an International Referral Service to provide liaison between those persons or institutions seeking environmental information, on the one hand, and persons or institutions, on the other hand, able to furnish the information desired.

Certain of the recommendations involved using the services of international organisations belonging to the United Nations 'family', or were specifically directed to the organisations themselves; for instance, by Recommendation 20, it was recommended that the Food and Agriculture Organisation, in co-operation with other international agencies concerned, should 'strengthen the necessary machinery for the international acquisition of knowledge and transfer of experience on soil capabilities, degradation, conservation and restoration'. It was recognised, however, that one might need to seek services beyond those provided by these international organisations; thus, under Recommendation 54, a roster of experts was to be established in order to be available to assist governments, upon request, 'to anticipate and evaluate the environmental effects of major water development projects'. Most of the suggestions made in the recommendations are both useful and practical; for example, the Recommendation 75 that governments should explore with the International Atomic Energy Agency and the World Health Organisation the feasibility of developing a registry of releases to the biosphere of significant quantities of radioactive materials. Other important recommendations were directed to the identification and control of pollutants. In that connection, reference should be made to Recommendation 79 which was to the following effect:

a. That approximately ten baseline stations be set up, with the consent of the states involved, in areas remote from all sources of pollution, in order to monitor long-term global trends in atmospheric constituents and properties which may cause changes in meteorological properties, including climatic changes.
b. That a much larger network of not less than 100 stations be set up, with the consent of the states involved, for monitoring properties and constituents of the atmosphere on a regional basis and especially changes in the distribution and concentration of contaminants.
c. That these programmes be guided and co-ordinated by the World Meteorological Organisation.

It may be said that the main contribution of the 'Action Plan' lay in its emphasis upon national and international action and co-operation for the identification and appraisal of environment dangers and problems of global significance.

4. The adoption of the Declaration on the Human Environment. This Declaration may be regarded as doing for the protection of the environment of the earth what the Universal Declaration of Human Rights of 1948 accomplished for the protection of human rights and fundamental freedoms, that is to say it was essentially a manifesto, expressed in the form of an ethical code, intended to govern and influence future action and programmes, both at the national and international levels. Although the Declaration was adopted by acclamation by the Conference, its fate lay in the balance until the last day of the sessions, when such adoption took place. The text was the subject of intensive and protracted discussion, involving fifteen meetings of the Working Group on the Declaration. Partly this was due to dissatisfaction with the draft prepared by the Working Group, partly to a torrent of amendments which endangered the balance of consensus underlying the text, and partly to the injection of highly political issues.[4]

It must be acknowledged that the Declaration on the Human Environment is an uneven document—certainly more uneven and less precisely drafted than the Universal Declaration of Human Rights of 1948—so that there is some ground for the dissatisfaction expressed at the Conference. The text represents an odd mixture of political declarations, scientific generalities, banalities, propositions of international law, and well-phrased environmental guidelines. It was divided into two Parts, a Preamble proclaiming certain truths about man in relation to his environment—a number of these may quite fairly be regarded as platitudes such as the statement in paragraph 3 that 'man has constantly to sum up experience and go on discovering, inventing, creating and advancing'—and an operative part, enunciating 26 principles to govern international and national action in the environmental field. A large number of these merely enunciate non-controversial environmental guidelines or truths, such as Principle 2, that the natural resources of the earth must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate, Principle 3, that the capacity of the earth to produce vital renewable resources must be maintained and wherever practicable, restored or improved, and Principle 18, that science and technology, as part of their contribution to economic and social development, must be applied to the identification, avoidance and control of environmental risks and the solution of environmental problems and for the common good of mankind. There was perhaps some value in codifying these by general consensus. States are not committed in a legally binding manner to observe any of these principles, however much they corresponded to the consensus of the

4. See also Louis B. Sohn 'The Stockholm Declaration on the Human Environment' (1973) 14 Harvard ILJ 423 at pp 430–431.

Conference. The non-mandatory nature of the Declaration was reflected in the different descriptions of it by delegates and writers as:

a. an 'aspirational' document;
b. a platform for future action;
c. a moral code;
d. a first step toward the development of international environmental law; and
e. the recognition and acceptance of an 'environmental ethic'. Some think that the main value of the Declaration lay in its future educational effects.

5. Recommendations were made to the United Nations General Assembly for the creation of new international machinery. The Conference did not approve of the establishment of a new major international organisation, but favoured instead the setting up of a Governing Council for Environmental Programmes, elected triennially by the General Assembly on the basis of equitable geographical distribution, to act as a central organ, with its operations annually reviewed by the Economic and Social Council and the General Assembly. The proposed Council would promote environmental co-operation among governments, and guide and co-ordinate the existing environmental work being done by various international organisations, which would continue to carry on as before within the ambit of their responsibilities. The Council would be supported by a small Environment Secretariat, which would co-ordinate United Nations programmes, advise international organisations, secure the co-operation of world scientists, and submit plans, both medium-range and long-term, for United Nations action.

6. The Conference recommended that the draft articles of a Convention on Ocean Dumping be referred for adoption to a Conference to be convened by the United Kingdom towards the end of 1972 (see below). The United Kingdom delegation had stressed the necessity for a convention to prevent marine pollution by the ocean dumping of wastes, and for a world programme to make rivers cleaner. It was felt that such a convention would represent a major step towards reducing marine pollution, notwithstanding the views of certain marine biologists that the bulk of the pollution of the seas was not due to dumping, or the emptying of wastes from rivers, but to the deposit of wind-blown materials from the land. Another significant recommendation was that a Conference be summoned to prepare and adopt a convention on the exports and imports of certain species of wild animals and plants, primarily with a view to conservation (see below).

7. It was recommended that the General Assembly should decide to convene a second United Nations Conference on the Human Environment, preparations in respect to which should be carried out by the environmental machinery referred to above.

Before the Conference, the link between development, on the one hand, and environmental considerations, on the other hand, mentioned at the commencement of this chapter, had been foreseen,[5] and indeed had occasioned some controversy about the drafting of the Declaration on the Human Environment by the Inter-Governmental Working Group, during the preparatory work for the Conference, when the Preparatory Committee for the Conference had felt that the first draft unduly dissociated environmental issues from the general framework of development and development planning.[6] Few persons would, however, have predicted that the link between development and the environment would have become so dominant an issue at the Stockholm Conference in 1972. Delegate after delegate from the developing and other countries urged, inter alia, that the preservation of the environment should not be at the expense of development in the developing countries, or be used as a pretext for discriminatory practices in trade or otherwise affecting these countries, that new industries in developing countries should not be compelled to bear the costs of anti-pollution campaigns, and that the protection of the environment should be integrated with development planning. This fear of environmental 'neo-protectionism' and this stress upon the overriding importance of development were ultimately reflected in the texts of the 'Action Plan' and of the Declaration on the Human Environment. At least eight important 'Action Plan' recommendations for international action were coloured by this emphasis upon the development-environment relationship, including recommendations that 'environmental concerns' should not be invoked by governments as a pretext for trade discrimination or for reduced access to markets, that the emergence of tariff and non-tariff barriers to trade as a result of environmental policies ought to be monitored and reported upon by the competent international bodies, and—more controversially—that if environmental concerns or standards should lead to trade restrictions upon or adversely affect exports from developing countries, appropriate measures for compensation should be worked out.

The link between development and the environment found expression in two recitals in the Preamble to the Declaration on the Human Environment (see recital 4 which affirms that environmental problems are caused by under-development, and recital 7 which advocates international co-operation to raise resources to help developing countries meet their environmental responsibilities), and in no less than nine principles in the second part of the Declaration, namely Principles 8–14,[7] 20 and 23,

5. See, eg, 22nd Report of the Commission to Study the Organisation of Peace (Louis B. Sohn, Chairman) on the United Nations and the Human Environment, April 1972, pp 21–27.
6. See Louis B. Sohn, article, loc cit, p 428.
7. For commentary on these Principles, see Louis B. Sohn, article, loc cit, pp 464–474.

declaring, inter alia, that environmental policies should enhance the development of developing countries, and be integrated with development planning, and that environmental standards might not always be appropriate for developing countries.

It is clear then that the necessities and problems of development must for some time continue as an obstacle to the growth of generalised rules of international law for the environment. Moreover, according to their special approach, developing countries attach importance to the social environment as well as to the physical environment (see, eg, the condemnation of apartheid and of racial discrimination in Principle 1 of the Declaration on the Human Environment). Later, this may cause difficulties.

In Principles 21 and 22 of the Declaration on the Human Environment, three principles of international law were proclaimed:

1. States have a sovereign right to exploit their own resources pursuant to their own environmental policies (mainly a concession to Brazil).
2. States are responsible for ensuring that activities within their jurisdiction or control do not cause damage to the environment of other states, or of areas beyond the limits of national jurisdiction.[8]
3. States are under a duty to co-operate to develop further the international law as to liability and compensation for the victims of pollution and other environmental damage caused by such activities to areas beyond national jurisdiction.

It is clear that, apart from all its worthwhile results, the Stockholm Conference served to identify those areas in which rules of international environmental law, acceptable to the international community as a whole, can be laid down, and as well as those areas in which the formation of environmental rules must encounter insurmountable obstacles. To that extent, it provided foundations for the development of international environmental law.

Some of the principal decisions and recommendations of the Conference were implemented subsequently by resolutions of the United Nations General Assembly at its 27th session later in 1972. By the main resolution 2997 (XXVII) adopted on 15 December 1972, and bearing the title 'Institutional and Financial Arrangements for International Environ-

8. For commentary on this principle of international law, see Louis B. Sohn, article, loc cit, pp 485–593. Cf the principle in the *Trail Smelter Case (US v Canada)* (1938) *United Nations Reports of International Arbitral Awards* Vol III, p 1905, which is confined to damage to the environment of neighbouring States, whereas the principle enunciated in the Declaration on the Human Environment extends to damage in areas beyond the limits of national jurisdiction (eg high seas). As to the developing principles in the subject, see C. Flinterman, B. Kwiatkowska and J. G. Lammers (eds) *Transboundary Air Pollution* (1986). There is a trend towards dealing with trans-border pollution by bilateral treaties or bilateral agreement; eg, the Bulgaria-Romania agreement of 20 February 1988 to take joint measures to prevent cross-border atmospheric pollution.

mental Co-operation', the General Assembly broadly gave effect to the organisational recommendations made at Stockholm. The executive body of the United Nations Environment Programme (UNEP) was, as proposed at Stockholm, to be a representative Governing Council, with a mandate 'to keep under review the world environmental situation'. The Council was, as previously recommended, to be supported by an Environment Secretariat—to be headed by an Executive Director—and backed financially by a voluntary Environment Fund. In order to provide for the most efficient co-ordination of United Nations Environmental programmes, the resolution provided for the establishment of an Environmental Co-ordination Board under the chairmanship of the Executive Director, and under the auspices and within the framework of the Administrative Committee on Co-ordination of the United Nations. By other resolutions, the General Assembly designated 5 June as World Environment Day, referred the main recommendations of the Stockholm Conference to the newly established Governing Council, emphasised that in the exploration, exploitation, and development of their natural resources states must not produce significant harmful effects in zones situated outside their national jurisdiction, decided to hold a Conference on Human Settlements in 1975, later scheduled to meet at Vancouver in 1976 (see below as to this Conference), and determined that the Environment Secretariat should be located in Nairobi, Kenya, by way of preference for a site in a developing country.

The Governing Council, established as the policy-making body of the United Nations Environment Programme (UNEP), designed as, and intended to be a framework for co-ordination of world environment activities, held its first session at Geneva in June 1973. It approved a report on the Stockholm Conference Action Plan, and also a plan for the projected Conference on Human Settlements. One policy decision was that the major task of UNEP should be the identification and assessment of the principal environmental problems for which 'Earthwatch' was an instrument of monitoring and evaluation, and also supporting measures, such as technical assistance, training, information, and finance. Governments, United Nations bodies, and the international scientific community were also invited to prepare for the early initiation of a monitoring system to detect pollutants.

With regard to the draft Convention on Ocean Dumping which was before the Conference, and which was to be referred for adoption to a later diplomatic conference to be convened at the end of 1972, such conference actually met at London from 30 October to 13 November 1972. The text of a Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter was adopted and opened for signature; it entered into force on 30 August 1975. The Convention binds the states parties individually and collectively to promote the effective control of all sources of pollution of the marine environment, and to take

all practicable steps to prevent the pollution of the sea by the dumping of harmful wastes which may affect health, injure living resources and marine life, or damage amenities (article I), while also the states parties are to take effective measures individually, according to their scientific, technical and economic capabilities, and collectively, to prevent marine pollution caused by dumping, and are to harmonise their policies in this regard (article II). In an important Annex I the Convention listed matter and items, the dumping of which should be absolutely prohibited. Thus the Convention has covered one of the most important environmental areas for which the Stockholm Conference was summoned in the first place.

Apart from the last-mentioned convention, the following instruments, conventions, or declaratory documents were concluded or adopted in the period 1973–1982 after the Stockholm Conference, to deal with matters of a direct or indirect bearing upon the protection or improvement of the human environment and upon the quality of human life:

a. The Convention for the Protection of the World Cultural and Natural Heritage, adopted at Paris on 16 November 1972, under the auspices of the United Nations Educational Scientific and Cultural Organisation (UNESCO).
b. The Convention on International Trade in Endangered Species of Wild Fauna and Flora, concluded at Washington on 3 March 1973.
c. The International Convention for the Prevention of Pollution from Ships, and its six Annexes and two Protocols, concluded on 2 November 1973, together with the related Convention of 1974 on the Prevention of Marine Pollution from Landbased Sources.
d. The Action Plan adopted by the United Nations World Population Conference at Bucharest, Romania, 19–30 August 1974, containing statements and recommendations directed to the control of population growth, and related demographic goals, and calling, inter alia, for the continuous monitoring of population trends by the United Nations, but involving no binding commitments for States in this area.
e. The Convention on Long-Range Trans-Boundary Air Pollution, done at Geneva on 13 November 1979, and which entered into force on 16 March 1983.
f. The United Nations Convention Law on the Sea of 10 December 1982, containing its Part XII on the Protection and Preservation of the Marine Environment, which Part consists of articles 192–237.[9]

Following its initial session in 1973, the Governing Council of the United Nations Environment Programme (UNEP) was in the first instance concerned with the establishment of necessary machinery, the determination of priority areas for action, and the approval or implementation

9. As to these provisions, see Chapter 9, above, pp 283–285.

of projects calling for special attention. Machinery matters included initially the creation of an International Habitat and Human Settlements Foundation within the UNEP framework for the improvement of housing and community conditions for the world's disadvantaged peoples, and the activation of two important components of the 'Earthwatch' system, namely, on the one hand, a Global Environment Monitoring System (GEMS) for monitoring the more dangerous and injurious pollutants, and focussing otherwise on the long-range transport of pollutants, renewable natural resources, climate, health and water quality, and, on the other hand, as above-mentioned, an International Referral System for Sources of Environmental Information (INFOTERRA), to constitute a global directory and network of information sources and information seekers, thereby facilitating access to knowledge and experience as to environmental matters. INFOTERRA has grown in the period since its establishment to a network of over 100 partner countries with established National Focal Points (NFPs) that co-ordinate national INFOTERRA activities. In connection with INFOTERRA, there is published annually an *International Directory of Sources* by the INFOTERRA Programme Activity Centre (PAC). INFOTERRA has contributed towards satisfying the world demand for precise information on environmental planning, development and technology. Another network established within the framework of UNEP has been the International Register of Potentially Toxic Chemicals (IRPTC), an important component of Earthwatch, which disseminates, through national correspondents and others, information on hazardous chemicals, and since 1980 has been concerned with the trans-boundary transport and disposal of hazardous wastes. Mention should also be made of the International Programme on Chemical Safety and of the Background Atmospheric Pollution Monitoring System.

The Governing Council's decisions and recommendations have reflected commendable concern for a balanced approach to the interconnected subjects of development and the environment, dealing with such matters as training and technical assistance, arresting the spread of deserts and arid areas, ensuring the conservation of nature, wildlife and genetic resources, the preparation of a proposed draft code of conduct to govern man-induced weather modifications, preservation of the marine environment, energy ecosystems, industry and the environment, natural disasters, environmental law, environmental education, and the co-ordination of the environmental activities of other international organisations. Special reference should be made to the Council's Decision 8 (II) of 22 March 1974, in which the Council directed the Executive Director of UNEP to have regard to the considerations, inter alia, that the solutions to many environmental problems depended on adequate environmental law, that the development of international environmental law required the collaboration of governments and intergovernmental bodies, and that,

while UNEP 'has no formal mandate in this connection',[10] UNEP could facilitate the development of international environmental law by initiating appropriate consultations between experts. In May 1975, the Governing Council recalled and implicitly reaffirmed this Decision, requesting the Executive Director of UNEP in his implementation of UNEP programmes to emphasise the 'preventive character' of environmental law, and in particular to take measures designed to provide technical assistance to developing countries at their request for the development of their national environment legislation. UNEP could thus serve as a forum of a practical nature for the process of developing rules of international environmental law.

One of the main achievements of UNEP to date has been the United Nations Conference on Human Settlements held at Vancouver, 31 May–11 June 1976, known familiarly as the 'Habitat Conference', which represented another significant step in giving effect to the principles proclaimed at the Stockholm Conference. The Conference will be remembered, in addition to its numerous wide-ranging recommendations, for the Declaration on Human Settlements adopted by it; this was a kind of manifesto, a programmatic charter in 55 paragraphs analogous to the Universal Declaration of Human Rights of 1948, serving to mark a first phase in the progress towards the establishment in due course of effective machinery and the acceptance of more specific rules and standards in the domain of human settlements. The Declaration sets out principles that are designed to prevent aggravation of the deteriorating circumstances of vast numbers of people in human settlements, to achieve action at both the national and international levels to deal with such factors as uncontrolled urbanisation, rural backwardness and dispersion, and to attend to the basic needs of disadvantaged peoples for food, shelter, clean water, and leisure. It can thus be seen that underlying the Declaration on Human Settlements is the general principle of respect for human rights, a principle initmately connected with the evolution of rules of international law as to the interrelated subjects of development and the environment.[11]

Dealing generally with the work of UNEP since 1977, it may be said that UNEP has served primarily as a catalyst agency[12] to encourage

10. See article by T. C. Bacon 'The Role of UNEP in the Development of International Environmental Law' (1974) 12 Can YIL 255 at pp 260–261; and cf L. A. Teclaff and A. E. Utton (eds) *International Environmental Law* (1974) ch 4. Detailed information as to the work of UNEP in its initial years may be found in its *Annual Reviews* (see particularly the UNEP *Annual Review 1980*, passim) and in its valuable publication UNEP Report No 2 (1981) under the title *Environmental Law; An In-Depth Review*.
11. See also W. Paul Gormley *Human Rights and Environment; The Need for International Co-operation* (1976) passim.
12. In para 10 of the Nairobi Declaration of 18 May 1982 (see below), UNEP was described as 'the major catalytic instrument for global environmental co-operation' (see the *Report* of the Governing Council of UNEP on its *Tenth Session* (1982) p 51).

and co-ordinate national and regional environment protection activities, rather than itself engaging in implementation of environmental projects. True, it has been instrumental in the setting up of working groups of experts in specialised fields, in the publication of documentation and its dissemination, and in the systematic collation of information. The functions of UNEP were in this initial period 1977–1982 much more of a promotional than of an operational nature. Within these limitations, it nonetheless achieved much. Some examples may be referred to. In 1978, it sought to achieve formulations of principles to guide states in respect to co-operation as to shared resources, and in respect to problems of liability and compensation for pollution and environmental damage. In 1978–1979, UNEP took the initiative of proposing a World Conservation Strategy in regard to living resources; this was formally endorsed by the United Nations General Assembly in 1979 and was successfully launched in 34 countries in March 1980, with general endorsement from governments and scientists. Another domain of activity in this period was the regional seas programme; for instance, in 1978 it convened a regional Conference, as a result of which the eight coastal states in the Kuwait region adopted an Action Plan for the protection and development of the marine environment and coastal areas, and also adopted and signed a Kuwait Regional Convention on the subject, together with a Protocol for Co-operation in Combating Oil Pollution and Pollution by other Harmful Substances. In 1981 a similar regional Conference was convened for the West and Central African region, with the result that ten coastal states adopted an Action Plan, and a Convention and Protocol similar to the instruments adopted for Kuwait in 1978.

Commencing in 1979, UNEP was given the responsibility of administering three environmental trust funds, one for the protection of the Mediterranean against pollution, a second fund for the protection and development of the marine environment and coastal areas of Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates, and a third fund for the Convention of 1973 on International Trade in Endangered Species of Wild Fauna and Flora.

In order to commemorate the tenth anniversary of the Stockholm Conference of 1972, 105 states assembled at Nairobi from 10–18 May 1982, and adopted a special Declaration, known as the 'Nairobi Declaration' on 18 May 1982.[13] Apart from this Declaration, other significant resolutions were adopted, including one for the creation of a special commission to propose long term environmental strategies for achieving

13. For the text of the Declaration, see the *Report* of the Governing Council of UNEP on its *Tenth Session* (1982) pp 49–51. The Nairobi Declaration was supplemented by the elaborate World Charter for Nature (on conservation of nature) adopted by the UN General Assembly in a Resolution of 20 October 1982.

'sustainable development to the year 2000 and beyond'.[14] A number of important points were made in the Nairobi Declaration:

1. It was stated that the Stockholm principles were as valid at the present time as they were in 1972, and provided a basic code of environmental conduct for the years to come, and the assembled states also solemnly reaffirmed their commitment to the Stockholm Declaration and Action Plan (paragraphs 1 and 10).
2. It was agreed that the Action Plan had only been 'partially implemented', and reference was made to some alarming deteriorations, including deforestation, soil and water degradation, desertification, changes in the ozone layer, the increasing concentration of carbon dioxide and acid rain, pollution, and the extinction of animal and plant species (paragraph 2).
3. Reference was made to the emergence of new perceptions, such as the 'need for environmental management and assessment', and the 'intimate and complex interrelationship between environment, development, population and resources' (paragraph 3).
4. States should promote the progressive development of international environmental law, including conventions and agreements (paragraph 6).
5. Particular attention should be paid to the role of technical innovation in promoting resource substitution, recycling and conservation (paragraph 8).
6. The human environment would greatly benefit from an international atmosphere of peace and security, free from the threats of any war, 'especially nuclear war' (paragraph 5).

It may be seen that the Nairobi Declaration served to illuminate realistically the deficiencies that can be corrected only by more stringent international rules and guidelines.

Paragraph 8 of that Declaration on resource substitution, recycling and conservation, was followed by a United Nations General Assembly resolution in the same year 1982, establishing an Intergovernmental Committee on the Development and Utilisation of New and Renewable Sources of Energy, open to the participation of all states as full members. The principal functions of this Committee, which has already held a number of sessions 1983–1988, were defined as the recommendation of policy guidelines for different organisations and bodies within the United Nations system in regard to new and renewable sources of energy on the basis of the programme of action proclaimed at Nairobi, the monitoring of its implementation and the review of activities of the United Nations system in that domain.

Since 1983–1984, the Governing Council of UNEP has continued to formulate programmes and priorities in the following areas among others:

14. Ibid, p 41.

(a) the better development of human settlements, taking advantage of improved technology; (b) human and environmental health, free of hazards to humans; (c) integration of the management of ecosystems, encouraging these where sustainable; (d) the continued protection and enhancement of the marine environment; (e) ensuring that governments and other bodies have regard to environmental considerations in development planning (see the early part of this chapter); (f) the prevention of, or the mitigation of the consequences of, natural disasters; (g) the use of environmentally sound forms of energy; (h) plans to combat desertification; (i) the development of guidelines and principles for the harmonious utilisation by States of shared natural resources and of offshore mining and drilling. The sharing of natural resources with developing countries is now considered as one of the possible solutions to overcome the tendency of such countries to prefer exploitation of their own resources for their much needed gain as against the application of principles of environmental protection.

By way of complementing, in effect, the work of the above-mentioned Intergovernmental Committee on New and Renewable Sources of Energy, UNEP has supported since 1983–1994 various pilot projects for producing energy from the sun, wind and household and agricultural wastes, and, as well, a comprehensive study on the environmental impact of the production, use and transport of various types of energy. In 1987 the Governing Council endorsed a long-term programme of international environmental strategies under the title of a 'World Environmental Perspective to the Year 2000 and Beyond'.

Perhaps the most notable achievement of UNEP in the period 1984–1988 was its sponsorship of the historic Vienna International Convention for the Protection of the Ozone Layer concluded in March 1985, and of the Protocol to that Convention signed in September 1987. The Convention was designed to combat the threat to the ozone layer—a layer in the upper atmosphere serving to protect life on earth from the risks occasioned by ultra-violent radiation—by the control of the spread of chlorofluorocarbons (CFCs). Research also revealed that certain CFCs and certain halons used in chemical fire extinguishers might also result in a concentration in the upper atmosphere possibly culminating in a progressive warming of the earth's atmosphere, with the consequences of melting of polar icecaps causing rises in sea levels and, as well, far-reaching climatic changes. Broadly speaking, the Protocol provides for the halving by the year 2000 of the consumption of five kinds of CFC's and for a freeze on the consumption of three categories of halons. It is critical for the success of both instruments that all countries should co-operate meticulously in their implementation.

Another recent problem is that of so-called 'acid rain', capable of environmental damage damage to, inter alia, forests and crops. On the one hand, it may involve solely a matter of trans-border damage in one

country caused allegedly by activities in an adjoining country; this could be solved possibly by bilateral treaty. On the other hand, there may be a group of countries affected by the scourge of acid rain, in which event a multilateral or regional treaty or convention becomes necessary.[15]

Considerations of space prevent discussion of an exhaustive nature regarding the contribution of bodies other than UNEP to the protection of the environment. However, reference may be made briefly to the participation of the International Labour Organisation (ILO) and of the European Community in the processes of international environmental protection. The ILO has been responsible, following a decision by its Governing Body in 1982, for the establishment of an International Occupational Safety and Health Alert System, which has operated for the past six years as a clearing-house for the transmission of warnings, or requests for information to a world-wide network in regard to newly-discovered or suspected occupational hazards. Moreover, the ILO has sought to promote and influence the widespread application of what is known as an 'Environmentally Sound Technology' (EST), ie a technology the object of which is to minimise the generation of pollution or waste and, at the same time, to conserve resources liable to depletion. In another area, the ILO has endeavoured to foster the environmental training of managers and employers to ensure that they pay due regard to the human environment, to environmental planning and to the planning of systems for the prevention of pollution in and outside the workplace.[16] The European Community, on its side, has by means of far-reaching directives followed since 1983 a more intensified environmental policy.[17] This has included the observance of defined priorities, namely, inter alia, the carrying out beforehand of environmental impact studies before taking decisions that might affect the environment, the prevention of pollution in the atmosphere, water or soil, action against noise nuisances, the management of waste and dangerous chemical substances or processes, the promotion of 'clean' technologies, the protection of the marine environment (the North Sea and Mediterranean), control of energy supply and the conservation of fauna and flora. The quality of the living environment is assured by the designation of protected areas.

5. NUCLEAR SAFETY AND THE ENVIRONMENT

The accident at the Chernobyl nuclear power plant in the Soviet Union on 25–26 April 1986 revealed a number of serious gaps and flaws in the

15. On the subject, see P. Ballantyne 'International Liability for Acid Rain' (1983) 41 Univ of Toronto L Rev pp 63–70.
16. See passim H. Z. Evan *Employers and the Environmental Challenge* (1987).
17. See *The European Community and Environmental Protection* (Document 5/85, March 1985, European File Series).

rules of international law concerning nuclear safety and the environment, although the subject of the possible international environmental implications of such an accident had already been the subject of discussion by concerned experts as a consequence of the earlier 'Three Mile Island' accident in the United States. Chernobyl demonstrated definitively that the environmental damage to humans medically and to natural resources could be widespread across neighbouring countries, and led to a special session of the General Conference of the International Atomic Energy Agency (IAEA) in Vienna, where two previously unheralded historic Conventions were adopted on 26 September 1986, namely: (1) the convention on Early Notification of a Nuclear Accident or Radiological Emergency (entered into force on 27 October 1986); (2) the Convention on Assistance in the Event of a Nuclear Accident or Radiological Emergency (entered into force on 26 February 1987). Under the Notification Convention, a state party is bound to notify and inform states likely to be adversely affected and also the IAEA of a nuclear accident involving its civil and military facilities and activities, except nuclear weapons.[18] Five nuclear weapon states have indicated that they would, within the framework of the Convention, give notice of any nuclear accident which might have significant radiological effects in another state. The European Community was galvanised into taking appropriate action, in addition to already existing measures, to supplement the two Conventions in the Community region, and to ensure the safety of nuclear installations in use, as well as closer co-operation between members. Earlier, there had been concluded a Convention of 1979 on the Physical Protection of Nuclear Material, adopted as a result of one of the recommendations at the first Review Conference on the Nuclear Non-Proliferation Treaty of 1968 (NPT); this Convention entered into force on 26 February 1987. It binds parties to take measures to deter or defeat deliberate acts such as theft, sabotage or removal and use of nuclear materials, whether in transit, storage or otherwise.

Finally, there should be mention of: (a) the Treaty of 6 August 1985, signed by 14 Pacific states, establishing a South Pacific Nuclear Free Zone; (b) the problem of removal of nuclear wastes; this is almost insoluble, if the aim is the complete elimination of hazards, insmuch as any disposal must to some extent affect the environment, marine or otherwise, selected as the final site for such wastes.[19]

18. Cf the OECD publication, *Chernobyl and the Supply of Nuclear Reactors in OECD Countries* Report by a Nuclear Energy Agency Group of Experts (June 1987).
19. Cf G. Handl 'Managing Nuclear Wastes: The International Connections' (1981) 21 Natural Resources Journal pp 621–690.

PART 4

International transactions

CHAPTER 15

The agents of international business; diplomatic envoys, consuls, and other representatives

1. DIPLOMATIC ENVOYS

Nearly all states today are represented in the territory of foreign states by diplomatic envoys and their staffs. Such diplomatic missions are of a permanent character, although the actual occupants of the office may change from time to time. Consequent on a development over some hundreds of years, the institution of diplomatic representatives has come to be the principal machinery by which the intercourse between states is conducted.

In fact, however, the general rise of permanent as distinct from temporary diplomatic missions dates only from the seventeenth century. The rights, duties, and privileges of diplomatic envoys continued to develop according to custom in the eighteenth century, and by the early nineteenth century the time was ripe for some common understanding on the subject, which as we shall see, took place at the Congress of Vienna in 1815. Developments in diplomatic practice since 1815 rendered necessary a new and more extensive codification[1] and formulation of the laws and usages as to diplomatic envoys, which was achieved in the Vienna Convention on Diplomatic Relations concluded on 18 April 1961.[2] Customary international law will, however, continue to govern questions not expressly regulated by the Convention (see Preamble). In the case of the *United States Diplomatic and Consular Staff in Tehran*,[3] the International Court of Justice described the rules of diplomatic law as 'a self-contained régime

1. In the case of the *United States Diplomatic and Consular Staff in Tehran* ICJ 1980, 3, para 45, the International Court of Justice referred to the Vienna Convention of 1961 on Diplomatic Relations as codifying the law of diplomatic relations. This is, semble, only partially correct, as some provisions of the Convention cannot definitely be attributed to customary international law.
2. Based on Draft Articles prepared by the International Law Commission; for commentary thereon, which is applicable to the corresponding Articles of the Vienna Convention, see *Report* of the Commission on the Work of its *Tenth Session* (1958). Effect was given to the Vienna Convention in the United Kingdom by the Diplomatic Privileges Act 1964 and in the United States by the provisions of legislation of 1982, namely, USC §254a–c.
3. ICJ 1980, 3 at para 86.

which, on the one hand, lays down the receiving state's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving state to counter any such abuse'.

Classification of diplomatic envoys

Originally, some controversy centred around the classification of diplomatic representatives, particularly as regards matters of precedence and relative status. Ambassadors sent on a temporary mission were called 'Extraordinary' as contrasted with resident envoys. Later the title 'Extraordinary' was given to all Ambassadors whether resident or temporary, and the title of 'Plenipotentiary' was added to their designation. In its literal sense the term 'Plenipotentiary' signified that the envoy was fully empowered to transact business on behalf of the Head of State who had sent him on the mission.

The designation 'Envoy Extraordinary and Minister Plenipotentiary' came to be applied to almost all diplomatic representatives of the first rank, such as Ambassadors and ministers, with the exception of ministers resident. This titular nomenclature survives today, although the reasons for its use are not commonly appreciated.

The Congress of Vienna in 1815 attempted to codify the classifications and order of precedence of diplomatic envoys. This codification, better known as the 'Regulation of Vienna', was, subject to certain adjustments, incorporated in the provisions of articles 14 to 18 of the Vienna Convention on Diplomatic Relations of 18 April 1961. According to these provisions, heads of diplomatic mission are divided into three classes:

1. Ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank.[4]
2. Envoys, ministers, and internuncios accredited to Heads of State.[5]
3. *Chargés d'affaires* accredited to Ministers for Foreign Affairs.

Except in matters of precedence and etiquette,[6] there is to be no differentiation between heads of mission by reason of their class. The class to which heads of their missions are to be assigned is to be agreed between

4. This class does not include Legates, as previously under the Regulation of Vienna, because the new codification purports to deal only with heads of mission. Also, the provisions of article 2 of the Regulation of Vienna that only Ambassadors, Legates, or nuncios should possess the representative character in relation to the accrediting Head of State, were not adopted. The words 'other heads of mission of equivalent rank' would, semble, include Ambassadors accredited to international organisations (eg the United Nations and UNESCO) or to certain long-term conferences, eg an Ambassador of Disarmament.
5. No provision was made for the class of 'Ministers resident', which was established by the Conference at Aix-la-Chapelle in 1818, in modification of the Regulation of Vienna. As to this former class, see Twiss *The Law of Nations* (2nd edn, 1884) Vol I, p 344.
6. 'Etiquette' includes ceremonial matters, and matters of conduct or protocol.

states. Heads of mission are to take precedence in their respective classes in the order of the date and time of taking up their functions; for this purpose, they are considered as taking up their functions either when they have presented their credentials, or when they have notified their arrival and a true copy of their credentials has been presented to the Minister for Foreign Affairs of the receiving state, or other ministry according to the practice of this state. Alterations in the credentials of a head of mission not involving any change of class, are not to affect his precedence. These provisions as to precedence are to be without prejudice to any practice of the receiving state regarding the precedence of the representative of the Holy See. The procedure to be observed in each state for the reception of heads of mission is to be uniform in respect of each class.

The attribution of the title of Ambassador, as distinct from minister, to the head of a diplomatic mission depends on various factors, including the rank of the states concerned. Sometimes an embassy is a matter of tradition, as for example between France and Switzerland. Usually, however, now, the population and importance of the country of mission are the determining factors.[7] There are none the less many cases of anomalies in the allocation of embassies, which reflect a lack of uniformity of practice. This is illustrated, eg, by the appointment in recent years of Ambassadors-at-large and of Ambassadors as to disarmament questions.

An envoy on an ad hoc mission is usually furnished with a document of Full Powers[8] setting out his authority which in due course he presents to the authorities of the state with whom negotiations are to be conducted, or to the Committee on Full Powers of the Conference at which he is to represent his country.

Appointment and reception of diplomatic envoys

The machinery of diplomacy used to be attended by a good deal of ceremony and ritual, and to a certain extent this still applies. Ceremonial procedure, for instance, is generally observed in regard to the arrival and departure of diplomatic envoys.

The appointment of an individual as Ambassador or minister is usually announced to the state to which he is accredited in certain official papers, with which the envoy is furnished, known as Letters of Credence or *Lettres de Créance*; these are for remission to the receiving state. Apart from the Letters of Credence the envoy may take with him documents of Full Powers relating to particular negotiations or other specific written instructions.

7. In its *Report*, op cit, the International Law Commission made significant mention of the growing tendency of most states today to appoint Ambassadors, rather than ministers, as heads of missions. The titular rank of minister is now, in fact, being used more and more for a responsible or senior member of the legation.
8. See also below, pp 447–449.

States may refuse to receive diplomatic envoys either: (a) generally, or in respect to a particular mission of negotiation; or (b) because a particular envoy is not personally acceptable. In the latter case, the state declining to accept the envoy is not compelled to specify its objections to the accredition or to justify them (see article 4, paragraph 2 of the Vienna Convention). Consequently, to avoid any such conflict arising, a state wishing to appoint a particular person as envoy must ascertain beforehand whether he will be persona grata. Once such assent or *agrément* is obtained, the accrediting state is safe in proceeding with the formal appointment of its envoy. Nonetheless, at any later time, the receiving state may, without having to explain its decision, notify the sending state that the envoy is persona non grata, in which case he is recalled, or his functions terminated (article 9 of the Vienna Convention).

Rights, privileges, and immunities of diplomatic envoys[9]

These are primarily based on the need to ensure the efficient performance of the functions of diplomatic missions (see Preamble to Vienna Convention), and to a secondary degree on the theory that a diplomatic mission personifies the sending state (the 'representative character' theory). The theory of 'exterritoriality', whereby the legation premises represent an extension of the sending state's territory, may now be discarded for all practical purposes. In the Australian case of *R v Turnbull, ex p Petroff*[10] where two persons had been charged with throwing explosive substances at the Chancery of the Soviet Union's Embassy in Canberra, in the Australian Capital Territory, it was sought to argue in prerogative writ proceedings that the magistrate concerned had no jurisdiction to deal with the alleged offences as these were committed on foreign territory. Fox J, of the Supreme Court of the Australian Capital Territory, rejected this contention and expressly held, after a full review of the authorities, that an embassy is not a part of the territory of the sending state, and that the accused could be prosecuted for such alleged offences against the local law.

As we have seen,[11] diplomatic envoys enjoy exemption from local civil and criminal jurisdiction.

9. Arts 20 to 41 of the Vienna Convention deal with these rights, privileges, and immunities in detail. Considerations of space have precluded a full treatment in the text, or an examination of the position of the subordinate personnel of diplomatic missions, as provided for in the convention. As to the determination of the status of a diplomatic envoy for the enjoyment of immunities, etc, see ante p 221, and cf *United States v Kostadinov* 734 F 2d 905 (1984); *United States v Lumumba* 741 F 2d 12 (1984); and *R v Lambeth Justices, ex p Yusufu* [1985] Crim LR 510 (unilateral action of sending government, eg, providing applicant with a diplomatic passport, insufficient for diplomatic status without notification to, or acceptance by, host state of accreditation).
10. (1971) 17 FLR 438.
11. See above pp 219–223. In this connection, note that certain governments (eg the United States Government) may require diplomatic missions to insure against liability for the

They also have a right to inviolability of the person. This protects them from molestation of any kind, and of course from arrest or detention by the local authorities (see article 29 of the Vienna Convention). Inviolability attaches likewise to the legation premises and the archives and documents of the legation (see articles 22 and 24 of the Vienna Convention).

In the case of the *United States Diplomatic and Consular Staff in Tehran*,[12] the International Court of Justice upheld the principle of the inviolability of the premises of a diplomatic mission and the correlative duty of the receiving state to protect the premises, and the documents and archives of the mission, as well as the receiving state's obligation to protect the personnel of the mission. The circumstances were that in November 1979 a strong group of militant Iranians overran the compound of the Embassy of the United States at Teheran, seized buildings there, entered the Chancery and gained control of the main vault, and also detained diplomatic and consular staff and other persons as hostages. Embassy documents and archives were destroyed and ransacked or taken away. On the facts, the Court held that it was satisfied that the Iranian Government had failed to take appropriate steps within the meaning of article 22 of the Vienna Convention on Diplomatic Relations to protect the premises, staff and archives of the mission against attack by the militants, or to take appropriate steps to protect American consulates at Tabriz and Shiraz. Other provisions of the Vienna Convention were relied upon, namely article 25 imposing a duty on a receiving state to accord full facilities for a mission to perform its functions, article 26 providing for freedom of movement and travel of mission personnel, and article 27 imposing a duty to permit and protect free communication on the part of the mission for all official purposes. The analogous or corresponding provisions of the Vienna Convention of 1963 on Consular Relations (see below in this chapter) were relied upon so far as concerned the consular staff held as hostages, and the American consulates at Tabriz and Shiraz.[13] The Iranian Government, so it was ruled, had also failed in its duty to restore the status quo and to bring the infringements by the militants to an end.

The question of inviolability of a legation's premises arose in England in 1984 when shots were fired from the Libyan People's Bureau in London at demonstrators outside the Bureau, killing a woman police officer. The British Government abstained from authorising any entry of the premises,

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benefit of persons who may be injured by members of the mission, the procurement of such insurance not being treated as a waiver of immunity; cf Buergenthal and Maier *Public International Law* (1985) p 211.

12. ICJ 1980, 3.
13. Ibid, at paras 62–63.

but insisted on the recall of the Bureau's staff, thus complying strictly with the principles laid down by the International Court of Justice.

Articles 34 and 36 of the Vienna Convention provide that diplomatic agents are exempt from all dues and taxes,[14] other than certain taxes and charges set out in article 34 (eg charges for services rendered), and also from customs duties. The latter exemption was formerly a matter of comity or reciprocity.

A new right is conferred by article 26 of the Convention, namely a right of members of a diplomatic mission to move and travel freely in the territory of the receiving state, except in prohibited security zones. Other privileges and immunities dealt with in detail in the Convention include the freedom of communication for official purposes (article 27), exemption from social security provisions (article 33), and exemption from services and military obligations (article 35).[15]

Prevention and punishment of crimes against diplomatic envoys

The increase in the number of serious crimes committed against diplomatic envoys and diplomatic missions, such as the murder and kidnapping of envoys, and attacks directed against the premises of legations, led to the adoption by the United Nations General Assembly on 14 December 1973, of a Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.[16] Notwithstanding the Convention, attacks on legation premises and crimes of violence or otherwise committed against diplomatic personnel have continued to the present day, little abated. The text of this Convention was based on draft articles on the subject prepared by the International Law Commission at its 24th Session in May–July 1972. The matter had been treated by the Commission as being of such special urgency that the draft text was prepared through a Working Group, without the appointment of a Special Rapporteur. In considering the draft text and in adopting the Convention, the General Assembly had before it the comments and observations on the Commission's draft articles by states, by specialised agencies of the United Nations, and by other inter-

14. As to the exemption in respect of the legation premises, see art 23 of the Vienna Convention.
15. As to the studies made by the International Law Commission of the questions of the status of diplomatic couriers, and of the diplomatic bag, not accompanied by a diplomatic courier, see *The Work of the International Law Commission* (3rd edn, 1980) pp 94–96. In 1986 the Commission made a first reading of draft articles adopted by it on the subject; these were submitted to the United Nations General Assembly. Governments were asked to submit observations on the draft text to the Secretary-General of the United Nations by 1 January 1988.
16. See article on this Convention by Michael C. Wood, (1974) 23 ICLQ 791–817. The disputes article (art 13) of the Convention was invoked by the United States in the case of *United States Diplomatic and Consular Staff in Tehran* before the International Court of Justice which, however, did not find it necessary to enter into the question of jurisdiction under the provisions relied upon; see ICJ 1980, 3 at para 55.

governmental organisations. The Convention follows closely, in most major respects, the relevant provisions appropriate to the subject of the Convention for the Suppression of Unlawful Seizure of Aircraft concluded at The Hague on 16 December 1970, and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971.[17]

Diplomatic envoys are, under article 1 of the Convention, included in the class of 'internationally protected persons' who are possible victims of crimes under the Convention, but that class encompasses also heads of state and of government, and ministers for Foreign Affairs, whenever such persons are in a foreign state, as well as members of their family accompanying them, and 'any representative or official of a state or any official or other agent of an international organisation of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household'. The key provision is article 2, which sets out the acts against which the Convention is directed, and which each state party is to make punishable as a crime under its internal law by appropriate penalties, taking into account their grave nature; these are the intentional commission of:

1. a murder, kidnapping or other attack upon the person or liberty of an internationally protected person;
2. a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty; and
3. threats or attempts to commit, or participation as accomplices in the commission of such attacks.

Article 2 is not to derogate from the obligations of states parties otherwise under international law to prevent attacks on the person, freedom or dignity of internationally protected persons, as, eg, under the Vienna Convention of 1961 on Diplomatic Relations. Under article 3, paragraph 1, states parties are to take such measures as may be necessary to establish jurisdiction over the crimes specified in article 2 when the crime is committed in the territory of the state concerned or on board a ship or aircraft registered in that state, when the alleged offender is a national of that state, and when the crime is committed against an 'internationally protected person' who enjoys his status as such by virtue of functions which he exercises on behalf of that state. States parties are also under paragraph 2 of the same article to take such measures as may be necessary to establish jurisdiction over these crimes in cases where the alleged offender

17. As to these two conventions, see Chapter 8, above, pp 237–240.

is present in its territory and is not extradited under article 8 of the Convention, which deals with the extradition of alleged offenders (see below).

Articles 4–6 and 10 provide for co-operation and various measures of collaboration in the prevention and apprehension of alleged offenders. Article 7 provides that the state party in whose territory the alleged offender is present shall, if it does not extradite him, submit, 'without exception whatsoever and without undue delay', the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that state.

Article 8 deals comprehensively with the subject of extradition. To the extent that the crimes under the Convention are not listed as extraditable offences in any extradition treaty between states parties, they shall be deemed to be included as such therein, and states parties undertake to include those crimes as extraditable offences in every future extradition treaty to be concluded between them. If a state party which makes extradition conditional upon the existence of an extradition treaty receives a request for extradition from another state party with which it has no extradition treaty, it may, if it decides to extradite, consider the Convention as the legal basis for extradition in respect of those crimes, but extradition is to be subject to the procedural provisions and the other conditions of the law of the requested state. States parties which do not make extradition conditional upon the existence of a treaty are to recognise those crimes as extraditable offences between themselves subject to the procedural provisions and the other conditions of the law of the requested state. Each of the crimes is to be treated, for the purpose of extradition as between states parties, as if it had been committed not only in the place in which it occurred, but also in the territories of the states required to establish their jurisdiction in accordance with paragraph 1 of article 3 (see above).

Termination of diplomatic mission

A diplomatic mission may come to an end in various ways:

1. Recall of the envoy by his accrediting state. The letter of recall is usually handed to the Head of State or to the Minister of Foreign Affairs in solemn audience, and the envoy receives in return a *Lettre de Récréance* acknowledging his recall. In certain circumstances, the recall of an envoy, eg a head of mission, will have the gravest significance; for example, where it is intended to warn the receiving state of the accrediting state's dissatisfaction with their mutual relations. Such a step is only taken where the tension between the two states cannot otherwise be resolved.
2. Notification by the sending state to the receiving state that the envoy's function has come to an end (article 43 of the Vienna Convention).
3. A request by the receiving state that the envoy be recalled. The host

country need not give any explanation for such a request (see article 9 of the Vienna Convention), but as in the case of Australia's request in June 1986 that a South African attaché return to his country, this can be expressly founded on a claim of alleged unacceptable conduct, with a specified time limit for departure (ten days being stipulated in Australia's above-mentioned request), although the nomination of a determinate time-limit is not expressly required by the Vienna Convention.

4. Delivery of passports to the envoy and his staff and suite by the receiving state, as when war breaks out between the accrediting and receiving states.
5. Notification by the receiving state to the sending state, where the envoy has been declared persona non grata and where he has not been recalled or his functions terminated, that it refuses to recognise him as a member of the mission (articles 9 and 43 of the Vienna Convention).
6. Fulfilment of the object of the mission.
7. Expiration of Letters of Credence given for a limited period only.

In 1985–1988, and more particularly in 1985–1986, there occurred a series of what were described as 'tit-for-tat' expulsions of minor diplomatic personnel on various alleged grounds, ie the receiving country's expulsion being matched by the sending country's reaction in likewise expelling personnel attached to the former's legation in the latter country. This practice is apparently the subject of an unusual degree of blasé acceptance and toleration by the states concerned, notwithstanding that it is hard to reconcile with the spirit of the Vienna Convention, although the letter of the Convention is not violated.

2. CONSULS

Consuls are agents of a state in a foreign country, but not diplomatic agents. Their primary duty in such capacity is to protect the commercial interests of their appointing state, but commonly a great variety of other duties are performed by them for the subjects of their state; for example, the execution of notarial acts, the granting of passports, the solemnisation of marriages, and the exercise of a disciplinary jurisdiction over the crews of vessels belonging to the state appointing them.[18]

The laws and usages as to the functions, immunities, etc of consuls were codified, subject to certain adaptations, alterations, and extensions, in the Vienna Convention of 24 April 1963, on Consular Relations (based on draft articles adopted in 1961 by the International Law Commission).

18. Formerly, in certain countries, consuls exercised extra-territorial jurisdiction over their fellow-nationals to the exclusion of local municipal courts. As to this, see the decision of the International Court of Justice in the *Case Concerning Rights of Nationals of the United States of America in Morocco* ICJ 1952, 176 and 198 et seq.

The Convention covers a wide field, but does not preclude states from concluding treaties to confirm, supplement, extend, or amplify its provisions (article 73), and matters not expressly regulated by the Convention are to continue to be governed by customary international law (see Preamble).

The institution of consuls is much older than that of diplomatic representatives, but the modern system actually dates only from the sixteenth century. Originally consuls were elected by the merchants resident in a foreign country from among their own number, but later the Great Powers established salaried consular services and consuls were despatched to different countries according to the requirements of the service. Consuls are frequently stationed in more than one city or district in the state to which they are sent, thus differing from diplomatic envoys. There are, of course, other differences. Consuls are not equipped with Letters of Credence, but are appointed under a commission issued by their government; the appointment is then notified to the state where the consul is to be stationed, the government of which is requested to issue an exequatur or authorisation to carry out the consular duties. If there is no objection to the appointment of the person concerned as consul, the exequatur is issued. Normally a consul does not enter on his duties until the grant of an exequatur. If, subsequently, his conduct gives serious grounds for complaint, the receiving state may notify the sending state that he is no longer acceptable; the sending state must then recall him or terminate his functions, and if the sending state does not do so, the receiving state may withdraw the exequatur, or cease to consider him as a member of the consulate. Article 23 of the Vienna Convention of 1963 goes much further than this accepted practice, permitting a receiving state at any time to notify the sending state that a consular officer is not persona grata, or that any other member of the consular staff is not acceptable.

Heads of consular posts are divided into four classes: (a) Consuls-general; (b) Consuls; (c) Vice-consuls; (d) Consular agents (see article 9 of the Vienna Convention of 1963, above). Generally speaking, they take precedence according to the date of grant of the exequatur.

Rights and privileges of consuls

Consuls seldom have direct communication with the government of the state in which they are stationed except where their authority extends over the whole area of that state, or where there is no diplomatic mission of their country in the state. More usually, such communication will be made through an intermediate channel, for example, the diplomatic envoy of the state by which they are appointed. The procedure is governed by any applicable treaty, or by the municipal law and usage of the receiving state (see article 38 of the Vienna Convention of 1963).

As pointed out above,[19] consuls do not, like diplomatic envoys, enjoy complete immunity from local jurisdiction. Commonly, special privileges and exemptions are granted to them under bilateral treaty, and these may include immunity from process in the territorial courts. Apart from this it is acknowledged that as to acts performed in their official capacity and falling within the functions of consular officers under international law, they are not subject to local proceedings unless their government assents to the proceedings being taken.

In practice a great number of privileges have attached themselves to the consular office. In the absence of such privileges, consuls would not be able to fulfil their duties and functions, and accordingly as a matter of convenience they have become generally recognised by all states. Examples of such privileges are the consul's exemption from service on juries, his right of safe conduct, the right of free communication with nationals of the sending state, the inviolability of his official papers and archives,[20] and his right if accused of a crime to be released on bail or kept under surveillance until his exequatur is withdrawn or another consul appointed in his place. Certain states also grant consuls a limited exemption from taxation and customs dues.

In general, however, the privileges of consuls under customary international law are less settled and concrete than those of diplomatic envoys, although in the Vienna Convention of 24 April 1963, referred to above, it was sought to extend to consuls mutatis mutandis, the majority of the rights, privileges, and immunities applying under the Vienna Convention on Diplomatic Relations of 18 April 1961, subject to adjustments in the case of honorary consuls. In that connection, it is significant that in recent years, both Great Britain[1] and the United States have negotiated standard consular conventions or treaties with a number of states in order that the rights and privileges of consuls may be defined with more certainty, and placed on as wide and secure a basis as possible.

19. See above, p 223.
20. There is, semble, no such corresponding general inviolability of the consular premises, nor are such premises *extra-territorial* in the sense that consuls may there exercise police powers, exclusive of the local authorities, over the citizens of their state. Thus, in 1948, in the *Kasenkina Case* in the United States, where a Russian woman, presumably detained by Soviet consular officers, jumped to the street from the window of a room in the Soviet Consulate, the United States Government insisted on the position that consular premises were subject to local police control in a proper case; cf Preuss 43 AJIL (1949) 37–56. But see now the rule of inviolability of consular premises laid down in article 31 of the Vienna Convention of 1963; this prohibits authorities of the receiving state from entering, without consent, only that part of the consular premises used exclusively for the work of the consular post, and provides that consent to enter may be assumed in case of fire or other disaster requiring prompt protective action.
1. Cf the series of such consular treaties concluded by Great Britain with Norway, the United States, France, Switzerland, Greece, Mexico, Italy, the Federal Republic of Germany, and other states.

The modern tendency of states is to amalgamate their diplomatic and consular services, and it is a matter of frequent occurrence to find representatives of states occupying, interchangeably or concurrently,[2] diplomatic and consular posts. Under the impact of this tendency, the present differences between diplomatic and consular privileges may gradually be narrowed.

3. SPECIAL MISSIONS OF A NON-PERMANENT NATURE

In addition to their permanent diplomatic and consular representation, states are often obliged to send temporary missions to particular states to deal with a specific question or to perform a specific task, and such missions may be accredited, irrespective of whether in point of fact permanent diplomatic or consular relations are being maintained with the receiving state. Of course, it is fundamental that a special mission of this nature may be sent only with the consent of the state which is to receive it.

The rules governing the conduct and treatment of these special missions of a non-permanent character were the subject of a Convention on Special Missions adopted by the United Nations General Assembly on 8 December 1969, and opened for signature on 16 December 1969. The Convention was based on the final set of draft articles prepared in 1967 by the International Law Commission, which had had the subject under consideration since 1958.[3]

The Convention is largely modelled on provisions of the Vienna Convention on Diplomatic Relations of 1961, while there has also been some borrowing from the text of the Vienna Convention on Consular Relations of 1963. No distinction was made by the Convention between special missions of a technical nature and those of a political character, and its provisions apply also to the so-called 'high level' special missions, that is, missions led by heads of state or cabinet ministers, subject however to the special recognition of the privileged status of the leader of the mission in such a case. Privileges and immunities are conferred upon the members of special missions to an extent similar to that accorded to permanent

2. See, eg, *Engelke v Musmann* [1928] AC 433. Consular functions may be performed by a diplomatic mission; see art 3, para 2 of the Vienna Convention on Diplomatic Relations, above. Similarly, diplomatic functions may be carried out by a Consular Officer (not necessarily a head of the post) in a state, where the sending state has no diplomatic mission, and with the consent of the receiving state; see art 17 of the Vienna Convention of 1963. In a United States Department of State Circular of 16 January 1958, it was stated that the United States Government would continue to recognise in a dual capacity members of diplomatic missions in Washington who also performed consular functions.

3. For text of draft articles and commentary thereon, see *Report* of the Commission on the Work of its *19th Session* (1967).

diplomatic missions, the justification being that the like privileges and immunities are essential for the regular and efficient performance of the tasks and responsibilities of special missions (see seventh recital of the preamble to the Convention).

The Convention on Special Missions of 1969 contains, inter alia, the following provisions which differentiate it from the Vienna Convention on Diplomatic Relations of 1961, while at the same time reflecting differences between the nature of special missions, on the one hand, and that of permanent diplomatic missions, on the other hand:

a. Two or more states may each send a special mission at the same time to another state in order to deal together with a question of common interest to all of them (article 6).
b. Before appointing members of a special mission, the sending state must inform the receiving state of the size of the mission, and of the names and designations of its members (article 8).
c. The seat of the mission is to be in a locality agreed by the states concerned, or, in the absence of agreement, in the locality where the Ministry of Foreign Affairs of the host state is situated, and there may be more than one seat (article 17).
d. Only such freedom of movement and travel is allowed as is necessary for the performance of the functions of the special mission (article 27; contrast article 26 of the Vienna Convention).
e. An action for damages arising out of an accident caused by a vehicle used outside the official functions of the person sought to be sued is not within the scope of immunity from the civil and administrative jurisdiction of the host state (article 31 paragraph 2 (d)).
f. Immunities are allowable to a mission representative in transit through a third state only if that state has been informed beforehand of the proposed transit, and has raised no objection (article 42 paragraph 4).

4. OTHER CATEGORIES OF REPRESENTATIVES AND AGENTS

Representatives and observers accredited in relation to international organisations

The increasing establishment of permanent missions and delegations accredited in relation to international organisations prompted the United Nations General Assembly in 1958 to invite the International Law Commission to consider the subject of the relations between states and intergovernmental international organisations. As a result of the Commission's labours at its sessions in 1968, 1969, 1970, and 1971[4] a composite set of draft articles was prepared dealing with the conduct and treatment of:

4. For text of the principal draft articles and commentary thereon, see the *Reports* of the Commission on the Work of its *20th* (1968), *21st* (1969), and *22nd* (1970) Sessions.

a. permanent missions to international organisations;
b. permanent observer missions of non-member governments to international organisations; and
c. delegations to organs of international organisations, and to conferences of states convened by or under the auspices of international organisations.

After these draft articles had been submitted to governments for comment and observations, and after further consideration of the subject by the United Nations General Assembly, a Conference was convened to be held in Vienna in 1975 to examine the subject, and to adopt a convention or other instruments upon the basis of the draft text. In the result a Convention on the Representation of States in their Relations with International Organisations of a Universal Character was adopted at Vienna on 14 March 1975, governing the status, functions, and immunities of the above-mentioned classes of representatives. On the face of it, this instrument seemed to be a worthwhile, comprehensive attempt to stabilise the practice as to these new classes of representatives and delegates. The contrary position of representatives of international organisations accredited to states was not dealt with, mainly because these representatives would of necessity be officials of the organisation concerned, and therefore their status would normally be covered by the appropriate rules and regulations of the organisation. Moreover, the Convention did not purport to regulate the position of representatives or observers accredited to regional organisations or organs of, or conferences convened by these regional bodies; only general or universal international organisations were within the scope of its provisions. However, for a number of reasons this Convention of 1975 is most unlikely to result in a substantial contribution to the body of universal diplomatic international law, although it may become operative as between those states which accept, ratify, or adopt it; even if it is in force as between them, such operative effect would be largely abstract or academic, as the majority of host states of international organisations have indicated their reluctance to become parties. The very necessity for the Convention has been questioned, on the ground that much of its content is covered to a substantial extent by Headquarters Agreements, and by the conventions on privileges and immunities of the relevant international organisations, while the host states entertain serious reservations regarding the extent of the privileges and immunities granted to representatives, delegates, and observer missions, etc, which generally speaking are on a par with those accorded under the Vienna Convention of Diplomatic Relations of 1961. Some of the exemptions accorded by the Convention are regarded as unnecessarily excessive or generous.[5] Nevertheless, if the Convention fails to mature

5. Cf article on this Convention by J. G. Fennessy 70 AJIL (1976) 62–72.

into an instrument of general international law, this does not mean that, in practice, a special status is not to be accorded to such representatives commensurate with what may be duly required for the performance of their functions.

It may also be recalled that under article 1 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, adopted on 14 December 1973, and considered above in this chapter, 'representatives' or 'officials' of a state may in appropriate circumstances come under the ambit of protection of the provisions of this Convention.

Non-diplomatic agents and representatives

States may employ for various purposes agents, other than regularly accredited diplomatic envoys or consuls. These may be of a permanent character, such as Trade Commissioners[6] and officers of independent information or tourist services. No special rules of international law have developed with respect to such agents. Their rights and privileges may be the subject of specific bilateral arrangement, or simply a matter of courtesy. Normally, they may expect to be treated with consideration by receiving states.

6. Independent representatives unlike the commercial counsellors or commercial attachés of permanent diplomatic missions.

CHAPTER 16

The law and practice as to treaties

1. NATURE AND FUNCTIONS OF TREATIES

Prior to 1969 the law of treaties consisted for the most part of customary rules of international law. These rules were to a large extent codified and reformulated in the Vienna Convention on the Law of Treaties, concluded on 23 May 1969, and which entered into force on 27 January 1980 following the deposit of 35 ratifications or accessions as required by its article 84 (referred to below in the present chapter as 'the Vienna Convention'[1]). Apart from such codification, the Convention contained much that was new and that represented development of international law, while also a number of provisions resulted from the reconciliation of divergent views and practices. The Vienna Convention was not, however, intended as a complete code of treaty law, and in the preamble it is in fact affirmed that rules of customary international law will continue to govern questions not regulated by the provisions of the Convention. In 1971, it was declared by the United States Department of State that the Vienna Convention was 'recognised as the authoritative guide to current treaty law and practice'.[2]

A treaty may be defined, in accordance with the definition adopted in article 2 of the Convention, as an agreement whereby two or more states establish or seek to establish a relationship between themselves governed by international law. So long as an agreement between states is attested, provided that it is not one governed by domestic national law, and provided that it is intended to create a legal relationship,[3] any kind of instrument or document, or any oral exchange between states involving

1. In the footnotes to this chapter, the Convention will also be referred to as 'the Vienna Convention', while the abbreviation 'Draft Arts ILC' will denote the draft articles on the law of treaties drawn up by the International Law Commission, and contained in Chapter II of its *Report* on the Work of its *18th Session* in 1966 (these Draft Articles were used as a basic text by the Vienna Conference of 1968–1969 which drew up the Convention). For an analysis of the Vienna Convention and of its drafting history at the Conference, see R. D. Kearney, and R. E. Dalton 'The Treaty on Treaties' 64 AJIL (1970) 495–561. See also Sir Ian Sinclair *The Vienna Convention and the Law of Treaties* (2nd edn, 1984) and T. O. Elias *The Modern Law of Treaties* (1974).
2. Quoted in Henkin, Pugh, Schachter and Smit *International Law; Cases and Materials* (2nd edn, 1987) p 387.
3. This would exclude 'gentlemen's agreements' as to the distribution of seats on the United Nations Security Council, or as to the regions from which Judges of the International Court of Justice are elected; see p 5, above. Also excluded are political declarations, or the accords spelled out in communiqués of 'summit' Conferences.

undertakings may constitute a treaty, irrespective of the form or circumstances of its conclusion. Indeed, the term 'treaty' may be regarded as nomen generalissimum in international law,[4] and can include an agreement between international organisations inter se, or between an international organisation on the one hand, and a state or states on the other,[5] although it should be borne in mind that the provisions of the Vienna Convention do not apply to such other instruments, but are confined to treaties between states, concluded in a written form.[6]

At the same time, merely considering the treaty as an agreement without more is to over-simplify its functions and significance in the international domain. In point of fact, the treaty is the main instrument which the international community possesses for the purpose of initiating or developing international co-operation.[7] In national domestic law, the private citizen has a large variety of instruments from which to choose for executing some legal act or for attesting a transaction, for example, contracts, conveyances, leases, licences, settlements, acknowledgments, and so on, each specially adapted to the purpose in hand. In the international sphere, the treaty has to do duty for almost every kind of legal act,[8] or transaction, ranging from a mere bilateral bargain between states

4. A League of Nations mandate was a 'treaty'; *South West Africa Cases (preliminary objections)*, ICJ 1962, 319 at 330.
5. That subject is now covered by the Vienna Convention of 1986 on the Law of Treaties between States and International Organisations or between International Organisations. This Convention is based on a set of draft articles adopted by the International Law Commission, and although there is a close resemblance between its provisions and the provisions of the Vienna Convention on the Law of Treaties of 1969, a number of the situations covered are more varied than those applicable to states alone. Cf *The Work of the International Law Commission* (1980) pp 88–91.
6. Art 3 of the Vienna Convention provides nevertheless that the fact that the Convention does not apply to agreements between states and non-state entities, or between non-state entities themselves, or to unwritten agreements is not to affect: (a) the legal force of such agreements; (b) the application to them of any rules in the Convention to which they would be subject under international law apart from the Convention; and (c) the application of the Convention to the relations of states as between themselves under agreements to which non-state entities may also be parties.
7. For treatments of the subject of treaties, see Rosenne *The Law of Treaties* (1970); Kaye Holloway *Modern Trends in Treaty Law* (1967); Ingrid Detter *Essays on the Law of Treaties* (1967); T. O. Elias *The Modern Law of Treaties* (1974); Henkin, Pugh, Schachter and Smit *International Law; Cases and Materials* (2nd edn, 1987) ch 6 'The Law of Treaties' pp 386 et seq. The United Nations publication, *Laws and Practices concerning the Conclusion of Treaties* (1953) is a valuable compilation of state practice, with a bibliography. For a selected bibliography on the law of treaties, see the Vienna Conference document, A/CONF.39/4.
8. *Unilateral acts:* The difference between treaties proper and certain unilateral acts, commonly recognised in international practice, should be noted. As to unilateral acts, see Schwarzenberger *International Law* (3rd edn, 1957) Vol 1, pp 548–561, and Dr E. Suy *Les Actes juridiques unilatéraux en droit international public* (1962). These include acts of protest, notification, renunciation, acceptance, and recognition, and serve the following purposes, inter alia: (a) assent to obligations; (b) cognition of situations; (c) declaration of policy; (d) notice to preserve rights; (e) reservation, in respect to a

to such a fundamental measure as the multilateral constituent instrument of a major international organisation (eg the United Nations Charter of 1945).

In nearly all cases, the object of a treaty is to impose binding obligations on the states who are parties to it. Many writers on the theory of international law have put the question—why do treaties have such binding force? Perhaps the only answer to this query is that international law declares that duly made treaties create binding obligations for the states parties. Certain theorists, for example, Anzilotti, have rested the binding force of treaties on the Latin maxim pacta sunt servanda, or in other words that states are bound to carry out in good faith the obligations they have assumed by treaty.[9] Once a state has bound itself by agreement in a treaty, it is not entitled to withdraw from its obligations without the consent of the other states parties. In 1871, Great Britain, France, Italy, Prussia, Russia, Austria, and Turkey subscribed to the following Declaration made at a Conference in London:

> 'That the Powers recognise it an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a treaty nor modify the stipulations thereof, unless with the consent of the contracting parties by means of an amicable understanding.'

Treaties proper must be distinguished from a contract between a state and an alien citizen or corporation; although in ultimate analysis such a contract may raise questions of international concern between the contracting state and the state to which the citizen or corporation belongs, it is not a treaty, and is not subject to the rules of international law affecting treaties.[10]

One further point should be mentioned. The law and practice of treaties naturally include rules relating to agreements on international matters made by international institutions, whether inter se, or with states, or perhaps even with individuals. With the establishment of the United Nations and the 'specialised agencies' (see Chapter 20, below), the number of such transactions is rapidly increasing. The matter has now been dealt

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possible liability. According to the decision of the International Court of Justice in the *Nuclear Tests Case* (*Australia v France*) ICJ 1974, 253 at 267–70, a declaration may be made by way of unilateral act by a state concerning a legal or factual situation under such circumstances (eg publicly and erga omnes) as to have the effect of creating a legal obligation on that state (in that case an obligation on France's part to hold no further nuclear atmospheric tests in the South Pacific).

9. Cf Vienna Convention, 3rd recital of preamble (affirming that the principles of free consent, good faith, and pacta sunt servanda are 'universally recognised'), and art 26 (all treaties are binding on the parties thereto, and must be performed by them in good faith).

10. See *Anglo-Iranian Oil Company Case* (*Jurisdiction*) ICJ 1952, 93 at 112. As to what instruments are not treaties, see Myers, 51 AJIL (1957) 596–605. A League of Nations mandate is a treaty; *South West Africa Cases* (*preliminary objections*) ICJ 1962, 319, 330.

with to some extent in the Vienna Convention of 1986 on the Law of Treaties between States and International Organisations or between International Organisations.[11]

2. FORMS AND TERMINOLOGY

In regard to the forms and terminology of modern treaties the present-day practice is far from systematic, and suffers from a lack of uniformity. This is due to several factors, principally the survival of old diplomatic traditions and forms not easily adaptable to the modern international life and to a reluctance on the part of states to standardise treaty usage.

The principal forms in which treaties are concluded are as follows:

i. Heads of states form. In this case the treaty is drafted as an agreement between Sovereigns or heads of state (for example, the British Crown, the President of the United States) and the obligations are expressed to bind them as 'High Contracting Parties'.[12] This form is not now frequently used, and is reserved for special cases of conventions, for example, consular conventions, and the more solemn kinds of treaties.

ii. Inter-governmental form. The treaty is drafted as an agreement between governments. The difference between this and the previous form is not a matter of substance; usually, however, the inter-governmental form is employed for technical or non-political agreements. One notable exception to this rule was the Anglo-Japanese Treaty of Alliance 1902, which was expressed to be made between the Government of Great Britain and the Government of Japan as contracting parties.

iii. Inter-state form. The treaty is drafted expressly or impliedly as an agreement between states. The signatories are then most often referred to as 'the Parties' (see, eg, the North Atlantic Security Treaty of 4 April 1949).

iv. A treaty may be negotiated and signed as between ministers of the respective countries concerned, generally the respective Ministers of Foreign Affairs.[13]

v. A treaty may be an inter-departmental agreement, concluded between representatives of particular government departments, for example, between representatives of the respective Customs Administrations of the countries concerned.

11. See p 437, n 5 above.
12. As to this phrase, see *Philippson v Imperial Airways Ltd* [1939] AC 332, and Henkin, Pugh, Schachter and Smit *International Law; Cases and Materials* (2nd edn, 1987) p 443, para 4.
13. The United States–Soviet Union Maritime Agreement concluded at Washington on 14 October 1972, was signed by the American Secretary of Commerce (Mr Peterson) and the USSR Minister of Merchant Marine (Mr Guzhenko).

vi. A treaty may be made between the actual political heads of the countries concerned, for example, the Munich Agreement of September 1938, which was signed by the British and French Premiers, Mr Chamberlain and M Daladier, and by the German and Italian Leaders, Hitler and Mussolini, and the United States–Soviet Union Treaty on Anti-Ballistic Missile Systems signed at Moscow on 26 May 1972 by President Nixon and General Secretary Leonid Brezhnev.[14] A recent example is the Joint Declaration of 19 December 1984 on the reversion of Hong Kong to Chinese sovereignty; this was signed by the British Prime Minister (Mrs Thatcher) and the Premier of the People's Republic of China (Mr Zhao Ziyang).

The form in which treaties are concluded does not in any way affect their binding character. To take an extreme illustration of this principle it is not even necessary that a treaty be in writing. An oral declaration in the nature of a promise made by the Minister of Foreign Affairs of one country on behalf of his country to the Minister of Foreign Affairs of another and in a matter within his competence and authority may be as binding as a formal written treaty.[15] International law does not as yet require established forms for treaties, and here content and substance are of more importance.[16]

Treaties go under a variety of names, some of which indicate a difference in procedure or a greater or a lesser degree of formality.[17] Thus besides the term 'treaty' itself, the following titles have been given: (1) *Convention*. (2) *Protocol*. (3) *Agreement*. (4) *Arrangement*. (5) *Procès-Verbal*. (6) *Statute*. (7) *Declaration*. (8) *Modus Vivendi*. (9) *Exchange of Notes (or of Letters)*. (10) *Final Act*. (11) *General Act*. Each of these titles will be commented on in turn. As to the term 'treaty' itself, this is given as a rule to formal agreements relative to peace, alliance, or the cession of territory, or some other fundamental matter.

(1) Convention

This is the term ordinarily reserved for a proper formal instrument of a multilateral character. The term also includes the instruments adopted by the organs of international institutions, for example, by the International

14. To this list may be added military treaties made between opposing commanders-in-chief, eg, the Korean Armistice Agreement of 27 July 1953. Another special case is that of a *Concordat*, ie an agreement between the Pope and a head of state; see Oppenheim *International Law* (8th edn, 1955) Vol I, p 252, and Satow's *Guide to Diplomatic Practice* (4th edn, 1957) pp 343–344.
15. See the decision of the Permanent Court of International Justice in the *Eastern Greenland Case* (1933) Pub PCIJ Series A/B, No 53. See also the decision of the International Court of Justice in the *Nuclear Tests Case* (*Australia v France*) ICJ 1974, 253 at 267–270, noted at pp 437–438, n 8 above.
16. Cf Oppenheim *International Law* (8th edn, 1955) Vol 1, pp 898–900.
17. See Myers 51 AJIL (1957) 574–605.

Labour Conference and the Assembly of the International Civil Aviation Organisation.[18]

(2) Protocol

This signifies an agreement less formal than a treaty or convention proper and which is generally never in the heads of state form. The term covers the following instruments:

a. An instrument subsidiary to a convention, and drawn up by the same negotiators. Sometimes also called a Protocol of Signature, such a Protocol deals with ancillary matters such as the interpretation of particular clauses of the convention, any supplementary provisions of a minor character, formal clauses not inserted in the convention, or reservations by particular signatory states. Ratification of the convention will normally ipso facto involve ratification of the Protocol.
b. An ancillary instrument to a convention, but of an independent character and operation and subject to independent ratification, for example, the Hague Protocols of 1930 on Statelessness, signed at the same time as the Hague Convention of 1930 on the Conflict of Nationality Laws.
c. An altogether independent treaty.
d. A record of certain understandings arrived at, more often called a *Procès-Verbal*.

(3) Agreement

This is an instrument less formal than a treaty or convention proper, and generally not in heads of state form. It is usually applied to agreements of more limited scope and with fewer parties than the ordinary convention.[19] It is also employed for agreements of a technical or administrative character only, signed by the representatives of government departments, but not subject to ratification.

(4) Arrangement

The observations above as to Agreements apply here. It is more usually employed for a transaction of a provisional or temporary nature.

(5) Procès-Verbal[20]

This term originally denoted the summary of the proceedings and conclusions of a diplomatic conference, but is now used as well to mean the

18. It is still sometimes used for a bilateral treaty; note, eg, the Franco-Dutch General Convention on Social Security of January 1950.
19. *Partial Agreements*: The term 'Partial Agreement' is used for an Agreement prepared and concluded within the framework of the Council of Europe, but between only a limited number of interested states.
20. For a note on the generic practice of drawing up a Procès-Verbal as a legal record, or as a minute of proceedings, see note by Pierre Crabites in the 1927 Volume of the American Bar Association Journal p 439.

record of the terms of some agreement reached between the parties; for example, the Procès-Verbal signed at Zurich in 1892 by the representatives of Italy and Switzerland to record their understanding of the provisions of the Treaty of Commerce between them. It is also used to record an exchange or deposit of ratifications, or for an administrative agreement of a purely minor character, or to effect a minor alteration to a convention. It is generally not subject to ratification.

(6) Statute

a. A collection of constituent rules relating to the functioning of an international institution, for example, the Statute of the International Court of Justice 1945.
b. A collection of rules laid down by international agreement as to the functioning under international supervision of a particular entity, for example, the Statute of the Sanjak of Alexandretta 1937.[1]
c. An accessory instrument to a convention setting out certain regulations to be applied; for example, the Statute on Freedom of Transit annexed to the Convention on Freedom of Transit, Barcelona, 1921.

(7) Declaration

The term denotes:

a. A treaty proper, for example, the Declaration of Paris, 1856. A recent significant example is that of the Joint Declaration, 19 December 1984, of the United Kingdom and the People's Republic of China on the reversion of Hong Kong to Chinese Sovereignty in 1997; cl 7 of the Declaration declared that the two Governments 'agree to implement the preceding declarations and the Annexes to this Joint Declaration', thereby converting the documentation into a binding treaty arrangement.
b. An informal instrument appended to a treaty or convention interpreting or explaining the provisions of the latter.
c. An informal agreement with respect to a matter of minor importance.
d. A resolution by a diplomatic conference, enunciating some principle or desideratum for observance by all states; for example, the Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, adopted by the Vienna Conference of 1968–1969 on the Law of Treaties.[2]

1. See the decision of the Permanent Court of International Justice on the *Interpretation of the Statute of Memel Territory* (1932) Pub PCIJ Series A/B, No 49, p 300, which shows that this type of statute must be interpreted in the same way as a treaty.
2. In addition the term 'Declaration' can denote: (i) a unilateral declaration of intent by a state; eg, a declaration accepting the compulsory jurisdiction of the International Court of Justice under art 36, para 2 of its Statute; (ii) resolutions of the United Nations General Assembly, intended to affirm a significant principle; eg, Declaration on the Rights of the Child, adopted in 1959.

Declarations may or may not be subject to ratification.

(8) Modus vivendi

A modus vivendi is an instrument recording an international agreement of a temporary or provisional nature intended to be replaced by an arrangement of a more permanent and detailed character. It is usually made in a most informal way,[3] and never requires ratification.

(9) Exchange of notes (or of letters)

An exchange of notes is an informal method, very frequently adopted in recent years,[4] whereby states subscribe to certain understandings or recognise certain obligations as binding them. Sometimes the exchange of notes is effected through the diplomatic or military representatives of the states concerned. Ratification is not usually required, but will be necessary if this corresponds to the intention of the parties.

There have been also instances of multilateral exchanges of notes.

(10) Final Act

The Final Act is the title of the instrument which records the winding up of the proceedings of the Conference summoned to conclude a convention (see, for example, the Final Act of the Vienna Conference of 1968–1969 on the Law of Treaties and the Final Act of the Third United Nations Conference on the Law of the Sea, signed on 10 December 1982, at Montego Bay, Jamaica). It summarises the terms of reference of the Conference, and enumerates the states or heads of states represented, the delegates who took part in the discussions, and the instruments adopted by the Conference. It also sets out resolutions, declarations, and recommendations adopted by the Conference which were not incorporated as provisions of the convention. Sometimes it also contains interpretations of provisions in the formal instruments adopted by the Conference. The Final Act is signed but normally does not require ratification.

There have been several instances of a Final Act which was a real international treaty, for example, the Final Act of the Conference of Countries Exporting and Importing Wheat, signed in London in August 1933.

(11) General Act

A General Act is really a treaty but may be of a formal or informal character. The title was used by the League of Nations in the case of the General Act for the Pacific Settlement of International Disputes adopted

3. Eg, being made in the names of the negotiating plenipotentiaries only, or initialled without being signed.
4. See Oppenheim *International Law* (8th edn, 1955) Vol I, p 907, and cf art 13 of the Vienna Convention (exchange of instruments constituting a treaty—consent to be bound is expressed by such exchange), and Satow's *Guide to Diplomatic Practice* (4th edn, 1957) pp 340–342.

by the Assembly in 1928, of which a revised text was adopted by the United Nations General Assembly on 28 April 1949.[5]

3. PARTIES TO TREATIES

Generally only states which fulfil the requirements of statehood at international law, or international law, or international organisations can be parties to treaties.

Modern developments have made it almost impossible to apply this rule in all its strictness. Sometimes agreements of a technical character are made between the government Departments of different states, being signed by representatives of these departments. Sometimes also conventions will extend to the dependent territories of states.

As a general rule a treaty may not impose obligations or confer rights on third parties without their consent (Vienna Convention, art 34), and, indeed, many treaties expressly declare that they are to be binding only on the parties. This general principle, which is expressed in the Latin maxim *pacta tertiis nec nocent nec prosunt*, finds support in the practice of states, in the decisions of international tribunals,[6] and now in the provisions of the Vienna Convention (see arts 34–38). The exceptions to it are as follows:

a. Treaties under which the intention of the parties is to accord rights to third states, with their express or presumed assent, such as treaties effecting an international settlement or conferring an international status on ports, waterways, etc, or creating what is called an 'objective régime', may reach out to states non-parties. The best illustration of this is the Convention of 1856 between France, Great Britain, and Russia, concerning the non-fortification of the Aaland Islands. In 1920, after Sweden, a non-party, had insisted that the provisions of the Convention should be complied with, a League of Nations Committee of Jurists expressed the opinion that, though Sweden was a non-party and had no contractual rights, the Convention in fact created objective law, with benefits extend-

5. Other titles for treaty instruments, sometimes used, are: *Accord; Act* (French equivalent—*Acte*) for a treaty laying down general rules of international law or setting up an international organ; *Aide-Mémoire*; *Articles*, or *Articles of Agreement* (eg, Articles of Agreement of the International Monetary Fund, 1944); *Charter* and *Constitution* for the constituent instruments of international organisations; *Compact*, *Instrument*, *Memorandum*, *Memorandum of Agreement*, *Memorandum of Understanding*, and *Minute* or *Agreed Minutes* to record in a less formal manner some understanding or to deal with a minor procedural matter; *Note verbale; Pact*, to record some solemn obligation; and *Public Act* (similar to *Act*, above).

6. For discussion, see Ingrid Detter *Essays on the Law of Treaties* (1967) pp 100–118; Joseph Gold *The Fund and Non-Member States. Some Legal Effects* (IMF Pamphlet Series, No 7); Henkin, Pugh, Schachter and Smit *International Law; Cases and Materials* (2nd edn, 1987) pp 451–454; and commentary on arts 30–32, Draft Arts ILC (this includes some useful references to the case law).

ing beyond the circle of the contracting parties. As the Permanent Court of International Justice has pointed out,[7] the operation of such a third-party right is not lightly to be presumed and much depends on the circumstances of each case. But if the parties intended to confer rights on a state which was not a party, this intention may be decisive. The test is 'whether the states which have stipulated in favour of a third state meant to create an actual right which the latter has accepted as such'.

Article 36 of the Vienna Convention purports to declare a general principle covering the case of such treaties intended to confer third party rights. On the matter of third party assent, it lays down that such assent 'shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides'. This can hardly be described as a model of vintage drafting, while also obscurity surrounds article 37, paragraph 2, providing that such a third party right may not be revoked or modified by the parties 'if it is established that the right was intended not to be revocable or subject to modification without the consent of the third state'.

b. Multilateral treaties declaratory of established customary international law will obviously apply to non-parties, but the true position is that non-parties are bound not by the treaty but by the customary rules, although the precise formulation of the rules in the treaty may be of significance. Also treaties, bilateral or otherwise, may, by constituting elements in the formation of customary international law, come to bind third parties by virtue of the same principle (cf Vienna Convention, article 38).

c. Multilateral treaties creating new rules of international law may bind non-parties in the same way as do all rules of international law,[8] or be de facto applied by them as standard-setting instruments.

d. Certain multilateral conventions which are intended to have universal operation, may provide in terms for their application to non-parties. Thus, the Geneva Drugs Convention of 1931 now replaced by the Single Convention on Narcotic Drugs concluded at New York on 30 March 1961, as amended in 1975, enabled an international organ finally to determine the estimates for legitimate narcotic drug requirements of states, not parties to the Convention. Moreover, if a state non-party exceeded these estimates by obtaining or producing larger supplies of

7. *Case of the Free Zones of Upper Savoy and Gex* (1932) Pub PCIJ Series A/B, No 46 p 147. These observations were, however, of the nature of obiter dicta.
8. See above, p 42. Cf the Briand-Kellogg Pact of 1928 for the Outlawry of War which under the Nuremberg Judgment of 1946 was regarded as creating general law for signatories and non-signatories alike.

drugs, it became liable to an embargo on imports in the same way as states parties.[9]

e. Article 35 of the Vienna Convention declares that an obligation arises for a third state from a treaty provision, if the parties to the treaty intend the provision to be the means of establishing the obligation, and the third state expressly accepts the obligation in writing. It is questionable whether this is a real exception; an arguable point is that the treaty itself in conjunction with the written acceptance of the obligation may constitute a composite tripartite arrangement, and such an interpretation seems to be supported by article 37, paragraph 1, providing that the obligation may be revoked or modified only with the consent of the treaty parties and the third state 'unless it is established that they had otherwise agreed'.

In the light of the impact of the above-mentioned articles 34–38 of the Vienna Convention upon the admissibility of third party rights and obligations, the practical course for states not wishing, in any treaty concluded by them, to confer such rights or impose such obligations is to stipulate expressly against this result, while a non-party state, unwilling to be saddled with an external treaty obligation, should ensure that neither by its conduct nor by its declarations has it assented to the imposition of the obligation.

Assignment of treaty rights and obligations

It has been sometimes stated as a general proposition that treaty rights and obligations are not assignable. Thus in the *Report* of its *24th Session* in 1972, the International Law Commission declared that assignability was not an institution recognised in international law, and that 'in international law the rule seems clear that an agreement by a party to a treaty to assign either its obligations or its rights under the treaty cannot bind any other party to the treaty without the latter's consent'. Such a generalisation although largely correct cannot be accepted without certain reservations and qualifications.

First, treaty rights and obligations may be assignable by way of novation, ie by a fresh agreement between the states parties to the treaty and the assignee state non-party. Just as in the case of a novation of a contract in private law, all parties to the old treaty must be parties to the new treaty with the assignee, and it must clearly appear that the treaty rights and obligations of the assigning state are to be extinguished, these being replaced by rights and obligations acknowledged to be those of the

9. For the practice and procedure, see *Study of the Convention* published by the League of Nations (1937), Doc. C. 191, M.136, 1937, XI, pp 183–187. Cf also para 6 of art 2 of the United Nations Charter (enforcement of principles of Charter upon non-members), and art 32 (non-members attending Security Council discussions). Cf the position under certain provisions of the Articles of Agreement of the International Monetary Fund; Gold, op cit, pp 40–42.

assignee state. Moreover, there must similarly be clear evidence of an animus novandi, that is to say an intention to enter into a new arrangement for the replacement of the assigning state's rights and obligations by rights and obligations of the assignee state.

Second, a treaty may expressly or by necessary implication permit a state party to assign to a non-party state; rights and obligations under the treaty are then assignable, provided that any restrictions laid down in the treaty as to notice to be given to other states parties, and as to the categories of states to which such an assignment is permissible, are duly observed by the assigning state.

Third, there is semble no reason why a liquidated debt or claim arising under a treaty may not be assigned by the beneficiary state, unless such assignment be clearly prejudicial to the debtor state.

Of course many treaty rights and obligations are clearly unassignable; eg, if the treaty itself expressly prohibits any such assignment, or in the case of rights or obligations under treaties of a purely political nature, or under extradition treaties.

4. PRACTICE AS TO CONCLUSION AND ENTRY INTO FORCE OF TREATIES

The various steps in the creation of obligations by treaty are:

1. The accrediting of persons who conduct negotiations on behalf of the contracting states.
2. Negotiation and adoption.
3. Authentication, signature and exchange of instruments.
4. Ratification.
5. Accessions and adhesions.
6. Entry into force.
7. Registration and publication.
8. Application and enforcement.

We shall take each of these steps in turn.

(1) Accrediting of negotiators; full powers and credentials

Once a state has decided to commence negotiations with another state or other states for a particular treaty, the first step is to appoint representatives to conduct the negotiations. It is clearly important that each representative should be properly accredited to the other and be equipped with the necessary authority proving not merely his status as an official envoy, but also his power to attend at and to participate in the negotiations, as well as to conclude and sign the final treaty, although, strictly speaking, a power to sign is unnecessary for the stage of negotiations. In practice a representative of a state is provided with a very

formal instrument given either by the head of state or by the Minister of Foreign Affairs showing his authority in these various regards. This instrument is called the Full Powers or *Pleins Pouvoirs*.[10] According to British practice, two kinds of Full Powers are issued to plenipotentiaries:

a. If the treaty to be negotiated is in the heads of state form, special Full Powers are prepared signed by the Sovereign and sealed with the Great Seal.
b. If the treaty to be negotiated is in the inter-governmental or inter-state form, Government Full powers are issued, signed by the Secretary of State for Foreign Affairs and bearing his official seal.

Full Powers are not necessary if it appears from the practice of the negotiating states that their intention was to consider the person concerned as representing the sending state, and to dispense with Full Powers (Vienna Convention, article 7, paragraph 1 (b)). Nor are Full Powers normally issued for the signature of an agreement to be concluded between the departments of two governments. This is rather a manifestation of the principle that the negotiating states concerned may evince an intention to dispense with Full Powers. Such relaxation in the practice has been rendered necessary by the growing practice of concluding agreements between governments in a more simplified form.

When bilateral treaties are concluded, each representative exhibits his Full Powers to the other. Sometimes an actual exchange of these documents is effected, in other cases only an exchange of certified copies takes place. Practice in this matter is far from settled.

In the case of diplomatic Conferences summoned to conclude a multilateral instrument, a different procedure is followed. At the beginning of the proceedings a Committee of Full Powers is appointed to report generally to the Conference on the nature of the Full Powers which each representative at the Conference possesses.[11] The delegates hand in their Full Powers to the Secretary of the Committee of Full Powers. It may be, for instance, that Full Powers possessed by a particular delegate authorise him to negotiate but give him no power to sign. In that case the Committee reports the fact to the Conference and the delegate is specifically requested to obtain from his government the necessary authority to sign. In practice, Committees of Full Powers do not, as a rule, insist on the presentation

10. See, as to the whole subject, Jones *Full Powers and Ratification* (1946), and Sir Ian Sinclair, op cit, p 436, n 1 above, pp 29–33 et seq. Full powers can authorise the representative to negotiate, adopt, or authenticate a treaty text, or to express a state's consent to be bound by a treaty, or to accomplish any other act with respect to a treaty (Vienna Convention, art 2); possibly, for example, to terminate or denounce a treaty.
11. Under art 7, para 2 (c) of the Vienna Convention, representatives accredited to an international conference, or to an international organisation or one of its organs, for the purpose of adopting a treaty text in that conference, organisation, or organ, are considered as representing their sending state, without the necessity of producing Full Powers.

of formal instruments of Full Powers, but sometimes temporarily accept as credentials for less formal documents such as telegrams or letters emanating from Prime Ministers, Ministers for Foreign Affairs, or Permanent Delegates to the United Nations.[12]

In the case of the International Labour Conference, Full Powers are generally not given to the various government, employers' and workers' delegates of each state represented. As a rule credentials are issued by the government authorising delegates to the Conference merely to attend it, but of course giving them no power to agree to or to conclude or to sign conventions adopted by the Conference, since these conventions are not signed by delegates but merely authenticated by the signatures of the President of the Conference and the Director-General of the International Labour Office, and since the Conference adopts a text in a different manner from diplomatic Conferences.

Acts relating to the conclusion of a treaty performed by a person who has either not produced appropriate Full Powers or who, in the absence of Full Powers, has not been considered as representing his sending state, are without legal effect unless subsequently confirmed by that state (Vienna Convention, article 8).

(2) Negotiation and adoption

Negotiations concerning a treaty are conducted either through *Pourparlers* in the case of bilateral treaties or by a diplomatic Conference, the more usual procedure when a multilateral treaty is to be adopted. In both cases the delegates remain in touch with their governments, they have with them preliminary instructions which are not communicated to the other parties, and at any stage they may consult their governments and, if necessary, obtain fresh instructions. As a matter of general practice, before appending their signature to the final text of the treaty, delegates do obtain fresh instructions to sign the instrument whether with or without reservations.

The procedure at diplomatic Conferences runs to a standard pattern. Apart from Steering Committees, Legal and Drafting Committees are appointed at an early stage to receive and review the draft provisions proposed by the various delegations. Usually, too, the Conference appoints a prominent delegate to act as rapporteur in order to assist the Conference in its deliberations. Besides the formal public sessions of the Conference, many parleys are conducted in the 'corridors', in hotel rooms, and at special dinners and functions. The results of these appear in due course in the decisions reached by the Conference.

12. Heads of state, heads of government, and Ministers for Foreign Affairs, negotiating in person, do not need Full Powers, but are treated as representing their state for the purpose of performing all acts relating to the conclusion of a treaty, and the same applies to the head of a diplomatic mission for the purpose of adopting a treaty between the sending and the receiving state (Vienna Convention, art 7, para 2 (a) and (b)).

Article 9, paragraph 2 of the Vienna Convention provides that the adoption of a treaty text at an international conference is to take place by the vote of two-thirds of the states present and voting, unless by the same majority these states decide to apply a different rule.

It should be mentioned that in respect of certain subjects at least, the procedure of adoption of multilateral instruments by diplomatic Conferences has been replaced by the method of their adoption by the organs of international institutions; for example, by—among others—the United Nations General Assembly, the World Health Assembly, and the Assembly of the International Civil Aviation Organisation. The Conventions adopted by any such Assembly are opened for signature or acceptance by member or non-member states.

A novel procedure was adopted in regard to the Convention of 18 March 1965, for the Settlement of Investment Disputes between States and Nationals of Other States. The Executive Directors of the International Bank for Reconstruction and Development (World Bank) prepared the final text with the preliminary assistance of a Legal Committee representing 61 member governments of the Bank, and submitted it to governments for signature, subject to ratification, acceptance or approval. Provisions of a treaty may be adopted by consensus, as in the case of the United Nations Convention of 10 December 1982 on the Law of the Sea.

(3) Authentication, signature and exchange of instruments

When the final draft of the treaty has been agreed upon, the instrument is ready for signature. The text may be made public for a certain period before signature, as in the case of the North Atlantic Security Treaty, made public on 18 March 1949, and signed at Washington on 4 April 1949. The act of signature is usually a most formal matter, even in the case of bilateral treaties. As to multilateral conventions, signature is generally effected at a formal closing session (*séance de clôture*) in the course of which each delegate steps up to a table and signs on behalf of the head of state or government by whom he was appointed.

Unless there is an agreement to dispense with signature, this is essential for a treaty, principally because it serves to authenticate the text. The rule, as stated in article 10 of the Vienna Convention, is that the text may be authenticated by such procedure as is laid down in the treaty itself, or as is agreed to by the negotiating states, or in the absence of such agreed procedure, by signature, signature ad referendum,[13] initialling,[14] or by

13. As to which see p 452, n 18, below.

14. In which case, formal signature of an instrument in proper form, takes place later; eg, the Security Treaty between Australia, New Zealand, and the United States (ANZUS), initialled at Washington on 12 July 1951, and signed at San Francisco on 1 September 1951. Other cases of initialling occur where a representative, without authority to sign or acting generally without instructions, prefers not to sign a text. The initialling may indeed be intended to convey only that the negotiating plenipotentiaries have reached

incorporation in the Final Act[15] of the conference. In practice, also, the text of an instrument may be authenticated by the resolution of an international organisation. If a treaty is signed, it is important that the signature should be made by each of the delegates at the same time and place, and in the presence of each other. Furthermore, the date of the treaty is usually taken to be the date on which it was signed.

Sometimes not merely a delegate but a head of state will sign a treaty. Thus, in 1919, Woodrow Wilson, as President of the United States, signed the Treaty of Versailles, the preamble reciting that he acted 'in his own name and by his own proper authority', and President Nixon signed the United States–Soviet Union Treaty on the Limitation of Anti-Ballistic Missile Systems concluded at Moscow on 26 May 1972.

As mentioned above, the conventions adopted by the International Labour Conference are not signed by the delegates but are simply authenticated by the signatures of the President of the Conference and the Director-General of the International Labour Office. There have also been cases of instruments adopted by international organs, which are accepted or acceded to by states, without signature.

It is a common practice to open a convention for signature by certain states until a certain date after the date of the formal session of signature. Generally, this period does not exceed nine months. The object is to obtain as many parties to the convention as possible, but inasmuch as new signatories can only be allowed with the consent of the original signatories, a special clause to this effect must be inserted in the convention. A current practice is to open a convention for signature to all members of the United Nations and the specialised agencies, to all parties to the Statute of the International Court of Justice, and to any other state invited by the General Assembly. During the period mentioned, each state may sign at any time, but after the expiration of the period no further signatures are allowed and a non-signatory state desiring to become a party must accede or adhere to the convention but cannot ratify, inasmuch as it has not signed the instrument. In the case of the nuclear weapons test ban treaty of 1963 referred to above,[16] the instrument was opened for the signature of all states (see article III).

A further expedient has been, by the so-called *acceptance formula clause*, to open an instrument for an indefinite time for: (a) signature, without reservation as to acceptance; (b) signature subject to, and followed by later acceptance; and (c) acceptance simpliciter, leaving states free to become bound by any one of these three methods. The term

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agreement on a text, to be referred to their governments for consideration. In special circumstances, an initialling may be intended to operate as a signature; and cf Vienna Convention, art 12.

15. See p 443 above.
16. See p 175 above.

'acceptance', used in this clause, has crept into recent treaty terminology to denote the act of becoming a party to a treaty by adherence of any kind, in accordance with a state's municipal constitutional law.[17] The principal object of the clause was indeed to meet difficulties which might confront a potential state party under its municipal constitutional rules relative to treaty approval. Some states did not wish to use the term 'ratification', as this might imply an obligation to submit a treaty to the legislature for approval, or to go through some undesired constitutional procedure. In general, it may be said, the formula of 'signature subject to acceptance' is employed more particularly in the case of treaties of such a kind that normally ratification would be inappropriate or legally inconvenient for certain of the states that are signatories.

Effect of signature

The effect of signature of a treaty depends on whether or not the treaty is subject to ratification, acceptance, or approval.

If the treaty is subject to ratification, acceptance, or approval, signature means no more than that the delegates have agreed upon a text and are willing to accept it and refer it to their governments for such action as those governments may choose to take in regard to the acceptance or rejection of the treaty. It may also indicate an intention on the part of a government to make a fresh examination of the question dealt with by the treaty with a view to putting the treaty into force.[18] In the absence of an express term to that effect, there is no binding obligation on a signatory state to submit the treaty to the national legislature for action or otherwise. On the other hand, it is laid down in the Vienna Convention that, where a treaty is subject to ratification, acceptance, or approval, signatory states are under an obligation of good faith to refrain from acts calculated to defeat the object of the treaty until they have made their intention clear of not becoming parties (see article 18[19]).

Where a treaty is subject to ratification, acceptance or approval, it is sometimes expressly stipulated in the treaty or in some related exchange

17. On the meaning of 'acceptance', see Yuen-Li Liang 44 AJIL (1950) 342 et seq. It means in effect a decision to become definitively bound, in accordance with a state's municipal constitutional rules. As to the term 'approval', see commentary on art 11, Draft Arts ILC. Art 11 of the Vienna Convention provides that the consent of a state to be bound by treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or any other means, if so agreed.
18. The common practice of signature ad referendum generally denotes that the signatory state is unable at the time to accept definitively the negotiated terms expressed in the treaty. It has also been interpreted as indicating that the plenipotentiary concerned had no definite instructions to sign, and no time to consult his government. If signature ad referendum be confirmed by the state concerned, the result is a full signature of the treaty; cf Vienna Convention, art 12.
19. Under this article, also, a state which has expressed a consent to be bound by a treaty, is similarly obliged to refrain from such acts, pending the entry into force of the treaty, and provided that such entry into force is not unduly delayed.

of notes that, pending ratification, acceptance, or approval, the instrument is to operate on a provisional basis as from the date of signature, as with the Japan-Australia Trade Treaty of 6 July 1957.

If the treaty is not subject to ratification, acceptance, or approval, or is silent on this point, the better opinion is that, in the absence of contrary provision, the instrument is binding as from signature. The ground for this opinion is that it has become an almost invariable practice where a treaty is to be ratified, accepted, or approved, to insert a clause making provision to this effect, and where such provision is absent, the treaty may be presumed to operate on signature. Some treaties may by their express provisions operate from the date of signature, for example, the Anglo-Japanese Treaty of Alliance of 1902, and Agreements concluded within the framework of the Council of Europe, which are expressed to be signed without reservation in respect to ratification.[20] Also many treaties relating to minor or technical matters, generally bearing the titles 'Agreement', 'Arrangement' or 'Procès-Verbal', are simply signed but not ratified, and operate as from the date signature is appended.[1] Indeed, if there is direct evidence of intention to be bound by signature alone, as, for example, in the terms of the Full Powers, this is sufficient to bind the states concerned without more. Article 12 of the Vienna Convention upholds the autonomous right of the negotiating states so to agree, expressly or impliedly, that they shall be bound by signature alone,[2] or by initialling treated as equivalent to signature, or by signature ad referendum[3] confirmed by the sending state.

Exchange of instruments

Where a treaty is constituted by instruments exchanged by representatives of the parties, such exchange may result in the parties becoming bound by the treaty if: (a) the instruments provide that the exchange is to have this effect; or (b) it can otherwise be shown that the parties were agreed that this would be the effect of such exchange (Vienna Convention, article 13).

20. Sometimes, a treaty signed, without being subject to ratification, may provide for entry into force as from a date later than the date of signature; eg, the United States–Soviet Union Maritime Agreement signed at Washington on 4 October 1972, was expressed to enter into force on 1 January 1973.
1. As to treaties in simple form, see generally Smets *La Conclusion des Accords en Forme Simplifiée* (Brussels, 1969).
2. Para 1 of art 12 provides that the consent of a state to be bound by a treaty is expressed by the signature of its representative when: (a) the treaty provides that signature shall have that effect; (b) it is otherwise established that the negotiating states were agreed that signature should have that effect; or (c) the intention of the state to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.
3. See p 452, n 18 above.

Sealing

Treaties and conventions are nearly always sealed, although this is not the case with the less formal types of international agreements. Sealing appears now to have lost its prior importance, and is not necessary either for the authentication or the validity of the treaty. Formerly, with the exception of notarial attestation for special instruments, it was, however, the only recognised mode of authenticating the text of a treaty.

(4) Ratification

The next stage is that the delegates who signed the treaty or convention refer it back to their governments for approval, if such further act of confirmation be expressly or impliedly necessary.

In theory, ratification is the approval by the head of state or the government of the signature appended to the treaty by the duly appointed plenipotentiaries. In modern practice, however, it has come to possess more significance than a simple act of confirmation, being deemed to represent the formal declaration by a state of its consent to be bound by a treaty. So in article 2 of the Vienna Convention, ratification was defined to mean 'the international act ... whereby a state establishes on the international plane its consent to be bound by a treaty'. Consistently with this, ratification is not held to have retroactive effect, so as to make the treaty obligatory from the date of signature.

At one time, ratification was regarded as so necessary that without it a treaty should be deemed ineffective. This point was referred to by Lord Stowell:[4]

> 'According to the practice now prevailing, a subsequent ratification is essentially necessary; and a strong confirmation of the truth of this position is that there is hardly a modern treaty in which it is not expressly so stipulated; and therefore it is now to be presumed that the powers of plenipotentiaries are limited by the condition of a subsequent ratification. The ratification may be a form, but it is an essential form; *for the instrument, in point of legal efficacy, is imperfect without it.*'

According to Judge J. B. Moore in the *Mavrommatis Palestine Concessions Case*[5] the doctrine that treaties may be regarded as operative before they have been ratified is 'obsolete, and lingers only as an echo from the past'.[6]

These judicial observations apply with less force and cogency at the present time, when more than two-thirds of currently registered treaties

4. See *The Eliza Ann* (1813) 1 Dods 244 at 248.
5. (1924) Pub PCIJ, Series A, No 2, p 57.
6. In modern practice, the express or implied waiver of ratification is so common that, today, the more tenable view is that ratification is not required unless expressly stipulated. Ratification is, of course, unnecessary if the treaty provides that parties may be bound by signature only, or if the treaty be signed by heads of state in person; and see also art 12 of the Vienna Convention.

make no provision whatever for ratification, and when most treaties make it quite clear whether or not signature, or signature subject to ratification, acceptance, etc is the method chosen by the states concerned. The more acceptable view today is that it is purely a matter of the intention of the parties whether a treaty does or does not require ratification as a condition of its binding operation. Consistently, article 14 of the Vienna Convention provides that the consent of a state to be bound by a treaty is expressed by ratification if: (a) the treaty so expressly provides; or (b) the negotiating states otherwise agree that ratification is necessary; or (c) the treaty has been signed subject to ratification; or (d) an intention to sign subject to ratification appears from the Full Powers or was expressed during negotiations.

The practice of ratification rests on the following rational grounds:

a. States are entitled to have an opportunity of re-examining and reviewing instruments signed by their delegates before undertaking the obligations therein specified.
b. By reason of its sovereignty, a state is entitled to withdraw from participation in any treaty should it so desire.
c. Often a treaty calls for amendments or adjustments in municipal law. The period between signature and ratification enables states to pass the necessary legislation or obtain the necessary parliamentary approvals, so that they may thereupon proceed to ratification. This consideration is important in the case of federal states, where, if legislation to carry into effect treaty provisions falls within the powers of the member units of the federation, these may have to be consulted by the central government before it can ratify.
d. There is also the democratic principle that the government should consult public opinion either in Parliament or elsewhere as to whether a particular treaty should be confirmed.

Ratification and municipal constitutional law

The development of constitutional systems of government under which various organs other than the head of state are given a share in the treaty-making power has increased the importance of ratification.[7] At the same time in each country the procedure followed in this regard differs. For instance, often states will insist on parliamentary approval or confirmation of a treaty although the treaty expressly provides that it operates as from signature, whereas other states follow the provisions of the treaty and regard it as binding them without further steps being taken.

In British practice there is no rule of law requiring all treaties to be

7. See as to the subject of ratification, Jones *Full Powers and Ratification* (1946), Oppenheim *International Law* (8th edn, 1955) Vol I, pp 903–918, and the commentary by the International Law Commission in (1966) 2 *Yearbook of the International Law Commission* p 197.

approved by Parliament prior to ratification. It is customary to submit certain treaties to Parliament for approval,[8] for example, treaties of alliance, and ratification is only effected after this approval is given. Theoretically, however, the Crown is constitutionally free to ratify any treaty without the consent of Parliament. By reason of their subject matter some treaties necessitate the intervention of Parliament, for example, treaties derogating from the private rights of citizens, treaties imposing a charge on public funds, etc. In practice the text of every treaty subject to ratification is, as soon as possible after signature, laid before Parliament for a period of at least 21 days before ratification.[9]

Usually the ratification is an act executed only by the head of state, but in the case of treaties of lesser importance the government itself or the Minister for Foreign Affairs may effect the ratification. The document of ratification is generally a highly formal instrument, notwithstanding that international law neither prescribes nor insists on any degree of formality for such instruments.

Some treaties make signature subject to 'acceptance'[10] or 'approval'; these terms may then denote a simplified form of ratification. In fact, in article 2 of the Vienna Convention, 'acceptance' and 'approval' have received the same definition as ratification, while the provisions of article 14 as to when ratification imports consent to be bound by a treaty apply mutatis mutandis to acceptance and approval.

Absence of duty to ratify

The power of refusing ratification is deemed to be inherent in state sovereignty, and accordingly at international law there is neither a legal nor a moral duty to ratify a treaty. Furthermore, there is no obligation other than one of ordinary courtesy to convey to other states concerned a statement of the reasons for refusing to ratify.

In the case of multilateral 'law-making' treaties, including the conventions of the International Labour Organisation, the delays of states in ratifying or their unexpected withholding of ratifications have caused much concern and raised serious problems. The practical value of unratified conventions scarcely calls for comment. The principal causes of delay were acutely investigated and reported on by a Committee appointed by the League of Nations to consider the matter, and the conclusions reached by the Committee appear to be more or less valid in the context of present-day conditions, more than half a century later.[11] To borrow from the study made by this Committee the causes may be briefly summarised as:

8. See eg p 82 above.
9. See p 82, n 17 above.
10. See pp 451–452 above.
11. See *Report* of the Committee, League of Nations Doc. A.10, 1930, V.

a. the complicated machinery of modern government involving protracted administrative work before the decision to ratify or accede;
b. the absence of thorough preparatory work for treaties leading to defects which entitle states to withhold or delay ratification;
c. the shortage of parliamentary time in countries where constitutional practice requires submission of the instrument to the legislature;
d. serious difficulties disclosed by the instrument only after signature and calling for prolonged examination;
e. the necessity for new national legislation or the need for increased expenditure as a result;
f. lack of interest by states.

The International Labour Office has over a period of years developed a specialised technique for supervising the ratification of conventions and their application by municipal law, partly through a special Committee[12] which regularly deals with the matter, partly through the work of special sections of the Office. The delays in ratification may explain the recent tendency in treaty practice to dispense with any such requirement, and the growth in the practice of concluding arrangements between governments in more simplified forms.

Exchange or deposit of ratifications

Unless the treaty itself otherwise provides, an instrument of ratification has no effect in finally establishing consent to be bound by the treaty until the exchange or deposit, as the case may be, of ratifications, or at least until some notice of ratification is given to the other state or states concerned, or to the depositary of the treaty, is so agreed (see Vienna Convention, article 16). The same rule applies to an instrument of acceptance or approval.

In the case of bilateral treaties, ratifications are exchanged by the states parties concerned and each instrument is filed in the archives of the Treaty Department of each state's Foreign Office. Usually a Procès-Verbal is drawn up to record and certify the exchange.

The method of exchange is not appropriate for the ratification of multilateral treaties. Such a treaty usually provides for the deposit of all ratifications in a central headquarters such as the Foreign Office of the state where the treaty was signed. Before the Second World War, ratifications of conventions adopted under the auspices of the League of Nations were deposited in the League Secretariat, and the Secretary-General used to notify all states concerned of the receipt of ratifications. The Secretariat of the United Nations now carries out these chancery

12. The Committee of Experts on the Application of Conventions and Recommendations.

functions.[13] In the case of the nuclear weapons test ban treaty of 1963 referred to above,[14] the treaty was to be deposited in the archives of each of the three original signatories, the USSR, the USA, and the UK.

(5) Accessions and adhesions

In practice, when a state has not signed a treaty it can only accede or adhere to it. According to present practice, a non-signatory state may accede or adhere even before the treaty enters into force.[15] Some writers profess to make a distinction between accession and adhesion. Thus it is sometimes said that accession involves being party to the whole treaty by full and entire acceptance of all its provisions precluding reservations to any clause, whereas adhesion may be an acceptance of part only of the treaty. Again, it is maintained by some that accession involves participation in the treaty with the same status as the original signatories, whereas adhesion connotes merely approval of the principles of the treaty. These suggested distinctions are not generally supported by the practice of states.

The term 'accession' has also been applied to acceptance by a state of a treaty or convention after the prescribed number of ratifications for its entry into force have been deposited. Thus, assuming ten ratifications are necessary for entry into force, and ten have been deposited, subsequent ratifications or acceptances would be termed 'accessions'. The use of the term 'accession' in this sense is not generally approved. In fact, in article 2 of the Vienna Convention, 'accession' has received the same definition as 'ratification', while under article 15 accession imports consent to be bound much in the same way mutatis mutandis as under article 14 dealing with ratification (see p 455 above). Similarly, also unless the treaty otherwise provides, an instrument of accession does not finally establish such consent, until exchange or deposit, or notice thereof to the contracting states, or to the depositary, if so agreed (Vienna Convention, article 16).

No precise form is prescribed by international law for an instrument of accession, although generally it is in the same form as an instrument of ratification. A simple notification of intention to participate in a treaty may be sufficient.

Strictly speaking, states which have not signed a treaty can in theory accede only with the consent of all the states which are already parties

13. The Secretary-General has exercised depositary functions in respect to a large number of conventions, treaties, etc. For his practice as depositary, see *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements*, published in 1959. The Vienna Convention contains provisions setting out the functions of a depositary of a treaty (see arts 76–80), and cf in that connection the depositary functions cast upon the Secretary-General of the United Nations by art 319 of the United Nations Convention on the Law of the Sea of 10 December 1982.
14. See p 175 above.
15. See commentary on art 12, Draft Arts ILC.

to the instrument. The ratio of this rule is that the states parties are entitled to know and approve of all other parties to a treaty binding them, so that the equilibrium of rights and obligations created by the treaty is not disturbed. Usually, therefore, states accede to a treaty in virtue of a special accession clause, enabling them to accede after the final date for signature of the treaty, and prescribing the procedure for deposit of accessions.

(6) Entry into force

The entry into force of a treaty depends upon its provisions, or upon what the contracting states have otherwise agreed (Vienna Convention, article 24, paragraph 1). As already mentioned, many treaties become operative on the date of their signature, but where ratification, acceptance, or approval is necessary, the general rule of international law is that the treaty concerned comes into force only after the exchange or deposit of ratifications, acceptances, or approvals by all the states signatories. Multilateral treaties now usually make entry into force dependent on the deposit of a prescribed number of ratifications and like consents to be bound—usually from six to about thirty-five.[16] Sometimes, however, a precise date for entry into force is fixed without regard to the number of ratifications received. Sometimes, also, the treaty is to come into operation only on the happening of a certain event; for example, even after its ratification by all states signatories, the Locarno Treaty of Mutual Guarantee of 1925 was to enter into force only after Germany's admission to the League of Nations (see article 10).

As to states parties desiring to ratify, accept, approve, or accede, it is usually provided that the treaty or convention will enter into force for each such state on the date of deposit of the appropriate instrument of consent to be bound, or within a fixed time—usually 90 days—after such deposit.[17] Sometimes also it is specified that the treaty will not be operative for a particular state until after the necessary legislation has been passed by it.

Another frequently adopted expedient is that of the provisional or de facto application of a treaty, or a part thereof, pending its de jure entry into force, as for example in the case of the Protocol of 8 February 1965, adding a new Part IV to the General Agreement on Tariffs and Trade (GATT) of 30 October 1947. This method of provisional application is

16. In the case of the Genocide Convention adopted by the United Nations General Assembly in 1948, the prescribed number was 20. In the absence of such a prescribed number of consents to be bound, a treaty enters into force only when all negotiating states are shown to have consented to be bound (Vienna Convention, art 24, para 2).
17. In principle, the act of deposit is sufficient without notification to other states concerned; cf commentary on art 13, Draft Arts ILC.

recognised by the Vienna Convention (see article 25).[18] The provisional application of a bilateral treaty is terminated if one party to the treaty informs the other of its intention not to become a party thereto.[19] In the case of the provisional application of a treaty, the obligation not to defeat the object and purpose of the treaty prior to its entry into force (see article 18 of the Vienna Convention) imports a duty to refrain from taking steps that would render impossible the future application of the treaty if and when it is ratified.[20]

(7) Registration and publication

The United Nations Charter 1945, provides by article 102 that all treaties and international agreements entered into by members of the United Nations Organisation shall 'as soon as possible' be registered with the Secretariat of the Organisation and be published by it. No party to a treaty or agreement not registered in this way 'may invoke that treaty or agreement before any organ of the United Nations'. This means that a state party to such an unregistered treaty or agreement cannot rely upon it in proceedings before the International Court of Justice or in meetings of the General Assembly or Security Council. Apparently the provision does not invalidate an unregistered treaty, or prevent such a treaty from being invoked before bodies or courts other than United Nations organs.

The object of article 102 was to prevent the practice of secret agreements between states, and to make it possible for the people of democratic states to repudiate such treaties when publicly disclosed.

It has been suggested that article 102 gives member states a discretion in deciding whether or not to register treaties, and, by electing not to register, voluntarily to incur the penalty of unenforceability of the instrument, but the better view, adopted by the Sixth Committee (Legal) of the United Nations General Assembly in 1947, is that it imposes a binding obligation to effect registration.

The following points may be briefly referred to:

a. In the interim period pending registration 'as soon as possible', the unregistered treaty can be relied upon before the Court or any United Nations organ, subject presumably to an undertaking to register.
b. Notwithstanding a failure to register 'as soon as possible', the lapse can be cured by subsequent registration.
c. Although, in principle, the functions of the Secretariat are purely ministerial, and it cannot reject an illegal treaty for registration, semble, an instrument obviously on the face of it, neither a treaty nor an international agreement, ought to be refused registration.

18. Other precedents for the provisional application of treaties, including maritime boundary treaties and international commodity arrangements, are referred to in 74 AJIL (1980) 931–932.
19. Para 2 of art 25 of the Vienna Convention.
20. 74 AJIL (1980) 933.

d. Under a direction from the General Assembly, the Secretariat receives for filing and recording (as distinct from registration and publication), instruments entered into before the date of coming into force of the Charter, and instruments transmitted by non-member states,[1] but in substance this process amounts to voluntary registration.
e. Certified statements as to changes in the parties, or the terms, scope, and application of registered treaties, are also received for registration.[1]

The duty of publication[2] by the Secretariat is performed by publishing the instruments concerned in the *United Nations Treaty Series* (cf the former *League of Nations Treaty Series*), together with lists from time to time of ratifications, acceptances, etc. A failure to publish does not render the instrument unenforceable (see terms of article 102).

Instruments that have been lodged with the Secretariat, include treaties or agreements made by or with the specialised agencies of the United Nations, trusteeship agreements, declarations accepting compulsory jurisdiction of the International Court of Justice, and even unilateral engagements of an international character, such as the Egyptian Declaration of 24 April 1957, regarding the future use of the Suez Canal.

Certain international organisations other than the United Nations have their own system of registration, etc, for treaties related to such organisations.

(8) **Application and enforcement**

The final stage of the treaty-making process is the actual incorporation, where necessary, of the treaty provisions in the municipal law of the states parties, and the application by such states of these provisions, and, also, any required administration and supervision by international organs. As already mentioned above, there may be, if the treaty so provides or the parties so agree, a provisional application of the treaty pending its entry into force. In practice, vigilant 'follow-up' work is needed to ensure that states parties do actually apply instruments binding them. Some international organs (for example, the International Labour Organisation with its Committee of Experts on the Application of Conventions and Recommendations, and its tripartite Conference Committee on the application of these instruments) have special Committees to discharge this function, work which may be supplemented by the sending of official

1. See the Regulations adopted by the General Assembly on 14 December 1946, as amended on 12 December 1950; these Regulations enable a certificate of registration of a treaty to be issued, and also permit the filing and recording (as distinct from registration) of agreements entered into by the United Nations and its specialised agencies (for text, see *Report* of the International Law Commission for 1962, Annex, pp 37–38). Art 80 of the Vienna Convention provides that treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.
2. Under municipal law, treaties are often required to be promulgated or published officially.

visiting missions. One innovation has been the drawing up of special model codes for the legislative application of conventions.

Structure of conventions and treaties

The principal parts of conventions or treaties in their usual order are:

1. The preamble or preliminary recitals, setting out the names of the parties (heads of state, states, or governments), the purpose for which the instrument was concluded, the 'resolve' of the parties to enter into it, and the names and designations of the plenipotentiaries.
2. The substantive clauses, sometimes known as the 'dispositive provisions'.
3. The formal (or final) clauses or 'clauses protocolaires'[3] dealing with technical or formal points or matters relative to the application or entry into force of the instrument. The usual such clauses relate separately to the following: (i) the date of the instrument; (ii) the mode of acceptance (signature, accession, etc); (iii) opening of the instrument for signature; (iv) entry into force; (v) duration; (vi) denunciation by the parties; (vii) application by municipal legislation; (viii) application to territories, etc;[4] (ix) languages in which the instrument is drafted; (x) settlement of disputes; (xi) amendment or revision; (xii) registration; (xiii) custody of, and the functions of the depositary of the original instrument.
4. Formal attestation or acknowledgment of signature, and of the date and place of signature.
5. Signature by the plenipotentiaries.

5. RESERVATIONS[5]

A state may often wish to sign or ratify or otherwise consent to be bound by a treaty in such manner that certain provisions of the treaty do not bind it, or apply to it subject to modifications. This can be effected principally by: (1) express provision in the treaty itself; or (2) by agreement between the contracting states; or (3) by a reservation duly made.

Where a state wishes to become bound by a specific part only of a

3. See *Handbook of Final Clauses*, prepared by Legal Department of United Nations Secretariat, August 1951, and the document on standard final clauses, A/CONF.39/L. 1, prepared for the Vienna Conference of 1968–1969 on the Law of Treaties. In 1962, the Committee of Ministers of the Council of Europe adopted texts of model final clauses of Agreements and conventions.
4. For the British practice regarding this so-called 'Territories' Clause, see the United Nations publication, *Laws and Practices Concerning the Conclusion of Treaties* (1953) pp 122–124. In the light of the subject matter and purpose of a treaty, a Territories Clause may be dispensed with; see, eg, the Convention of 1962 on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages.
5. See commentary on arts 16–20, Draft Arts ILC for the 1966 views of the International Law Commission upon the subject.

treaty, its consent to be so bound can be effective only if this is permitted by the treaty or is otherwise agreed to by the contracting states; and where a treaty allows a contracting state to become partially bound by exercising a choice between differing provisions, the consent must make clear to which provisions it relates (Vienna Convention, article 17).

A reservation is defined in article 2 of the Vienna Convention as a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state. For example, a reservation may stipulate for exemption from one or more provisions of the treaty, or the modification of these provisions or of their effect, or the interpretation of the provisions in a particular way. A declaration by a signatory as to how the treaty will be applied, which does not vary the obligations of that signatory vis-à-vis other signatories, is not however a true reservation.[6]

Like the power of withholding ratification, the privilege of making reservations is regarded as an incident of the sovereignty and perfect equality of states. It is felt preferable that states which cannot accept certain provisions should participate in the treaty, even if only in a limited way, rather than that they should be excluded altogether from participation. Where there is agreement on the basic provisions of a convention, a certain diversity of obligation in respect of the less important provisions is regarded, subject to some limits, as permissible.

The effect of a reservation is to modify the provisions of the treaty to which the reservation relates, to the extent of that reservation, in the reserving state's relations with other parties, but leaving intact the treaty relations of non-reserving states inter se. This applies also to relations between a reserving state and a state objecting to the reservation, provided it has not opposed the entry into force of the treaty between it and the reserving state (Vienna Convention, article 21).

In principle, a state making a reservation can do so only with the consent of other contracting states; otherwise the whole object of the treaty might be impaired. Sometimes, the intention to make reservations is announced at some session or other of the Conference and the res-

6. See *Power Authority of State of New York v Federal Power Commission* 247 F (2d) 538 (1957). In 1959, the Assembly of the Inter-Governmental Maritime Consultative Organisation (IMCO), renamed with effect from May 1982 as the International Maritime Organisation (IMO), agreed that India's acceptance of the Convention of 6 March 1948, establishing the Organisation, subject to her right to adopt measures aimed solely at developing her maritime industries, was not a reservation but a declaration of policy. A similar problem arose in IMCO concerning Cuba's declaration in 1964 and 1965 in connection with Cuba's acceptance of the same Convention, that it would not consider itself bound by the Convention if IMCO made recommendations at variance with Cuban domestic law. There was a division of opinion among IMCO members whether the Cuban declaration was a statement of policy, or an impermissible reservation.

ervations are then and there agreed to by the delegates, but in principle such an 'embryo' reservation should be confirmed in the subsequent signature, ratification, acceptance, approval or accession,[7] or at least in the formal minutes of the proceedings. If a state wishes to ratify or otherwise consent to be bound, subject to a reservation, it should inquire of the other states parties whether they assent to the reservation; and in certain circumstances the assent may be inferred.[8] The practice of making reservations has, however, become so common that states have tended to ignore the requirement of obtaining the assent of other states parties; thus reservations have frequently been made at the time of signature without being announced during the deliberations of the Conference, or at the time of ratification or accession without previous consultation or inquiry of states which have signed or ratified the treaty.

The form in which reservations have been recorded has varied; sometimes they are inserted in a Protocol of Signature annexed to the convention concerned, sometimes in the Final Act, sometimes they are specified in an exchange of notes, sometimes they are made by transcription under or above the signature for the state making them, and sometimes merely by declaration at the Conference recorded in the minutes (or *Procès-Verbal*) of the proceedings.

The Vienna Convention (see article 23) laid it down that reservations, and acceptance of, or objections to reservations, must be in writing and be duly communicated; also reservations made when signing a treaty subject to ratification, acceptance, or approval, must be confirmed in the subsequent instrument of ratification, acceptance, or approval.

Because of the special character of the Conventions of the International Labour Organisation, it is recognised that these instruments are incapable of being ratified subject to reservations. They may, however, in certain circumstances be conditionally ratified.[9]

It is generally accepted that reservations expressly or impliedly prohibited by the terms of a treaty are inadmissible,[10] while those expressly or impliedly authorised, are effective. The Vienna Convention provides that a reservation 'expressly' authorised by a treaty does not require

7. Cf Vienna Convention, art 23, para 2.
8. For the purposes of art 20 of the Vienna Convention, a contracting state is deemed to have accepted a reservation, if it has raised no objection within twelve months of notification, or by the date of its expression of consent to be bound by the treaty, whichever is later (see art 20, para 5).
9. Also, a state ratifying a Labour Convention may couple its ratification with explanations of any limitations upon the manner in which it intends to execute the convention; and the provisions in the convention may be drawn so as to allow certain states some latitude in fulfilling their obligations; see *International Labour Code*, 1951 Vol I (1952), pp xcix–ci and *Conventions and Recommendations Adopted by the IL Conference 1919–1966* (1966) p viii.
10. Eg, if the treaty authorises specified reservations which do not include the reservation in question.

subsequent assent by other contracting states, unless the treaty so provides (article 20, paragraph 1).

With the increase in the number of multilateral conventions the unchecked practice of making reservations to multilateral instruments has created a disturbing problem. Obviously an excessive number of reservations tends to throw out of gear the operation of a multilateral treaty. Also, states are never sure that later, when ratifying, another state may not make a reservation which originally would have deterred them from entering into the treaty. Various solutions of the difficulty have been adopted from time to time, in order to secure a maximum number of parties to multilateral conventions. According to the solution resorted to by the Inter-American states, a signatory desiring to make reservations is not precluded from becoming a party to the convention, but the convention is deemed not to be in force between such 'reserving' state and any state objecting to the reservations.

If a limited number of negotiating states be involved, and it is clear from the object and purpose of the treaty that the application of the treaty in its entirety is an essential condition of the consent of each state to be bound by the treaty, the admissibility of the reservations will depend upon unanimous acceptance (Vienna Convention, article 20, paragraph 2).

Also, if the reservation is one to the constituent instrument of an international organisation, prima facie, acceptance by a competent organ of that institution is required, unless there is express provision to the contrary (Vienna Convention, article 20, paragraph 3).

Where these rules do not apply, a reserving state may become party to the treaty vis-à-vis a state accepting the reservation, while an objection to the reservation does not preclude the treaty coming into force between the objecting and the reserving state, unless the objecting state opposes this (Vienna Convention, article 20, paragraph 4).

In 1949–1950, the problem of maximum participation in a multilateral treaty arose in relation to objections taken to reservations of parties to the Genocide Convention 1948. The questions of: (a) the admissibility and (b) the effect of such reservations, and (c) the rights of states to object thereto, were submitted for Advisory Opinion to the International Court of Justice. The Court's views[11] (being the views of the majority) may be summarised as follows:

(*a*) *Admissibility of reservations.* Reservations are allowable notwithstanding the absence of a provision in the convention permitting them. There need not necessarily be an express assent by other interested states to the making of reservations; such assent may be by implication, particularly in the case of certain multilateral conventions, where clauses

11. See *Advisory Opinion on Reservations to the Genocide Convention* ICJ 1951, 15 et seq.

are adopted by majority vote of the drafting Conference. If a reservation is *compatible*,[12] objectively, with the nature and purpose of a convention, a state making it may be regarded as fully a party to the instrument; this test of compatibility is consistent with the principle that the convention should have as universal an operation as possible, and with the principle of 'integrity' of the instrument.

(*b*) *Effect of reservations.* The same test of compatibility applies; therefore, if a state rightly objects that a reservation is incompatible with the convention, it may legitimately consider that the reserving state is not a party thereto.

(*c*) *States entitled to object to reservations.* A state entitled to sign or accept a convention, but which has not done so, cannot validly object to reservations; nor is an objection by a signatory state, which has not ratified the instrument, effective until its ratification.

This Advisory Opinion could not be said to have solved all problems in this connection; it appeared to confer too extensive a liberty to make reservations. The objective test of compatibility also bore hardly on signatory states which might not have signed the instrument if they had subjectively realised that certain drastic reservations would be made by other states. It was significant that the International Law Commission which at the request of the General Assembly also studied the problem in 1951[13] did not follow the Court in the test of compatibility, but stressed the necessity for consent to reservations, adopting the view that it might be more important to maintain the 'integrity' of a convention than to aim at its widest possible acceptance. The Commission also suggested the insertion of express provisions in conventions dealing with the admissibility or non-admissibility of reservations, and the effect of such reservations when made.[14] However, the General Assembly in its Resolution of 12 January 1952, recommended to states that they should be guided by the Court's Advisory Opinion. Also, the general increase in the number of new states since 1952 emphasised the desirability of maximum participation by such potential parties to conventions, and therefore of greater permissibility of reservations, as against a possible risk that the

12. According to the International Law Commission, where the treaty concerned is the constitution of an international organisation, this question of compatibility should be determined by a competent organ of that organisation; see *Report* for 1962, p 21 and cf Vienna Convention, art 20, para 3.
13. *Report* of the Commission on the work of its *3rd Session* (1951) pp 5–7.
14. As to the attitude to be adopted by the United Nations Secretariat as depositary of reservations made by states, see the General Assembly Resolution of 12 January 1952, to the effect that a depositary should in regard to future multilateral conventions maintain a neutral attitude, merely passing on documents to the interested states, leaving them to decide whether or not reservations are objectionable. This has been reaffirmed in a later Resolution of 7 December 1959, showing that the directive applies to conventions concluded before, as well as after 12 January 1952.

integrity of a convention may be impaired by a more liberal admission of reservations.[15] In the Vienna Convention (see article 19), the test of compatibility with the object and purpose of the treaty was adopted, subject naturally to the principles otherwise governing admissibility of reservations, thus constituting in effect a régime of freedom to formulate reservations, with certain exceptions to such freedom.

Various expedients have been tried in order to overcome the complications caused by reservations. One method has at least the merit of stark simplicity, that is, to provide by a special clause in the Convention that no reservations at all are permissible (see, eg, article 39 of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome on 7 October 1952), or none with regard to certain important provisions (eg no reservations were allowed as to articles 1 to 3 of the Geneva Convention on the Continental Shelf of 29 April 1958). Other formulae allow special kinds of reservations only. These methods of providing for inadmissibility of reservations are recognised by the Vienna Convention (see article 19) as valid and effective. One clause now regularly inserted in conventions permits states to make reservations excluding the application of the convention to their territories. Another method, sometimes known as the 'authorisation' method, is to specify certain admissible reservations in a clause in the convention, and to limit the choice of any parties desiring to make reservations to these.

Probably the best method in the circumstances is to insert a clause providing that the states parties to the convention are to be consulted as to all reservations intended to be made, with presumed acceptance in default of reply within a fixed period; but if objections are lodged against the reservations, the state desiring to make them should be given the alternative of ratifying or not ratifying without reservations.[16]

A practice has developed in recent years of ratifications or accessions, subject to statements by the ratifying or acceding governments of their special understandings or intepretations of the treaty concerned or particular provisions of it, or subject to some declaration as to some matter in the treaty, or as to its domestic implementation by them. There is a very thin line between such understandings, on the one hand, and

15. This is a consideration which influenced the International Law Commission in 1966; see commentary on arts 16–17, Draft Arts ILC. The Commission preferred a 'flexible' system under which it is for each state individually to decide whether to accept a reservation and treat the reserving state as a party, and did not adopt the 'collegiate' system (reserving state a party only if a given proportion of other states concerned accept the reservation).

16. Note the method used in the Convention concerning Customs Facilities for Touring, of 4 June 1954 (see art 20; reservations made before signing of Final Act admissible if accepted by a majority of the Conference, and recorded in the Final Act, while reservations made after signing of Final Act not admitted if objected to by one-third of the parties to the Convention).

reservations, on the other hand. Semble, if an understanding thus declared operates clearly to vary or to exclude an obligation under the treaty in question lying on the ratifying or acceding state, it should be considered as a reservation.[17]

It should be observed, however, that no method can be safely followed in the future by contracting states wishing to make, accept, or object to reservations, without carefully considering the impact upon the particular treaty concerned of the provisions as to reservations in articles 19–23 of the Vienna Convention, referred to above.

6. REVISION AND AMENDMENT OF TREATIES

The terms 'revision', 'amendment', and 'modification' are in current use to denote the process of altering the provisions of treaties. In the Vienna Convention (see Part IV) the words 'amendment' and 'modification' were used.

The term 'revision' frequently carries some political significance, being employed by states claiming that unjust or unequal treaties should be reviewed, and final dispositions of territory or frontiers adjusted. Such a re-examination, directed to the peaceful change of situations formerly accepted as final, may be a 'revision' in the widest sense of the term, but is not treaty revision as ordinarily understood, that is to say the alteration of treaty provisions imposing continuing obligations. For this reason, the words 'amendment' and 'modification' are perhaps preferable to denote such an alteration.

The most usual way of ensuring reconciliation of the provisions of treaties with changing conditions is through amendment clauses inserted in the treaties themselves, thus giving effect to the basic principle that a treaty may be amended by agreement of the parties (cf Vienna Convention, article 39). These clauses attempt to fix beforehand the particularities of the procedure for amendment. They generally provide that such procedure may be initiated at the request of one or a number of parties, or through some authoritative international organ. Then, usually, the move for amendment must be endorsed by the states parties to the convention and is carried out by a Conference of these states at a subsequent time. According to the clauses, the exact time at which the amendment may be made falls broadly speaking into four classes: (a) at any time; (b) after the expiration of a prescribed period dating from the entry into force of the convention; (c) periodically, at the expiration of prescribed periods; and (d) combinations of one or more of the preceding classes. Generally, unanimity is required for the adoption of the amendments, but the trend since 1945 is towards allowing amendment of multilateral conventions by a majority, if this is in the interests of the international community.

17. See also pp 462–465 above.

The main difficulty has been in getting the parties to proceed promptly to ratification of the proposed modification. This has led to the use of certain expedients to obviate ratification. Sometimes the changes are treated as being of minor importance only, and are effected not under the procedure of the amendment clause, but by means of a *Procès-Verbal*, Protocol, or other administrative instrument opened to signature, which is regarded as sufficient.[18]

Sometimes, it is expressly provided in the convention that certain amendments may be carried out upon the recommendation of an international organ, which may or may not require endorsement—purely here an administrative act—of the contracting parties.

The Vienna Convention purports in articles 40–41 to lay down certain principles governing the procedure and effect of the amendment of multilateral treaties, such as the principles that proposals for amendment must be notified to all contracting states, that all such states are entitled to participate in the process of amendment, that every state entitled to adhere to the original treaty has a right to become party to the amending treaty, and that two or more parties may, subject to the provisions of the treaty itself and subject to giving due notice to other parties, conclude an agreement to modify the treaty as between themselves alone.

United Nations Charter and the re-examination of treaties

Article 14 of the United Nations Charter authorises the General Assembly 'to recommend measures for the peaceful adjustment of any situation ... which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations' (ie, the provisions of articles 1 and 2). It has been maintained that article 14 empowers the General Assembly to initiate a process of peaceful change through the readjustment of final settlements (eg, of territory or frontiers) under treaties, since the word 'situations' is capable of referring to 'situations' both under executed and under executory treaties. However, even assuming this to be the correct interpretation of article 14, the General Assembly could not take any binding action in the direction of the peaceful change of treaty settlements,[19] as its powers in this connection are recommendatory only.

18. See, for example, the *Procès-Verbal* of June 1936, for amending art 5 of the Geneva Drugs Convention 1931. In some cases, non-ratifying parties have been given an option of withdrawing from the convention, or are treated as non-parties if they do not ratify within a specific time.

19. Apart from this provision in the Charter, it is claimed that the Vienna Convention provides, to some extent, machinery of peaceful change of situations under treaties, inasmuch as it enables states, which maintain that a treaty has been invalidated by jus cogens or terminated by fundamental change of circumstances, to have disputes concerning such claims of invalidity or termination of a treaty submitted to a process of judicial settlement, arbitration, or conciliation (see pp 472, 474–475 below).

7. INCONSISTENT TREATIES AND VALIDITY AND DURATION OF TREATIES

Inconsistent treaties

Some difficulty surrounds the question of the applicability of a treaty which is inconsistent with the terms of an earlier treaty.[20] The matter resolves itself essentially into one of reconciliation of the obligations of the parties to both treaties.

If one of the treaties concerned specifies that it is subject to, or that it is not to be considered as incompatible with an earlier or subsequent treaty, the provisions of this latter treaty should prevail (Vienna Convention, article 30, paragraph 2). Otherwise, as between parties to an earlier treaty who are also parties to the later treaty, the earlier treaty governs only to the extent that it is compatible with the later treaty (article 30, paragraph 3). Moreover, as between a state party to both treaties and a state party to only one of the treaties, the treaty to which both states are parties is to apply.

It may be also that different considerations are applicable to bilateral treaties or treaty-contracts, on the one hand, and to multilateral conventions, on the other hand. In the case of conflicting multilateral conventions, if the earlier convention does not in definite terms prohibit the later convention, and if such later instrument is in the interests of the international community,[1] or prescribes general rules of conduct, the later convention should not be held inapplicable, notwithstanding that it derogates substantially from the earlier convention and that it has not been entered into by all of the parties to the other instrument. Where the point turns on the construction of ambiguous treaty provisions, there is a presumption of non-conflict. Much may depend on whether there is or is not real incompatibility, and on the intention of the parties to both instruments; the two instruments may validly co-exist, if one may be regarded as an annex to the other, facultatively imposing wider or stricter obligations at the election of the parties concerned (as in the case of the co-existence of the Geneva Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs, and the penal repression provisions of the Single Narcotic Drugs Convention signed at New York on 30 March 1961 as amended in 1975).

The United Nations Charter contains its own rule of inconsistency; under article 103, the obligations of member states under the Charter are to prevail in the event of conflict between the Charter and their obligations

20. Cf for general discussion, Aufricht 37 Cornell LQ (1952) 684 et seq, and see also commentary on art 26, Draft Arts ILC.

1. This proviso is in accordance with the practice after the last war, as to the revision or modification of pre-war conventions, so far as this was effected without the consent of all parties to the earlier instruments.

under other international instruments. Charter obligations are paramount.

The validity of treaties[2]

The invalidation of treaties on grounds analogous to those applicable in the domestic law of contracts, namely, contractual incapacity, absence of consent due to mistake or fraud or duress, and illegality, has been the subject of much doctrinal speculation, some of which is both inconclusive and controversial. However, a significant attempt to formulate general principles in this area, capable of obtaining general acceptance, was made in the Vienna Convention which dealt with the following six grounds of invalidity of treaties: (1) treaty-making incapacity; (2) error; (3) fraud; (4) corruption; (5) coercion; (6) conflict with a norm of jus cogens.

(1) *Treaty-making incapacity.* Under article 46 of the Vienna Convention a state may not rely on the fact that its representative exceeded his treaty-making powers under internal law unless such excess of authority was:

a. 'manifest', ie objectively evident to the other negotiating state acting in accordance with normal practice and in good faith; and
b. concerned a rule of internal law of fundamental importance.

Article 47 deals with the case where a representative's authority is subject to a specific limitation in point of fact; excess of authority is then not sufficient to invalidate that representative's action unless the specific restriction on his authority was notified beforehand to the other negotiating states.

(2) *Error.* A state is entitled to rely upon error as a ground of invalidity of a treaty if the error be one as to a fact or situation assumed by the state concerned to exist at the time when the treaty was concluded, and which formed an essential basis of its consent to the treaty.[3] This ground is not open to the state if it contributed to the error by its own conduct, or the circumstances were such as to put it upon notice of a possible error, or the error related only to the wording of the text of the treaty (Vienna Convention, article 48). The last-mentioned article 48 makes no explicit reference to an error of law, although it speaks of an error relating to a 'situation', as well as a 'fact'. Nor is any distinction drawn expressly

2. See Oppenheim *International Law* (8th edn, 1955) Vol I, pp 887–893, and Henkin, Pugh, Schachter and Smit *International Law; Cases and Materials* (2nd edn, 1987) pp 458–475.
3. Almost all the recorded instances of attempts to invalidate treaties on the ground of error have concerned geographical errors, and most of them related to errors in maps. On the latter point, see (1966) 2 *Year Book of the International Law Commission* pp 243 et seq. As to error in respect to treaties generally, see T. O. Elias *The Modern Law of Treaties* (1974) pp 154–161. Cf 64 AJIL (1970) 529–530.

between unilateral error, on the one hand, and common or mutual error, on the other hand.

(3) *Fraud.* This ground of invalidity applies where the state relying upon it has been induced by the fraudulent conduct of another negotiating state to enter into the treaty (Vienna Convention, article 49). Fraud itself is not defined in the Vienna Convention, and there is a recognised lack of international precedents as to what constitutes fraudulent conduct.

(4) *Corruption.* If a state's consent to a treaty has been procured through the corruption of its representative, directly or indirectly by another negotiating state, the former state is entitled to claim that the treaty is invalid (Vienna Convention, article 50).

(5) *Coercion.* This ground is satisfied if: (a) a state's consent to a treaty has been procured by the coercion of its representative through acts or threats directed against him; (b) the conclusion of the treaty has been procured by the threat or use of force in violation of the principles of international law embodied in the United Nations Charter[4] (see Vienna Convention, articles 51–52).[5] Quaere, whether, as claimed by some states, the word 'force' used in the United Nations Charter is capable of denoting economic or political pressure,[6] which was alleged to be characteristic of 'neo-colonialism'. By way of answer to this claim, it has been objected that it would open a wide door for the invalidation of treaties concluded at arm's length.

(6) *Conflict with a norm of jus cogens.* A treaty is void if at the time of its conclusion it conflicts with a norm of jus cogens.[7]

The right to invalidate a treaty on the ground of treaty-making incapacity, error, fraud, or corruption is lost if subsequently the state expressly agrees that the treaty is valid or remains in force, or its conduct is such as to lead to the inference of acquiescence in the continued validity or application of the treaty (Vienna Convention, article 45).

A state relying upon the above-mentioned grounds of invalidity must notify other parties of its claim so that the procedure laid down in articles 65–66 may be followed. This may ultimately lead to a process of judicial settlement, arbitration, or conciliation with reference to any disputed claim.

4. See, in particular, art 2, para 4 of the Charter.
5. In the *Fisheries Jurisdiction Cases* ICJ 1974, 3, 175, the International Court of Justice held that art 52 of the Vienna Convention could not be relied upon to show duress where the circumstances revealed that the challenged treaty had been freely negotiated by the parties on the basis of perfect equality and freedom of decision on both sides.
6. See Henkin, Pugh, Schachter and Smit *International Law; Cases and Materials* (2nd edn, 1987) pp 464–466.
7. As to jus cogens, see pp 55–57 above.

Termination of treaties

Treaties may be terminated by: (1) operation of law; or (2) act or acts of the states parties.

(1) Termination of treaties by operation of law

(i) Extinction of either party to a bilateral treaty, or of the entire subject-matter of a treaty may discharge the instrument.[8] In connection with the former case, questions of state succession may arise where the territory of the extinguished state comes under the sovereignty of another state.[9]

(ii) Treaties may cease to operate upon the outbreak of war between the parties. In some instances suspension of the treaty, rather than actual termination, may be the result of such a war. The matter is discussed in a later chapter.[10]

(iii) Aside from the case of provisions for the protection of the human person contained in treaties of a humanitarian character, a material breach of a bilateral treaty by one party entitles the other to terminate the treaty or to suspend its operation, while a material breach of a multilateral treaty by one pa y may, according to the circumstances, result in its termination as between all parties, or as between the defaulting state and other parties, or as between the defaulting state and a party specially affected by the breach (Vienna Convention, article 60).[11]

(iv) Impossibility of performance of the treaty due to the permanent disappearance or destruction of an object indispensable for the execution of the treaty will result in termination, but not if the impossibility is due to a breach of the treaty itself, or of any other international obligation committed by the party which seeks to terminate the treaty upon the ground of such impossibility (Vienna Convention, article 61). Case (i) above may be regarded in a sense as an instance of impossibility of performance.

(v) Treaties may be discharged as a result of what is traditionally known as the *rebus sic stantibus* doctrine, although there is a current trend to dispense with the appellation '*rebus sic stantibus*'. According to this doctrine, a fundamental change in the state of facts which existed at the time the treaty was concluded may be invoked as a ground for terminating the treaty, or for withdrawing from it. It is also put that there is necessarily

8. See Hackworth *Digest of International Law* (1940–1943) Vol V, pp 297 et seq.
9. See pp 325–331 above.
10. See Chapter 18, pp 544–546 below.
11. See Advisory Opinion of 21 June 1971, of the International Court of Justice on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, where the Court upheld the view that the failure of South Africa to comply with its obligation, as Mandatory Power in South West Africa, to submit to supervision by United Nations organs, resulted in the termination of its mandate, and therefore of its authority to administer the Territory; see ICJ 1971, 16 at 47–48.

an implied term or clause in the treaty—the *clausula rebus sic stantibus*—to the effect that the treaty obligations subsist only so long as the essential circumstances remain unchanged. However, in its *Report* on the work of its *1966 (18th) Session*, the International Law Commission rejected the theory of an implied term, preferring to base the doctrine of fundamental change upon grounds of equity and justice, and even to discard the words '*rebus sic stantibus*' as carrying undesired implications.

The matter is now dealt with in article 62 of the Vienna Convention under the heading 'fundamental change of circumstances'. The text of this article is as follows:

> '*Article 62*
> *Fundamental change of circumstances*
> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
> a. the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
> b. the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
> 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
> a. if the treaty establishes a boundary; or
> b. if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
> 3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.'

It will be observed that paragraph 1 of this article of the Vienna Convention involves a combination of two tests, the subjective test, on the one hand, that the parties to the treaty should have envisaged the continuance of the circumstances surrounding its conclusion as a decisive motivating factor in entering into the treaty,[12] and the objective test, on the other hand, that the change must be so fundamental as radically to alter the obligations of the parties.[13] The article excludes reliance on mere onerousness of treaty obligations, felt by a party at a period later than

12. A view favoured by the Permanent Court of International Justice in the *Case of the Free Zones of Upper Savoy and Gex* (1932) Pub PCIJ Series A/B, No 46.
13. In the *Fisheries Jurisdiction Cases* ICJ 1974, 3, the International Court of Justice recognised that article 62 of the Vienna Convention constituted a codification of existing customary international law, but held that the case did not reveal any fundamental change of circumstances within the meaning of article 62; rather the situation of controversy between the parties was exactly of the character contemplated in the relevant treaty provision.

the date of the conclusion of the treaty, as of itself sufficient ground for a claim to be released from the treaty. There is no requirement that the fundamental change must occur only after a certain period of time, and this is in accordance with the current realities of international affairs, as cataclysmic changes can occur on the international scene even within months. Also the article does not preclude parties to a treaty from expressly stipulating what fundamental changes will entitle them to withdraw from the treaty.[14]

A party invoking this ground of fundamental change must give notice under articles 65–66 of the Vienna Convention to the other parties of its claim that the treaty has been terminated, stating its reasons, so as to set in motion the procedure laid down in these articles. In other words, there is no automatic termination of a treaty as a result of the doctrine of fundamental change.

(vi) A treaty specifically concluded for a fixed period of time terminates upon the expiration of that period.

(vii) If successive denunciations (see below as to the meaning of 'denunciation') of a multilateral treaty reduce the number of states parties to less than the number prescribed by the treaty for its entry into force, the treaty may cease to operate if this be expressly or impliedly provided; otherwise a multilateral treaty does not terminate by reason only of the fact that the number of parties falls below the number necessary for its coming into force (Vienna Convention, article 55).

(viii) Article 64 of the Vienna Convention provides that if a new peremptory norm of jus cogens[15] emerges, any existing treaty which is in conflict with that norm becomes void and terminates. This is a controversial provision, and in the light of the opposition that it encountered at the Vienna Conference of 1968–1969 which drew up the Convention, cannot be said to contain a universally accepted rule of international law. One major objection to it is that no treaty can be safely entered into without being exposed to the hazard of subsequent invalidation by reason of some unanticipated future development in the higher governing principles of international law. Nor, semble, can parties by any provision now made in a treaty, agree to exclude such a hazard, for such an exclusionary provision would presumably itself be invalidated by the force of jus cogens.

(2) Termination of treaties by act or acts of the parties

(i) The termination of a treaty or the withdrawal of a party may take place in conformity with the provisions of the treaty, or at any time by

14. See, eg, article V of the Nuclear Weapons Test Ban Treaty of 1963 referred to, p 175 above, entitling a party to withdraw if it decides that 'extraordinary events' related to the subject-matter of the Treaty have jeopardised its 'supreme interests'.
15. See pp 55–57 above.

consent of all the parties after consultation inter se (Vienna Convention, article 54). A treaty will also be considered as terminated if all the parties to it conclude a subsequent treaty relating to the same subject matter, and it appears from this later treaty or otherwise that the parties intended that the matter be governed by that treaty, or that the provisions of this later treaty are so far incompatible with those of the earlier treaty that the two instruments cannot be applied at the same time (Vienna Convention, article 59). Semble, it is also possible that, by their conduct if not by their declarations, States parties could be considered as being ad idem in regarding the treaty as being no longer in force, or as being obsolete.

(ii) When a state party wishes to withdraw from a treaty, it usually does so by notice of termination, or by act of denunciation. The term 'denunciation' denotes the notification by a state to other states parties that it intends to withdraw from the treaty. Ordinarily, the treaty itself provides for denunciation, or the state concerned may, with the consent of other parties, have reserved a right of denunciation. In the absence of such provision, denunciation and withdrawal are not admissible, and all the other parties must as a rule consent to the denunciation or withdrawal, unless it is established that the parties intended to admit the possibility of denunciation or withdrawal, or a right of denunciation or withdrawal may be implied by the nature of the treaty (Vienna Convention, article 56). The practical difficulty with regard to denunciation or withdrawal by a state is the possibility of embarrassment to the other states parties, wishing to continue their participation in the treaty, by disturbing the general equilibrium of rights and obligations which originally made the treaty possible.

In practice, multilateral conventions contain a special clause allowing denunciation after the expiration of a certain period of time from the date of entry into force of the convention. This clause may provide that a denunciation will not take effect until a certain time (eg one year) after it is given.

Suspension of operation of treaties

The operation of a treaty may be suspended, in regard to either all parties or a particular party: (a) in conformity with the provisions of the treaty;[16] or (b) at any time by the consent of all parties after consultation (Vienna Convention, article 57); or (c) through the conclusion of a subsequent treaty, if this be the intention of the parties (Vienna Convention, article 59). Subject to the provisions of the treaty concerned, and its object and purpose, two or more parties to a multilateral treaty may suspend its operation as between themselves alone (article 58).

16. In regard to the suspension clauses in International Labour Conventions, see E. A. Landy *The Effectiveness of International Supervision. Thirty Years of ILO Experience* (1966) pp 147–150.

8. INTERPRETATION OF TREATIES

Agencies of interpretation

These agencies of interpretation may be courts such as: (a) the International Court of Justice; and (b) the Court of Justice of the three European Communities,[17] which has jurisdiction to interpret the Treaties of 18 April 1951 and 25 March 1957 establishing these three Communities. Treaties are also interpreted by international technical organs, such as the International Labour Office[18] and the various organs of the United Nations,[19] and by the Executive Directors and Board of Governors of the International Monetary Fund.[20] Other expedients may be resorted to; for example, reference of the point to an ad hoc Committee of Jurists.

Instruments of interpretation

Diplomatic Conferences which adopt a treaty are only too conscious themselves of drafting defects. To avoid any difficulties arising out of the construction of particular clauses or Articles, an instrument such as a Protocol, or *Procès-Verbal*, or Final Act is often annexed to the main convention containing a detailed interpretation or explanation of the doubtful provisions.

Multilingual treaties

Treaties are often drafted in two or more languages. Multilateral conventions, including conventions of the International Labour Organisation, are usually concluded in two languages—English and French—and it is provided that both texts shall be authoritative.[1] In some instances it is declared that the English or French text as the case may be shall prevail in the event of a conflict. The United Nations Charter 1945 was drawn up in five languages—Chinese, French, Russian, English, and Spanish—

17. The European Coal and Steel Community, the European Economic Community (Common Market), and the European Atomic Energy Community (EURATOM).
18. For the Office's interpretations of Labour Conventions, see *The International Labour Code, 1951* (1952), and the ILO *Official Bulletin*.
19. It was recognised at the San Francisco Conference which in 1945 drew up the United Nations Charter that each organ of the United Nations would have largely to do its own interpretative work; see *Report* of the Rapporteur of Committee IV/2 of the Conference, pp 7–8.
20. Arts XVIII, XXI (d) and XXXI of the Articles of Agreement of the International Monetary Fund; see Hexner 53 AJIL (1959) 341–370; Sir Joseph Gold *Interpretation by the Fund* IMF Pamphlet Series, No 11 (1968), and the same author's *The Fund Agreement in the Courts* (1982) Vol II, pp 7–8.

1. This means that, generally speaking, the two texts may be read in conjunction in order to ascertain the meaning of the convention. Also, in the event of discrepancies, prima facie, the least extensive interpretation should be adopted. Where the treaty is silent as to the equivalence of the two texts, possibly greater weight should be given to the language in which the instrument was first drawn up. But see now Vienna Convention, art 33.

and it was provided by article 111 that the five texts were to be 'equally authentic'.[2]

Article 33 of the Vienna Convention provides:

a. that if a treaty is authenticated in several languages, the text is equally authoritative in each language unless the treaty provides or the parties agree that one particular text is to prevail in case of divergence;
b. that the terms of the treaty are presumed to have the same meaning in each text;
c. that a construction is to be given which best reconciles the texts having regard to the object and purpose of the treaty.

General principles of treaty interpretation

Numerous rules, canons, and principles have been laid down by international tribunals, and by writers to be used as tools in the interpretation of treaties, and to serve as useful, indeed necessary, guidelines to the drafting of treaty provisions. These rules, canons, and principles, although sometimes invested with the sanctity of dogmas, are not absolute formulae, but are in every sense relative—relative to the particular text, and to the particular problem that is in question. To some extent, like presumptions in the law of evidence, their weight may depend on the cumulative application of several, rather than the application of one singly.

The following is a summary of the more general principles:[3]

(*1*) *Grammatical interpretation, and the intention of the parties.* Words and phrases are in the first instance to be construed according to their plain and natural meaning.[4] However, if the grammatical interpretation

2. For rules of interpretation of multi-lingual treaties, see art 29, Draft Arts ILC, commentary, pp 108–113, and cf Henkin, Pugh, Schachter and Smit *International Law; Cases and Materials* (2nd edn, 1987) pp 450–451.
3. For references to the various authorities on which the above summary is based, see Hudson *The Permanent Court of International Justice, 1920–1942* pp 640–661; Hyde 24 AJIL (1930) 1–19; J. F. Hogg 'International Court: Rules of Treaty Interpretation' (1958–1959) 43 Minnesota LR pp 369–441, and Vol 44 (1959–1960) pp 5–73; I. Tammelo *Treaty Interpretation and Practical Reason* (1967); commentary on Draft Arts ILC, arts 27–29; and Jiménez de Aréchaga in (1978) 159 Hague Recueil des Cours pp 42–48.
4. This principle was reaffirmed by the International Court of Justice in the *Advisory Opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation* ICJ 1960, 150 (words 'largest ship-owning nations' in art 28 of the convention of 6 March 1948, establishing the Organisation, held to mean the countries with the largest figures of registered tonnage, without regard to questions of the real national ownership). Under the Vienna Convention, art 31, para 1, a treaty is to be interpreted in good faith 'in accordance with the ordinary meaning to be given' to its terms in their context and in the light of its object and purpose; this provision was relied upon by the European Court of Human Rights in February 1975, in the *Golder Case*, in reaching its conclusion that art 6(1) of the European Convention of 1950 for the Protection of Human Rights and Fundamental Freedoms, guaranteeing a right to a fair and public hearing in civil and criminal proceedings, involved a right of access to the courts, and therefore of access to legal advice.

would result in an absurdity, or in marked inconsistency with other portions of the treaty, or would clearly go beyond the intention of the parties, it should not be adopted.

The related rules concerning the intention of the parties proceed from the capital principle that it is to the intention of the parties at the time the instrument was concluded, and in particular the meaning attached by them to words and phrases at the time, that primary regard must be paid. Hence, it is legitimate to consider what was the 'purpose' or 'plan' of the parties in negotiating the treaty.[5] Nor should a treaty be interpreted so as to restrict unduly the rights intended to be protected by it.[6] What must be ascertained is the *ostensible* intention of the parties, as disclosed in the four corners of the actual text; only in exceptional circumstances is it permissible to investigate other material to discover this intention. Moreover, a special meaning must be given to a particular term, if it is established that the parties so intended (Vienna Convention, article 31, paragraph 4).

(2) *Object and context of treaty.* If particular words and phrases in a treaty are doubtful, their construction should be governed by the general object of the treaty, and by the context;[7] article 31, paragraph 1 of the Vienna Convention lays down that a treaty should be interpreted by reference to its 'object' and 'purpose'. The context need not necessarily be the whole of the treaty, but the particular portion in which the doubtful word or phrase occurs. However, for the purposes of interpretation, it can

5. The International Court of Justice had recourse to the 'purpose' of the treaty in the *Case Concerning the Applications of the Convention of 1902 Governing the Guardianship of Infants* (Netherlands-Sweden) ICJ 1958, 55. Cf the speech of Lord Diplock in *R v Henn* [1980] 2 All ER 166, pointing out that the Court of Justice of the European Communities seeks, in its interpretation of treaties, to give effect to the 'spirit' rather than to the letter of treaties and the reference by the International Court of Justice in *Nicaragua v United States* ICJ 1986, 14 at 270 et seq, to the 'whole spirit' of the Treaty of 1956 between the United States and Nicaragua of Friendship, Commerce and Navigation, as being undermined by certain United States activities. See also *James Buchanan & Co v Babco Forwarding and Shipping (UK)* [1978] AC 141 at 160 for an affirmation of the principle of the 'broad' interpretation of treaties. In the *Beagle Channel Arbitration* of 1977, Wetter *The International Arbitral Process* (1979) Vol I, p 276, the Court of Arbitration had regard to the 'spirit and intention' of an 1881 treaty between the parties, Argentina and Chile (see para 18 of the award).
6. See *Kolovrat v Oregon* 366 US 187 (1961).
7. In its decision of 16 May 1980, in the case of *The Government of Belgium v The Government of the Federal Republic of Germany* (1980) 19 International Legal Materials 1357–1408, the Arbitral Tribunal for the London Agreement of 1953 on German External Debts had regard to the 'context' in accordance with the provisions of art 31 of the Vienna Convention. In *Nicaragua v United States* ICJ 1986, 14 at 270–282, the International Court of Justice held that the mining by the United States of Nicaraguan ports and other activities were in breach of the Treaty of 1956 of Friendship, Commerce and Navigation between the two countries in that these served to deprive the Treaty of its 'object and purpose'.

include the preamble[8] and annexes to the treaty, and related agreements or instruments made in connection with the conclusion of the treaty (Vienna Convention, article 31, paragraph 2).

(*3*) *Reasonableness and consistency.* Treaties should, it is held, be given an interpretation in which the reasonable meaning of words and phrases is preferred, and in which a consistent meaning is given to different portions of the instrument. In accordance with the principle of consistency, treaties should be interpreted in the light of existing international law.[9] Also applying both reasonableness and consistency, since it is to be assumed that states entering into a treaty are as a rule unwilling to limit their sovereignty save in the most express terms, ambiguous provisions should be given a meaning which is the least restrictive upon a party's sovereignty, or which casts the least onerous obligations; and in the event of a conflict between a general and a special provision in a treaty, the special provisions should control the general (cf the municipal law maxim, *lex specialis derogat generali*), unless the general stipulation is clearly intended to be overriding.

(*4*) *The principle of effectiveness.* This principle, particularly stressed by the Permanent Court of International Justice, requires that the treaty should be given an interpretation which 'on the whole' will render the treaty 'most effective and useful',[10] in other words, enabling the provisions of the treaty to work and to have their appropriate effects. This principle is of particular importance in the construction of multilateral conventions, containing the constituent rules of international organisations.[11] It does

8. In the *Beagle Channel Arbitration* of 1977, Wetter *The International Arbitral Process* (1979) Vol I, p 276, the Court of Arbitration had regard to the preamble of an 1881 Boundary Treaty between the parties (see paras 18 et seq of the award).
9. A principle relied upon by the European Court of Human Rights in February 1975 in the *Golder Case*, in interpreting the European Convention of 1950 for the Protection of Human Rights and Fundamental Freedoms.
10. See commentary on art 27, Draft Arts ILC. The International Court of Justice seems to have applied this principle in the case of the *United States Diplomatic and Consular Staff in Tehran* ICJ 1980, 3, when it ruled that the fact that a dispute was before the Security Council did not prevent the Court from exercising jurisdiction (contrary to the prohibition to this effect on the General Assembly), inasmuch as under article 36, paragraph 3 of the United Nations Charter, the Security Council in making recommendations to settle disputes was to have regard to the fact that legal disputes should as a general rule be referred to the Court (see paragraph 40 of the Court's judgment). A major rationale of the principle of effectiveness is, to quote Sir Joseph Gold (*Finance and Development* September 1981, p 39), that 'the drafters of multilateral treaties, particularly if they are to regulate some new sphere of international relations, do not, and indeed cannot, foresee the issues that will arise in practice'.
11. See, eg, *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations* ICJ 1949, 174 for an illustration of the application of this principle, in order to enable an international organisation to function more effectively.

not, however, warrant an interpretation which works a revision of a convention, or any result contrary to the letter and spirit of treaties.[12]

(5) *Recourse to extrinsic material.* Normally, the interpreting tribunal is limited to the context of the treaty. However, the following may be resorted to, provided that clear words are not thereby contradicted:

a. Past history, and historical usages relevant to the treaty.
b. Preparatory work (*travaux préparatoires*), ie preliminary drafts, records of Conference discussions, draft amendments, etc. This may be taken into account where normal interpretation leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable (Vienna Convention, article 32), and more particularly to confirm a conclusion reached by normal methods of construction.[13] Merely abortive proposals, or secret or confidential negotiatory documents will not be so used, nor will preparatory work be given weight against a state party which did not participate in the negotiations, unless the records of such preparatory work have been published.
c. Interpretative Protocols, Resolutions, and Committee Reports, setting out agreed interpretations. Unless these form part of the treaty,[14] they will be treated as on the same level as preparatory work, subject to certain of such documents having greater weight than others, according to circumstances.
d. A subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions (Vienna Convention, article 31, paragraph 3).
e. Subsequent conduct of the states parties, as evidencing the intention of the parties and their conception of the treaty, although a subsequent interpretation adopted by them is binding only if it can be regarded as a new supplementary agreement. Under the Vienna Convention (see article 31, paragraph 3), a subsequent practice in the application of the treaty, establishing agreement regarding its interpretation, may be assimilated to such a supplementary agreement.
f. Other treaties, in pari materia, in case of doubt.

12. See *South West Africa Cases, 2nd Phase* ICJ 1966, 6 at 48.
13. Ibid, at 43–44. Note the speeches of members of the House of Lords in *Fothergill v Monarch Air Lines* [1981] AC 251, in which varying views were expressed about the use of *travaux préparatoires* by an English court in interpreting a treaty, eg that recourse to these should be with caution, that they should be used as an aid only, and that, in any event, they should be public and accessible. See also for the views on the subject of the Justices of the High Court of Australia, their judgments in the *Commonwealth of Australia v Tasmania* (1983) 158 CLR 1.
14. Cf the *Ambatielos Case* ICJ 1952, 28 et seq, showing that a declaration subscribed to by parties who contemporaneously drew up a treaty, may be part of such treaty; and that the conduct of the parties may be looked to in this connection to ascertain whether the declaration was so regarded.

Disputes clause

It is now a general practice to insert a disputes clause in multilateral conventions providing for methods of settling disputes arising as to the interpretation or application of the convention. The alternative methods usually specified are negotiation between the parties, arbitration, conciliation, or judicial settlement.

PART 5

Disputes and hostile relations (including war, armed conflicts and neutrality)

CHAPTER 17

International disputes

1. GENERAL

The expression 'international disputes' covers not only disputes between states as such, but also other cases that have come within the ambit of international regulation, being certain categories of disputes between states on the one hand, and individuals, bodies corporate, and non-state entities on the other.[1]

The present chapter is, however, mainly concerned with disputes between states, and these may range from minor differences scarcely causing a ripple on the international surface to the other extreme of situations of prolonged friction and tension between countries, attaining such a pitch as to menace peace and security.

To settle international disputes as early as possible, and in a manner fair and just to the parties involved, has been a long-standing aim of international law, and the rules and procedure in this connection are partly a matter of custom or practice, and partly due to a number of important law-making conventions such as the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes and the United Nations Charter drawn up at San Francisco in 1945. One of the principal objects of the latter Charter in setting up the United Nations Organisation was indeed to facilitate the peaceful settlement of differences between states. This also had been the purpose of the League of Nations during the period of its activities between two world wars.

Broadly speaking, the methods of settling international disputes fall into two categories:

1. Peaceful means of settlement, that is, where the parties are agreeable to finding an amicable solution.

1. Eg, investment disputes between capital-receiving states and private foreign investors, the settlement of which is provided for under the Convention of 18 March 1965, for the Settlement of Investment Disputes between States and Nationals of Other States (Convention applies to legal disputes only). Under the Convention there was established at Washington the International Centre for the Settlement of Investment Disputes (ICSID). See as to this Centre, article by P.J. O'Keefe (1980) 34 *Year Book of World Affairs* 286, Ryans and Baker (1976) 10 *J World Trade L* 65; and Boskey and Sella *Settling Investment Disputes* (1965) 3 Finance and Development 129, and, as to the Convention, Szasz (1970) 1 Journal of Law and Economic Development 23.

2. Forcible or coercive means of settlement, that is, where a solution is found and imposed by force.

Each class will be discussed in turn.

2. PEACEFUL OR AMICABLE MEANS OF SETTLEMENT[2]

The peaceful or amicable methods of settling international disputes are divisible into the following:

a. Arbitration.
b. Judicial settlement.
c. Negotiation, good offices, mediation, conciliation, or inquiry.
d. Settlement under the auspices of the United Nations Organisation.

This classification does not mean that these processes remain in rigidly separate compartments, each appropriate for resolving one particular class of dispute. The position is otherwise in practice. For example, the flexible machinery established by the Convention of 18 March 1965, for the Settlement of Investment Disputes between States and the Nationals of Other States consists of an International Centre for the Settlement of Investment Disputes (ICSID), at Washington, with facilities for the arbitration and conciliation of investment disputes,[3] and provision for Panels of Arbitrators and Conciliators. Again the model body of rules drawn up in February 1962 by the Bureau of the Permanent Court of Arbitration, The Hague (see below), for cases where the Bureau has made available its premises and facilities for settling disputes, one only of the parties involved being a state, allows a dispute to be submitted to a sequence, first of conciliation, and then of arbitration, in the event that a conciliation commission reports that conciliation has failed (see Section III).

(a) Arbitration[4]

Ordinarily, arbitration denotes exactly the same procedure as in municipal law, namely the reference of a dispute to certain persons called arbitrators, freely chosen by the parties, who make an award without being bound to pay strict regard to legal considerations. Experience of international practice has shown, however, that many disputes involving

2. See J. G. Merrills *International Dispute Settlement* (1984), passim the *Report* of a Study Group on the Peaceful Settlement of International Disputes (David Davies Memorial Institute of International Studies, London, 1966), Henkin, Pugh, Schachter, and Smit *International Law; Cases and Materials* (2nd edn, 1987) pp 565 et seq, and Raman (ed) *Dispute Settlement through the United Nations* (1977).
3. The Convention applies to legal disputes only. See also p 485, n 1 above.
4. For a general treatise on the subject, see J. L. Simpson and H. Fox *International Arbitration: Law and Practice* (1959). See also Henkin, Pugh, Schachter, and Smit, op cit, pp 587 et seq and J. Gillis Wetter *The International Arbitral Process; Public and Private* (1979, 5 vols).

purely legal issues are referred to arbitrators for settlement on a legal basis.[5] Moreover, in the various treaties by which it has been agreed that disputes should be submitted to arbitration, frequently in addition to being directed to make their award according to justice or equity or ex aequo et bono, arbitral tribunals have been specially instructed to apply international law. A common formula in the nineteenth century was the direction to give a decision 'in accordance with the principles of international law and the practice and jurisprudence of similar tribunals of the highest authority'.

Arbitration is an institution of great antiquity (see Chapter 1, above), but its recent modern history is recognised as dating from the Jay Treaty of 1794 between the United States and Great Britain, providing for the establishment of three joint mixed commissions to settle certain differences which could not otherwise be disposed of in the course of the negotiation of the Treaty. Although these commissions were not strictly speaking organs of third party adjudication, two of the three performed successfully, and the result was to stimulate a fresh interest in the process of arbitration which had fallen into desuetude for about two centuries. A further impetus to arbitration was given by the *Alabama Claims Award* of 1872 between the United States and Great Britain. According to Judge Manly O. Hudson:[6]

> 'The success of the *Alabama Claims Arbitration* stimulated a remarkable activity in the field of international arbitration. In the three decades following 1872, arbitral tribunals functioned with considerable success in almost a hundred cases; Great Britain took part in some thirty arbitrations, and the United States in twenty; European States were parties in some sixty, and Latin American States in about fifty cases.'

Clauses providing for the submission of disputes to arbitration were also frequently inserted in treaties, particularly 'law-making' conventions, and to quote Judge Manly O. Hudson again,[7] 'arbitration thus became the handmaiden of international legislation' inasmuch as disputes concerning the interpretation or application of the provisions of conventions could be submitted to it for solution. Also a number of arbitration treaties for the settlement of defined classes of disputes between the states parties were concluded.

5. This can be illustrated by the work of the Austrian-German Arbitral Tribunal in the period 1957–1971; see I. Seidl-Hohenveldern *The Austrian-German Arbitral Tribunal* (1972) passim. Another instance is that of the Iran-United States Claims Tribunal, at the Hague, established in 1981, dealing with private claims of US citizens against Iran and of Iran citizens against the US; the Tribunal's mandate, inter alia, was to determine cases before it on the basis of respect for law, applying choice of law, rules and principles of law as thought applicable (see *Proceedings of American Society of International Law* (1984) pp 221, 227–233).
6. Hudson *International Tribunals* (1944) p 5.
7. Hudson, op cit, p 6.

A most important step was taken in 1899 when the Hague Conference not only codified the law as to arbitration but also laid the foundations of the Permanent Court of Arbitration. The Hague Conference of 1907 completed the work of the 1899 Conference. The Permanent Court of Arbitration is an institution of a peculiar character. It is neither 'permanent' nor is it a Court. The members of the 'Court' are appointed by states which are parties to one or both of the conventions adopted by the Hague Conferences. Each state may appoint four persons with qualifications in international law, and all the persons so appointed constitute a panel of competent lawyers from whom arbitrators are appointed as the need arises. Thus the members of the Permanent Court of Arbitration never meet as a tribunal:

> 'Their sole function ... is to be available for service as members of tribunals which may be created when they are invited to undertake such service.'[8]

When a dispute arises which two states desire to submit to arbitration by the Permanent Court of Arbitration, the following procedure applies:—Each state appoints two arbitrators, of whom one only may be its national or chosen from among the persons nominated by it as members of the Court panel. These arbitrators then choose an umpire who is merely a presiding member of the arbitral tribunal. The award is given by majority vote. Each tribunal so created will act pursuant to a special *compromis* or arbitration agreement, specifying the subject of the dispute and the time allowed for appointing the members of the tribunal, and defining the tribunal's jurisdiction, the procedure to be followed, and the rules of law and the principles according to which its decision is to be given. The Permanent Court of Arbitration itself has no specific jurisdiction as such. Approximately 20 arbitral tribunals have been appointed under this system since its foundation, and several important awards have been given, including those in the *Pious Fund Case* of 1902 between the United States and Mexico, the *Muscat Dhows Case* of 1905 between Great Britain and France, the *North Atlantic Coast Fisheries Case* of 1910 between the United States and Great Britain, and the *Savarkar Case* of 1911 between Great Britain and France. In practice, a small number of specially experienced members of the Court panel were repeatedly selected for duty as arbitrators, a practice that had obvious advantages.

Notwithstanding its obvious defects—as Judge Manly O. Hudson says it was hardly more than 'a method and a procedure'[9]—the Permanent Court of Arbitration was a relative success, and in the early years of this century influenced a more frequent recourse to arbitration as a method of settling international disputes, while it may be said to have moulded the modern law and practice of arbitration. This was reflected, too, in

8. Hudson, op cit, p 159.
9. Hudson, op cit, p 8.

the great number of arbitration treaties, both multilateral and bilateral, and of special ad hoc submission agreements, concluded before and after the First World War.

Following the First World War, several important arbitral tribunals operated. Among these may be mentioned the several Mexican Claims Commissions which adjudicated the claims of six different states against Mexico on behalf of their subjects, and the Mixed Arbitral Tribunals set up in Europe to deal with various claims arising out of the territorial redistribution effected by the Treaty of Versailles 1919.[10]

Arbitration is essentially a consensual procedure.[11] States cannot be compelled to arbitrate unless they agree to do so, either generally and in advance, or ad hoc in regard to a specific dispute. Their consent even governs the nature of the tribunal established.

The structure of arbitral tribunals has accordingly in practice revealed anomalies. Sometimes a single arbitrator has adjudicated a dispute, at other times a joint commission of members appointed by the states in dispute, and very frequently a mixed commission has been created, composed of nominees of the respective states in dispute and of an additional member selected in some other way. The nominees of a state are usually its own nationals; sometimes they are treated as representing it and being under its control—a practice which is in many ways objectionable.

Disputes submitted to arbitration are of the most varied character. Arbitral tribunals have dealt with disputes primarily involving legal issues as well as disputes turning on questions of fact and requiring some appreciation of the merits of the controversy. As a rule such tribunals have not declined to deal with a matter either on the ground that no recognised legal rules were applicable[12] or on the ground that political aspects were involved. For this reason the distinction frequently drawn by writers on international law between 'justiciable' and 'non-justiciable' disputes is a little difficult to understand and does not appear to have much practical value.[13] Inasmuch, however, as by special clauses in their

10. A number of arbitral tribunals were also established after the Second World War; among them are the Arbitral Tribunal on German External Debts set up under the Agreement on German External Debts of 27 February 1953.
11. *Advisory Opinion on the Status of Eastern Carelia* (1923) Pub PCIJ Series B, No 5, p 27.
12. Ie, they have not in practice made a finding of non liquet; see above, p 35.
13. Writers seem generally agreed on the point, however, that a dispute in which one of the parties is in effect demanding a change in the rules of international law, is 'non-justiciable'. Other criteria of non-justiciability, which have been relied upon, include the following: (1) the dispute relates to a conflict of interests, as distinct from a conflict between parties as to their respective rights (the test of justiciability in the Locarno Treaties of 1925); (2) application of the rules of international law governing the dispute would lead to inequality or injustice; (3) the dispute, while justiciable in law, is not so in fact, because for political reasons neither of the disputant states could undertake to

arbitration treaties, states often exclude from arbitration disputes affecting their 'vital interests', or concerning only matters of 'domestic jurisdiction', such reserved disputes may in a sense be 'non-justiciable', and open only to the procedure of conciliation. An illustration is the clause in the Anglo-French Arbitration Treaty of 1903 whereby the two states bound themselves not to arbitrate disputes which 'affect the vital interests, the independence, or the honour' of the parties. A more intelligible distinction is that between legal and non-legal disputes (see, eg, article 36 of the United Nations Charter).

There will always be a place for arbitration in the relations between states. Arbitral procedure is more appropriate than judicial settlement for technical disputes, and less expensive, while, if necessary, arbitrations can be conducted without publicity, even to the extent that parties can agree that awards be not published. Moreover, the general principles governing the practice and powers of arbitral tribunals are fairly well recognised.[14] Lastly, arbitral procedure is flexible enough to be combined with the fact-finding processes which are availed of in the case of negotiation, good offices, mediation, conciliation, and inquiry.[15]

(b) Judicial settlement

By judicial settlement is meant a settlement brought about by a properly constituted international judicial tribunal, applying rules of law.

The only general organ[16] of judicial settlement at present available in

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comply with an unfavourable adjudication, or in other words 'non-justiciability' is governed by the attitude of the parties to the dispute.

14. In 1953, the International Law Commission submitted a Draft Convention on Arbitral Procedure, which not only codified the law of international arbitration, but also endeavoured to overcome certain existing defects in procedure, eg disagreements between states as to whether a certain dispute was subject to arbitration, inability to establish the tribunal, failure to agree on the terms of the *compromis*, powers of the arbitral tribunal, and revision of awards. Deadlocks on the first two matters were, according to the Draft, to be broken by recourse to the International Court of Justice. For the text of the Draft and commentary thereon, see *Report* of the Commission on the Work of its *5th Session* (1953). The General Assembly did not accede to the Commission's view that a Convention should be concluded on the basis of the Draft, and in 1958, the Commission adopted a set of model Draft Articles on Arbitral Procedure, which could be used by states as they thought fit when entering into agreements for arbitration, bilateral or multilateral, or when submitting particular disputes to arbitration ad hoc by *compromis*. For the text of the model Draft Articles and commentary thereon, see *Report* of the Commission on the Work of its *10th Session* (1958), and *The Work of the International Law Commission* (3rd edn, 1980) pp 122–132. By its Resolution of 14 November 1958, the General Assembly brought the Draft Articles to the attention of member states of the United Nations for their consideration and use.
15. Eg, in the *Argentina-Chile Boundary Arbitration* (1965–6), the arbitral tribunal caused a field mission to be sent to the disputed area for the purpose of aerial photographic surveys and mixed ground-air reconnaissance of the territory.
16. As distinct from a regional judicial tribunal, such as the Court of Justice of the European Communities under the Treaties of 18 April 1951, and of 25 March 1957.

the international community is the International Court of Justice[17] at The Hague, which succeeded to and preserves continuity with the Permanent Court of International Justice. Its inaugural sitting was held on 18 April 1946, the very date on which its predecessor, the latter Court, was dissolved by the League of Nations Assembly at its final session. The essential difference between the Court, on the one hand, and an arbitral tribunal, on the other hand, can be seen by reference to the following points:

1. The Court is a permanently constituted tribunal, governed by a statute and its own body of rules of procedure, binding on all parties having recourse to the Court.
2. It possesses a permanent registry, performing all the necessary functions of receiving documents for filing, recording, and authentication, general court services, and acting as a regular channel of communication with government and other bodies.
3. Proceedings are public, while in due course the pleadings, and records of the hearings and judgments are published.
4. In principle, the Court is accessible to all states for the judicial settlement of all cases which states may be able to refer to it, and of all matters specially provided for in treaties and conventions in force.
5. Article 38[18] of its Statute specifically sets out the different forms of law which the Court is to apply in cases and matters brought before it, without prejudice to the power of the Court to decide a case ex aequo et bono if the parties agree to that course. (Although not ex aequo et bono in the strict sense, equitable principles have been applied by the Court in the most recent cases before it in regard to maritime and territorial boundary delimitation.)
6. The membership of the Court is representative of the greater part of the international community, and of the principal legal systems, to an extent that is not the case with any other tribunal. (Currently six of the Court's judges come from countries in Africa and Asia, whereas initially only two judges came from these countries.)
7. In the result, it is possible for the Court to develop a consistent practice

17. The standard authoritative treatises on the Court are S. Rosenne *The Law and Practice of the International Court* (2nd edn, 1985) and M. Dubisson *La Cour Internationale de Justice* (1964). See also the valuable manual published by the Court itself in 1976, under the title, *The International Court of Justice*, with bibliography of works etc, on the Court, at p 112, L. Gross (ed) *The Future of the International Court of Justice* (1976, 2 vols), J.G. Merrills *International Dispute Settlement* (1984) 6, pp 93 et seq, Falk *Reviving the World Court* (1986), G. Schwarzenberger *International Law as applied by International Courts and Tribunals Vol IV, International Judicial Law* (1986), C. Gray *Judicial Remedies in International Law* (1987) pp 59 et seq, and Henkin, Pugh, Schachter and Smit, op cit, pp 600 et seq.
18. See pp 33–35 above, for discussion of this article.

in its proceedings, and to maintain a certain continuity of outlook to a degree that is not feasible with ad hoc tribunals.

The International Court of Justice was established pursuant to Chapter XIV (articles 92–96) of the United Nations Charter drawn up at San Francisco in 1945. Article 92 of the Charter declares that the Court is 'the principal organ of the United Nations', and provides that the Court is to function in accordance with a Statute, forming 'an integral part' of the Charter. By contrast, the Court's predecessor, the Permanent Court of International Justice, was not an organ of the League of Nations, although in some measure linked to the League. Inasmuch as the International Court of Justice is firmly anchored in the system of the United Nations, member states are just as much bound to the Court as to any other principal organ of the United Nations, while reciprocal duties of co-operation with each other bind the Court and United Nations organs, and indeed in 1986 on the occasion of the Court's 40th anniversary, the President (Judge Nagendra Singh) declared that in the area of peaceful settlement of disputes the Court and UN Security Council were 'complementary organs'. Also the Court is bound by the Purposes and Principles of the United Nations as these are expressed in articles 1 and 2 of the Charter, and because the Court's Statute is annexed to the Charter and is an integral part of it, the context of the Charter is a controlling factor in the interpretation of the provisions of the Statute.

As an illustration of the fact that the Court has exercised jurisdiction over the whole range of international law, the following diverse subjects have been among those it has dealt with: maritime and territorial boundary delimitation disputes, non-use of force, non-intervention, decolonisation, treaty law and treaty interpretation, nuclear tests, diplomatic and consular law, state responsibility, treatment of aliens, the status of foreign investments, asylum, nationality and guardianship.

The Statute contains the basic rules concerning the constitution, jurisdiction, and procedure of the Court, and is supplemented by two sets of rules adopted by the Court pursuant to its rule-framing powers under article 30 of the Statute:

a. The Rules of Court adopted on 14 April 1978 representing a major revision of prior Rules adopted on 6 May 1946, based on the corresponding Rules of 1936, applied by the Court's predecessor—the Permanent Court of International Justice, and which had been amended on 10 May 1972. They came into force on 1 July 1978, and as from that date replaced the former Rules, as thus amended, save in respect of any case submitted to the Court before 1 July 1978, or any

phase of such a case, which should continue to be governed by the previous Rules.[19] The new revised Rules contain not only provisions as to procedure, but also rules governing the structure and working of the Court and of the Registry.

b. The Resolution of 12 April 1976, concerning the Court's internal judicial practice, being a revised version of a Resolution adopted on 5 July 1968.[20] This sets out the practice to be followed by the Court in respect to exchanges of views between the judges regarding particular points, after the termination of the written proceedings, and before the commencement of the oral hearing, and in respect to the Court's deliberations in private after the conclusion of the oral hearing, with a view to reaching its decision, voting by the judges, and the preparation of the judgment, and of separate and dissenting opinions. As is recited in the preamble to the Resolution, the Court 'remains entirely free to depart from the present Resolution, or any part of it, in a given case, if it considers that the circumstances justify that course'.

It can be seen that procedural rules are to be found both in the Statute and in the Rules of Court. Broadly speaking, the difference in nature between the content of the two instruments is that the Statute is basically more important for the Court itself, while the Rules of Court are basically more important for the parties appearing before the Court. Moreover, the Statute is of higher legal sanctity than the Rules of Court; being an integral part of the Charter, it cannot, unlike the Rules of Court, be amended directly by the judges themselves.[1] Since the Statute is so to speak the higher law, the Rules cannot be adopted or altered in such manner as to conflict expressly or impliedly with basic provisions of the Statute.

All Members of the United Nations are ipso facto parties to the Statute, but other states may become parties to it, on conditions to be laid down in each case by the United Nations General Assembly upon the recommendation of the Security Council (article 93 of the Charter). The

19. See S. Rosenne 'Some Reflections on the 1978 Revised Rules of the International Court of Justice' (1981) 19 Columbia Journal of Transnational Law pp 235–253.
20. The text of this Resolution is to be found in the Court's publication of 1978, *Charter of the United Nations, Statute and Rules of Court and Other Documents* pp 165–173. Prior to 1968, the internal judicial practice of the Court was governed by the Resolution of the Permanent Court of International Justice of 20 February 1931 (as amended on 17 March 1936), by virtue of a decision of the International Court of Justice of 1946 to adopt provisionally the practice of the former Permanent Court.
1. However, under art 70 of the Statute, the Court is entitled to propose amendments thereto. The Court exercised this power for the first time in 1969 when it proposed amendments enabling the General Assembly, upon the recommendation of the Court, to approve a place other than The Hague as the seat of the Court; see *ICJ Yearbook* 1969–1970 p 113.

conditions laid down in this connection have, up to the present, been the same for each case, namely, acceptance of the provisions of the Statute, acceptance of the obligations under article 94[2] of the United Nations Charter, and an undertaking to contribute to the expenses of the Court, and were contained in the General Assembly's Resolution of 11 December 1946.

The Court consists of fifteen judges. The persons constituting the panel of candidates for membership of the Court are nominated by the national groups of the panel of the Permanent Court of Arbitration.[3] From this list of nominees, the General Assembly and Security Council, voting independently, elect the members of the Court, an absolute majority in both the Assembly and the Council being required for election.[4] The procedure of concurrent election by the General Assembly and the Security Council applies also to the case of the filling of casual vacancies due to the death or retirement of a judge.[5] Not only are the highest legal qualifications (namely either capacity to be appointed to the 'highest judicial offices' in their countries, or being in fact 'jurisconsults of recognised competence in international law'; see article 2 of the Statute) requisite under the Statute for election to the Court but also appointments are made with due regard to ensuring that the judges elected represent 'the main forms of civilisation' and the '... principal legal systems of the world' (article 9 of the Statute). The first elections were held in 1946. Under a kind of 'gentlemen's agreement', currently applicable, the regional distribution of judges to be elected is: Africa, 3; Latin America, 2; Asia, 3; Western Europe and other countries, 5; and Eastern Europe, 2.[6]

Jurisdiction of International Court of Justice

The Court is open:

a. to the states (members or non-members of the United Nations) parties to the Statute; and
b. to other states on conditions to be laid down by the United Nations Security Council, subject to the special provisions contained in treaties

2. See below, p 502.
3. See above, pp 488–489.
4. Non-members of the United Nations, parties to the Statute of the Court, may participate in the elections of judges by the General Assembly in accordance with the conditions laid down in the General Assembly Resolution of 8 October 1948.
5. See art 14 of the Statute. Casual vacancies occurred after the deaths in September–October 1980 of, respectively, Judge Baxter (USA) and Judge Salah Tarazi (Syria), in August 1981 after the death of Judge Sir Humphrey Waldock (UK) and in March 1987 after the death of Judge G. L. de Lacharrière.
6. See the handbook, op cit, *The International Court of Justice* (1976) p 22.

in force, and such conditions are not to place the parties in a position of inequality before the Court (article 35 of the Statute).[7]

The Court's jurisdiction is twofold:

a. to decide contentious cases;
b. to give advisory opinions.

Both functions are judicial functions.

Contentious jurisdiction

In contentious cases, in principle, the exercise of the Court's jurisdiction is conditional on the consent of the parties to the dispute. Under article 36, paragraph 1, of the Statute, the Court has jurisdiction over all cases which the parties refer to it; such reference would normally be made by the notification of a bilateral agreement known as a *compromis*. As would appear, however, from the Court's *Yearbook 1986–1987* (1987) a document concluded by the parties as a 'Special Agreement', rather than a *compromis*, has become in the 1980s the most generalised form used for bringing a case before the Court. The provision in article 36, paragraph 1, is not to be taken as meaning that the Court has jurisdiction only if the proceedings are initiated through a joint reference of the dispute by the contesting parties. A unilateral reference of a dispute to the Court by one party, without a prior special agreement, will be sufficient if the other party or parties to the dispute consent to the reference, then or subsequently. It is enough if there is a voluntary submission to jurisdiction (ie the principle of forum prorogatum), and such assent is not required to be given before the proceedings are instituted, or to be expressed in any particular form.[8] A recommendation by the UN Security Council that the parties should settle a legal dispute by referring it to the Court (see para 3 of art 36 of the UN Charter) is not of itself sufficient to give the Court jurisdiction over the dispute. If, however, there is no consent, and no submission by the other party to the dispute, the case must be removed

7. The conditions as laid down by the Security Council in a Resolution of 15 October 1946, were that such states should deposit with the Court's Registrar a declaration accepting the Court's jurisdiction in accordance with the Charter and Statute and Rules of Court, undertaking to comply in good faith with the Court's decisions, and to accept the obligations under art 94 of the Charter (see below, p 502).
8. *Corfu Channel Case (preliminary objection)* ICJ, 1948, 15 et seq, and the handbook, op cit, the *International Court of Justice* (1976) p 33. Assent by conduct can scarcely be inferred where the respondent state consistently denies that the Court has jurisdiction; see *Anglo-Iranian Oil Co Case (jurisdiction)* ICJ 1952, 93 at 114. The principle of forum prorogatum does not apply if: (a) the respondent state accepts jurisdiction only subject to a condition or conditions not assented to by the complainant state; or (b) if the complainant's claim is subsequently modified to a substantial extent; and see Henkin, Pugh, Schachter and Smit, op cit, p 603.

from the Court's list.[9] Nor can the Court decide on the merits of a case in the absence of a materially interested state.[10]

Only states may be parties in cases before the Court, but the Court is empowered to obtain or request information from public international organisations relevant to these cases, or such organisations may furnish this information on their own initiative (see article 34 of the Court's Statute). Moreover, the Court has been given jurisdiction under the Statutes of the Administrative Tribunals[11] of the United Nations and of the International Labour Organisation (ILO) to determine by advisory opinion whether judgments of these tribunals have been vitiated by fundamental errors in procedure, etc, and in that connection upon requests for an advisory opinion by the international organisations concerned, may take into account written observations and information forwarded on behalf of individuals, ie, the officials as to whom the judgments have been given.[12] Such organisations cannot be parties in contentious proceedings before the Court. However, it is conceivable that under the relevant provisions of the Vienna Convention of 1986 on

9. Eg, the Court made such orders for removal in 1956 in respect of the British references of disputes with Argentina and Chile concerning Antarctica, both Argentina and Chile denying jurisdiction; see ICJ 1956, 12 and 15. There have been other instances subsequent thereto, including the United States application in 1958 against the Soviet Union relative to the aerial incident of 4 September 1954: see ICJ 1958, 158.
10. See *Case of Monetary Gold removed from Rome in 1943* ICJ, 1954, 19. Where parties are concerned, if one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim; before doing so, the Court must satisfy itself not only that it has jurisdiction, but also that the claim is well founded in fact and law (art 53 of the Statute). This the Court did in the *United States Diplomatic and Consular Staff in Tehran Case* ICJ 1980, 3, where Iran did not appear to answer the claim by the United States, and in *Nicaragua v United States* ICJ 1986, 14, in the proceedings of which case the United States did not participate. Jurisdiction in the latter case had been previously esablished to the Court's satisfaction by its judgement of 26 November 1984 (see ICJ 1984, 392), but the Court declared that it had nevertheless to find specifically that Nicaragua's claim was well-founded in fact and law, inasmuch as there was no automatic judgment in favour of a party appearing; the Court also observed that it was valuable for it to know the views of the non-appearing party, even if those views were expressed in ways not provided by the Rules of Court. Cf H. W. A. Thirlway *Non-Appearance before the International Court of Justice* (1985). For instance of judgments and orders delivered in the absence of a party, see the *Yearbook 1986–1987* (1987) of the Court, p 123, n 2.
11. These tribunals have jurisdiction to deal with complaints by officials of breaches of the terms of their appointment, etc.
12. See *Advisory Opinion on Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints made against the United Nations Educational, Scientific, and Cultural Organisation (UNESCO)* ICJ 1956, 77, *Advisory Opinion on the Application for Review of Judgment No 158 of the United Nations Administrative Tribunal* ICJ 1973, 166, *Advisory Opinion on the Review of Judgment No 273 of the United Nations Administrative Tribunal* ICJ 1982, 325, and *Advisory Opinion on the Application for Review of Judgement No 333 of the United Nations Administrative Tribunal* ICJ 1987, 18.

the Law of Treaties between States and International Organisations or between International Organisations that the Court may be called upon to adjudicate in some way in a so-called 'hybrid' dispute of treaty interpretation between a state and an international organisation. Of course, a state may in its absolute discretion espouse the case of one of its nationals, upon the ground of a breach of international law allegedly suffered by that national; but the dispute and the related proceedings will then be between the states concerned.[13] Moreover, a request for an advisory opinion may be drawn in such a way as to enable the Court to pronounce on the rights of individuals or non-state groupings.[14] Should individuals apply to the Court with the object of obtaining a decision on questions at issue between them and their own or other governments, the practice is for the Registrar of the Court to inform such applicants that under article 34 of the Statute only states may be parties in cases before the Court; while if entities other than individuals seek to bring proceedings, the Registrar may refer the matter to the Court in private meeting, if he be uncertain as to the status of the complainant entity.[15] Suggestions have been made from time to time for altering the position under the Court's Statute so as to provide access for private individuals, corporations and non-governmental organisations. One such proposal, that seems not unreasonable, is that the Court should have jurisdiction to deal with disputes concerning the interpretation of transnational contracts between governments, on the one hand and multinational corporations, on the other hand.

The Court has compulsory jurisdiction where:

1. The parties concerned are bound by treaties or conventions in which they have agreed that the Court should have jurisdiction over certain categories of disputes. Among the instruments providing for reference of questions or disputes to the Court are numerous bilateral Air Services Agreements, Treaties of Commerce and Economic Co-operation, Consular Conventions, the Peace Treaty with Japan signed at San Francisco on 8 September 1951 (see article 22), and the European Convention for the Peaceful Settlement of Disputes concluded at

13. See handbook, *The International Court of Justice* (1976) p 31. An example is the *Barcelona Traction Case* (Belgium/Spain) ICJ 1973, 3.
14. See the Advisory Opinion of 1971 on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* ICJ 1971, 16 at 56, where the Court treated the *people* of the Mandated Territory of South West Africa as having rights violated by South Africa, by reason of South Africa's refusal to place the Territory under the supervision of United Nations organs.
15. This course was followed in 1966–1967 with regard to an application instituting proceedings, submitted by the Mohawk nation of the Grand River; see *ICJ Yearbook, 1966–1967* p 88, and the handbook, *The International Court of Justice* (1976) pp 31–32. According to the Court's *Yearbook 1986–1987* p 164, between 1 August 1986 and 31 July 1987 1,200 requests were received from private persons.

Strasbourg on 29 April 1957.[16] To preserve continuity with the work of the Permanent Court of International Justice, the Statute further stipulates (see article 37) that whenever a treaty or convention in force provides for reference of a matter to the Permanent Court, the matter is to be referred to the International Court of Justice. The Court must be affirmatively satisfied that the treaty or arrangement relied upon by the complainant state for invoking the Court's jurisdiction is one which unequivocally confers jurisdiction when the Court receives the unilateral request for its exercise; thus an arrangement which contemplates a joint submission by both the complainant state and the respondent state does not amount to a commitment by the respondent state to accept the Court's compulsory jurisdiction under the arrangement.[17]

2. The parties concerned are bound by declarations made under the so-called 'Optional Clause'—paragraph 2 of article 36 of the Statute. This clause appeared in the former Statute, in substantially the same terms as in the present Statute. It now provides that the parties to the Statute may at any time declare that they recognise as compulsory ipso facto and without special agreement 'in relation to any other State accepting the same obligation', the jurisdiction of the Court in *all* legal disputes concerning:

a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation.

These declarations may be made:

i. unconditionally; or
ii. on condition of reciprocity on the part of several or certain states; or
iii. for a certain time only.

According as such declarations are made, and providing that the dispute is of a legal character and that it falls within the categories specified, the Court's jurisdiction becomes compulsory. The Court is empowered to decide whether a particular dispute is or is not one of the kind mentioned in the 'Optional Clause'.[18]

To preserve continuity, as before, with the Permanent Court, article 36, paragraph 5 of the Statute provides that declarations made under the 'Optional Clause' in the earlier Statute are deemed, as between parties to

16. For a list of such instruments, see the Court's *Yearbook 1986–1987* pp 92–108.
17. See the *Aegean Sea Continental Shelf Case* ICJ 1978, 3.
18. See para 6 of art 36 of the Statute, providing that in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

the Statute, to be acceptances of the compulsory jurisdiction of the present Court for the period which they still have to run, and in accordance with their terms. This provision has been the subject of interpretation by the present Court. According to its decision in the *Case Concerning the Aerial Incident of July 27 1955 (Preliminary Objections)*[19] such former declarations are only transferable if made by states parties to the present Statute who were represented at the San Francisco Conference which drew up that Statute,[20] and a former declaration made by any other state party to the Statute lapsed in 1946 when the Permanent Court of International Justice ceased to exist, and on that account. However, under the Court's decision in the *Preah Vihear Temple Case (Preliminary Objections)*[1] a declaration made after 1946 by any such other state, purporting to renew a declaration under the 'Optional Clause' in the earlier Statute, is none the less valid as a declaration under the present Statute, because owing to the dissolution of the Permanent Court, it could have no application except in relation to the present Court.

At the San Francisco Conference, some delegations had urged that the Statute should provide for some compulsory jurisdiction of the Court over legal disputes, but others hoped that this result could be practically obtained through more widespread acceptance of the 'Optional Clause'. This expectation has not been fulfilled to date.

The majority of the present declarations in force[2] are subject to a condition of reciprocity. Many of them also include reservations, excluding certain kinds of disputes from compulsory jurisdiction. The reservations as to jurisdiction are to some extent standardised, covering inter alia the exclusion of:

i. past disputes, or disputes relating to prior situations or facts;
ii. disputes for which other methods of settlement are available;
iii. disputes as to questions within the domestic or national jurisdiction of the declaring state;
iv. disputes arising out of war or hostilities; and
v. disputes between member States of the British Commonwealth.

Too many of the reservations are, however, merely escape clauses or

19. ICJ 1959, 127. The parties were Israel and Bulgaria.
20. There are seven such states (namely Colombia, Dominican Republic, Haiti, Luxembourg, Nicaragua, Panama, and Uruguay), who have not made new declarations, and whose declarations under the earlier Statute apply in relation to the present Court. If one of such states has continuously manifested an intent to recognise the Court's compulsory jurisdiction, it is immaterial that it did not ratify the Protocol of Signature of the Statute of the Court's predecessor, the Permanent Court of International Justice; see *Nicaragua v United States (Jurisdiction)* ICJ 1984, 392.
1. ICJ 1961, 17.
2. As at 31 July 1987, 46 declarations were in force. For the text of each of these declarations, see the Court's *Yearbook 1986–1987* pp 59–91.

consciously designed loopholes. Such a system of 'optional' compulsory jurisdiction verges on absurdity.

A case of a specially contentious reservation is the so-called 'automatic' or 'self-judging' form of reservation contained in proviso b to the American declaration of 14 August 1946, reserving 'disputes with regard to matters essentially within the domestic jurisdiction of the United States of America *as determined by the United States of America*'. The validity of this reservation, more generally known as the 'Connally amendment', has been questioned.[3]

A number of points affecting the operation of the 'Optional Clause' have been settled by decisions of the present Court:

a. Where a declaration, subject to a condition of reciprocity has been made by a state, and another state seeks to invoke compulsory jurisdiction against it, the respondent state is entitled to resist the exercise of jurisdiction by the Court by taking advantage of any wider reservation, including the 'automatic' or 'self-judging' form of reservation, made by the claimant state in its declaration.[4] Jurisdiction is conferred upon the Court only to the extent to which the two declarations coincide at their narrowest, that is to say, jurisdiction is restricted to those classes of disputes that have not been excluded by any one state. But this bilateral effect does not apply in favour of a respondent state except on the basis of wider reservations actually contained in the claimant state's declaration; the fact that the claimant state would, if proceedings had been taken in the Court against it by the respondent state, have been entitled to resist jurisdiction, on the ground of a wide reservation in the respondent state's declaration, is not sufficient to bring into play the bilateral principle.[5] Nor, logically, does it apply if the respondent state elects to waive expressly any objection to jurisdiction upon the ground of this 'bilateral' effect.
b. If a dispute between states relates to matters exclusively within the domestic jurisdiction of the respondent state, it is not within the category of 'legal disputes' referred to in article 36 paragraph 2.[6]

3. On the ground that it is incompatible with the power of the Court under art 36, para 6 (mentioned above) of its Statute to settle disputes as to its jurisdiction, and on the further ground that the reservation of such a discretion is inconsistent with any proper acceptance, within the meaning of art 36, para 2, of compulsory jurisdiction.
4. See the *Norwegian Loans Case* ICJ 1957, 9, and the handbook, *The International Court of Justice* (1976) pp 38–39. Because of this decision, certain states which had made 'automatic' reservations, withdrew these.
5. See the *Interhandel Case (Preliminary Objections)* ICJ 1959, 6. For the purposes of the bilateral comparison in order to determine whether there is an absence of reciprocity, the *substance* of the two declarations is only to be considered, not such formal matters as duration or time limits of each state's commitment; *Nicaragua v United States (Jurisdiction)* ICJ 1984, 392.
6. See the *Right of Passage over Indian Territory Case (Preliminary Objections)* ICJ 1957, 125 at 133–134, and Briggs 53 AJIL(1959) 305–306.

c. A declaration made almost immediately before and for the purpose of an application to the Court is not invalid, nor an abuse of the process of the Court.[7]
d. If a matter has properly come before the Court under article 36, paragraph 2, the Court's jurisdiction is not divested by the unilateral act of the respondent state in terminating its declaration in whole or in part.[8]

Before the decision of the International Court of Justice in the *Corfu Channel Case (Preliminary Objection)*,[9] it was thought that a third category of compulsory jurisdiction existed, namely where under article 36 of the United Nations Charter, the Security Council recommended the parties to a dispute to refer their case to the Court, particularly as in paragraph 3 of that article the Council is virtually enjoined, where the dispute is of a legal character to recommend submission to the Court. In the International Court's decision, however, seven judges expressed the view that this article did not create a new class of compulsory jurisdiction, and the same interpretation apparently applies to a decision of the Security Council under article 33 'calling upon' the parties to adjust their differences by judicial settlement.

Where the Court has compulsory jurisdiction, the normal method of initiating proceedings is by a unilateral written application addressed to the Registrar, indicating the subject of the dispute, and the other party or parties. The Registrar thereupon communicates the application to the other party or parties, and notifies all members of the United Nations and any other states entitled to appear before the Court (article 40 of the Statute). The Court cannot exercise jurisdiction of its own motion, as one party at least must elect to bring the case before it, the other party then being obliged to accept the Court's jurisdiction. There is one important element of flexibility in the system; both parties remain free at any stage to settle the dispute concerned by their own agreement, without any necessity of approval by the Court, which may then simply be notified so that the case is removed from the list (see also article 88 of the Rules of Court of 1978). Or one party only may give written notice of discontinuance of proceedings, as did Nicaragua recently on 12 August 1987 in the case brought by it in July 1986 against Costa Rica, whereupon the President of the Court makes orders, respectively, to record the

7. See the *Right of Passage Case*, above. This is covered by the United Kingdom reservation, excluding a dispute in which a state has so acted, or where it has deposited or ratified a declaration less than 12 months prior to the filing of its application bringing the dispute before the Court.
8. See the *Right of Passage Case*, above, n 6. See also *Nicaragua v United States (Jurisdiction)* ICJ 1984, 392 (declaration in force by reason of non-expiration of period of notice of termination under earlier declaration not affected by the lodging of a new amending declaration).
9. ICJ 1948, 15 et seq.

discontinuance, and for the removal of the case from the list (cf art 89 of the Rules of Court).

The effect of the exercise of compulsory jurisdiction by the Court is clarified by the provisions of article 94 of the United Nations Charter. Under this article, each member of the United Nations undertakes to comply with the decision of the Court in any case to which it is party. Further, if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council which may make recommendations or decide upon measures to be taken to give effect to the judgment, and these may be dictated by considerations unlike those which condition processes of execution in domestic legal systems. There are no provisions whereby the Court may enforce its decisions, and this of course represents a serious weakness.

The procedure in contentious cases is partly written, partly oral. The written proceedings of the Court consist of communicating to it pleadings by way of memorials, counter-memorials, replies and rejoinders (replies and rejoinders may be filed only if authorised by the Court), and papers and documents in support. The oral proceedings consist of the hearing by the Court of witnesses, and experts, and of agents, counsel, or advocates who may represent the states concerned. The hearings are public unless the Court decides otherwise or the parties demand that the public be not admitted. The *South West Africa Cases* confirmed that claimants in the same interest may be joined together, that the parties can call witnesses or experts to testify personally, and that the Court itself may put questions to the parties and witnesses, but that the Court has some area of discretion in deciding whether to accede to a request for a view or inspection in loco (semble, also if the view is requested by consent of all parties).

The Court may indicate under article 41 of its Statute any interim measures necessary to preserve the respective rights of the parties, notice of which has to be given forthwith to the parties and to the Security Council.[10] It is provided in article 73 of the Rules of Court of 1978 that such provisional measures may be indicated on the *written* request 'at any time' of a party to the proceedings, while under article 75 the Court, in its turn, may 'at any time' decide to examine of its own motion whether the circumstances of the case require the indication of provisional

10. Semble, such interim measures of protection may be indicated even though it is claimed that the Court has no jurisdiction in the dispute between the parties; cf, for example, the interim measures indicated by the Court on 5 July 1951, in the *Anglo-Iranian Oil Co Case* ICJ 1951, 89, on 22 June 1973, in the *Nuclear Tests Cases* ICJ 1973, 99, and 135, and more recently in *Nicaragua v United States* (order of 10 May 1984) ICJ 1984, 169 and in *Burkina Faso v Republic of Mali* (order of 10 January 1986) ICJ 1986, 3. See also articles 73–78 of the Rules of Court of 1978 under the heading '*Interim Protection*.'

measures. According to the decision of the Court on 11 September 1976, in the *Aegean Sea Continental Shelf Case* (*Greece v Turkey*),[11] interim measures will not be indicated where there is no risk of irreparable prejudice to the rights of the state requesting such measures, or it is not to be presumed that either party will fail to observe its obligations under the United Nations Charter, where the matter turns on the due performance of such obligations. The Court is not precluded from entertaining a request by one party for provisional measures, merely because what is sought by that party may be unilateral measures to be taken by the respondent state.[12] Provisional measures may be mandatory in nature, as well as injunctive or restraining;[13] the purpose is primarily to 'preserve the respective rights of either party' within the meaning of article 41 of the Court's Statute.

Preliminary objections may be taken, eg to the jurisdiction of the Court, or that the application is not admissible, or is non-justiciable, or by way of a plea that the matter belongs to the exclusive domestic jurisdiction of the respondent state,[14] or that the stage of a dispute between the parties has not arisen.[15] Where the preliminary objections raised matters which require fuller investigation, or which were wrapped up with the issues and evidence that might be tendered thereon, the Court did not under its

11. *Aegean Sea Continental Shelf Case; Interim Protection Order* ICJ 1976, 3.
12. *United States Diplomatic and Consular Staff in Tehran Case, Provisional Measures* 15 December 1979 ICJ 1979, 7.
13. Ibid.
14. An international dispute as to the applicability of treaty provisions or of rules of customary international law, is not a matter within the domestic jurisdiction of parties to the dispute; see *Interhandel Case (Preliminary Objections)* ICJ 1959, 6. In *Nicaragua v United States (Jurisdiction)* ICJ 1984, 392, the Court appears to have accepted that there can be a preliminary objection as to the 'admissibility' of an application by a state, in respect to which objection the Court can rule whether it is admissible or inadmissible. There can, of course, be a fine line between an objection as to admissibility and an objection as to jurisdiction. Presumably, admissibility covers the possibility that the application is akin to an abuse of process, as in domestic law. As to non-justiciability, an example is perhaps that of an application regarding a dispute concerning what could hypothetically, but not with certainty, occur in the future. Semble, a dispute between two states about a question of diplomatic precedence (eg table seatings) would be both inadmissible and non-justiciable.
15. A legal dispute within the meaning of art 36, para 2 may be sufficiently inferred from diplomatic exchanges, without the necessity that it should have reached a stage of precise legal definition; see the *Right of Passage over Indian Territory Case (Preliminary Objections)* ICJ 1957, 125, and the *Aegean Sea Continental Shelf Case* ICJ 1978, 3. Diplomatic exchanges can include debates in United Nations organs as part of the normal process of diplomacy; *South West Africa Cases, Preliminary Objections* ICJ 1962, 319. The Court in its *Advisory Opinion* of 26 April 1988 on *the Applicability of the Obligation to Arbitrate under the UN Headquarters Agreement 1947* indicated that in its view, a 'dispute' existed if there were 'a disagreement on a point of law or a conflict of legal views or interests', or, even if no explicit justifications were expressed by one or other of the parties, there were 'opposing attitudes' (see paras 34–44 of the Advisory Opinion).

pre-1972 practice decide upon them in the first instance, but joined them to the merits of the case.[16] It was the Court's majority view in the *South West Africa Cases, Second Phase* (1966)[17] that a decison on a preliminary objection, even of a somewhat like point, can never bind the Court where the question resolves itself into one founded on the merits, after all arguments have been presented. However, under the provisions of article 79 of the Rules of Court of 1978, corresponding to the provisions contained in the partial revision in 1972 of the formerly applicable Rules, the Court will now give its decision in the form of a judgment upholding the preliminary objection, or rejecting it, or declaring that it 'does not possess, in the circumstances of the case, an exclusively preliminary character', in which latter case the respondent state must file a defence on the merits embracing this ground if it wishes to rely thereon. In other words, it is no longer open to the Court to order in its judgment that a preliminary objection be joined to the merits, save that under paragraph 8 of article 79 of the Rules of the Court of 1978 any agreement between the parties that a preliminary objection be heard and determined within the framework of the merits is to be given effect by the Court.

All questions are decided by a majority of the judges present; and if the voting is equal, the President has a casting vote. The legal effect of the Court's judgment is set out in articles 59–61. The Court's decision has no binding force except between the parties and in respect of the particular case (article 59). The judgment is 'final and without appeal' (article 60) but a revision may be applied for on the ground of the discovery of a new 'decisive factor', provided that application is made within six months of such discovery and not later than ten years from the date of the judgment (article 61).[18] Unless otherwise decided by the Court, each party bears its own costs.

The Court has given its tacit sanction to the useful technique whereby states may, by special agreement, ask the Court to declare the principles of international law applicable to a particular dispute between them, so as to pave the way for a treaty settlement on the basis of such principles. In other words, an adversarial-type judgment or decision is not sought, but merely a preliminary elucidation of the principles or criteria to which the disputant states may have regard in reaching an arrangement to resolve particular differences. An earlier successful instance of the employment of this technique was that of the *North Sea Continental Shelf Cases*,[19] in

16. See the *Right of Passage Case* above and *South West Africa Cases, Preliminary Objections* ICJ 1962, 319.
17. ICJ 1966, 6 at 18, 36, 37.
18. In 1985 the Court rejected an application by Tunisia for the revision of its 1982 judgment in the *Continental Shelf (Tunisia-Libya) Case* ICJ 1982, 18. The Court held, inter alia, that it was not clear that the claimed new fact relied upon by Tunisia was such that it would have persuaded the Court to alter its earlier determination: see ICJ 1985, 192.
19. ICJ 1969, 3.

which in 1969 the Court was requested to declare the principles applicable to the division of the common continental shelf of the German Federal Republic, the Netherlands and Denmark. In a more recent case between Tunisia and Libya, pursuant to a special agreement between these two States, the Court was asked to declare the principles and rules of international law to be applied for the delimitation of the common continental shelf of these states in the region known as the Pelagian Block or Basin, and in its decision given on 24 February 1982, the Court did formulate the applicable principles, and did clarify the practical method for implementing the principles so declared.[20]

According to the Court, there are semble some essential limitations on the exercise of its judicial functions in the contentious jurisdiction, and on the rights of states to advance a claim in that jurisdiction.

First, as the *Northern Cameroons Case* shows,[1] an adjudication by the Court must deal concretely with an actual controversy involving a conflict of legal rights or interests as between the parties; it is not for the Court to give abstract rulings, inter partes, to provide some basis for political decisions, if its findings do not bear upon actual legal relationships. Otherwise, it might be acting virtually as a 'moot Court'. The correlative aspect is that the parties cannot be treated as mutually aggrieved to the extent of a 'dispute' if there is a mere difference of opinion between them, in the absence of a concrete disagreement over matters substantively affecting their legal rights or interests. In the *Nuclear Tests Cases*,[2] the Court declared that the existence of a dispute is '*a primary condition*' for the exercise by the Court of its judicial function, to the extent that the dispute must continue to exist at the time when the Court makes its decision; and where because of an undertaking given by the respondent state, the object of the claim or dispute has disappeared, the Court makes no further adjudication or determination, simply limiting itself to a finding that is 'not called upon to give a decision'.

Second and more controversially, the Court decided by a majority in the *South West Africa Cases, Second Phase*[3] that the claimant states,

20. *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case* ICJ 1982, 18. A similar function of formulating the applicable canons of international law was performed by a five-member Special Chamber of the Court in the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine* (United States-Canada ICJ 1984, 24). As recently as 18 August 1988 Denmark filed an application requesting the Court to decide, in accordance with international law, the line of delimitation between Denmark's and Norway's fishing zones and continental shelf areas in waters between Greenland and Jan Mayen.

1. ICJ 1963, 15, esp at 33–34, 37–38; and see excellent article on the case by D. H. N. Johnson (1964) 13 ICLQ 1143–1192. The case is useful also as confirming the Court's powers to make a declaratory judgment in an appropriate case.
2. See ICJ 1974, 253 at 270–272.
3. ICJ 1966, 6 at 18, 51. The Court also affirmed that it could take account of moral principles only so far as manifested in legal form (ibid, p 34), and that it was not a legislative body, its duty being to apply, not to make the law (ibid, p 48). The absen...

Ethiopia and Liberia, had failed to establish a legal right or interest appertaining to them in the subject-matter of their claims which, therefore should be rejected. This question was treated as one of an antecedent character, but nevertheless bearing upon the merits.

At the same time it is relevant to stress that the Court has expressly declared that two suggested limitiations on the exercise of its contentious jurisdiction are inapplicable in that area. First, the Court will not decline to resolve a legal question or issue, where it has otherwise jurisdiction, if that question or issue should be only one aspect of a political dispute. Second where the United Nations Security Council is exercising its function in respect of a particular dispute or situation, the Court is, unlike the United Nations General Assembly under article 12 of the United Nations Charter, not debarred from resolving any legal issue between the parties on the ground that the Security Council has, or may be entitled to take cognisance of the dispute or situation.[4]

Advisory opinions

As to advisory opinions, the General Assembly and the Security Council of the United Nations Organisation may request such opinions from the Court. Other organs of the United Nations and the 'specialised agencies' or other members of the United Nations 'family' may, if authorised by the General Assembly, request the Court to give advisory opinions on legal questions arising within the scope of their activities.[5] Advisory opinions can only be sought on legal questions,[6] concrete or abstract, and in giving them the Court would of course be exercising a judicial function. The Court would semble not give an advisory opinion on a purely

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of legal standing of the claimant states was attributed, inter alia, to the exclusive, institutional responsibility of League of Nations organs for supervising the fulfilment of the terms of mandates. The establishment of some concrete interest is also a condition of a state's right to intervene in a case in the Court; it is not sufficent that the state seeks to argue in favour of a decision in which the Court would refrain from adopting and applying particular criteria (see the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case* ICJ 1982, 18; *Application by Malta to Intervene* ICJ 1981, 3; see Le in 75 AJIL (1981) 949–952.

4. For the Court's rejection of these two suggested limitations, see the *United States Diplomatic and Consular Staff in Tehran Case* ICJ 1980, 3 para 37 and para 40, respectively, and also *Nicaragua v United States* (Jurisdiction) ICJ 1984, 392, paras 89–90.
5. The Economic and Social Council, the Trusteeship Council, and the various specialised agencies have been so authorised.
6. It is no objection to the giving of an advisory opinion that the questions submitted to the Court for advice involve issues of fact, provided that the questions remain nonetheless *essentially* legal questions; *Advisory Opinion on the Western Sahara* ICJ 1975, 12. The questions put to the Court may necessarily involve identification of the tual and legal background thereof, while the legal questions really in issue, according to the may not necessarily correspond precisely to the questions thus submitted to the cf *Advisory Opinion on the Interpretation of the Agreement of March 25, 1981 the WHO and Egypt*, ICJ 1987, 73.

academic question,[7] but so long as the advice sought may ultimately assist the international organisation concerned in discharging its functions, the questions are not to be deemed purely academic.[8] An advisory opinion is no more than it purports to be; it lacks the binding force of a judgment in contentious cases, even for the organisation or organ which has requested it, although of course such organisation or organ may choose to treat it as of the nature of a compulsory ruling. Nor does the Court have powers of judicial review or of appeal in respect to any decisions of such organisation or organ, for example by way of setting these aside, although it may incidentally in the course of an advisory opinion pronounce upon the question of the validity of a particular decision.[9] So far as states are concerned, they may by treaty or agreement undertake in advance to be bound by advisory opinions on certain questions (see, for example, section 30 of the Convention on the Privileges and Immunities of the United Nations 1946, and section 32 of the Convention on the Privileges and Immunities of the Specialised Agencies 1947). Also, in the absence of any such provisions, advisory opinions will have strong persuasive authority.

The procedure in the case of advisory opinions is that a written request must be laid before the Court containing an exact statement of the question on which an opinion is sought, while accompanying documents likely to throw light on the question are to be transmitted to the Court at the same time as the request, or as soon as possible thereafter, in the number of copies required by the Registry. This is a formal and indispensable requirement for the exercise of jurisdiction by the Court to give an advisory opinion. The Registrar then notifies all states entitled to appear before the Court. He also notifies any state or international organisation, thought likely to be able to furnish information on the subject, that the Court will receive written or oral statements. States and international organisations presenting written or oral statements may comment on those made by other states and organisations. The advisory opinion is delivered in open court (see article 67 of the Statute). Both under article 68 of the Statute and in practice the Court's procedure has been closely assimilated to the procedure in the contentious jurisdiction. If an early answer to the request for an advisory opinion is desirable (see art 103 of the Rules of Court), the Court may accelerate its procedure by shortening time-limits, etc, as it did in the preliminary phase before the delivery on 26 April 1988 of its *Advisory Opinion on the Applicability of the Obligation to Arbitrate under the UN Headquarters Agreement 1947*.

The Court also regards itself as under a duty to observe essential

7. Cf *Northern Cameroons Case* ICJ 1963, 15 at 33–34, 37–38, and p 481 above.
8. *Advisory Opinion on the Western Sahara* ICJ 1975, 12
9. See *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* ICJ 1971, 16 at 45.

judicial limitations in its advisory opinion procedure, so that it will not exercise the jurisdiction if the main point on which an opinion is requested is decisive of a controversy between certain states, and any one of these states is not before the Court.[10] For to give an advisory opinion in such circumstances would be to adjudicate without the consent of one party. The interpretation of treaty provisions is essentially a judicial task, and the Court will not reject a request for an opinion on such a question, although it be claimed that such question and such request are of a political nature.[11] In any event, the Court will not decline to give an advisory opinion, because it is maintained that in respect to such opinion the Court had been, or might be subjected to political pressure.[12]

The Court has, semble, also a discretion to refuse to give an advisory opinion upon other grounds, for example, that the question submitted involves other than legal aspects, or is embarrassing. The Court has held, however, that the circumstance that the Executive Board of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) was alone entitled to seek an advisory opinion as to whether a decision of the Administrative Tribunal of the International Labour Organisation (ILO) upon a staff claim was vitiated by a fundamental error in procedure, etc, and that no equivalent right of challenge was given to complainant officials, was not, because of such inequality, a reason for not complying with a request for an advisory opinion on such a question.[13]

10. See the *Advisory Opinion on the Status of Eastern Carelia* (1923) Pub PCIJ Series B, No 5 pp 27–29. But this does not prevent the Court dealing by advisory opinion with a legal question, the solution of which may clarify a factor in a dispute between states or between a state and an international institution, without affecting the substance of the dispute, or the solution of which may provide guidance for an international organ in matters of the procedure under, or the effect to be given to a multilateral convention, notwithstanding that one of the states concerned is not before the Court or has not consented; see the Advisory Opinions of the present Court on the *Interpretation of the Peace Treaties* ICJ 1950, 65 at 221, and on *Reservations to the Genocide Convention*, ICJ 1951, 15. Similarly, the Court is not debarred from acceding to a request by a United Nations organ for legal advice on the consequences of decisions of that organ, notwithstanding that in order to give an answer, the Court may have to pronounce on legal questions upon which there is a divergence of views between a particular member state, on the one hand, and the United Nations, on the other hand; see Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* ICJ 1971, 16 at 23–25, and *Advisory Opinion on the Western Sahara* ICJ 1975, 12.
11. See *Advisory Opinion on Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)* ICJ 1962, 151.
12. *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*; see ICJ 1971, 16 at 23.
13. See *Advisory Opinion on Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints made against the United Nations Educational, Scientific and Cultural Organisation (UNESCO)* ICJ 1956, 77. In its *Advisory Opinion* of 1987 for the *Review of Judgment No 333 of the United Nations Administrative Tribunal* ICJ 1987, 18 the Court stressed also that although its power to give an advisory

As we have already seen above,[14] the Court applies international law, but article 38 of its Statute expressly enables it to decide a case ex aequo et bono if the parties concerned agree to this course. This means that the Court can give a decision on objective grounds of fairness and justice without being bound exclusively by rules of law. The Court will adopt this course only if so directed by the parties in the most explicit terms.[15] Presumably the Court could not be required to undertake, ex aequo et bono, functions which were strictly speaking of a legislative character. This consensual ex aequo et bono jurisdiction must, however, be distinguished from the Court's inherent power, as a Court of justice, to apply equitable principles.[16]

There are other points of importance concerning the Court. Nine judges form a quorum. If the parties so request, the Court may sit in Chambers. Under paragraph 2 of article 26 of its Statute the Court may at any time form a Chamber to deal with a particular case, and the number of such judges to constitute the Chambers will be determined by the Court with the approval of the parties. In January 1982, for the first time in its history, the Court constituted a Special Chamber to deal with the dispute between the United States and Canada over the delimitation of the maritime boundary in the Gulf of Maine area, and this precedent has been followed in certain later matters by the constitution of similar Special Chambers, in particular in 1985 and 1987.[17] Under art 27 of the Court's Statute, any judgement rendered by the Chamber is considered as one given by the Court. Chambers of three or more judges may be formed for dealing with particular categories of cases, for example, labour

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opinion was discretionary, the exercise of that power should not generally be refused in cases concerning the protection of UN officials.

14. See above, pp 33–34, 491.

15. See *Case of the Free Zones of Upper Savoy and Gex* (1930) Pub PCIJ, Series A, No 24, p 10, and Series A/B No 46 (1932) 161.

16. See discussion in the *North Sea Continental Shelf Cases* ICJ 1969, 3 at 48–9. In the *Case Concerning the Barcelona Traction, Light and Power Co Ltd (Second Phase)* ICJ 1970, 3 (see paras 92–101 of the judgment), the Court declined to accept the proposition that, by virtue of equitable principles, the national state of shareholders of a company, incorporated in another state, was entitled to espouse a claim by shareholders for loss suffered through injury done to the company. On the other hand, in the *Fisheries Jurisdiction Cases* ICJ 1974, 3 at 175, the Court held that Iceland and each of the two complainant countries, the United Kingdom and the Federal Republic of Germany, were under mutual obligations to undertake negotiation in good faith for an equitable solution of their differences as to the fisheries in the disputed waters, and it indicated certain of the relevant equitable factors. In two recent cases, the Court (or a special Chamber thereof) relied on equitable criteria, not of the nature of ex aequo et bono, namely, *Libya-Malta Continental Shelf Case* ICJ 1985, 13 and *Burkina Faso v Republic of Mali* ICJ 1986, 554.

17. See Court's *Yearbook 1986–1987* p 158. Special Chambers were constituted, in addition to that for the *Gulf of Maine Case* ICJ 1982, 3, in the Cases *Burkina Faso v Republic of Mali* ICJ 1985, 6, *Elettronic Sicula SpA* ICJ 1987, 3 and *El Salvador-Honduras* ICJ 1987, 10.

cases and cases relating to transit and communications, and annually a Chamber is formed to hear and determine cases by summary procedure, while also ad hoc Chambers may be formed at the request of parties. The principle of national judges applies under the present Statute (article 31). Judges of the nationality of parties before the Court retain their right to sit in the case; if the Court includes a judge of the nationality of one party, any other party may choose a person to sit as judge, and if the Court does not include judges of the nationality of the parties, each of the parties may proceed to appoint as judge ad hoc a person of its nationality. A judge ad hoc may also be appointed as member of a Special Chamber, as, eg, in the case of the above-mentioned Special Chamber formed in 1982 to deal with the maritime boundary in the Gulf of Maine area. If an advisory opinion is sought upon a legal question actually pending between two or more states, the Court may authorise the appointment of a judge ad hoc of one of such states; cf the appointment of a judge ad hoc by Morocco in the proceedings for an advisory opinion on the *Western Sahara* in 1975, such appointment being authorised by order of the Court on 22 May 1975.

A third state may request to be permitted to intervene if it considers that it has 'an interest of a legal nature which may be affected' by the Court's decision (art 62 of the Statute). The Court decides whether permission should be granted.[18]

It must be admitted that although both the Permanent Court of International Justice, and the International Court of Justice disposed of a substantial number of contentious matters and of requests for an advisory opinion, states generally showed marked reluctance to bring before these Courts matters of vital concern, or to accept compulsory adjudication in such matters. It is significant, also, that states have been unwilling to avail themselves of the clauses in the very large number of bilateral and multilateral treaties (see p 498, n 16 ante), providing for reference of disputes to the former, or to the present Court.

Pessimism, on this account, as to the limited scope of judicial settlement in the international community, is to some extent mitigated by the fact that both Courts adjudicated many questions raising important points of law, or difficult problems of treaty interpretation. Some of these judgements or opinions arose out of important political disputes which came before the League of Nations Council, or before the United Nations Security Council; eg the Permanent Court's Advisory Opinions on the

18. Permission is refused if the requesting state's interests are not greater than those of other non-party states, or if permission to intervene would introduce a fresh dispute; see decision on Malta's request in the *Tunisia-Libya Continental Shelf Case* ICJ 1986, 3, and on Italy's request in the *Libya-Malta Continental Shelf Case* ICJ 1984, 3. For the case law on intervention by a third party, see Henkin, Pugh, Schachter and Smit *International Law; Cases and Materials* (2nd edn, 1987) p 650.

Frontier between Turkey and Iraq,[19] on the *Customs Régime between Germany and Austria*,[20] and on the *Nationality Decrees in Tunis and Morocco*,[1] and the International Court's judgment in the *Corfu Channel Case (Merits)*.[2] Nor can it be denied that both Courts made substantial contributions to the development and methodology of international law.[3] So far as the present Court is concerned, reference need only be made to the Advisory Opinions on *Conditions of Membership in the United Nations*[4] and on *Reparation for Injuries Suffered in the Service of the United Nations*,[5] and to the judgments in the *Fisheries Case*,[6] the *Nottebohm Case (Second Phase)*,[7] the *Minquiers and Ecrehos Case*,[8] the *United States Diplomatic and Consular Staff in Tehran Case*,[9] and other later important cases, such as, eg, *Nicaragua v United States* (1986), referred to, in their appropriate place, in the present book. The role permitted to international adjudication may be a modest one, but it is at present indispensable, particularly for clarifying on the judicial level those issues which can be resolved according to international law.

Then there should be mentioned the possibility, as illustrated in the *Case Concerning the Arbitral Award of the King of Spain*,[10] of using the International Court of Justice for the judicial review or revision of international arbitral awards on the ground that the arbitral tribunal exceeded its jurisdiction, committed a fundamental error in procedure, etc. The International Law Commission favoured recourse to the Court for revision of an award on the ground of the discovery of some fact of such a nature as to constitute a decisive factor.[11] At present, however, any such challenge to an arbitral award is only possible by special agreement between the parties, or if the matter can be brought under the compulsory jurisdiction of the Court.

Finally not to be overlooked is the key role which the President of the

19. (1925) Pub PCIJ Series B, No 12.
20. (1931) Pub PCIJ Series A/B, No 41.
1. (1923) Pub PCIJ Series B, No 4. The Court ruled that questions of nationality cease to belong to the domain of exclusive domestic jurisdiction if issues of treaty interpretation are incidentally involved, or if a state purports to exercise jurisdiction in matters of nationality in a protectorate.
2. ICJ 1949, 4.
3. See for an evaluation of the work of the International Court of Justice, Leo Gross 56 AJIL (1962) 33–62.
4. Referred to below, p 635.
5. Referred to below, p 604.
6. Referred to above, pp 249–250.
7. Referred to above, p 344.
8. Referred to above, p 161.
9. ICJ 1980, 3.
10. See ICJ 1960, 192. In this case, the Court negatived the existence of any excess of jurisdiction, or error.
11. In art 38 of the draft model Articles on Arbitral Procedure, referred to above, p 490, n 14.

Court plays in so far as he is called upon to appoint arbitrators, umpires, and members of Commissions, or other holders of offices[12]—to this extent, he performs indispensable services in the field of peaceful settlement of disputes.

(c) Negotiation, good offices, mediation, conciliation, or inquiry

Negotiation, good offices, mediation, conciliation, and inquiry are methods of settlement less formal than either judicial settlement or arbitration.

Little need be said concerning negotiation except that it frequently proceeds in conjunction with good offices or mediation, although reference should be made to the now growing trend of providing, by international instrument or arrangement, legal frameworks for two processes of ***consultation***, both prior consultation and post-event consultation, and ***communication***, without which in some circumstances negotiation cannot proceed. Illustrations of the former are the provisions for consultation in the Australia-New Zealand Free Trade Agreement of 31 August 1965, and of the latter, the United States-Soviet Memorandum of Understanding, Geneva, 20 June 1963 for a direct communication link—the so-called 'hot line'—between Washington and Moscow in case of crisis.[13] The value of *continued* negotiation was illustrated by the conclusion of the US-Soviet Intermediate-Range Nuclear Forces Agreement (INF) in December 1987 after the earlier unsuccessful parleys between the two countries at Reykjavik, Iceland; the latter parleys although abortive had nonetheless clarified some overhanging issues.

Both good offices and mediation are methods of settlement in which, usually, a friendly third state assists in bringing about an amicable solution of the dispute.[14] But the party tendering good offices or mediating may also, in certain cases, be an individual or an international organ (cf the tender of good offices by the United Nations Security Council in 1947 in the dispute between the Netherlands and the Republic of Indonesia). The distinction between good offices and mediation is to a large extent a matter of degree. In the case of good offices, a third party tenders its services in order to bring the disputing parties together, and to suggest

12. As to the functions of the President, see study by Sir Percy Spender (President, 1964–1967), *Australian Year Book of International Law* (1965) pp 9–22, and the Court's *Yearbook 1986–1987* pp 125–126.

13. The latter agreement was supplemented by a Modernisation Agreement of 1971 for improving the reliability of the 'hot line' link. The link has had the advantage of the addition of sophisticated technological improvements. See as to negotiation, J. G. Merrills *International Dispute Settlement* (1984) ch 1, 'Negotiation' pp 1–19, and in respect to prior consultation, Kirgis *Prior Consultation in International Law: A Study of State Practice* (1983) and Sir Joseph Gold (1984) 24 Virginia Journal of International Law pp 729–753.

14. See Part II of the Hague Convention of 1907 on the Pacific Settlement of International Disputes.

(in general terms) the making of a settlement, without itself actually participating in the negotiations or conducting an exhaustive inquiry into the various aspects of the dispute. Hence, once the parties have been brought together for the purpose of working out a solution of their controversies, strictly speaking the state or party tendering good offices has no further active duties to perform (see article X of the Pact of Bogotá, ie the Inter-American Treaty on Pacific Settlement of 30 April 1948). In the case of mediation, on the other hand, the mediating party has a more active role, and participates in the negotiations and directs them in such a way that a peaceful solution may be reached, although any suggestions made by it are of no binding effect upon the parties.[15] The initiative of the Soviet Government at the end of 1965 and early in 1966 in bringing representatives of India and Pakistan together at Tashkent to settle the conflict between them, and in creating a propitious atmosphere, for a settlement, seems to have lain somewhere between good offices and mediation.

It is likewise difficult to fit into the traditional third-party roles in the settlement of disputes the part played by the Government of the Democratic and Popular Republic of Algeria in procuring a resolution in January 1981 of the United States–Iranian dispute—perhaps better described as a 'crisis' in the relations of the United States and Iran—over the detention of American nationals (diplomatic and consular staff in particular) in Iran. In the relevant documents[16] it was stated that the Algerian Government had been 'requested' by the disputant parties 'to serve as an *intermediary* in seeking a mutually acceptable resolution', and that it had 'consulted extensively with the two governments as to the commitments which each is willing to make in order to resolve the crisis'. Moreover, the Algerian Government made two Declarations, attesting the commitments and agreements of the disputant parties, including an agreement for the establishment of an International Arbitral Tribunal, designated as the Iran-United States Arbitral Tribunal, to decide claims of American nationals against Iran, and claims of Iranian nationals

15. These meanings of good offices and mediation have not been strictly followed in United Nations practice. The United Nations Good Offices Committee in Indonesia appointed by the Security Council in 1947 had more extensive functions than good offices as such, eg, reporting to the Security Council on, and making recommendations as to developments in Indonesia, 1947–48; the United Nations Mediator in Palestine in 1948 was entrusted with the duties of reporting on developments, of promoting the welfare of the inhabitiants of Palestine, and of assuring the protection of the Holy Places; and the Good Offices Committee for the Korean hostilities appointed by the United Nations General Assembly in 1951 was expected not merely to bring about negotiations between the contending forces, but to propose means and methods for effecting a cessation of hostilities. Cf also the case of the Good Offices Committee on South West Africa, appointed in 1957, whose duty was not only to discuss a basis of agreement with the South African Government, but to report to the General Assembly.
16. The material documents are reproduced in 75 AJIL 418 et seq.

against the United States. If the Algerian Government's part cannot be categorised as pertaining entirely to conciliation, or good offices, or mediation, it was nevertheless effective in achieving a settlement involving, among other points, the release of the detained American nationals.

The scope of both good offices and mediation is limited; there is a lack of any procedure in both methods for conducting a thorough investigation into the facts or the law. Hence, in the future, the greatest possibilities for both methods lie as steps preliminary or ancillary to the more specialised techniques of conciliation, of inquiry, and of settlement through the United Nations.

The term 'conciliation' has both a broad and a narrow meaning. In its more general sense, it covers the great variety of methods whereby a dispute is amicably settled with the aid of other states or of impartial bodies of inquiry or advisory committees. In the narrow sense, 'conciliation' signifies the reference of a dispute to a commission or committee to make a report with proposals to the parties for settlement, such proposals not being of a binding character. According to Judge Manly O. Hudson:[17]

> 'Conciliation... is a process of formulating proposals of settlement after an investigation of the facts and an effort to reconcile opposing contentions, the parties to the dispute being left free to accept or reject the proposals formulated.'

The fact that the parties are perfectly free to decide whether or not to adopt the proposed terms of settlement distinguishes conciliation from arbitration, and has the consequence that conciliation can be used to settle any kind of dispute or situation.

Conciliation Commissions were provided for in the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes (see respectively Title III and Part III of these conventions). Such Commissions could be set up by special agreement between the parties, and were to investigate and report on situations of fact with the proviso that the report in no way bound the parties to the dispute. The actual provisions in the conventions avoid any words suggesting compulsion on the parties to accept a Commission's report. Similar Commissions were also set up under a series of treaties negotiated by the United States in 1913 and the following years, known as the 'Bryan Treaties'. More recent treaties providing for conciliation are the Brussels Treaty of 17 March 1948, and the Pact of Bogotá of 1948, referred to above.

The value of Conciliation Commissions as such has been doubted by several authorities, but the procedure of conciliation itself proved most useful and important when employed by the League of Nations Council to settle international disputes. The Council's use of conciliation was extremely flexible; generally a small committee, or a person known as a

17. Hudson *International Tribunals* (1944) p 223.

rapporteur,[18] was appointed to make tactful investigations and suggest a method of composing the differences between the parties.[19] States do attach great value to the procedure of conciliation, as reflected in the provision made for it in the Convention of 18 March 1965, on the Settlement of Investment Disputes between States and Nationals of other States.

The object of an inquiry is, without making specific recommendations, to establish the facts, which may be in dispute, and thereby prepare the way for a negotiated adjustment.[20] Thus, frequently, in cases of disputed boundaries, a commission may be appointed to inquire into the historical and geographical facts which are the subject of controversy and thus clarify the issues for a boundary agreement. Also, sometimes an expert fact-finding committee is necessary to inquire into certain special facts for the purposes of preliminary elucidation.

Obviously one or more of the above methods—negotiation, good offices, mediation, conciliation, inquiry, and fact-finding—may be used in combination with the other or others.

Various endeavours have been made to improve processes of settlement, and render them even more flexible. The proposals have included the extension of fact-finding methods, and the creation of a fact-finding organ or fact-finding centre.[1] On 18 December 1967, the United Nations General Assembly adopted a Resolution, upholding the usefulness of the method of impartial fact-finding as a mode of peaceful settlement, and in which it urged member states to make more effective use of fact-finding methods, and requested the Secretary-General to prepare a register of experts whose services could be used by agreement for fact-finding in relation to a dispute. Subsequently, in accordance with the Resolution, nominations of experts were received for the purposes of the register (see Note by Secretary-General, Document A/7240), and each year the Secretary-General has transmitted to member states lists of experts so nominated. Existing facilities for fact-finding include also those provided by the Panel

18. The United Nations General Assembly also favours the flexible procedure, and has made various recommendations in the matter of the appointment of rapporteurs and conciliators; see below, p 639. Governments of a number of member states of the United Nations have designated members of a United Nations panel to serve on Commissions of conciliation and inquiry.
19. There have been several instances of the use of conciliation, outside the United Nations, since the end of the Second World War. The Bureau of the Permanent Court of Arbitration makes its facilities available for the holding of Conciliation Commissions. Cf also art 47 of the Hague Convention, 18 October 1907, on the Pacific Settlement of International Disputes.
20. An inquiry may necessitate the lodging of written documents similar to pleadings, such as memorials and counter-memorials, and oral proceedings, with the taking of evidence, as in the '*Red Crusader' Inquiry* (Great Britain–Denmark) conducted at The Hague in 1962; see *Report* of the three-member Commission of inquiry, 23 March 1962.
1. See *UN Juridical Yearbook*, 1964 pp 166–174.

for Inquiry and Conciliation set up by the General Assembly in April 1949.

Even wider initiatives have been supported by the United Kingdom, the United States, and other countries in the General Assembly. If these result in more effective processes, the suggestions are to be welcomed, but it is always to be remembered that further multiplication of organs may derogate from the value and significance of those which now exist. In this connection, reference should be made to the hortatory Resolution on the peaceful settlement of international disputes adopted by the General Assembly on 12 December 1974, in which the attention of member states of the United Nations was drawn to existing machinery for resolving disputes, and the Assembly called upon them 'to make full use and seek *improved implementation*' of such machinery. This Resolution, which contained an interesting reference to the good offices of the Secretary-General of the United Nations, may be regarded in a sense as a Charter on the subject of settlement of disputes between states.

However, it would appear that this 1974 Resolution, viewed as such a Charter, has been superseded by the Manila Declaration on the Peaceful Settlement of International Disputes, approved by consensus by the General Assembly in 1982, and which may be regarded partly as a code of rules on the subject, partly as a manifesto of guidelines and desiderata, and partly as an elaborate hortatory instrument. In more vigorous language, many of the principles contained in that connection in the United Nations Charter are re-affirmed, states are required to have recourse to the traditional techniques of dispute-settlement already mentioned above, and their attention is drawn to all the available options for peaceful resolution of their differences. Some special points are made in the Manila Declaration, as follows:

a. States should bear in mind that direct negotiations are a flexible and effective means of peaceful settlement of disputes, and if they choose to resort to direct negotiations, they should negotiate meaningfully.
b. States are enjoined to consider making greater use of the fact-finding capacity of the Security Council in accordance with the United Nations Charter.
c. Recourse to judicial settlement of legal disputes, particularly by way of referral to the International Court of Justice , should not be considered as an unfriendly act between states.
d. The Secretary-General of the United Nations should make full use of the provisions of the Charter concerning his special responsibilities, eg, bringing to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

Although it may be felt that there is little that is novel in the Manila

Declaration, the reaffirmation of established precepts in more elaborate and categorical language can be of value.

(d) Settlement under Auspices of United Nations Organisation

As successor to the League of Nations, the United Nations Organisation, created in 1945, has taken over the bulk of the responsibility for adjusting international disputes. One of the fundamental objects of the Organisation is the peaceful settlement of differences between states, and by article 2 of the United Nations Charter, Members of the Organisation have undertaken to settle their disputes by peaceful means and to refrain from threats of war or the use of force.

In this connection, important responsibilities devolve on the General Assembly and on the Security Council, corresponding to which wide powers are entrusted to both bodies. The General Assembly is given authority, subject to the peace enforcement powers of the Security Council, to recommend measures for the peaceful adjustment of any situation which is likely to impair general welfare or friendly relations among nations (see article 14 of the Charter).

The more extensive powers, however, have been conferred on the Security Council in order that it should execute swiftly and decisively the policy of the United Nations. The Council acts, broadly speaking, in two kinds of disputes: (i) disputes which may endanger international peace and security; (ii) cases of threats to the peace, or breaches of peace, or acts of aggression. In the former case, the Council, when necessary, may call on the parties to settle their disputes by the methods considered above, viz, arbitration, judicial settlement, negotiation, inquiry, mediation, and conciliation. Also the Council may at any stage recommend appropriate procedures or methods of adjustment for settling such disputes. In the latter case, (ii) above, the Council is empowered to make recommendations or decide what measures are to be taken to maintain or restore international peace and security, and it may call on the parties concerned to comply with certain provisional measures. There is no restriction or qualification on the recommendations which the Council may make, or on the measures, final or provisional, which it may decide are necessary. It may propose a basis of settlement, it may appoint a commission of inquiry, it may authorise a reference to the International Court of Justice, and so on. Under articles 41 to 47 of the Charter, the Security Council has also the right to give effect to its decisions not only by coercive measures such as economic sanctions, but also by the use of armed force against states which decline to be bound by these decisions.[2]

With the exception of disputes of an exclusively legal character which are usually submitted to arbitration or judicial settlement, it is purely a matter of policy or expediency which of the above different methods is

2. See further below, Ch 20 at pp 645–651 for detailed treatment.

to be adopted for composing a particular difference between states. Certain treaties have endeavoured to define the kind of dispute which should be submitted to arbitration, judicial settlement, or conciliation, or the order in which recourse should be had to these methods, but experience has shown the dubious value of any such pre-established definitions or procedure. Any one method may be appropriate, and the greater the flexibility permitted, the more chance there is of an amicable solution.

The General Act for the Pacific Settlement of International Disputes adopted by the League of Nations Assembly in 1928 was a type of instrument in which a maximum of flexibility and freedom of choice was sought to be achieved.[3] It provided separate procedures, a procedure of conciliation (before Conciliation Commissions) for all disputes (Chapter I), a procedure of judicial settlement or arbitration for disputes of a legal character (Chapter II), and a procedure of arbitration for other disputes (Chapter III). States could accede to the General Act by accepting all or some of the procedures and were also allowed to make certain defined reservations (for example, as to prior disputes, as to questions within the domestic jurisdiction, etc). The General Act was acceded to by 23 states, only two of whom acceded to part of the instrument, but unfortunately the accessions to the General Act as a whole were made subject to material reservations. As a result, the practical influence of the instrument was negligible. A Revised General Act was adopted by the United Nations General Assembly on 28 April 1949, but it has not been acceded to by as many states as expected.

In this connection, there should be mentioned the problem of peaceful change or revision of treaties and the status quo which troubled publicists a good deal just before the Second World War. Many claimed that none of the above methods was suitable for settling 'revisionist' disputes, and proposed the creation of an International Equity Tribunal which would adjudicate claims for peaceful change on a basis of fairness and justice. The powers which would have been conferred on such a tribunal appear now to be vested, although not in a very specific or concrete manner, in the United Nations. Thus art 14 of the United Nations Charter on the re-examination of treaties, already examined above in Chapter 16 on the law and practice as to treaties, empowers the UN General Assembly to recommend measures for the peaceful adjustment of any situation 'likely to impair the general welfare or friendly relations among nations', including situations resulting from a breach of the Charter.

3. The Pact of Bogotá of 30 April 1948 (Inter-American Treaty on Pacific Settlement), and the European Convention for the Peaceful Settlement of Disputes, concluded at Strasbourg on 29 April 1957, are illustrations of regional multilateral instruments with similarly detailed provisions for recourse to different procedures of settlement of disputes.

Because of considerations of space, only brief reference can be made to the settlement of international disputes by regional agencies or groups. This is referred to in para 2 of art 52 of the United Nations Charter. The subject has also been dealt with in detail in the relevant literature.[4] In 1983–1988, the efforts of three regional groups in Central and South America directed to achievement of peaceful settlements in that part of the world attracted general notice. These were the Contadora group (Foreign Ministers of Colombia, Mexico, Panama and Venezuela), the Central American group (Foreign Ministers of Costa Rica, Honuras, Guatemala, El Salvador and Nicaragua) and the so-called 'Support Group' (Foreign Ministers of Argentina, Uruguay, Brazil and Peru).

3. FORCIBLE OR COERCIVE MEANS OF SETTLEMENT

When states cannot agree to solve their disputes amicably a solution may have to be found and imposed by forcible means. The principle forcible modes of settlement are:

a. War and non-war armed action.
b. Retorsion.
c. Reprisals.
d. Pacific blockade.
e. Intervention.

(a) War and non-war armed action

The whole purpose of war is to overwhelm the opponent state, and to impose terms of settlement which that state has no alternative but to obey. Armed action, which falls short of a state of war, has also been resorted to in recent years. War and non-war armed hostilities are discussed in detail in Chapter 18, below.

(b) Retorsion

Retorsion is the technical term for retaliation by a state against discourteous or inequitable acts of another state, such retaliation taking the form of unfriendly legitimate acts within the competence of the state whose dignity has been affronted; for example, severance of diplomatic relations, revocation of diplomatic privileges, or withdrawal of fiscal or tariff concessions.[5]

So greatly has the practice as to retorsion varied that it is impossible to define precisely the conditions under which it is justified. At all events it need not be a retaliation in kind.

4. See, eg, J.G. Merrills *International Dispute Settlement* (1984) ch 9, 'Regional Organisations' pp 164 et seq, esp at pp 175–179 dealing with the limitations of regional action.
5. See Richard B. Lillich 'Forcible Self-Help under International Law' 62 *US Naval War College International Law Studies* (1980) 129, pp 130–131.

The legitimate use of retorsion by member states of the United Nations has probably been affected by one or two provisions in the United Nations Charter. For example, under paragraph 3 of article 2, member states are to settle their disputes by peaceful means in such a way as not to 'endanger' international peace and security, and justice. It is possible that an otherwise legitimate act of retorsion may in certain circumstances be such as to endanger international peace and security, and justice, in which event it would seemingly be illegal under the Charter.

(c) Reprisals

Reprisals are methods adopted by states for securing redress from another state by taking retaliatory measures.[6] Formerly, the term was restricted to the seizure of property or persons, but in its modern acceptation connotes coercive measures adopted by one state against another for the purpose of settling some dispute brought about by the latter's illegal or unjustified conduct. The distinction between reprisals and retorsion is that reprisals consist of acts which would generally otherwise be quite illegal whereas retorsion consists of retaliatory conduct to which no legal objection can be taken. Reprisals may assume various forms, for example, a boycott of the goods of a particular state,[7] an embargo, a naval demonstration,[8] or bombardment. Few topics of international practice are more controversial than that of reprisals, and this was well illustrated in 1973–1974 when the Arab oil producing states introduced an oil export embargo as to certain states of destination; the views expressed on the legality or illegality of this embargo were irreconcilable, and are indicative of the extent to which the law in this respect is unsettled.

It is now generally established by international practice that a reprisal is only justified, if at all, where the state against which it is directed has been guilty of conduct in the nature of an international delinquency. Moreover, a reprisal would not be justified if the delinquent state had not been previously requested to give satisfaction for the wrong done, or if the measures of reprisals were 'excessive' proportionately in relation to the injury suffered.[9] There have been several vivid illustrations of

6. Ibid, pp 131–133.
7. Unless used by way of justifiable reprisal, semble, a national boycott by one state of the goods of another may amount to an act of economic aggression in breach of international law. See Bouvé 28 AJIL (1934) 19 et seq.
8. Semble, defensive naval or military demonstrations are permissible in defence to an armed attack, but subsequent forcible self-help for purposes of redress, added precautions, etc, is not; cf *Corfu Channel (Merits) Case* ICJ 1949, 4 at 35.
9. See the *Naulilaa Case* (1928), Recueil of Decisions of the Mixed Arbitral Tribunals, Vol 8, p 409 at pp 422–425. The subject of the international law as to reprisals, including the question of their possible justification under certain circumstances, is thoroughly examined in a number of articles in the special Spring 1987 issue of the *Case Western Reserve Journal of International Law*. Certain of the articles also analyse the principles governing the question of the legitimacy of the American bombing of Libyan targets on 15 April 1986, considered as a reprisal (see below, p 521).

purported reprisal action by states, for example the expulsion of Hungarians from Yugoslavia in 1935, in alleged retaliation for Hungarian responsibility for the murder of King Alexander of Yugoslavia at Marseilles, and the shelling of the Spanish port of Almeria by German warships in 1937, as reprisal for an alleged bombardment of the battleship *Deutschland* by a Spanish aircraft belonging to the Spanish Republican forces. Perhaps the most dramatic example is that of a recent nature, namely the United States-initiated aerial bombing of targets inside the borders of Libya on 15 April 1986 by way of claimed legitimate reprisal against what was said to be indiscriminate violence allegedly directed by the latter country against Americans over a period of time, including a bomb explosion on 5 April 1986 in a West German discotheque frequented by American servicemen, resulting in the wounding of over 50 Americans.

Some authorities hold that reprisals are only justified if their purpose is to bring about a satisfactory settlement of a dispute. Hence the principle referred to above that reprisals should not be resorted to unless and until negotiations for the purpose of securing redress from the delinquent state fail.

Strictly speaking, retaliatory acts between belligerent states in the course of a war are a different matter altogether from reprisals, although they also are termed 'reprisals'. The object of such acts is generally to force an opponent state to stop breaking the laws of war; as, for example, in 1939–1940, when Great Britain commenced the seizure of German exports on neutral vessels in retaliation for the unlawful sinking of merchant ships by German-sown naval magnetic mines. No less than peace-time reprisals, the topic of reprisals as between belligerents is the subject of deep controversy, as reflected in the acute division of views on the matter at the Sessions in 1974–1977 of the Diplomatic Conference at Geneva on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (see also Chapter 18, below).

As in the case of retorsion, the use of reprisals by member states of the United Nations has been affected by the Charter. Not only is there paragraph 3 of article 2 mentioned above in connection with retorsion, but there is also the provision in paragraph 4 of the same article that member states are to refrain from the threat or use of force against the territorial integrity or politicial independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. Also, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations Charter, adopted by the General Assembly on 24 October 1970, expressly declares: 'States have a duty to refrain from acts of reprisal involving the use of force'. The United Nations Security Council had earlier, in 1964, by a majority, condemned reprisals as being 'incompatible with the Purposes and Principles of the United Nations'. A reprisal, therefore, being an act otherwise than for the purpose of lawful defence,

under article 51 of the United Nations Charter, against armed attack, and which consisted in the threat or the exercise of military force against another state in such a way as to prejudice its territorial integrity, or political independence would presumably be illegal. Moreover under article 33 the states parties to a dispute, the continuance of which is likely to endanger peace and security are 'first of all' to seek a solution by negotiation, and other peaceful means. Thus a resort to force by way of retaliation would seemingly be excluded as illegal. The above-mentioned American bombing of targets in Libya on 15 April 1986 was justified, inter alia, on the ground that it was by way of lawful defence against alleged continuous armed attacks made by Libya.

There have also been cases of international or collective reprisals.[10]

(d) Pacific blockade

In the time of war, the blockade of a belligerent state's ports is a very common naval operation. The pacific blockade, however, is a measure employed in time of peace. Sometimes classed as a reprisal, it is generally designed to coerce the state whose ports are blockaded into complying with a request for satisfaction by the blockading states. Some authorities have doubted its legality. If not now obsolete, its admissibility as a unilateral measure is questionable, in the light of the United Nations Charter.

The pacific blockade appears to have been first employed in 1827; since that date there have been about 20 instances of its employment[11]. It was generally used by very powerful states, with naval forces, against weak states. Although for that reason liable to abuse, in the majority of cases it was employed by the Great Powers acting in concert for objects which were perhaps in the best interests of all concerned, for example, to end some disturbance, or to ensure the proper execution of treaties, or to prevent the outbreak of war, as in the case of the blockade of Greece in 1886 to secure the disarming of the Greek troops assembled near the frontiers and thus avoid a conflict with Turkey. From this standpoint the

10. By Resolution of 18 May 1951, during the course of the hostilities in Korea, the United Nations General Assembly recommended a collective embargo by states on the shipment of arms, ammunition and implements of war, items useful in their production, petroleum, and transportation materials to areas under the control of the Government of the People's Republic of China, and of the North Korean authorities. A number of member states of the United Nations acted upon this recommendation. Another case was the decision of the Ministers of Foreign Affairs of the American States at Punta del Este, Uruguay, in January 1962, acting under the Inter-American Treaty of Reciprocal Assistance of 2 September 1947, to suspend trade with Cuba in arms and implements of war of every kind. It was alleged that Cuba was conducting subversive activity in America. Cuba challenged the validity of the decision on the ground that it was enforcement action taken without the authorisation of the Security Council under Chapter VII of the United Nations Charter, but this objection was denied.

11. See Walter R. Thomas 'Pacific Blockade: A Lost Opportunity of the 1930s?' in 62 *US Naval War College International Law Studies* (1980) 197 at 198.

pacific blockade may be regarded as a recognised collective procedure for facilitating the settlement of differences between states. Indeed, the blockade is expressly mentioned in article 42 of the United Nations Charter as one of the operations which the Security Council may initiate in order to 'maintain or restore international peace and security'.

There are certain obvious advantages in the employment of the pacific blockade. It is a far less violent means of action than war, and is more elastic. On the other hand, it is more than an ordinary reprisal, and against any but the weak states who are usually subjected to it, might be deemed an act of war. It is perhaps a just comment on the institution of pacific blockade that the strong maritime powers who resort to it do so in order to avoid the burdens and inconveniences of war.

Most writers agree, and on the whole the British practice supports the view, that a blockading state has no right to seize ships of third states which endeavour to break a pacific blockade.[12] It follows also that third states are not duty bound to respect such a blockade. The principle is that a blockading state can only operate against ships of other states if it has declared a belligerent blockade, that is, where actual war exists between the blockading and blockaded states and accordingly it becomes entitled to search neutral shipping. But by instituting merely a pacific blockade, the blockading state tacitly admits that the interests at stake were not sufficient to warrant the burdens and risks of war. On principle, therefore, in the absence of an actual war, the blockading state should not impose on third states the obligations and inconveniences of neutrality. In other words, a blockading state cannot simultaneously claim the benefits of peace and war.

The 'selective' blockade or 'quarantine' of Cuba by the United States in October 1962, although instituted in peacetime, cannot be fitted within the traditional patten of the pacific blockades of the nineteenth century. First, it was more than a blockade of the coast of a country as such. Its express purpose was to 'interdict' the supply of certain weapons and equipment[13] to Cuba, in order to prevent the establishment or reinforcement of missile bases in Cuban territory, but not to preclude all entry or exit of goods to or from Cuba. Second, vessels of countries other than Cuba, en route to Cuba, were subject to search and, if necessary, control by force, and could be directed to follow prescribed routes or avoid prohibited zones; but it was not in terms sought to render weapon-carrying vessels or their cargoes subject to capture for breach of the

12. The United States also consistently maintained that pacific blockades were not applicable to American vessels.
13. In the Presidential Proclamation of October 1962, instituting the blockade, these were listed as: Surface-to-surface missiles; bomber aircraft; bombs, air-to-surface rockets and guided missiles; warheads of any of these weapons; mechanical or electronic equipment to support or operate these items; and other classes designated by the US Secretary of Defence.

'interdiction'. Third, among other grounds, the President of the United States purported to proclaim the quarantine pursuant to a recommendation of an international organisation, namely the Organisation of American States.[14] Fourth, the quarantine was conducted in a manner unlike that characteristic of traditional pacific blockades; eg under a 'Clearcet' scheme, shippers could obtain beforehand a clearance certificate to send cargoes through the zone subject of the quarantine.[15]

Assuming that such a blockade is, in all the circumstances, permitted by the United Nations Charter, nevertheless because of the very special geographical and other conditions, no general conclusions can be drawn from it as a precedent. If not permissible under the Charter, the effect of the 'quarantine' in interfering with the freedom of the high seas raised serious issues as to its justification under customary international law.

Another special case, more recent than that of the Cuban quarantine of 1962, and likewise to be distinguished from that of a pacific blockade, was represented by the formal announcement on 28 April 1982 by the United Kingdom Government of a 200-mile Total Exclusion Zone (TEZ) around the Falkland Islands, extended on 7 May 1982 to 12 miles from the coast of Argentina; this measure preceded the steps taken by British forces to retake the territory of the islands occupied by Argentine garrisons, and was thus a warlike measure forming an integral part of a combined air, naval and military campaign. It was in point of fact justified as an exercise of the right of self-defence against an armed attack under article 51 of the United Nations Charter. The terms of the formal announcement of the TEZ, so far as material point clearly to its difference from a pacific blockade:

> '..... The exclusion zone will apply not only to Argentine warships and naval auxiliaries, but also to any other ship, whether naval or merchant vessel, which is operating in support of the illegal occupation of the Falkland Islands by Argentine forces. The zone will also apply to any aircraft, whether military or civil, which is operating in support of the Argentine occupation. Any ship and any aircraft, whether military or civil, which is found within this zone without authority from the Ministry of Defence in London will be regarded as operating in support of the illegal occupation and will therefore be regarded as hostile and will be liable to be attacked by British forces.'

Leaving aside the difference of this TEZ from a pacific blockade, its

14. Its Council, meeting as a provisional Organ of Consultation under the Inter-American Treaty of Reciprocal Assistance of 2 September 1947, adopted on 23 October 1962, a Resolution recommending member states to take measures to ensure that Cuba should not receive military supplies, etc.
15. See James J. McHugh, 'Forceable Self-Help in International Law' 62 *US Naval War College International Law Studies* (1980) 139, pp 154–156; and Henkin, Pugh, Schachter and Smit *International Law; Cases and Materials* (2nd edn, 1987) pp 702–704, 794–795.

legality, as in the case of the Cuban quarantine, under the United Nations Charter and customary international law, has been questioned.

(e) Intervention

The subject of intervention has been discussed above in Chapter 5.[16]

16. See pp 103–107.

CHAPTER 18

War, armed conflicts and other hostile relations

1. GENERAL

The hostilities in Korea, 1950–1953,[1] ending with the Armistice Agreement of 27 July 1953, the fighting in Indo-China, 1947–1954, and the conflict in and around the Suez Canal Zone involving Israel, Egypt, France and Great Britain in 1956, finally confirmed a development in the practice of states which has to some extent revolutionised the basis of those rules of international law, traditionally grouped under the title, 'the law of war'. For these were non-war armed conflicts. Further confirmation of this development was furnished by the hostilities in West New Guinea between Indonesian and Dutch units in April-July 1962, by the border fighting between India and the People's Republic of China in October-November 1962, by the hostilities in the Congo, 1960–1963, by the India-Pakistan armed conflicts of September 1965, and December 1971, and more recently by the hostilities in Lebanon in 1982–1983. None of these cases received general recognition as involving a state of war.

The conflict in Vietnam was a special case.[2] In the early stages, the Vietnam hostilities could appropriately have been fitted into the category of non-war armed conflicts. Since the struggle escalated from about 1965 onwards into the dimensions of a major local war, this non-war characterisation had scarcely been possible. Indeed some of the participants expressly referred to it as a 'war' (eg, the United States President on 30 April 1971, in an address justifying the incursion into Cambodia,

1. See also below, pp 651–652.
2. It is a moot question whether the conflict between the United Kingdom and Argentina, April–June 1982, over the occupation of territory of the Falkland Islands by Argentine garrisons, and which involved a combined military, air and naval campaign by British forces to retake the territory and expel the garrisons, could be characterised as a 'war' in the classic sense, although it was popularly referred to, or described as the 'Falklands War', notwithstanding the official attitude of the British Government that a state of war with Argentina did not exist. On the other hand, the Iraq–Iran hostilities which began in September 1980 and terminated in August 1988 when the mandatory Resolution 598 of the UN Security Council for the implementation of a cease-fire came into operation, were on such a scale as to justify description as a 'war' rather than as a non-war armed conflict.

now known as Kampuchea).[3] More decisively, the principal Agreement signed at Paris on 27 January 1973, for terminating the conflict bore the title 'Agreement on ending the *War* and Restoring Peace in Vietnam'. Opinions are divided on the point whether the Vietnam conflict can be correctly described as a large-scale civil war with heavy involvement of outside states, or an international war, or a tertium quid of an international conflict with some civil war characteristics.

The traditional rules hinged on the existence between such states as came under the operation of the rules, of a hostile relationship known as 'war', and war in its most generally understood sense was a contest between two or more states primarily through their armed forces, the ultimate purpose of each contestant or each contestant group being to vanquish the other or others and impose its own conditions of peace. This is similar to the conception of the greatest theorist of the nature of war, Karl von Clausewitz (1780–1831), for whom war was a struggle on an extensive scale designed by one party to compel its opponent to fulfil its will. Hence also we have the well-respected definition of 'war' by Hall, judicially approved in *Driefontein Consolidated Gold Mines v Janson*:[4]

> 'When differences between States reach a point at which both parties resort to force, or one of them does acts of violence, which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other, until one of the two has been brought to accept such terms as his enemy is willing to grant.'

The Korean hostilities involved an armed conflict, at first between the North Korean armies[5] on the one hand, and the South Korean Armies and armed forces of the United Nations Command on the other hand, without any declared status of war being involved. Yet this conflict was one on the scale of war as normally understood, and made it necessary to bring into application many of the rules traditionally applicable as part of the law of war. Prior to the Korean conflict, there had been precedents of hostilities, not deemed to be of the nature of war, among which may be instanced: (a) the Sino–Japanese hostilities in Manchuria, 1931–1932, and from 1937 onwards in China; (b) the Russo–Japanese hostilities at Changkufeng in 1938; and (c) the armed operations involving (ostensibly) Outer Mongolian and Inner Mongolian forces at Nomonhan in 1939. A later example of a non-war armed conflict, the Suez Canal zone hostilities in October–November 1956, was indeed the subject of

3. The United States point of view, in justification of the incursion, was, inter alia, that as North Vietnam and the Vietcong had violated Cambodia's neutrality, the United States as a 'belligerent' was entitled to protect her security by way of self-preservation.
4. [1900] 2 QB 339 at 343.
5. Later including armed forces described in the Armistice Agreement as the 'Chinese People's Volunteers'.

the following comment by the British Lord Privy Seal (on 1 November 1956):

> 'Her Majesty's Government do not regard their present action as constituting war... There is no state of war, but there is a state of conflict.'

Before the outbreak of the Korean conflict in 1950, states had already to some extent foreseen the consummation of this development of non-war hostilities.[6] In 1945, at the San Francisco Conference on the United Nations Charter, the peace enforcement powers of the United Nations Security Council were made conditional, not on the existence of a recourse to war by a covenant-breaking state as under article 16 of the League of Nations Covenant, but on the fact of some 'threat to the peace, breach of the peace, or act of aggression' (see article 39 of the Charter). In 1949, the conventions adopted by the Geneva Red Cross Conference dealing with prisoners of war, the sick and wounded in the field, and the protection of civilians were made applicable to any kind of 'armed conflict' as well as to cases of war proper.[7]

Another refinement has been introduced in the distinction between international and 'non-international' armed conflicts. The distinction was drawn in the two Protocols: Protocol I, 'relating to the Protection of Victims of International Armed Conflicts', and Protocol II, 'relating to the Protection of Victims of Non-International Armed Conflicts', adopted as additions to the Geneva Red Cross Conventions of 12 August 1949, by the Geneva Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts at its final session in June 1977 (see below in this chapter). Article 1 of Protocol II virtually defines a non-international armed conflict by providing that the Protocol applies to all armed conflicts not covered by article 1 of Protocol I 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'. However, under the same article 1, the Protocol is not to apply to 'situations of internal disturbances and tensions such as riots, isolated and sporadic

6. The difference between the outbreak of war and the commencement of 'non-war' hostilities was also recognised early on in the United Nations General Assembly Resolution of 17 November 1950, on 'Duties of States in the Event of the Outbreak of Hostilities' (such duties being to avoid *war*, notwithstanding the commencement of an armed conflict). See also the Resolution of the General Assembly of 16 December 1969, on respect for human rights in armed conflicts, which refers to the necessity of applying the basic humanitarian principles 'in all armed conflicts'.
7. Cf also the use of the expression 'armed conflict' in arts 44 and 45 of the Vienna Convention on Diplomatic Relations of 18 April 1961 (facilities to enable diplomatic envoys to leave, protection of legation premises, etc).

acts of violence and other acts of a similar nature, as not being armed conflicts'.

The main reasons or conditions which have dictated this development of non-war hostilities are:

a. the desire of states to preclude any suggestion of breach of a treaty obligation not to go to war[8] (eg, the Briand-Kellogg General Treaty of 1928 for the Renunciation of War, under which the signatories renounced war as an instrument of national policy);
b. to prevent non-contestant states from declaring their neutrality and hampering the conduct of hostilities by restrictive neutrality regulations;
c. to localise the conflict, and prevent it attaining the dimensions of a general war.

Hence there must now be distinguished:

1. A war proper between states.
2. Armed conflicts or breaches of the peace, which are not of the character of war, and which are not necessarily confined to hostilities involving states only, but may include a struggle in which non-state entities participate.

The distinction does not mean that the second category of hostile relations involving states and non-state entities is less in need of regulation by international law than the first.

It is significant that coincidentally with the development of the second category, as illustrated by the Korean conflict,[9] the nature of war itself has become more distinctly clarified as a formal status of armed hostility, in which the intention of the parties, the so-called animus belligerendi, may be a decisive factor. This is consistent with Karl von Clausewitz's view that war is not merely of itself a political act, but serves as a real political instrument for the achievement of certain ends. Thus a state of war may be established between two or more states by a formal declaration of war, although active hostilities may never take place between them; indeed, it appears that of the 50 or more states which declared war during the Second World War, more than half did not actively engage their military or other forces against the enemy. Moreover, the cessation

8. Cf the affirmation in Principle 2 of the United Nations Declaration of 15 December 1978, on the Preparation of Societies for Life in Peace that 'a *war* of aggression, its planning, preparation or initiation are crimes against peace, prohibited by international law'. In that connection, see also the text of the Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, adopted in 1950 by the International Law Commission, and pp 61–63 above.
9. See L.C. Green (1951) 4 ILQ 462 et seq. for discussion on the point whether the Korean conflict amounted to a 'war', and, by same writer, 'Armed Conflict, War, and Self-Defence', *Archiv des Völkerrechts* (1957) Vol 6, pp 387–438.

of armed hostilities does not, according to modern practice, necessarily terminate a state of war.

The 'status' theory of war was reflected in the anomalous position of Germany and Japan during the years immediately following their unconditional surrender in 1945 in accordance with the formula decided upon during the War by the Big Three—Great Britain, Russia and the United States. Although both countries were deprived of all possible means of continuing war, and although their actual government was for a time carried on by the Allies, they continued to be legally at 'war' with their conquerors. In 1947, in *R v Bottrill*, a certificate by the British Foreign Secretary that the state of war continued with Germany was deemed by the Court of Appeal to be binding on the courts.[10] One object of prolonging this relationship of belligerency, if only technically, was no doubt to enable the machinery of occupation controls to be continued. The absence of immediate peace settlements with either of these ex-enemy states was a further significant circumstance.

The definition of war given at the beginning of this chapter sets out that it is a contest *primarily* between the armed forces of states. The word 'primarily' should be noted. As the Second World War demonstrated, a modern war may involve not merely the armed forces of belligerent states, but their entire populations. That war in its 'absolute perfection' could and would embrace whole peoples was foreseen by Karl von Clausewitz, writing in the period 1816–1831. In the Second World War, indeed, economic and financial pressure exerted by the belligerents on each other proved only less important and decisive than the actual armed hostilities. The wholesale use of propaganda and psychological warfare also played a role which became ultimately more decisive. Finally, to a far greater degree than combatants, civilians bore the brunt of air bombardment and the rigours of wartime food shortages.

The commercial or non-technical meaning of war is not necessarily identical with the international law meaning. Thus it was held by an English court[11] that the word 'war' in a charterparty applied to the 'non-war' hostilities in China in 1937 between Chinese and Japanese forces. The word 'peace' can similarly denote the termination of actual hostilities, notwithstanding the continuance of a formal state of war.[12]

10. [1947] KB 41, and cf *Re Hourigan* [1946] NZLR 1. In the American case of *Ludecke v Watkins* 335 US 160 (1948), it was pointed out in Frankfurter J's judgment that a status of war can survive hostilities. See also (1949) 2 ILQ 697.
11. *Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham SS Co Ltd (No 2)* [1938] 3 All ER 80; upheld on appeal [1939] 2 KB 544. Cf *Gugliormella v Metropolitan Life Insurance Co* 122 F Supp 246 (1954) (death in Korean hostilities 1950–1953 is the result of 'an act of war'). Also the 'war' represented by non-war hostilities ends with the termination of such hostilities; see *Shneiderman v Metropolitan Casualty Co* 220 NYS (2d) 947 (1961).
12. See *Lee v Madigan* 358 US 228 (1959) (words 'in time of peace' in art 92 of the Articles of War).

The question whether there is a status of war, or only a condition of non-war hostilities, depends on: (a) the dimensions of the conflict; (b) the intentions of the contestants; and (c) the attitudes and reactions of the non-contestants.

As to (a), merely localised or limited acts of force fall short of war.

As to (b), the intentions of the contestants are normally decisive if the conflict concerns them only, and does not affect other states. Hence, if there is a declaration of war, or in the absence of such a declaration, the contestants treat the conflict as a war, effect must be given to such intention; if, on the other hand, they are resolved to treat the fighting as of the nature of non-war hostilities, a state of war is excluded. An insoluble difficulty arises, however, if according to the attitude of one or more of the contestants, there be a state of war, whereas according to the other or others there is no war. Recent state practice (eg, in the case of the India-Pakistan hostilities of September 1965) is inconclusive on this point. Prima facie, a unilateral attitude of one contestant that it is at war is intended as notice of a claim of belligerent rights, with the expectation that third states will observe neutrality; while a unilateral denial of war operates as notice to the contrary.

As to (c), the policies of non-contestant states enter into account when the conflict impinges on their rights and interests. Assuming the hostilities are on a sufficiently extensive scale, the decision may be made to recognise belligerency,[13] or to make a declaration of neutrality, irrespective of the intentions of the contestants. A third state, adopting this course, woud be subject to the risk of the exercise against it of belligerent rights by either contestant, whose right to do so could not then be challenged. A non-war status could none the less still apply in the relations of the contestants inter se.

Rules of international law governing 'non-war' hostilities

Practice in the Korean conflict, 1950–1953, and the other conflicts mentioned above, revealed the tendency of states to apply most of the rules governing a war stricto sensu to non-war hostilities.[14] As already mentioned, the Geneva Red Cross Conventions of 1949 (for example, that relating to prisoners of war) and the Protocols I and II additional to these Conventions adopted in June 1977 by the Geneva Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (see above in this chapter) were in their terms expressly applicable to non-war conflicts, while the Resolution adopted by the United Nations General Assembly on 16 December 1969,

13. See above, pp 151–153.
14. The United Nations Command in the Korean conflict 1950–1953 declared its intention of observing the 'laws of war', and the Geneva Red Cross Conventions of 1949. These were also observed in varying measure in the Vietnam conflict, to which of course the Geneva Conventions had application.

with regard to respect for human rights in armed conflicts, referred to the necessity of applying the basic humanitarian principles 'in all armed conflicts'.

But every such armed conflict must vary in its special circumstances. It may be, for instance, that the states or non-state entities opposed to each other in hostilities have not made a complete severance of their diplomatic relations. Again, they may or may not seek to blockade each other's coasts.[15] It cannot therefore be predicted of any future armed conflict, not involving a state of war, that the entirety of the laws of war automatically apply to it. Which rules of war apply, and to what extent they are applicable, must depend on the circumstances.

Moreover, in the case of a non-war armed conflict, as to which the United Nations Security Council is taking enforcement action, actual decisions or recommendations adopted by the Security Council under articles 39 et seq of the United Nations Charter, for the guidance of states engaged in the hostilities, may fill the place of rules of international law. Then one has to consider also the incidence of United Nations 'peacekeeping operations', which are referred to in Chapter 20, where recommendations of the General Assembly play a primary role.

Other hostile reactions

Between a state of peace, on the one hand, and of war or non-war hostilities, on the other hand, other gradations of hostile reactions between states are possible, but have to a very limited extent only come within the ambit of international law. An example is the state of opposition—the so-called 'cold war'—existing since 1946 between the Western and the Communist groups of states, although from time to time there is a thaw described as a 'détente'.[16] To a certain extent, this cold war has already reacted on international law; for instance, it has, on both sides, been considered to justify an unprecedented interference with diplomatic agents of opponent states, by procuring their defection and inducing the disclosure of confidential material, and to justify also rigid limitations on the freedom of diplomats, or at times mass expulsions of members of diplomatic missions. Moreover, the cold war has also been thought to necessitate the extensive use of hostile propaganda, including the publication and/or dissemination of so-called 'disinformation', directed by the members of one group against the members of the other group, notwithstanding that the diplomatic relations of the states concerned remain normal, while other unfriendly action, such as cessation of non-discrimination, has occurred.

15. Cf the case of the Total Exclusion Zone (TEZ) declared by the United Kingdom on 28 April 1982, to be in force around the Falkland Islands, for the purpose of the operations to retake the territory occupied by Argentine garrisons; see Chapter 17, above, p 524.
16. The 'cold war' is not a war, for the purpose of determining who are enemy aliens; see decision of Supreme Court of Alabama in *Pilcher v Dezso* 49 AJIL (1955) 417.

One of the unprecedented elements in the cold war is the so-called 'balance of terror', or its euphemism, 'Mutual Assured Destruction' (MAD), which is nothing more or less than precarious equilibrium between the United States and the Soviet Union in their possession and global deployment of nuclear and thermonuclear weapons, and missiles. Some authorities regard it as a myth that MAD represents an assurance of peace. A crucial question is to what extent this permits one of these states, purporting to act for purposes of self-defence, in the absence of an armed attack[17] on it, and without the authorisation of the United Nations Security Council, to take measures which would otherwise be a breach of international law. This issue lay behind the controversy over the legality of: (a) the flight of the United States high-flying reconnaissance aircraft, the U-2, over Russian territory in 1960, when it was detected and shot down, and the pilot taken prisoner; and (b) the continued surveillance of Cuban territory by United States aircraft in October-November 1962, for various purposes. It is simplifying things to reduce the matter to an issue of whether or not peace-time espionage is permissible. Under normal circumstances, it is a violation of international law for the government aircraft of one state to enter the airspace of another without that state's consent. If, then, these flights were legal, the intensity of the cold war had wrought a fundamental change in the rules of international law.

A concept of a new kind made its appearance in the period 1963–1966 in the shape of Indonesia's 'confrontation' of Malaysia, after the establishment of that new state in September 1963. 'Confrontation' involved action and policies to undermine the integrity and position of Malaysia. It was short-lived, being terminated by the signature on 11 August 1966 of an agreement of peace and co-operation (drawn up at Bangkok, signed at Djakarta).

Commencement of war or hostilities

From time immemorial, state practices as to the commencement of a war have varied. Down to the sixteenth century, it was customary to notify an intended war by letters of defiance or by herald, but the practice fell into disuse. In the seventeenth century, Grotius was of the opinion that a declaration of war was necessary, but subsequently several wars were commenced without formal declaration. By the nineteenth century, however, it was taken for granted that some form of preliminary warning by declaration or ultimatum was necessary.

Many instances of state practice in the twentieth century have been inconsistent with the rule. In 1904, Japan commenced hostilities against Russia by a sudden and unexpected attack on units of the Russian fleet

17. Within the meaning of art 51 of the United Nations Charter, permitting measures of self-defence against an armed attack, pending enforcement action by the Security Council to maintain international peace and security.

in Port Arthur. Japan justified her action on the ground that she had broken off negotiations with Russia and had notified the Russians that she reserved her right to take independent action to safeguard her interests.

The Port Arthur incident led to the rule laid down by the Hague Convention III of 1907, relative to the Opening of Hostilities, according to which hostilities ought not to commence without previous explicit warning in the form of either: (a) a declaration of war stating the grounds on which it was based, or (b) an ultimatum containing a conditional declaration of war. It was further provided that the existence of the state of war should be notified to neutral states without delay and should not take effect as regards them until after the receipt of the notification which might, however, be given by telegraph. Neutral states were not to plead absence of such notification in cases where it was established beyond question that they were in fact aware of a state of war.

Scant respect was paid to these rules in the period 1935–1945, during which hostilities were repeatedly begun without prior declaration. So far as the post-1945 period is concerned, the parties to the majority of armed conflicts 1945–1988 have not recognised the rules as applicable to such conflicts. This does not mean, however, that the procedure of a declaration of war, preceding the commencement of hostilities, is altogether obsolete.

Legal regulation of right to resort to war, to armed conflict, and to the use of force

In the field of international law, one of the most significant twentieth century developments has been the legal regulation of the former unregulated privilege of states to resort to war, or to engage in non-war hostilities, or to use force, and the development of the concept of collective security.[18] The latter concept is essentially legal, as it imports the notion of a general interest of all states in the maintenance of peace, and the preservation of the territorial integrity and political independence of states, which have been the object of armed aggression. To quote Professor Bourquin:[19] 'A collective organisation of security is not directed against one particular aggression, but against war considered as a common danger'.

The League of Nations Covenant (see articles 12–15) placed primary emphasis on restricting the right of member states to resort to war, stricto sensu, in breach of certain obligations connected with accepting the arbitration or judicial settlement of certain disputes (more particularly those 'likely to lead to a rupture'), or the recommendations thereon of the League of Nations Council. But in a secondary sense, the Covenant precluded also certain kinds of recourse to non-war hostilities; for

18. On the subject of the legal regulation of the use of force, see A. Casseese (ed) *Legal Restraints on the Use of Force 40 years after the UN Charter* (1986).
19. M. Bourquin (ed) *Collective Security* (1936) p 162.

example, in imposing an obligation upon states to seek arbitration or judicial settlement of disputes which might have entered the stage of active hostilities, and an obligation to respect and preserve as against external aggression the territorial integrity and political independence of other member states (see article 10).

In 1928, under the Briand-Kellogg Pact (or, more precisely, the Paris General Treaty for the Renunciation of War), the states parties agreed generally to renounce recourse to 'war' for the solution of international controversies, and as an instrument of national policy. They also agreed not to seek the solution of disputes or conflicts between them except by 'pacific means', thus covering no doubt non-war hostilities.

In terms, the United Nations Charter of 1945 went much further than either of these two instruments, the primary emphasis on war stricto sensu having disappeared, while in its stead appeared the conception of 'threats to the peace', 'breaches of the peace' and 'acts of aggression', covering both war and non-war armed conflicts. In article 2, as already mentioned in Chapter 17, the member states agreed to settle their disputes by peaceful means so as not to endanger peace and security and justice, and to refrain from the threat or use of force[20] against the territorial integrity or political independence of any state. They also bound themselves to fulfil in good faith their obligations under the Charter, which include not only (a) the restriction that in the case of disputes likely to endanger peace and security, they shall seek a solution by the peaceful procedures set out in articles 33–38; but also (b) the obligation to submit to the overriding peace enforcement functions of the Security Council, including the decisions and recommendations that the Council may deem fit to make concerning their hostile activities. This conception of *peace enforcement*, not predetermined in specific obligations under the Charter, but to be translated ad hoc into binding decisions or recommendations of the Security Council which must be accepted by states resorting to war or to hostilities, represented the most striking innovation of the Charter.

In this connection, two aspects are of particular importance:

1. The aspect of a war or resort to hostilities, involving aggression.
2. A resort to war or to hostilities which is in self-defence.

As to (1), apart from the power of the Security Council to control 'acts of aggression' under article 39 of the Charter, the judgments of the Nuremberg and Tokyo Tribunals confirmed the view that a war of aggression, or in violation of international treaties, is illegal. The Tribunals went further in also holding that the acts of 'planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties' are international crimes engaging the individual

20. *Meaning of 'force'*: Quaere, whether this includes political, economic, and other forms of pressure or coercion, or use of irregular forces; *UN Juridical Yearbook*, 1964 pp 79–83, 97–98. See also p 520, n 7, above, in Ch 17.

responsibility of those committing the acts.[1] The Tribunals' views were based on the Briand-Kellogg Pact of 1928 (mentioned above), but international lawyers have questioned the soundness of the judgments in view of state practice prior to 1941.[2]

An effective system of collective security must provide safeguards against aggression.

The point of difficulty is to determine when a war is 'aggressive' for the purpose of the Nuremberg principles, or when non-war hostilities may constitute 'an act of aggression' for the purpose of the peace enforcement functions of the Security Council. If a state legitimately defends itself against attack by another (see below), it is not guilty of waging aggressive war, or of using aggressive force. But if a state attacks the territorial integrity or political independence of another state either in breach of treaty obligations, or without any justification and with the wilful purpose of destroying its victim, it is clearly guilty of aggression. In the period 1919–1939, a large number of bilateral treaties of non-aggression were concluded, and the draftsmen of these instruments were far from overcoming the formidable difficulties involved in the definition of aggression.[3]

The intractable difficulties involved in the definition of the concept were illustrated by the almost negative results of the labours of two Special Committees, appointed by the United Nations General Assembly in 1952 and 1954 respectively, to deal with the question of defining aggression. By Resolution adopted on 18 December 1967, the General Assembly set up a third Committee,[4] the Special Committee on the Question of Defining Aggression, with the specific mandate of preparing 'an adequate definition of aggression', and made reference to 'a widespread conviction of the need to expedite the definition of aggression'. However, it was not until its seventh session in March–April 1974 that this Special Committee was able to adopt by consensus a definition of aggression, and to recommend that such definition be adopted by the

1. See Principle VI of the Principles of International Law Recognised in the Charter of the International Tribunal and in the Judgment of the Tribunal, drawn up by the International Law Commission in 1950.
2. Eg, the United States Proclamation of neutrality in 1939 on the outbreak of war, professing amity with the belligerents; if the Tribunals were right, by such Proclamation the United States was in effect condoning the illegality of Germany's aggression against Poland.
3. See, eg, definition of 'aggression' in the Soviet Conventions of 1933 for the Definition of Aggression, art II; Keith *Speeches and Documents on International Affairs, 1918–1937* Vol I, pp 281–282.
4. In 1957, the General Assembly had established a Committee to study the comments of governments in order to advise the Assembly when it would be appropriate to resume consideration of the question of defining aggression. This Committee held a number of meetings, including a session in April–May 1967, some six months before the above-mentioned General Assembly Resolution of 18 December 1967.

General Assembly. By Resolution of 14 December 1974, the General Assembly approved the Special Committee's definition, the text of which was made an annexure to the Resolution, and called the attention of the Security Council to the definition, recommending that it should, as appropriate, take account of the definition as guidance in determining, in accordance with the United Nations Charter, the existence of an act of aggression for the purposes of article 39 of the Charter. During the period 1968–1974, embracing its seven sessions, the Special Committee's work and discussions had ranged over a wide field and had taken account of experience in the previous decade. Among the considerations or elements proposed for incorporation in the definition of aggression were the following:

a. direct aggression, that is, conduct initiating or constituting the direct application of force (eg, declaration of war, invasion, bombardment, and blockade);
b. indirect aggression, represented, inter alia, by the indirect use of force (eg, the sending of mercenaries or saboteurs to another state, the encouragement there of subversive activities by irregular or volunteer bands, and the fomenting of civil strife in other countries);
c. priority, that is the significance to be attached to the first use of force;
d. capacity to commit aggression, namely whether the definition should embrace aggression committed by states only or be extended to cover aggression by other entities;
e. the legitimate use of force (eg by way of collective self-defence);
f. aggressive intent, representing a subjective test of aggression;
g. proportionality, involving a comparison of the degree of retaliation with the extent of force or threat of force responded to.

Some weight of opinion both in the Special Committee itself and in the United Nations General Assembly had favoured a 'mixed definition' of aggression, in which a general descriptive formula would precede and condition an enumeration of specific acts of aggression, this list being by way of illustration rather than serving to cut down the general formula, and also being without prejudice to the overriding power of the United Nations Security Council to characterise as an act of aggression some form of action not corresponding to any of the enumerated items.[5] Broadly speaking, this was the solution adopted in the Special Committee's definition of 1974 as approved by the General Assembly. Article 1 of the definition contained the following descriptive formula: 'aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner incon-

5. In the case of the Korean conflict in 1950, the Security Council determined that the action of the North Korean forces constituted a 'breach of the peace' (see Resolution of 25 June 1950). However, the United Nations Commission in Korea in its report to the General Assembly on 4 September 1950, described this as an 'act of aggression'.

sistent with the Charter of the United Nations as set out in this definition', the term 'state' in this article including a group of states, where appropriate, and being used without prejudice to questions of recognition or to whether the relevant state was a member of the United Nations. Under article 2, the 'first use' of armed forces by a state on contravention of the Charter was to constitute prima facie evidence of an act of aggression, although it would be open to the Security Council to conclude otherwise in the light of the gravity of the conduct of that state or the consequences of such conduct. The enumeration of specific acts of aggression was made in article 3; these were, subject to the provisions of article 2, to include invasion or attack by the armed forces of a state on the territory of another state, military occupation resulting from invasion or attack, annexation by the use of force, bombardment of or the use of weapons against the territory of another state, blockade of the ports or coasts of a state, and the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to invasion, attack, bombardment, etc, or substantial 'involvement' therein by the sending state. Article 4 provides that the acts enumerated in article 3 are not exhaustive, and the Security Council is free to determine that other acts constitute aggression under the provisions of the Charter. (Perhaps, needless to say, also, the Security Council is not bound by the guidelines in the definition approved by the General Assembly.) Article 5 goes on to provide that no consideration of whatever nature, political, economic, military or otherwise, is to serve as a justification for aggression, that a war of aggression is a crime against international peace, with aggression giving rise to international responsibility, and that no territorial acquisition or special advantage resulting from aggression is or shall be recognised as lawful. Under the savings provisions of articles 6 and 7, nothing in the definition is to be construed as enlarging or diminishing the scope of the Charter, or to prejudice the right to self-determination, freedom, and independence as derived from the Charter. Finally, article 8 declares that the provisions of articles 1–7 are, in their interpretation and application, 'interrelated', and that each provision is to be construed in the context of the other provisions.

It is hardly necessary to say that this definition of aggression falls short of legal perfection.[6] The value of the Special Committee's formulations lies rather in the manner in which attention is directed to tests and criteria of the aggressive nature of conduct by a particular state, for tests and criteria can be of more value than a definition in the strict sense. Thus,

6. Cf Stone 'Hopes and Loopholes in the 1974 Definition of Aggression' 71 AJIL (1977) 224–246.

one useful test of aggression is a repeated refusal to seek a settlement by peaceful means.[7]

As to (2)—the right of self-defence—the Charter by article 51 recognises an inherent right of individual and collective self-defence of member states against *armed attack*, pending enforcement action by the Security Council, and reserving to the Security Council full authority in the matter. It appears that consistently with article 51, the North Atlantic Powers could legitimately enter into their Regional Security Treaty of 4 April 1949, and create the machinery beforehand for collective self-defence should any one of their number be exposed to an armed attack.[8]

Qualified as it is by the reservation of ultimate authority in the Security Council, the right of self-defence conceded by article 51 of the Charter differs in scope and extent from the right of self-defence under customary international law.[9] The latter right was more restricted than the right of self-preservation, normally understood, and allowed measures of defence or protection only in the case of an 'instant, overwhelming' necessity, 'leaving no choice of means, and no moment for deliberation',[10] provided that the measures used were not unreasonable or excessive. Under article 51 of the Charter, the right of self-defence is framed as one in terms of similar rights possessed by other States,[11] and subject to conditions as to its continued exercise.[12] A matter of current controversy is whether, under

7. In 1951, the International Law Commission held it undesirable to define aggression by a detailed enumeration of aggressive acts, since no enumeration could be exhaustive. It favoured the view that the threat or use of force for any reason or purpose other than individual or collective self-defence, or in pursuance of a decision or recommendation of a competent United Nations organ was aggression; see *Report* on the Work of its *3rd Session* (1951) pp 8–10. In 1954, the Commission included acts of aggression, and threats of aggression in its enumeration of acts which were 'offences against the peace and security of mankind'; see Article 2 of its Draft Code of Offences against the Peace and Security of Mankind (1954). For the best and most comprehensive treatments of the problem of the definition of aggression, and of other aspects of aggression, see Stone *Aggression and World Order* (1958), which deals with the subject in its historical context to the end of 1957, and the same author's books, *Conflict Through Consensus: United Nations Approaches to Aggression* (1977), and *Visions of World Order—Between State Power and Human Justice* (1984).
8. For discussion of the consistency of the North Atlantic Security Pact with the Charter, see Beckett *The North Atlantic Treaty, the Brussels Treaty, and the Charter of the United Nations* (1950).
9. See Westlake *International Law* (2nd edn, 1910) Vol I, pp 309–317, for treatment of such right of self-defence.
10. A test enunciated by Secretary of State Webster in regard to the '*Caroline*' *Case* (1837); as to which see Oppenheim *International Law* (8th edn, 1955) Vol 1, pp 300–301.
11. Cf Joan D. Tooke *The Just War in Aquinas and Grotius* (1965) p 234.
12. In the case of the Falklands conflict in 1982, it was claimed on behalf of the United Kingdom that the British operations to expel the Argentine garrisons from Falklands territory were conducted by way of self-defence under article 51 of the United Nations Charter, in the absence of measures concretely taken by the Security Council, notwithstanding the Council's resolution of 3 April 1983, calling, inter alia, for the withdrawal by Argentina of its forces in the garrisons.

article 51, nuclear and thermonuclear weapons can legitimately be used in self-defence against a non-nuclear armed attack. International lawyers are divided upon the answer to this crucial question, some holding that the use of nuclear and thermonuclear weapons is disproportionate[13] to the seriousness of the danger of a conventional attack, while others say that in some circumstances a country may be unable to defend itself adequately without recourse to its nuclear armoury. A more crucial point is the extent to which states involved in a nuclear 'crisis' may resort to measures of self-defence, as did the United States when it proclaimed a 'selective' blockade of Cuba during the Cuban missile crisis of 1962 (see above in Chapter 17). Obviously, such a situation was beyond the contemplation of the draftsmen of article 51 of the Charter.

Necessity of new approach to problem of conflict regulation

The impact of these problems of nuclear weapons, the blurring of questions of responsibility by the overriding purpose of restoring or maintaining peace and security, and the range and variety of methods of pressure and coercion that may be adopted by states to secure political ends have rendered it difficult to work always with traditional concepts such as the 'threat or use of force', 'security', 'aggression', 'subversion' and 'self-defence'. For the new conditions, the United Nations Charter embodying these concepts, is sometimes an imperfect tool of conflict-regulation. A new approach is necessary if this difficulty is to be overcome, and is not to be achieved merely by adopting Resolutions or instruments containing formulae or phraseology that are in effect no more than reiterative versions of United Nations Charter provisions. More radical initiatives are required in the interests of peace and security.

One of the most conspicuous fields, in this connection, where regulatory initiatives are needed, is that of civil wars.[14] It is trite law that civil wars

13. *Proportionality and self-defence:* It is generally accepted that measures of self-defence should not be disproportionate to the weight and degree of an armed attack; this was seemingly recognised by the US Government at the time of the Gulf of Tonkin incident, August 1964, its armed action being officially described as a 'limited and measured response fitted precisely to the attack that produced it'. On the question whether the American bombing of targets in Libya on 15 April 1986, claimed to be self-defensive as a reaction to alleged continued Libyan attacks directed against Americans, complied with the requirement of 'proportionality', see the article by J. A. McCredie in (1987) 19 *Case Western Reserve Journal of International Law* 215 at p 233.

14. The subject of civil wars has given rise to a considerable international law literature thereon; see, eg Richard Falk (ed) *The International Law of Civil War* (1971); Moore (ed) *Law and Civil War in the Modern World* (1974); J.F. Hogg 'Legal Aspects of Counterinsurgency' US Naval War College International Law Studies, Vol 62 (1980) 106. The extent to which self-defence, unilateral or collective, may be relied upon as a legal justification for involvement by one state in the struggle in a civil war in another state was thoroughly considered by the International Court of Justice in *Nicaragua v United States* ICJ 1986, 14.

are not prohibited by any international legal rules; this would apply a fortiori in the case of an insurgent movement designed to achieve self-determination and to eliminate colonial domination. Controversy surrounds the extent to which outside states may become legitimately involved by aid to one side or the other. Some writers are of the opinion that aid, short of the despatch of forces, may be provided to established governments against insurgents. Paragraph (5) of article 2 of the Draft Code of Offences against the Peace and Security of Mankind, adopted by the International Law Commission in 1954, treats as an offence against the peace and security of mankind: 'The undertaking or encouragement by the authorities of a state of activities calculated to foment civil strife in another state, or the toleration by the authorities of a State of organised activities calculated to foment civil strife in another State'. That there is a general consensus to the effect that such conduct is in breach of international law seems to be supported by the reiteration in Resolutions of the United Nations General Assembly of prohibitions of this or similar conduct. There is no settled rule, semble, that established governments may be assisted against outside subversion. The whole subject is overshadowed by political considerations. In recent years, mercenaries, who have no right to be treated as lawful combatants (see article 47 of Protocol I of 1977 as to international armed conflicts, above), have played an increasingly significant role in civil wars or internal armed conflicts, and here again there are no settled rules determining the obligations lying upon the states of nationality of mercenaries. It has been suggested that states should accept as a basic principles that their nationals should not freely participate in conflicts as mercenaries, and that they should take appropriate action to restrict the participation and recruitment of their nationals to act as such.[15] However, the status of mercenaries is but one of a growing number of problems that require solution if peace and security are not to be imperilled by civil wars.

It is paradoxical that, notwithstanding the predominance of non-war armed conflicts in the last two decades, the subject of a just war, the jus ad bellum, and the related matter of restraints on war in its classic sense, should have attracted so much recent discussion by publicists.[16] At first sight, this seems like a return to the traditional debates of the sixteenth and seventeenth centuries, but the moral and ethical issues arise in a different context.

15. H.C. Burmester 'The Recruitment and Use of Mercenaries in Armed Conflicts' 72 AJIL (1978) 37 at p 56.
16. See, eg, J.T. Johnson *Just War Tradition and the Restraint of War* (1981); Walzer *Just and Unjust Wars* (1978); Michael Howard *Restraints on War* (1979); and W.V. O'Brien *Conduct of Just and Limited War* (1981).

2. EFFECTS OF OUTBREAK OF WAR AND OF ARMED CONFLICTS

The outbreak of war, as such, has far-reaching effects on the relations between the opponent belligerent states.

At the outset, it is necessary to know what persons or things are to be deemed of enemy character, as usually municipal legislation will prohibit trading and intercourse with the enemy, and provide for the seizure of enemy property.

The general rule of international law, as distinct from municipal law, is that States are free to enact such legislation upon the outbreak of war, and the same general rule must in principle apply in the case of non-war armed conflicts, subject to the qualification that where such a conflict comes under the peace enforcement jurisdiction of the United Nations Security Council, the states involved must abide by the Security Council's decisions or recommendations.

Under the Geneva Convention of 1949 for the Protection of Civilian Persons in Time of War, enemy nationals not under confinement or in prison may leave the territory of a state at war, unless the national interests of that state call for their detention (article 35). They are entitled to bring the matter of refusal before a court or administrative boards of the detaining Power. The Convention contains provisions forbidding measures severer than house arrest or internment, and for the proper treatment of internees.

In the following pages, the principal municipal and international effects of *war* are broadly surveyed.

Not all these effects will necessarily apply in the case of a non-war armed conflict. State practice during the Korean conflict 1950–1953, and the Suez Canal zone hostilities of 1956, revealed wide divergencies concerning state attitudes in this connection. It would seem from such practice that, in the event of a non-war armed conflict, the contesting states will not hold themselves bound to apply the same stringent rules as they would in the case of a war proper, and that, in particular, they will not necessarily to the same extent interrupt or suspend their diplomatic intercourse and their treaty relationships, but will make such adjustments as the special circumstances of the conflict require, and will—if necessary—follow the guidance of the United Nations Security Council and General Assembly through their decisions or recommendations.

Enemy character in war

As to individuals, state practice varies on the test of enemy character. British and American courts favour residence or domicile as against the Continental rule which generally determines enemy character according

to nationality.[17] But as a result of exceptions grafted on these two tests, Anglo-American practice, has tended to become assimilated to the Continental practice, and there is now little practical difference between them.

Hostile combatants, and subjects of an enemy state resident in enemy territory are invariably treated as enemy persons, and residence in territory subject to effective military occupation by the enemy is assimilated for this purpose to residence in enemy territory.[18] According to Anglo-American practice even neutrals residing or carrying on business in enemy territory are also deemed to be enemy persons, while on the other hand subjects of an enemy state resident in neutral territory are not deemed to have enemy character. However, by legislation adopted in two World Wars, the United States and Great Britain have made enemy influence or associations the test of enemy character, whether persons concerned are resident in enemy or in neutral territory.

In the case of *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd*,[19] the House of Lords adopted the test of enemy associations or enemy control for corporations carrying on business in an enemy country but not incorporated there, or corporations neither carrying on business nor incorporated there but incorporated in Great Britain itself or a neutral country. It was ruled that enemy character may be assumed by such a corporation if 'its agents or the persons in de facto control of its affairs' are 'resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies'. This was an extremely stringent principle, and the decision has received a good deal of criticism. A company, incorporated in Great Britain, which acquires enemy character under the *Daimler* principle, is nonetheless not deemed to have its location in enemy territory; it is for all other purposes a British company, subject to British legislation, including regulations as to trading with the enemy.[20] Apart from the *Daimler* ruling, it is clear law that a corporation incorporated in an enemy country has enemy character.[1]

As regards ships, prima facie the enemy character of a ship is determined by its flag.[2] Enemy-owned vessels sailing under a neutral flag may assume enemy character and lose their neutral character if: (a) they take part in hostilities under the orders of an enemy agent or are in enemy employment for the purpose of transporting troops, transmitting intelligence, etc; or (b) they resist legitimate exercise of the right of visit and capture. All

17. See leading case of *Porter v Freudenberg* [1915] 1 KB 857, affirming the test of residence in enemy territory as determining enemy status.
18. See *Sovfracht (V/O) v Van Udens Scheepvaart* [1943] AC 203.
19. [1916] 2 AC 307.
20. See *Kuenigl v Donnersmarck* [1955] 1 QB 515.
1. See *Janson v Driefontein Consolidated Mines* [1902] AC 484.
2. On the 'conclusive' nature of the enemy flag, see *Lever Bros and Unilever NV v HM Procurator General, The Unitas* [1950] AC 536.

goods found on such enemy ships are presumed to be enemy goods unless and until the contrary is proved by neutral owners.

As to goods generally, if the owners are of enemy character, the goods will be treated as enemy property. This broad principle was reflected in the various wartime Acts of countries of the British Commonwealth, prohibiting trading with the enemy and providing for the custody of enemy property.

Diplomatic relations and war

On the outbreak of war, diplomatic relations between the belligerents cease. The ambassadors or ministers in the respective belligerent countries are handed their passports and they and their staff proceed home. Under article 44 of the Vienna Convention of 1961 on Diplomatic Relations, the receiving state must grant facilities enabling such persons to leave at the earliest possible moment, placing at their disposal the necessary means of transport.

Effect on treaties of war and non-war armed conflicts

The effect of war on existing treaties to which the belligerents are parties is, to quote Mr Justice Cardozo, 'one of the unsettled problems of the law'.[3] Although this judicial dictum refers to 'war' in the strict sense, it is true also of the effect on treaties of non-war armed conflicts. The Vienna Convention of 1969 on the Law of Treaties contains no provisions dealing with the consequences of the outbreak of hostilities upon treaties between the parties to the conflict. However, in 1985 the Institut de Droit International (Institute of International Law) adopted a Resolution containing a set of rules in 11 articles to govern the subject, applying both to war and non-war conflicts (hereinafter referred to as the 'Institut Resolution'). According to the older authorities, treaties were annulled ipso facto between the belligerents as soon as war came. So sweeping a view is now discounted by the modern authorities, and by the Institut Resolution (see art 2), while it is inconsistent with recent state practice according to which some treaties are considered as annulled, others are considered as remaining in force, and others are held to be merely suspended, and to be revived on the conclusion of peace.[4]

In the unsettled state of the law, it is difficult to spell out any consistent principle or uniformity of doctrine. To quote Mr Justice Cardozo again, international law 'does not preserve treaties or annul them, regardless of

3. See on the whole question his judgment in *Techt v Hughes* 229 NY 222 (1920). See also *Karnuth v US* 279 US 231 (1929), and Henkin, Pugh, Schachter and Smit *International Law; Cases and Materials* (2nd edn, 1987) pp 498–505.
4. Semble, belligerent states may even contract new treaties (through the auspices of neutral envoys) relevant to their belligerent relationships. The United States' practice during the Second World War was contrary to any principle of automatic abrogation of treaties by war; see McIntyre *Legal Effect of World War II on Treaties of the United States* (1958).

the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact'. Two tests are applicable in this connection. The first is a subjective test of intention—did the signatories of the treaty intend that it should remain binding on the outbreak of war? The second is an objective test—is the execution of the treaty incompatible with the conduct of war?

Applying these tests, and having regard to state practice, the Institut Resolution and the views of modern authorities, we may sum up the position as follows:

1. Treaties between the belligerent states which presuppose the maintenance of common political action or good relations between them, for example, treaties of alliance, are abrogated.
2. Treaties representing completed situations or intended to set up a permanent state of things, for example, treaties of cession or treaties fixing boundaries, are unaffected by war and continue in force.
3. Treaties to which the belligerents are parties relating to the conduct of hostilities, for example, the Hague Conventions of 1899 and 1907 and other treaties prescribing rules of warfare, remain binding.
4. Multilateral conventions of the 'law-making' type relating to health, drugs, protection of industrial property, etc, are not annulled on the outbreak of war but are either suspended and revived on the termination of hostilities, or receive even in wartime a partial application. If the multilateral convention is one establishing an international organisation, it remains unaffected (Institut Resolution, art 6).
5. Sometimes express provisions are inserted in treaties to cover the position on the outbreak of war. For example, article 38 of the Aerial Navigation Convention 1919, provided that in case of war the Convention was not to affect the freedom of action of the contracting states either as belligerents or as neutrals, which meant that during war the obligations of the parties became suspended.[5]
6. With regard to other classes of treaties, eg, extradition treaties[6] in the absence of any clear expression of intention otherwise, prima facie these are suspended.
7. A state complying with a resolution by the UN Security Council concerning action with respect to threats to the peace, breaches of the peace or acts of aggression, must either terminate or suspend the operation of a treaty, to which it is a party, if the treaty would be incompatible with the Security Council's resolution (Institut Resolution, art 8).

5. Cf art 89 of the International Civil Aviation Convention 1944. It may also appear that, apart from express provision, it was the intention of the parties that the treaty should not operate in time of war, in which event effect will be given to that intention.
6. See *Argento v Horn* 241 F (2d) 258 (1957). This case also shows that the parties may conduct themselves on the basis that a treaty is suspended.

Where treaties are suspended during wartime, certain authorities claim they are not automatically revived when peace comes, but resume their operation only if the treaties of peace expressly so provide.[7] Practice is not very helpful on this point, but usually clauses are inserted in treaties of peace, or terminating a state of war, to remove any doubts as to which treaties continue in force. According to art 11 of the Institut Resolution, at the end of an armed conflict and unless otherwise agreed, the operation of a treaty which has been suspended should be resumed as soon as possible.

Prohibition of trading and intercourse in war; contracts

Trading and intercourse between the subjects of belligerent states cease on the outbreak of war, and usually special legislation is introduced to cover the matter. The details of state practice in this connection lie outside the scope of this book, but it can be said that international law gives belligerent states the very widest freedom in the enactment of municipal laws dealing with the subject.

Similarly with regard to contracts between the citizens of belligerent states, international law leaves states entirely free to annul, suspend, or permit such contracts on the outbreak of war. Consequently this is a matter primarily concerning municipal law, and will not be discussed in these pages. There is some uniformity of state practice in the matter, inasmuch as most states treat as void, executory contracts which may give aid to or add to the resources of the enemy, or necessitate intercourse or communication with enemy persons, although as regards executed contracts or liquidated debts, the tendency is not to abrogate, but to suspend the enforceability of such obligations until the state of war is terminated.[8]

Enemy property in war

The effect of war on enemy property differs according as such enemy property is of a *public* nature (ie, owned by the enemy state itself), or of a *private* nature (ie, owned by private citizens of the enemy state).

(*a*) *Enemy public property.* A belligerent state may confiscate movable property in its territory belonging to the enemy state. Where the enemy movable property is located in enemy territory under military occupation by the forces of that state, such property may be appropriated in so far as it is useful for local military purposes. Immovable property (ie, real estate) in such territory may be used (for example, occupied or used to

7. Cf however, *Argento v Horn*, n 6, above.
8. See *Arab Bank Ltd v Barclays Bank (Dominion, Colonial and Overseas)* [1953] 2 QB 527, and [1954] AC 495, and *Bevan v Bevan* [1955] 2 QB 227.

produce food or timber) but not acquired or disposed of.[9] Ships of war and other public vessels at sea belonging to the enemy state may be seized and confiscated except those engaged in discovery and exploration, or in religious, scientific, or philanthropic missions or used for hospital duties.

(*b*) *Enemy private property.* The general practice now of belligerent states is to sequestrate such property in their territory (ie, seize it temporarily) rather than to confiscate it, leaving its subsequent disposal to be dealt with by the peace treaties. It is not certain whether there is a rule of international law prohibiting confiscation as such, and authorities are somewhat divided on the point. But private property in occupied territory must not be taken, or interfered with, unless it is of use for local military purposes,[10] for example, for goods and services necessary for the army of occupation; mere plunder is prohibited. In contrast to the substantial protection of enemy private property on land, enemy ships and enemy cargoes at sea are liable to confiscation. This does not apply to enemy goods on a neutral merchant vessel unless such goods are useful for warlike purposes, or unless they are seized as a reprisal of war for continuous breaches by the enemy of the rules of warfare.[11]

Combatants and non-combatants

Combatants are divided into two classes: (a) lawful, and (b) unlawful. Lawful combatants may be killed or wounded in battle or captured and made prisoners of war. Certain categories of lawful combatants, for example, spies as defined in article 29 of the Regulations annexed to the Hague Convention IV of 1907 on the Laws and Customs of War on Land, are subject to special risks or disabilities,[12] or specially severe repressive measures if captured. Unlawful combatants are liable to capture and detention, and in addition to trial and punishment by military tribunals for their offences.[13] Citizens of, or persons owing allegiance to one belligerent state, and who have enlisted as members of the armed forces of the opposing belligerent, cannot claim the privileges of lawful combatants

9. It may also be destroyed, if it is of a military character (eg, barracks, bridges, forts), and destruction is necessary in the interests of military operations (cf art 53 of the Geneva Convention 1949, on the Protection of Civilian Persons in Time of War).
10. The occupant Power cannot seize property, such as stocks of petroleum, for the purposes not of the occupying army, but for its needs generally at home or abroad; see decision of Court of Appeal, Singapore, in *NV De Bataafsche Petroleum Maatschappij v The War Damage Commission* 51 AJIL (1957) 802.
11. See Chapter 19, below at pp 592–593, 596.
12. Espionage is not a breach of international law; see United States Army Field Manual on the Law of Land Warfare (1956), para 77.
13. See *Ex p Quirin* 317 US 1 (1942) at 31, and *Osman Bin Haji Mohamed Ali v Public Prosecutor* [1969] 1 AC 430 (saboteurs attired in civilian clothes, and who are members of the regular armed forces of one belligerent, are not entitled to be treated as lawful combatants by the opposing belligerent, if captured).

if they are subsequently captured by the former belligerent state.[14] Under article 47 of Protocol I as to international armed conflicts, additional to the Geneva Red Cross Conventions of 1949 (see above in this chapter), mercenaries as defined in paragraph 2 of the article have no rights to be treated as combatants or as prisoners of war if captured.

Traditionally international law maintains a distinction between combatants and non-combatants, inasmuch as non-combatants are not in principle to be wilfully attacked or injured. Certain classes of non-combatants, for example, merchant seamen, may however be captured and made prisoners of war. Nineteenth century official pronouncements affirmed that the only legitimate object of war was to weaken the *military* forces of the enemy. In 1863 the following passage appeared in United States Army General Orders:

> 'The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit.'

A valiant attempt to draw a distinct line between civilians and the armed forces was also made in the Hague Convention IV of 1907 on the Laws and Customs of War on Land and its annexed Regulations. Yet under the demands of military necessity in two World Wars, the distinction came to be almost obliterated.

A learned author[15] who in 1945 examined the importance of the distinction under the heads of:

i. artillery bombardment;
ii. naval bombardment;
iii. sieges;
iv. blockade;
v. contraband; and
vi. aerial bombardment,

reached the conclusion in essence that while non-combatants might not be the primary objects of these six operations of war, they were denied material protection from injury thereunder.

On the subject of aerial bombardment, the history of attempts to protect non-combatants has not been encouraging. The Hague Regulations of 1907 mentioned above (see article 25) prohibited the attack or bombardment of undefended towns,[16] villages, etc, by 'any means

14. *Public Prosecutor v Koi* [1968] AC 829.
15. See Nurick, 39 AJIL (1945) 680 et seq.
16. '*Open cities*': Note in this connection the concept of 'open cities', which has probably become obsolete as a consequence of the provisions regarding 'non-defended localities' in article 59 of Protocol I of 1977 as to international armed conflicts, supplementing the Geneva Red Cross Conventions of 1949 (see above). An 'open city' was one so completely undefended *from within or without* that the besieging or opposing forces could enter and take possession of it without fighting or incurring casualties. In

whatever', and this phrase was intended to cover aerial attacks. But during the First World War the rule laid down was not respected. In 1923 a Commission of Jurists at The Hague drew up a draft Code of Air Warfare, which did not come into force as a Convention, and which provided, inter alia, that bombardment was legitimate only when directed at specified military objectives such as military forces, works, and establishments, and arms factories, and was forbidden when bombardment could not take place without the indiscriminate bombardment of civilians. The Spanish Civil War of 1936–1938 showed that it was not sufficient merely to prohibit air attack on specified military objectives, and a Resolution of the League of Nations Assembly in 1938 recommended a subjective test that the intentional bombing of civilians should be illegal. But up to the stage of the outbreak of the Second World War, states had not definitely agreed on rules for the limitation of aerial bombardment.

During the War, the Axis Powers bombed civilians and civilian objectives, using explosive bombs, incendiary bombs, and directed projectiles. The Allies retaliated eventually with area and pattern bombing, and finally in 1945 with atom-bomb attacks on Nagasaki and Hiroshima, resulting in enormous civilian casualties. Whether regarded as legitimate reprisals or not, the Allied air bombardments were like the similar Axis attacks, directed at civilian morale. It would be unrealistic in the light of these events, not to consider that in modern total war civilian morale may, notwithstanding the prohibitions contained in international treaties or instruments,[17] become a true military objective. Indeed it is becoming more and more difficult in total war to define negatively what is *not* a military objective. Besides, the so-called civilian 'work forces', or 'quasi-combatants', that is to say those civilians employed in the manufacture of tools of war, were considered to be targets as important as the armed forces proper.

An attempt was made in the Geneva Convention of 1949 for the Protection of Civilian Persons in Time of War to shield certain classes of civilian non-combatants from the dangers and disadvantages applicable to combatants and non-combatants in a war or armed conflict. The Convention did not purport to protect all civilians,[18] but mainly aliens in the territory of a belligerent and the inhabitants of territory subject to military occupation, although other classes receive incidental protection

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principle, a declaration was necessary by the government to which the city belonged, the purpose being to preserve it from destructive attacks or bombardment. During the Second World War a number of such declarations were made, including Paris (1940), Brussels (1940), Belgrade (1941) and Rome (1943). See as to the practice during this War, Whiteman *Digest of International Law* (1968) vol 10, pp 415, 433–435, and *Sansolini v Bentivegna* [1957] 24 Int LR 986 at 989.

17. Eg, Protocol I of 1977, referred to in the previous footnote.
18. For discussion of the Convention, see Draper (1965) I Hague Recueil 119–139, and the same author's book, *The Red Cross Conventions* (1958) ch 2 (pp 26–48).

under the provisions allowing the establishment of hospital, safety, and neutralized zones, and for insulating from the course of hostilities such persons as the sick and aged, children, expectant mothers and mothers of young children, wounded and civilians performing non-military duties. Also in the Convention are provisions that civilian hospitals properly marked should be respected and not attacked.[19]

The very necessity of such detailed provisions as the Convention contained demonstrated that, as a consequence of practices followed in the Second World War, little remained of the traditional distinction between combatants and non-combatants save the duty not to attack civilians in a wanton or unnecessary manner, or for a purpose unrelated to military operations and to abstain from terrorisation.

In 1950, the International Committee of the Red Cross requested states to prohibit the use of atomic, and indiscriminate or so-called 'blind' weapons. Subsequently it drew up a set of Draft Rules 'to Limit the Risks Incurred by the Civilian Population in Time of War', and which went much further. These Draft Rules were submitted to the 19th Conference of the Red Cross at New Delhi in 1957 and approved, but follow-up work with governments did not lead to the conclusion of a new convention. The question was raised again at the 20th Conference of the Red Cross at Vienna in 1965 which adopted a Resolution affirming four principles, three of which declared that the right of a contestant to use means of injuring the enemy was not unlimited, that attacks against the civilian population as such were prohibited, and that the distinction between combatants and the civilian involved sparing the latter as much as possible. These principles were affirmed in a Resolution adopted by the United Nations General Assembly on 19 December 1968 in regard generally to the protection of human rights in armed conflicts.[20]

The necessity for the increased protection of the civilian population and of civilian objectives in time of armed conflict led to the convening of the Geneva Conference of 1974–1977 on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts which adopted, as additional to the Geneva Red Cross Conventions of 1949, Protocols I and II dealing, respectively, with international armed conflicts and non-international armed conflicts, and which are discussed below in this chapter.[1] Apart from the initial session of this Conference in 1974, the Lucerne Conference of Government Experts on the Use of Conventional Weapons, of September–October 1974, unan-

19. See art 14 and following arts.

20. In a further Resolution on the same subject adopted on 16 December 1969, the General Assembly requested the Secretary-General of the United Nations to give special attention in his study of the matter to the need for protection of the rights of civilians and combatants in struggles for self-determination and liberation, and to the better application of the existing conventions and rules to these conflicts.

1. See pp 567–571 below.

imously condemned the massive use of incendiary weapons against civilian centres, a conclusion approved later in the same year by the United Nations General Assembly.

The legality of the atom bomb attacks by the United States on Nagasaki and Hiroshima, referred to above, is questionable. They have been variously justified as:

a. A reprisal, although the casualties inflicted were quite out of proportion to those caused by single instances of illegal air bombardments committed by the Axis Powers.
b. As terminating the war quickly and thereby saving both Allied and enemy lives, which would be equivalent to relying on the doctrine of military necessity.

Neither ground is satisfactory as a matter of law.[2]

If there were objections to the original atom bomb, these apply with greater force to the hydrogen bomb, and to the new highly developed nuclear and thermonuclear weapons. The dangers and uncontrollable hazards involved in such mass destruction weapons led to the conclusion of four treaties which are dealt with in other chapters of this book, namely the Nuclear Weapons Test Ban Treaty of 1963, the Outer Space Treaty of 1967 (inter alia, banning nuclear weapons in outer space), the Nuclear Weapons Non-Proliferation Treaty of 1968, and the Treaty of 1971 Prohibiting the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor.[3] Although only a bilateral treaty, and not one of a multilateral nature, the Intermediate-

2. Apart from the legality of the attack on civilians, the use of atom bombs could be questioned on the ground that they involved 'poisonous' substances, viz, radio-active fall-out (see art 23 of the Regulations annexed to the Hague Convention IV of 1907, mentioned above), fall-out propensity being a matter strongly relied upon by the complainants in 1973–1974 in the *Nuclear Tests Cases* before the International Court of Justice, ICJ 1974, 253, and 457, or 'uselessly' aggravated suffering within the meaning of the Declaration of St Petersburg, 1868. Possibly, also, their use is subject to the prohibitions contained in the Geneva Gas and Bacteriological Warfare Protocol of 1925. In *Shimoda v The Japanese State* (1963) *Japanese Annual of International Law* 1964, 212–252, the Tokyo District Court held that the attacks on Nagasaki and Hiroshima were contrary to international law. See also on the legality of nuclear weapons, the Ingram Memorandum (author, Mr Geoffrey Ingram) on the validity of the SALT II Treaty of 1979, ie the United States–Soviet Union Treaty on the Limitation of Strategic Offensive Weapons signed at Vienna on 18 June 1979. The text of the Ingram Memorandum, a copy of which was deposited with the Registry of the International Court of Justice in December 1979, is reproduced in (1980) 54 Aust LJ 615–620. On the legality of a 'first use' of, or 'first strike' with nuclear weapons (whether defensive or otherwise), see George Bunn, 'US Law of Nuclear Weapons' in the *Naval War College Review* July/August 1984 46 at pp 55–57 and generally on the subject of such weapons and the law, Miller and Feinrider (eds) *Nuclear Weapons and Law* (1984).

3. As to these treaties, see above p 175 (1963 Treaty), pp 179–186 (1967 Treaty), pp 313–314 (1968 Treaty), and pp 256–257 (1971 Treaty).

Range Nuclear Forces Treaty (INF) concluded by the United States and the Soviet Union in December 1987, and ratified in mid-1988, for the mutual elimination of intermediate-range nuclear weaponry, has been hailed as an arrangement of global significance in the realm of nuclear arms controls. Attempts since 1963 to enlarge the Test Ban Treaty into a fully comprehensive treaty banning nuclear weapons tests in all environments (CTB) have so far failed, although by the Treaty of Tlatelolco opened for signature on 14 February 1967, about 20 Latin American and Caribbean states agreed to a prohibition of the presence of nuclear weapons, and of the conduct of nuclear weapons tests in the territory of any party to the Treaty. It may also be recalled that by a majority resolution, the Stockholm Conference of 1972 on the Human Environment condemned all nuclear weapons tests, especially those carried out in the atmosphere.[4]

3. THE 'LAWS OF WAR'; INTERNATIONAL HUMANITARIAN LAW

The 'laws of war'[5] consist of the limits set by international law within which the force required to overpower the enemy may be used, and the principles thereunder governing the treatment of individuals in the course of war and armed conflict. In the absence of such rules, the barbarism and brutality of war would have known no bounds. These laws and customs have arisen from the long-standing practices of belligerents; their history goes back to the Middle Ages when the influence of Christianity and of the spirit of chivalry of that epoch combined to restrict the excesses of belligerents. Under present rules such acts as the killing of civilians, the ill-treatment of prisoners of war, and military use of gas, and the sinking of merchant ships without securing the safety of the crew are unlawful.

Since the nineteenth century, the majority of the rules have ceased to be customary and are to be found in treaties and conventions. Among the most important of these instruments are the Declaration of Paris 1856, the Geneva Convention 1864 for the Amelioration of the Condition of Wounded in Armies in the Field, the Declaration of St Petersburg 1868, the Hague Conventions of 1899 and 1907, the Geneva Gas and Bacteriological Warfare Protocol 1925, as supplemented by the Convention of 1972 on the Prohibition of the Development, Production, and Stockpiling of

4. See p 404 above.

5. The International Law Commission of the United Nations favoured the discarding of this phrase; see *Report* on work of its *1st Session* (1949) p 3. Perhaps these 'laws' are more correctly termed the 'rules governing the use of armed force and the treatment of individuals in the course of war and armed conflict'. They apply to all types of armed conflicts (see above, p 528). As will appear below, the appellation 'laws of war' has been replaced by that of 'international humanitarian law'.

Bacteriological (Biological) and Toxin Weapons and their Destruction, the Submarine Rules Protocol 1936, the four Geneva Red Cross Conventions 1949, namely, those dealing with prisoners of war, sick and wounded personnel of armies in the field and of forces at sea, and the protection of civilians, and which effected a far-reaching revision and codification of a major portion of the 'laws of war', and Protocols I and II of 1977 on, respectively, international armed conflicts and non-international armed conflicts, adopted as instruments additional to the latter Geneva Conventions of 1949.

The essential purpose of these rules is not to provide a code governing the 'game' of war, but for humanitarian reasons to reduce or limit the suffering of individuals, and to circumscribe the area within which the savagery of armed conflict is permissible. For this reason, they were sometimes known as the 'humanitarian law of war', or the rules of 'humanitarian warfare'. Indeed, the currently recognised title for these rules is 'international humanitarian law', as illustrated by the fact that the full name of the Geneva Conference of 1974–1977 which adopted the above-mentioned Protocols I and II in 1977, for the purpose of adding to and updating the Geneva Red Cross Conventions of 1949, was 'the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts'. Also, the principal international institute concerned with this branch of international law is that at San Remo, Italy, known as the International Institute of Humanitarian Law. True, these rules have been frequently and extensively violated, but without them the general brutality of warfare would have been completely unchecked. It would be unrealistic, in this connection, to overlook the impact of the so-called 'push-button' warfare of the future, conducted by directed missiles, nuclear weapons, etc. This tendency to the depersonalisation of war, the very antithesis of its humanisation, constitutes a grave threat to the very existence of international humanitarian law.

In practice, the military manuals of the different states contain instructions to commanders in the field embodying the principal rules and customs of war.

Inasmuch as the rules of international humanitarian law exist for the benefit of individuals, it would appear that in the case of an unlawful conflict, waged by an aggressor state, these rules nevertheless bind the state attacked and members of its armed forces in favour of the aggressor and its armed forces. However, the aggressor state may be penalised to the extent that, during the course of the conflict, neutral or non-contestant states may discriminate against it, or by reason of the fact that at the termination of hostilities it may have to bear the reparations or to restore territory illegally acquired. The rules of course must apply as well to non-war armed conflicts.

The rules of international humanitarian law are binding not only on

states as such, but on individuals, including members of the armed forces, heads of states, ministers, and officials. They are also necessarily binding upon United Nations forces engaged in a military conflict, mainly because the United Nations is a subject of international law and bound by the entirety of its rules, of which the laws of war form part. There is also the consideration that if United Nations forces were not so bound, and became involved in operations against a state, the forces of the latter would be subject to the laws of war, but not United Nations forces.

Unless a treaty or customary rule of international law otherwise provides, military necessity does not justify a breach of the rules of international humanitarian law.

Impact of human rights rules and standards

One of the most remarkable developments of the last decade, and which largely explains the replacement of the former title of this branch of international law, 'laws of war', by the present name 'international humanitarian law', has been the importation of human rights rules and standards into the law of armed conflicts. As was mentioned in Chapter 12, above, a bridge has in effect been created between the doctrine of human rights and the rules of international law applicable in armed conflicts. This truly desirable change was marked by, or manifested in, inter alia,

a. The Resolution of the International Conference on Human Rights at Teheran in 1968, recommending to the United Nations General Assembly that a study be made of existing rules for the protection of human rights in time of war.
b. The General Assembly's Resolution of 19 December 1968, calling upon the Secretary-General to make such study.
c. The Reports of the Secretary-General, 1969–1970, on Respect for Human Rights in Armed Conflict.
d. The Conferences of Government Experts called under the aegis of the International Committee of the Red Cross (ICRC) in 1971–1972 on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.
e. The above-mentioned Geneva Diplomatic Conference of 1974–1977 on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts by which the Protocols I and II on international and non-international armed conflicts were adopted in 1977, in order to supplement and update the Geneva Red Cross Conventions of 1949. There has been little or no dissent from this trend towards a blending of human rights principles and the rules observable in armed conflicts.

Sanctions of international humanitarian law; war crimes

While the rules of international humanitarian law are frequently violated, international law is not entirely without means of compelling states to observe them. One such method is the reprisal, although it is at best a crude and arbitrary form of redress.[6] Another sanction of the laws of war is the punishment both during and after hostilities of war criminals, following upon a proper trial.

In that connection, the trials of war criminals by Allied tribunals after the Second World War provided significant precedents.

First, there were the trials, 1945–1948, of the *major* war criminals at Nuremberg and Toyo respectively by the International Military Tribunals. These trials have been referred to in an earlier chapter.[7] To consolidate the precedent represented by the trials, the International Law Commission acting in pursuance of a direction of the United Nations General Assembly, formulated in 1950 a set of principles under the title, 'Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal', and, as well in 1954 adopted a Draft Code of Offences against the Peace and Security of Mankind, embodying the said Nuremberg principles, while the General Assembly attempted to sponsor, partly through the Commission and partly through a special Committee, the establishment of a permanent International Criminal Court to try persons guilty of such offences, and also of the offence of genocide. On 26 November 1968, the General Assembly adopted a Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, obliging parties to abolish existing limitations on prosecution and punishment for such crimes, and to take measures otherwise to ensure their non-application.

Second, there were the trials by Allied courts of offenders other than the Axis major war criminals. Such accused included:

a. persons prominently involved in war conspiracies (for example, industrialists, financiers), who were indicted for the same crimes as the major war criminals;
b. members of the enemy forces and civilians charged with ordinary offences against the laws of war (ie ordinary war crimes); and
c. the so-called 'quislings' or 'collaborationists' guilty of treason.

The variety and geographical range of the tribunals which tried the offenders were without precedent; these included national military tribunals, special tribunals constituted for the purpose (composed of pro-

6. The Geneva Conventions of 1949 prohibit reprisals against the persons protected thereby (see, eg, the prohibition of reprisals against prisoners of war in art 13 of the Prisoners of War Convention). Note also art 20 of Protocol I of 1977 on international armed conflicts which prohibit reprisals against the persons and objects protected by Part II of the Protocol, which Part bears the title 'Wounded, Sick and Shipwrecked'.
7. See above, pp 61–63.

fessional judges or jurists),[8] the ordinary municipal civil courts, and even international military tribunals, while the trial venues were located in Europe, Asia, Australia, and even in the South Pacific.

Prior to the trials, it had been recognised that a belligerent was entitled to punish for war crimes those members of the armed forces of its opponent who fell into its hands, or who had committed such crimes within its territorial jurisdiction. Not every violation of the rules of warfare is a war crime, and some jurists support the view that the term should be limited to acts condemned by the common conscience of mankind, by reason of their brutality, inhumanity, or wanton disregard of rights of property unrelated to reasonable military necessity. Some such conception of a war crime emerges from the decisions of the different tribunals, referred to above, a conception which has received a flexible application, as shown in the decisions that the following persons could be guilty of war crimes:

a. Civilians, as well as members of the forces.
b. Persons not of enemy nationality, for example, those having enemy affiliations.
c. Persons guilty of a gross failure to control subordinates responsible for atrocities.[9] However, it is provided in paragraph 5 of Article 85 of Protocol I of 1977 on international armed conflicts, additional to the Geneva Red Cross Conventions of 1977, that without prejudice to the application of the latter Conventions and of the Protocol, 'grave breaches' of these instruments are to be regarded as war crimes. In each of the Conventions, certain acts are enumerated as grave breaches (see eg, those specified in Article 130 of the Convention relating to the Prisoners of War), and certain additional grave breaches are set out in Articles 11 and 85 of the Protocol.

It appears clearly established also by the above-mentioned post-war trials (see, for example, the judgment of the Nuremberg Court) that orders by superiors, or obedience to national laws or regulations, do not constitute a defence, but may be urged in mitigation of punishment.[10] In

8. Eg, the special American tribunals which operated at Nuremberg under Allied Control Council Law No 10 of 20 December 1945, promulgated by the Zone Commanders of Occupied Germany.
9. See the *Yamashita Trial* 4 War Crimes Trials Reports 1–96.
10. To the same effect is para 627 of Pt III of the British *Manual of Military Law*. Contrast para 216(d) of the United States *Manual for Courts Martial* (1969) under which there is liability if the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question was actually known to the person obeying it to be unlawful; this test was adopted by the majority of the United States Court of Military Appeals in *Calley v United States* (1973) 48 Court Martial Reports 19. Cf also L.C. Green *Superior Orders in National and International Law* (1976); H W Briggs 'The Position of Individuals in International Law' in 62 *US Naval War College International Law Studies* (1980) pp 415–425; and N. Keijzer *Military Obedience* (1978).

1921, in the case of the *Llandovery Castle*,[11] a German court found the accused guilty of killing defenceless persons in lifeboats in the First World War, and rejected the plea of superior orders, stating that the plea was inadmissible if the order were 'universally known to be against the law', but that such order might be an extenuating circumstance. Probably courts must take into account the state of mind of the accused; if he believed that the order was lawful, this belief might be a defence, but not if the order were obviously illegal. So, just as in ordinary criminal law, the question of mens rea is important. As the Nuremberg Court pointed out, the true test is 'whether moral choice was in fact possible' on the part of the individual ordered to commit the cirminal act.[12]

The transgressions of subordinates committed under obedience to superior orders are one thing, and the responsibility of superiors for the actions of subordinates another. The post-war trials, referred to above in this chapter, suggest in principle that there must be some dereliction of duty before high command responsibility is involved. In general, a commander should take steps to prevent the commission of war crimes, and to stop the continuation of their commission once knowledge is obtained of the wrongdoing. As in the *Yamashita Trial Case*,[13] a gross failure to control subordinates responsible for atrocities, almost equivalent to tacit permission for their commission, will involve command responsibility. A fortiori, actual knowledge or grounds for possessing knowledge will import liability. Yet as has been pointed out:[14] 'The tribunals left unanswered the degree of efficiency required from the commander in preventing war crimes, in discovering information about them, and in punishing wrongdoers'.

Paragraph 2 of Article 86 of Protocol I of 1977 as to international armed conflicts, which is additional to the Geneva Red Cross Conventions of 1949, lays down the following rule:

> 'The fact that a breach of the Conventions [ie the Geneva Conventions of 1949] or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was

11. Annual Digest of Public International Law Cases, 1923–1924, Case No 235.
12. See *Official Record* Vol I, p 224. The International Law Commission employed this criterion of a possibility of moral choice in Principle IV of its formulation in 1950 of the Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, but art 4 of the Draft Code of Offences against the Peace and Security of Mankind adopted by it in 1954 provided that the subordinate was not relieved from responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order.
13. *Yamashita Trial* 4 War Crimes Trial Reports 1–96.
14. Franklin A. Hart 'Yamashita, Nuremberg and Vietnam; Command Responsibility Reappraised' 62 *US Naval War College International Law Studies* (1980) 397 at p 412.

> going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.'

It will be noted that responsibility is confined to 'circumstances at the time', and that a duty is imposed on the commander to take 'all feasible measures' within his power to prevent or repress the breach, committed or threatened.

One further sanction of the laws of war should not be overlooked. This is contained in article 3 of the Hague Convention IV of 1907 providing that if a belligerent state violate any such laws, that state is to pay compensation, and to be responsible for all acts committed by persons forming part of its armed forces. Under this article a substantial indemnity may be exacted when the treaty of peace is concluded.

Rules of land, sea, and air warfare

The principal rules as to land warfare[15] are set out in the Hague Convention IV of 1907 on the Laws and Customs of War on Land, and its annexed Regulations. These Regulations are sometimes for the sake of convenience referred to as the 'Hague Rules' or 'Hague Regulations'. They define the status of belligerents, ie, those who will be treated as lawful combatants. Guerrilla troops and militia or volunteer corps like the British Home Guard in the Second World War are subject to the laws, rights, and duties of war if they satisfy four conditions, namely that they are properly commanded, have a fixed distinctive emblem recognisable at a distance, carry arms openly, and conduct their operations in accordance with the laws and customs of war. Where there are *levées en masse*, ie, organised or spontaneous risings of the civilian population against the enemy, those called to arms by the authorities must fulfil the four conditions just mentioned in order to be respected as lawful combatants, whereas those spontaneously taking up arms on the approach of the enemy need only satisfy the two conditions of carrying arms openly, and respecting the laws and customs of war. The Geneva Prisoners of War Convention of 1949 (see article 4) provides that the troops of organised resistance movements are entitled to be treated as prisoners of war if they satisfy the above-mentioned four conditions, and even if they operate in occupied territory.[16] No such privilege as regards operations in occupied territory is conceded to *levées en masse*.

The Hague Rules of 1907 also contained provisions relative to the

15. For studies on the subject, see Greenspan *The Modern Law of Land Warfare* (1959); F. Kalshoven *The Law of Warfare* (1973); G.I.A.D. Draper 'Rules Governing the Conduct of Hostilities—The Laws of War and Their Enforcement' 62 *US Naval War College International Law Studies* (1980) 247–262; Jean Pictet *Development and Principles of International Humanitarian Law* (1983); F. de Mulinen *Handbook on the Laws of War for Armed Forces* (1987); and M. Veuthey *Guerilla Warfare and Humanitarian Law* (2nd edn, 1983).

16. Cf the 'Hostages Case' (*United States v List*, Case No 7) tried at Nuremberg in 1947–1948, *War Crimes Trials Reports* Vol 8, pp 39–92, where it was held that non-uniformed

treatment of prisoners of war. The humane treatment of these and other captives is now dealt with in the Geneva Prisoners of War Convention of 1949, superseding a Geneva Convention of 1929, which itself replaced the Hague Rules. The 1949 Convention contains a code of provisions, more appropriate for twentieth century wars and armed conflicts than the earlier instruments,[17] but still, in the light of post-1949 experience, falling short of what is now required. Strict duties are imposed upon a Detaining Power of treating prisoners of war humanely, and there are special provisions for ensuring that they are not exposed to unnecessary brutality during the immediate aftermath of capture when their captors may attempt to procure information useful for the conduct of operations. On humanitarian grounds, it was also provided in the Convention that prisoners of war should be released and repatriated without delay after the cessation of active hostilities (see articles 118–119). These stipulations were presumably based on the assumption that prisoners would desire to return to the homeland; in the course of the negotiations for a truce in the Korean conflict, 1951–1953, a new problem[18] emerged when the United Nations Command ascertained by the so-called 'screening' of thousands of prisoners in its custody that, owing to fear of persecution, many were unwilling to be repatriated. Claims of humanity had to be weighed against the danger in the future of unscrupulous belligerents affecting to make spurious 'screenings' of captives, and the possibility that, under pretext of political objections to repatriation, prisoners of war might be guilty of treason. A compromise, giving due emphasis to grounds of humanity, was reached in the Korean Armistice Agreement of 27 July 1953 (see articles 36–58).[19]

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partisan troops operating in German-occupied territory in the last War were not entitled to the status of lawful combatants.

17. For discussion, see Draper (1965) 1 Hague Recueil des Cours 101–118.
18. See Mayda 47 AJIL (1953) 414 et seq, for treatment of the problem.
19. In regard to the Korean experience see the study by H.P. Ball 'Prisoner and War Negotiations: the Korean Experience and Lesson' in 62 *US Naval War College International Law Studies* (1980) 292, esp at pp 296 et seq. In the case of the India–Pakistan conflict of 1965, art VII of the Tashkent Declaration, 10 January 1966, for restoring peace, provided for repatriation of prisoners. Following hostilities again in December 1971, between India and Pakistan and the emergence of the new State of Bangladesh, India in 1972–1973 claimed to detain a number of Pakistani prisoners of war, without repatriating them, on grounds, inter alia, that the possibility of a renewal of hostilities could not be excluded, and that war crimes trials were contemplated; see note by H.S. Levie, 67 AJIL (1973) 512–516. The dispute was later settled for the most part by an Agreement signed by the two countries in August 1973. In May 1973, Pakistan filed an application in the International Court of Justice against India, claiming that India was proposing to hand over 195 Pakistani prisoners of war to the Government of Bangladesh, which intended to try them for acts of genocide and crimes against humanity. India denied the Court's jurisdiction. Later, in December 1973, in view of negotiations between the two countries, Pakistan requested the Court to record discontinuance of the proceedings, and the matter then was removed from the list; see ICJ 1973, 347.

In the case of the Vietnam War,[20] it was provided by article 8 (a) of the Four-Party Agreement on Ending the War and Restoring the Peace in Vietnam, signed at Paris on 27 January 1973, that the return of captured military personnel and foreign civilians of the parties should be carried out simultaneously with and completed not later than the same day as the troop withdrawal provided for in article 5 of the Agreement, the parties exchanging complete lists of the persons to be returned. Articles 1 and 2 of the Protocol to the Agreement provided, in effect, for the return of captured servicemen and captured civilians to the country, authority, or party of which they were nationals or under whose command they served, such return to be controlled and supervised by an International Commission of Control and Supervision. These provisions, including the provision for return of captured civilians, reflected the unusual nature of the Vietnam conflict, and suggest the need for a convention regulating the detention and repatriation of civilians captured by contestants in future such conflicts.

The same Conference of 1949 which adopted the Prisoners of War Convention, referred to above, also adopted in place of earlier instruments:

a. A Convention on Wounded and Sick Members of the Armed Forces in the Field, containing detailed provisions requiring belligerents to protect wounded and sick personnel, and to respect the medical units and establishments normally caring for such personnel.
b. A Convention on Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, dealing with the cognate problem of wounded, sick, and shipwrecked personnel at sea, and providing mutatis mutandis for similar duties of respect and protection.

The latter convention is notable for the important provisions relating to hospital ships, which drew upon the experience of the Second World War.[1]

Methods and means of combat and the conduct of hostilities are dealt with in Section II of the Hague Rules of 1907. Certain methods and means of war are forbidden, for example, the use of poisoned weapons, or arms

20. See Ball, op cit, pp 311 et seq as to the prisoner of war situation in Vietnam during the course of the conflict. In the case of the Falklands conflict of April–June 1982, Argentine prisoners of war were speedily repatriated both before and after the cease-fire of 13/14 June 1982. See also now sub-para (b) of para 4 of art 85 of Protocol I of 1977 (p 570 below).

1. Of particular interest in both conventions are the provisions relative to the use of the Red Cross emblem, and concerning the protection of medical aircraft. For a treatise on the four conventions adopted by the Geneva Conference of 1949, see Draper *The Red Cross Conventions* (1958), and see the commentaries thereon of Jean S. Pictet, Director, International Committee of the Red Cross.

or projectiles which would cause unnecessary suffering,[2] or the refusal of quarter. Ruses of war are permitted, but, according to general practice, not if tainted by treachery or perfidy, or if in breach of some agreement between the belligerents. As already mentioned, undefended towns are not subject to bombardment (article 25), and during the Second World War (1939–1945) declarations of certain undefended towns as 'open cities' were made, so as to exempt them from attack or destructive operations.[3] Military objectives in an undefended city not so open and free for entry might be bombarded from the air. Attacking officers must give warning before commencing a bombardment of defended places, except in case of an assault, and must spare distinctly marked churches, hospitals, monuments, etc. Pillage is forbidden.

The rules of naval warfare[4] are contained partly in rules of customary international law, partly in the Declaration of Paris of 1856, partly in the Hague Conventions of 1907, Nos VI, VII, VIII, IX (Naval Bombardment), X, XI, and XIII (Neutral Rights and Duties in Maritime War), and partly in the London Submarine Rules Protocol of 1936. In maritime warfare, belligerents are entitled to capture enemy vessels and enemy property. Surface ships, submarines, and aircraft engaged in sea warfare may destroy enemy merchant shipping provided that, except in the case of a persistent refusal to stop or resistance to search, the safety of the crew, passengers, and ship's papers must be definitely assured. However, as was demonstrated in the Falklands Conflict in 1982, and also in the Iraq–Iran war of 1980–1988, merchant vessels and tankers may be destroyed, wholly or partially, by missiles directed from land-based launchers or from aircraft hundreds of miles away, so that the possibility of ensuring the safety of the crew or others aboard the ship is excluded. Merchant ships are entitled to defend themselves against attacks at sight, not conforming to these rules. Privateering, ie, the commissioning of private merchant vessels, is illegal (see Declaration of Paris 1856). Merchant ships may be lawfully converted into warships, provided, according to British

2. It is difficult to reconcile with this prohibition the general practice of using flame-throwers and napalm bombs, as in the Second World War, and as in the Vietnam conflict. One generally accepted test of 'unnecessary suffering' is whether the relevant suffering is needless, superfluous, or disproportionate to the military advantage or effectiveness reasonably to be expected from the use of the particular weapon concerned; cf 69 AJIL (1975) 399–400, and *Canadian Yearbook of International Law* 1981, pp 233–234.
3. See p 548, n 16 above.
4. See as to the law of naval warfare, Tucker *The Law of War and Neutrality at Sea* (1957); O'Connell *The Influence of Law on Sea Power* (1975); G.I.A.D. Draper 'Rules Governing the Conduct of Hostilities—The Laws of War and Their Enforcement' in 62 *US Naval War College International Law Studies* (1980) 247 at pp 248–255; W.O. Miller 'Law of Naval Warfare', ibid, pp 263–270; H.S. Levie 'Mine Warfare and International Law', ibid, pp 271–279; and H. Moineville *Naval Warfare Today and Tomorrow* (1983).

practice, that the conversion is effected in a home port, and not while the vessel is at sea or in a neutral port. Auxiliary vessels may be treated as being of a combatant character if they are part of the naval forces, being employed to assist naval operations.

Under the Hague Convention IX (Naval Bombardment), the naval bombardment of undefended ports, towns, etc, is prohibited unless the local authorities refuse to comply with a formal requisitioning demand for provisions and supplies. Otherwise, military works, military or naval establishments, and other military objectives may be attacked.

Floating mines must not be sown indiscriminately, and it is the duty of belligerents laying such mines not merely to take all possible precautions for the safety of peaceful navigation, but to notify the precise extent of minefields as soon as military considerations permit. Unfortunately the law as to mines is uncertain because of the weakness of the text of the Hague Convention VIII (Submarine Contact Mines), and because of the development of new types of mines and new kinds of minelaying techniques and mine-launching methods (eg from submarines).

In the Second World War, the rules of naval warfare laid down in the above-mentioned instruments, in particular the Submarine Rules Protocol of 1936, were time and again disregarded. Partly this was justified on the basis of reprisals for breaches by the other side, partly this was due to conditions rendering strict compliance with the rules either dangerous or not practical for the party concerned. The new naval weapons and equipment technology, as developed in the last two decades, and the emergence of nuclear-powered vessels and submarines, capable of firing nuclear missiles, and as well the use and deployment of aircraft in naval warfare for the purpose of firing from a distance 'homing' missiles at warships (as demonstrated in the Falklands conflict of April–June, 1982), have likewise operated to render some or most of the former rules unworkable, so as further to reduce the areas of naval warfare over which regulation is possible or acceptable. Already, these technological improvements have compelled naval commands to develop the concept of 'exclusion zones' in the high seas, as was shown in the case of the Cuban 'quarantine' of 1962 and in the case of the above-mentioned Falklands conflict. Indeed, a country with an untrackable nuclear-powered submarine can virtually exclude, at their own peril, surface warships from entering a defined zone of an appropriate area in the high seas. Also, helicopters, appropriately equipped with technological capabilities, have become an integral element of naval operations, thus rendering it necessary for the rules of naval warfare to take into account the airspace as well as the high seas.

In regard to submarines, two new developments with a possible impact on the rules governing naval warfare need to be mentioned. First, intelligence and surveillance have come to be an essential component of

maritime warfare, and submarines are destined to be used in such covert operations on a much larger scale. Second, the employment of overhead-based systems in outer space has become an indispensable element in the effective conduct of anti-submarine tactics, particularly detection and targeting.

As to the rules, if any, concerning aerial warfare, see above.[5]

There are no rules of international law prohibiting the use of psychological warfare, or forbidding the encouragement of defection or insurrection among the enemy civilian population.

Other special rules are contained in the above-mentioned Geneva Protocal of 1925, gas and bacteriological warfare being prohibited (see also Draft Convention of the Commission of Disarmament 1930),[6] the Protocol being supplemented by the later Convention of 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction, itself supplemented by a Final Declaration adopted in 1986 to strengthen verification methods, while by the International Convention for the Protection of Cultural Property in the event of Armed Conflict, signed at The Hague in May 1954, measures of protection against the ravages of war were provided for works of art, monuments, and historic buildings.[7]

5. Pp 548–550. Cf Hamilton De Saussure 'The Laws of Air Warfare: Are There Any?' in 62 *US Naval War College International Law Studies* (1980) 280–291.
6. Quaere whether this Protocol applies to the use of non-lethal tear gases or other chemical agents; the latter were employed in the Vietnam conflict. In 1966–1970, the application of the Geneva Protocol of 1925 came under close examination by the United Nations General Assembly, which in 1968 requested the Secretary-General of the United Nations to prepare a report on chemical and biological or bacteriological weapons, and the effects of their use. A report was prepared by a group of consultant experts, and issued by the Secretary-General on 1 July 1969. This contained a strong condemnation of such weapons, and led to a Resolution adopted by the General Assembly on 16 December 1969, declaring as contrary to the generally recognised rules of international law as embodied in the 1925 Protocol, the use in international armed conflicts of: (a) chemical agents of warfare with direct toxic effects on man, animals, or plants; and (b) biological agents of warfare, intended to cause death or disease in man, animals or plants, and dependent for their effects on ability to multiply. A number of important military powers, however, either voted against the Resolution or abstained from voting. Some states contested the right of the General Assembly to interpret the Protocol, claiming that this was the sole prerogative of the parties to that instrument. Since 1984 when at the Geneva Conference on Disarmament a draft text for a chemical weapons convention was put forward on behalf of the United States Government, work has been in progress for the conclusion of a convention to establish a comprehensive and verifiable system to control or ban the use or making of chemical weapons. It should be noted that the Convention of 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction, which supplements the Geneva Protocol of 1925, was negotiated over a period of two years at the Geneva Conference of the Committee on Disarmament (CCD).
7. *Defoliants:* As to the legality of attacks on other objectives, quaere whether jungle growth, plantations, and crops may be destroyed by defoliants or other chemical agents, even if these be used to safeguard military operations and personnel, or to prevent

In 1977 there was opened for signature a Convention on the Prohibition of Military or Other Hostile Use of Environmental Modification Techniques (ENMOD Convention), to prohibit any such techniques having long-lasting or severe effects, injurious to states parties.

Apart from Protocols I and II of 1977, additional to the Geneva Red Cross Conventions of 1949, considered below in the present chapter, the latest instruments of importance to be concluded in the domain of international humanitarian law were the Convention and three annexed Protocols adopted at Geneva on October 1980 by the United Nations Conference on Prohibitions or Restrictions of Use of Certain Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (more popularly known as the Conference on 'Inhumane Weapons'). When a state ratifies the Convention—the basic instrument—it must at the same time give notice of its consent to be bound by any two or more of the annexed Protocols. The first Protocol is concerned with non-detectable fragments; it prohibits the use of any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays. The second Protocol deals with prohibitions or restrictions on the use of mines, booby traps and other like devices. The third Protocol contains restrictions with regard to the use of incendiary weapons, imposing, inter alia, obligations to record locations. The Protocols do not, however, make any listing of 'grave breach' offences as in the Geneva 1949 Conventions and the 1977 Protocols. The Conference was but a partial success; on the one hand, there was a failure to reach any agreement on certain important categories of so-called 'inhumane weapons', and, on the other hand, as in the case of other law-making conferences of the past decade, it was in effect agreed not to agree, and so three categories of weapons were set aside for future study, namely small-calibre projectiles, anti-personnel fragmentation warheads, and fuel air explosives. After a full discussion of the Convention and Protocols, an eminent expert came to the conclusion that the Conference 'has relatively minor effect on the use of effective modern conventional weapons'.[8]

Law of belligerent occupation of enemy territory

Belligerent occupation must be distinguished from two other stages in the conquest of enemy territory:

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crops going to the enemy. From one point of view, the indiscriminate nature of the damage renders such methods of destruction objectionable.

8. See W. J. Fenrick 'New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict', *Canadian Yearbook of International Law* 1981, 229 at p 255.

a. invasion, a stage of military operations which may be extended until complete control is established; and
b. the complete transfer of sovereignty, either through subjugation followed by annexation, or by means of a treaty of cession. Occupation is established only by firm possession, or as article 42 of the Hague Rules of 1907 says, only when the territory is 'actually placed under the authority of the hostile army'. As was demonstrated in practice both before and after the termination of hostilities in the Second World War (1939–45), a belligerent may also temporarily establish military government over territory of third states, liberated from enemy occupation.

The distinction from invasion is important, inasmuch as the occupant Power is subject to a number of rights and duties in respect to the population of the occupied territory. Important also is the point that belligerent occupation does not displace or transfer the sovereignty of the territory but involves the occupant Power in the exercise solely of military authority subject to international law. For this reason, occupation does not result in any change of nationality of the local citizens nor does it import any complete transfer of local allegiance from the former government. Nor can occupied territory be annexed. The occupant Power's position is that of an interim military administration, which entitles it to obedience from the inhabitants so far as concerns the maintenance of public order, the safety of the occupying forces, and such laws or regulations as are necessary to administer the territory.

Lawful acts of the occupant Power will therefore normally be recognised when the occupation is terminated; but not unlawful acts (for example, the wholesale plunder of private property).

The rational basis of the international law as to belligerent occupation is that until subjugation is complete and the issue finally determined, the occupant Power's authority is of a provisional character only.

The status of Germany after the Second World War following on the unconditional surrender appears to have involved a stage intermediate between belligerent occupation and the complete transfer of sovereignty (b. above). The four Allied Powers, Great Britain, France, Russia and the United States exercised supreme authority over Germany, and in the opinions of some writers, this could not be regarded as a belligerent occupation because of the destruction of the former government, and the complete cessation of hostilities with the conquest of the country. Nor, since the occupying Powers were acting in their own interests, were they trustees in any substantive sense for the German people. At the same time, it should be pointed out that the Allied control system was expressly of a provisional character, not involving annexation, was predominantly military in form, and based on the continuance of the German State as such, and on the continuance also of a technical state of war. However,

the question is now somewhat academic, except as a precedent for the future, owing to the establishment of separate West and East German Governments.[9]

The rights and duties of the occupant Power are conditioned primarily by the necessity for maintaining order, and for administering the resources of the territory to meet the needs of the inhabitants and the requirements of the occupying forces, and by the principle that the inhabitants of the occupied territory are not to be exploited. The rules with regard to public and private property in the occupied territory are referred to above.[10] The inhabitants must, subject only to military necessities, be allowed to continue their lawful occupations and religious customs, and must not be deported. Requisitions for supplies or services must be reasonable, and not involve the inhabitants in military operations against their own country. Contributions are not to be exacted unless ordinary taxes and dues are insufficient for the purposes of the administration. These and other rules are set out in section III of the Hague Rules of 1907.

The provisions of the Hague Rules were supplemented by the Geneva Convention of 1949 on the Protection of Civilian Persons in Time of War (see Part III, section III, articles 47–78). In the interests of the inhabitants[11] of occupied territory, and having regard to the experience of military occupations in two world wars, numerous carefully defined duties were imposed upon occupying Powers by the Convention, duties qualified in certain particular cases by the requirements of internal security and order, and by the necessities of military operations; among such duties are the obligations:

a. Not to take hostages,[12] or impose collective penalties against the population for breaches of security or interference with the occupying forces by individual inhabitants;
b. not to transfer by force inhabitants, individually or en masse, to other territory or to deport them;
c. not to compel the inhabitants to engage in military operations or in work connected with such operations other than for the needs of the occupying army; and

9. Distinguish also: (1) The occupation of non-enemy territory in the interests of military operations; eg the Allied occupation of North Africa, 1942–3. (2) The occupation by Allies, temporarily, of the territory of another Allied state, which had been under military occupation by the enemy; eg the Allied occupation of Greece in 1944.
10. See pp 546–547.
11. Cf the reference to such persons as 'protected persons'. The rights of the inhabitants under the Convention cannot be taken away by any governmental changes, or by agreement between the local authorities and the occupying Power, or by annexation (see art 47).
12. Thus negativing the decision in the 'Hostages Case' (*United States v List*) p 558, n 16, above, that hostages may be executed in order to secure obedience of the local population.

d. not to requisition food and medical supplies, so as to impinge upon the ordinary requirements of the civilian population.

The Convention also imposes, subject to the same qualifications, a specific obligation to maintain the former courts and status of judges, and the former penal laws, and not to use coercion against judges or public officials.

Neither the Hague Rules nor the Convention purport to deal with all the problems of an occupying Power. There are noticeable deficiencies in regard to economic and financial matters. For example, what are the duties of the occupying Power in regard to banks, public finance, and the maintenance or use of the former currency or introduction of a new currency? Semble, here, the occupying Power must follow the principle of ensuring orderly government, which includes the proper safeguarding of the economic and financial structure, but excludes any attempt to obtain improperly any advantage at the expense of the inhabitants of the occupied territory.

Finally, as to the question of duties of obedience (if any) owed by the civilian population towards the occupying Power, it is clear that for conduct prejudicial to security and public order, for espionage, and for interference with military operations, inhabitants are subject to penalisation by the occupying Power. However, the notion of allegiance due by the inhabitants to the occupying Power was rejected by the Geneva Convention of 1949 on the Protection of Civilian Persons in Time of War (see articles 67–68). It appears that, in relation to the population, the occupying Power may prohibit certain activities by the population in the occupied territory, subject to due public notice of what is prohibited, notwithstanding that it has occupied the territory concerned following upon an act of aggression which was a crime under international law.[13]

Geneva conference on international humanitarian law in armed conflicts and the two Protocols adopted by the conference

The law as stated above is subject to such modifications and additions as were made in Protocol I on international armed conflicts and in Protocol II on non-international armed conflicts, being the Protocols adopted in June 1977 by the Geneva Diplomatic Conference on the Reaffirmation and Development of International Law Applicable in Armed Conflicts. The main purpose of this Conference, which met in sessions spread over the years 1974–1977, was to update and revise the Geneva Red Cross Conventions of 1949, and thus to restate and reaffirm, in a new political and technological context, the laws of war, that is to say the rules of international humanitarian law applicable in armed conflicts. Protocols I and II were adopted explicitly as being in addition to the Geneva Conventions of 1949.

13. Cf the 'Hostages Case' (*United States v List*) p 558, n 16, above.

The necessity for such updating and revision arose, as a practical matter, from the history since 1949 of the application—and as well non-application—of the Geneva Red Cross Conventions concluded in that year, and of the Hague Rules of 1907, and from the vast political and technological changes during the post-1949 period. There had been instances of governments and entities engaged in hostilities, refusing to recognise that their armed operations were subject to the rules laid down in the Geneva Conventions of 1949. Moreover, new kinds of warfare and of armed conflicts had emerged, which did not belong to the pre-1949 stereotypes of hostilities, an illustration being the Vietnam War itself, which, as mentioned above, was partly an international conflict, and partly a major civil war, with the involvement of outside powers. Also, it was claimed that the so-called 'wars of national liberation', and anti-colonial struggles, ought to be treated as conflicts subject to the rules of international humanitarian law. This raised incidentally the problem of how guerrilla forces and mercenaries were to be treated. Besides, new weapons technology had resulted in the manufacture and use of bombs, mines, and projectiles of greater destructiveness, more unnecessary suffering, and more indiscriminate damage than previously, such as cluster and fragmentation bombs, incendiary weapons, and delayed action mines and booby traps. Moreover, as a result of world-wide moves for the protection of the environment and the conservation of natural resources, which found expression in 1972 in the Stockholm Conference for the Protection of the Human Environment (see Chapter 14 above), it was felt that the former rules required some updating and revision so as specifically to take account of this necessity for preservation of the environment. Finally, the Vietnam War had demonstrated the need for new rules in certain areas, for example with respect to the matter of speedy evacuation of wounded through the use of more highly developed means of aerial transport than existed in the year 1949, when the Geneva Red Cross Conventions were concluded.

In the progression of steps which led to the first session of the Conference in 1974, an important role was played by the International Committee of the Red Cross (ICRC), by the Secretary-General and General Assembly of the United Nations, and by the two Conferences of Government Experts of 1971–1972 which met under the aegis of the ICRC to consider the subject of reaffirming and developing international humanitarian law,[14] and in particular to examine the two draft Protocols I and II prepared by the ICRC to deal respectively with the rules in international

14. For an account of the steps leading to the calling of the Conference by the Swiss Government, depositary of the four Geneva Red Cross Conventions of 1949, see R.R. Baxter (later, Judge Baxter of the International Court of Justice) 'Humanitarian Law or Humanitarian Politics; The 1974 Conference on Humanitarian Law', 16 Harvard ILJ (1975) 1 at pp 4–9.

armed conflicts, and the rules in non-international armed conflicts, these being the basic texts submitted to the first session of the Geneva Conference in 1974. The difficulties which plagued the sessions, 1974–1977 of the Conference were to a large extent due to the necessity of proceeding with two draft texts, instead of a single draft, and of settling the precise scope of each.

The first session of the Geneva Conference in 1974 had to deal with a number of thorny questions, two questions in particular being the participation of National Liberation Movements in the deliberations of the Conference, and the proposal that wars of national liberation be considered international armed conflicts for the purpose of the application of the Geneva Conventions of 1949 and of the two draft Protocols. The Conference decided, as to the former question, to invite National Liberation Movements, which were recognised by the 'regional intergovernmental organisations concerned', to participate fully in the deliberations of the Conference and in its main Committees. It also decided that the statements made or the proposals and amendments submitted by delegations of such National Liberation Movements as were so participating should be circulated by the Conference Secretariat as Conference documents to all the participants in the Conference, it being understood that only delegations representing states or governments would be entitled to vote. Although National Liberation Movements had no right to vote, their views were certainly taken into consideration and influenced the attitudes of the participating states.

The subsequent sessions of the Conference in 1975–1977 were more productive of concrete results, although much ground was left uncovered and compromises were necessary to an extent that contrasted with the course of the discussions at the Geneva Conference of 1949 which drew up the four Red Cross Conventions.

Detailed consideration of the two Additional Protocols (to the Geneva Conventions) adopted by the Conference lies beyond the scope of this book, and reference can be made only to some of the principal provisions of the two texts,[15] remembering always that their effectiveness will depend more upon their practical implementation rather than upon their formal acceptance by governments.

Dealing first with Protocol I on international armed conflicts, some of the main provisions include the following:

15. For discussion, etc, in respect to the Protocols, see Y. Dinstein 'The New Geneva Protocols: A Step Forward or Backward' (1979) Year Book of World Affairs 265; L.C. Green 'The New Law of Armed Conflict' (1977) 15 Canadian Yearbook of International Law 1; D.F.J.J. De Stoop 'New guarantees for human rights in armed conflicts—a major result of the Geneva Conference 1974–1977' (1978) 6 Australian Year Book of International Law 52; A. Cassese (ed) *The New Humanitarian Law of Armed Conflict* (1979–1981, 2 vols).

1. The international armed conflicts covered by the Protocol include hostilities in which 'peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination' (para 4 of art 1).
2. Subject to conditions, more definite protection is assured for both service and civilian medical units and personnel, and for medical transport vehicles, ships and aircraft (articles 12–18, and 21–31).
3. Although the Protocol does not explicitly deal with specific weapons, it reiterates the prohibition or the use of weapons and methods, etc, causing superfluous injury or unnecessary suffering, and adds a prohibition on the use of methods or means that are intended or may be expected to cause widespread, long-term and severe damage to the natural environment (article 35), while in the study, development, etc, of new weapons or methods of warfare, the parties are bound to determine whether these would be prohibited by the Protocol or other applicable rules of international law (article 36).
4. In situations where an armed combatant cannot distinguish himself from a civilian (for example guerrilla activities) he is only required to carry arms openly during military engagements and in visible deployment prior to the launching of attacks (article 44).
5. Articles 52–56 impose obligations for the greater protection of civilian objects and the civilian population, including prohibitions of starvation of civilians, and of destruction of foodstuffs and agricultural areas, and the protection of works and installations containing dangerous forces.
6. Provision for fundamental guarantees of human rights is made in article 75; these include criminal procedural guarantees, and protection against abusive treatment, while covering a great variety of persons. Moreover, under article 74 provision is made for ensuring the reunification of families dispersed as a consequence of armed conflicts.
7. Journalists engaged in dangerous professional missions in conflict areas are to be protected as having civilian status, and may obtain a special identity card (article 79).
8. The list of 'grave breaches' is extended in articles 11 and 85 (see above), and one such breach is 'unjustifiable delay in the repatriation of prisoners of war or civilians' (see sub-paragraph (b) of paragraph 4 of article 85); having regard to what happened in the Korean conflict 1950–1953 and the Vietnam War,[16] the latter provision is of the utmost significance.

Other provisions of Protocol I (eg, as to mercenaries) have been referred to in their appropriate place in this chapter, above. It should be added that the Protocol does not contain provisions dealing expressly with

16. See p 560.

nuclear warfare, and having regard to certain reservations made upon the signature of the Protocol, it may for all practical purposes be taken that the Protocol does not extend to such warfare involving nuclear weaponry.'

Protocol II is much shorter than Protocol I. It is confined to armed conflicts between non-state entities or groups. As Professor Dinstein has said,[17] its foremost aim is 'to augment the protection accorded to the victims of civil wars', and in this vein it provides a number of basic guarantees and special protection for civilians, works and installations containing dangerous forces, medical personnel, and medical transports. The main thrust of the provisions of Protocol II is to mitigate the suffering and damage that civil wars may involve, and it is hoped that, insofar as all conceivable situations are not covered in the Protocol, civil war antagonists will at least respect the spirit of humanitarianism underlying the entirety of its provisions.

Arms control—distinction from international humanitarian law

In this section of the present chapter, it remains to mention the subject of arms control, for the purpose only of distinguishing it from that of international humanitarian law, since it lies beyond the scope of the present book. The expression 'arms control' refers to accepted regulatory measures, in certain specific directions only, of the deployment, abolition, reduction or limitation, or of prohibition of the new production, of certain arms, in regard to which the primary purposes are to restore the equilibrium of deterrence, or to decrease the pitch and intensity of an arms race, or even to lessen the possible risks of escalation of armed conflicts.[18] It will be evident, then, that the predominant aim of arms control is to reduce the likelihood of armed conflicts, that is to say, to contribute to the maintenance of peace, and that it is not concerned specifically at all with reducing the suffering occasioned by the actual weaponry when used in armed conflicts. The purpose indeed is to ensure that such armed conflicts do not occur or if they do, to keep within limits the range of damage that may be caused by the weaponry used.

Arms control is to be distinguished also from disarmament. The object of disarmament is to abolish war-making capacity, while the purpose of arms control is to keep such capacity within certain bounds. So far, the subject of arms control has hardly been within the province of general international law, but has been dealt with in the main by bilateral agreements, or by multilateral agreements confined to a limited number of states.

17. (1979) Year Book of World Affairs, op cit, p 280.
18. See J. Goldblat *Agreements for Arms Control: A Critical Survey* (1982), and Julie Dahlitz *Nuclear Arms Control: With Effective International Agreements* (1983).

4. MODES OF TERMINATING WAR AND HOSTILITIES

State practice in the present century renders necessary a distinction between:

1. Modes of termination of the status of war.
2. Modes of termination of hostilities which are continuing in a war stricto sensu, and of the hostilities in a non-war armed conflict.[19]

(1) Modes of termination of the status of war

The following are the principal ways of termination:

a. Simple cessation of hostilities by the belligerents without any definite understanding being reached between them. Illustrations are the wars between Sweden and Poland (1716), between France and Spain (1720), between Russia and Persia (1801), between France and Mexico (1867), and between Spain and Chile (1867). The disadvantage of this method is that it leaves the future relations of belligerents in doubt, and is not appropriate for modern conditions under which complicated questions of property, *matériel*, prisoners of war, and boundaries have to be resolved usually by treaty.

b. Conquest followed by annexation. The governing principle here is that a country conquered and annexed ceases to exist at international law; hence there cannot be a state of war between it and the conqueror. It is not clear how far this principle now applies where the annexed state was vanquished in a war of gross aggression, illegal under international law.[20] For example, in the case of Ethiopia and Czechoslovakia, annexed in 1936 and 1939 by Italy and Germany respectively, the Allied Powers refused to recognise the territorial changes thus illegally brought about, but these were both cases where independence was restored within a reasonably short time. It may be recalled, for example, that by article 5 of the definition of aggression, adopted in 1974 by the United Nations General Assembly (see above in this chapter), no territorial acquisition or special advantage resulting from aggression is to be recognised as lawful.

c. By peace treaty. This is the more usual method. A treaty of peace generally deals in detail with all outstanding questions concerning the relations of the belligerents, for example, evacuation of territory, repatriation of prisoners of war, indemnities, etc. On all points concerning property on which the treaty is silent, the principle uti possidetis ('as you possess, you shall continue to possess') applies, namely, that each state is entitled to retain such property as was actually in its

19. It may also be necessary to consider a tertium quid, namely the termination of hostile or unfriendly relationships; eg, the termination of a 'confrontation', as to which, note the agreement between Indonesia and Malaysia of peace and co-operation, 11 August 1966, referred to, p 533 above.

20. See above, pp 153–155.

possession or control at the date of cessation of hostilities. There also applies the postliminium principle, in the absence of express provision, to the rights of the parties other than to property; that is to say, that any prior condition and prior status are to be restored; hence, legal disabilities of former alien enemies are removed, diplomatic relations are reconstituted, etc.

d. By an agreement or agreements for ending war, and restoring peace, as distinct from a peace treaty in the strict sense. This method has been adopted where one or more of the parties involved in the war was a non-state entity; an illustration is the Four-Party Agreement of 27 January 1973, for ending the war and restoring peace in Vietnam, one party to which was the Provisional Revolutionary Government of South Vietnam (Vietcong).
e. By armistice agreement, where the agreement although primarily intended to bring about a cessation of hostilities, operates subsequently as a result of its practical application by the parties de facto to terminate the status of war. This, it is believed, is largely a question of construction of the particular armistice agreement concerned.[1]
f. By unilateral declaration of one or more of the victorious Powers, terminating a status of war.[2] This seemingly anomalous procedure was adopted by certain of the Allied Powers (including Great Britain and the United States) in 1947 and 1951 respectively towards Austria and the West German Republic, principally because of irreconcilable disagreement with the Soviet Union over procedure and principle in regard to the conclusion of peace treaties.

Municipal law and the termination of war. The date of termination of a war, according to a particular state's municipal law is not necessarily the same as the date of the peace treaty, or the date of cessation of hostilities.[3] There is no rule of international law precluding the municipal law of any belligerent state from adopting a date different to that in the treaty, unless there be express contrary provision in the treaty itself.

(2) Modes of termination of hostilities

The following modes of terminating hostilities, as distinct from the status of war itself, are applicable to hostilities both in a war, and in a non-war conflict:

1. Note in that connection the view adopted by Israel, and denied by Egypt that its armistice agreement of 1949 with the four Arab States, Egypt, Lebanon, the Hashemite Kingdom of Jordan, and Syria, terminated the status of war; see Rosenne *Israel's Armistice Agreement with the Arab States* (1951). But cf now the Treaty of Peace between Israel and Egypt signed at Washington on 26 March 1979, in (1979) 18 International Legal Materials 362, which expressly terminated any status of war.
2. See *Re Grotrian, Cox v Grotrian* [1955] Ch 501 at 506, [1955] 1 All ER 788 at 791.
3. See, eg, *Kotzias v Tyser* [1920] 2 KB 69, and *Ruffy-Arnell and Baumann Aviation Co v R* [1922] 1 KB 599 at 611–612.

a. By armistice agreement. Strictly speaking, an armistice is but a temporary suspension of hostilities, and normally signifies that hostilities are to be resumed on the expiration of the armistice period. Armistices may be, on the one hand, *general*, when all armed operations are suspended; or on the other hand, *partial* or *local*, being then restricted to portions only of the armed forces engaged, or to particular areas only of the operational zones. One modern trend in regard to general armistices, however, is that they represent no mere temporary halting of hostilities, but a kind of de facto termination of war, which is confirmed by the final treaty of peace.[4] In the case of a non-war armed conflict, as for example, the Korean conflict, 1950–1953, the armistice puts an end to the conflict, and it may also be that a final peaceful settlement is contemplated by the contending parties.[5]

b. Unconditional surrender or other forms of general capitulation, unaccompanied by any agreement or treaty, containing terms of peace. The formula of unconditional surrender was adopted by the Allies in the Second World War for the reasons, inter alia, that it was deemed impossible to negotiate with the Axis Governments, that it was necessary to preclude any suggestion of a betrayal of the enemy armed forces by civilian governments, and to enable a process of re-education and democratisation of the enemy populations to be undertaken for a time under military controls, while a formal state of war continued.

c. By a 'Truce' so-called. The term has been used in United Nations practice[6] (for example, the Truce established in Palestine in May–June 1948, as a result of action by the Security Council). It probably indicates a less definitive cessation of hostilities than the term 'Armistice'.[7]

d. Cease-Fire. The term more frequently used for a cessation of hostilities on the order or request of the United Nations Security Council or other international organ is 'cease-fire'; for example, the cease-fire ordered by the Security Council in December 1948, on the occasion of

4. As in the case of the general Armistice of 11 November 1918, in the First World War, which preceded the Treaty of Versailles 1919.
5. See, eg, the references in the Preamble to the Korea Armistice Agreement of 27 July 1953, to 'stopping the Korean conflict' and to a 'final peaceful settlement'; art 62 also refers to the eventual supersession of the Agreement by an agreement for 'a peaceful settlement at a political level'.
6. See as to the United Nations practice in respect to truces, and as well in respect to 'cease-fires' and armistices, Sydney D. Bailey 'Cease-Fires, Truces, and Armistices in the Practice of the UN Security Council' 71 AJIL (1977) 461–473, esp at p 470.
7. Rosenne, op cit, at pp 24–28, suggests that a truce differs from an armistice in being a more limited method, since the armistice may involve positive provisions other than the mere suspension of hostilities, and affect third parties, which a truce usually does not. See also Bailey, op cit, in 71 AJIL (1977) 462–463.

the renewal of hostilities in Indonesia between the Netherlands and the Indonesian Republican forces, the cease-fire of 13 October 1961, between the United Nations Force in the Congo and the armed forces of Katanga,[8] and the cease-fire in the India–Pakistan conflict 'demanded' by the Security Council in its resolution of 20 September 1965. The general effect of a cease-fire is to prohibit absolutely hostilities and operations within the area subject of the order or agreement, and during the period of time stipulated. A cease-fire subject of an order by the UN Security Council may not necessarily have immediate operation; eg, the Council's mandatory requirement for implementation of a cease-fire in the Iraq-Iran war, although made by Resolution 598 adopted in July 1987, did not obtain acceptance by the belligerents until August 1988.

e. Agreement of cessation or suspension[9] of hostilities; for example, the three Geneva Agreements of 20 July 1954, on the cessation of hostilities respectively in Vietnam, Laos, and Cambodia, which ended the fighting in Indo-China between government and Viet Minh forces. The Agreement on Disengagement between Israeli and Syrian forces, in respect to the hostilities of October 1973, may be regarded as falling within this category; paragraph H of the Agreement specifically declared: 'This Agreement is not a Peace Agreement. It is a step towards a just and durable peace on the basis of Security Council resolution 338 dated 22 October 1973'.

f. By joint declaration of the restoration of normal, peaceful, and friendly relations between the contestants; eg, the Tashkent Declaration, 10 January 1966, as to the India–Pakistan Conflict (this included terms as to withdrawal-lines of armies, and as to prisoners).[10]

g. De facto cessation of the fighting, as in the case of the halting of hostilities in Angola, 8–9 August 1988.

General

One unsatisfactory feature of the Second World War and its aftermath has been the undue prolongation of the period between cessation of

8. The termination of hostilities in Laos in 1962 was referred to as a 'cease-fire' in art 9 of the Protocol of 23 July 1962, to the Declaration on the Neutrality of Laos, of the same date. See also Bailey, op cit, at p 470 for the various categories of 'cease-fires.' The Falklands conflict of April–June 1982 was ended by surrender of Argentine garrisons and a cease-fire of 13/14 June 1982.
9. There was a suspension in May 1965 in the case of the conflict in the Dominican Republic.
10. The terminology as to cessation of hostilities also includes a 'pause' (ie, a brief period of temporary cessation of particular kinds of operations, such as air bombardment), a 'standstill' (this can cover not only a prohibition of hostilities, ie cease-fire, but also a cessation of all movement of armaments or personnel), and 'de-escalation' (a diminution in the intensity, magnitude, and range of the hostilities).

hostilities and the conclusion of a peace treaty.[11] This can leave conquered states subject to an uncertain régime, intermediate between war and peace, a possibly recurrent situation for which some solution should be found by international law.

11. Although hostilities terminated in August 1945, the Peace Treaty with Japan was not signed until 8 September 1951, and at the date of writing a peace treaty with Germany has not been concluded.