determine its external and internal political status, was gradually given shape and expanded to include colonialism in all its forms and manifestations. It was to find its way into treaty law and judicial pronouncements, and is now considered to form part of the body of rights fundamental to the international community, breaches of which are deemed to warrant a different and more serious legal response.

Placed within the context of the right to self-determination, the questions of Southern Rhodesia and Palestine were to constitute important precedents in this process.

IV THE COLLECTIVE RESPONSES TO THE UNILATERAL DECLARATIONS OF INDEPENDENCE

Action with respect to Southern Rhodesia had been initiated in 1961 at the international level as a result of the concern of the UN majority over the progressive evolution towards independence of a territory placed under a local administration of settlers and based on racial discrimination and a denial of political and other rights to the African majority. In seeking the means to oppose and eradicate this system before it could slide into the formal *apartheid* system of its Southern neighbour, and to substitute for it the only goal acceptable, that of self-determination for its people, the UN majority sought to ground international jurisdiction on the international status of Southern Rhodesia. In 1962, this status was determined by the General Assembly, over the protests of the United Kingdom but in the light of international standards and criteria, to be that of a non-self-governing territory under Chapter XI of the Charter (General Assembly Resolution 1747 (XVI)), and hence a self-determination unit to which could be applied the body of law on decolonisation which had progressively been shaped. In this context, it is easy to understand why the UN opposed efforts by the European minority in 1965 to perpetuate colonialism in another form by unilaterally declaring the independence of a state based on minority rule and discrimination.

It is contended that the United Nations went well beyond a verbal condemnation in determining, on the basis of a series of quasi-judicial pronouncements (Security Council Resolutions 216, 217 (1965)),[29] that this unilateral declaration of independence made by a racist minority, as well as the situation arising from it, was not only unconstitutional but also *illegal and invalid under international law* as it ran counter to the rights of the majority.

The United Nations then called for collective sanctions in the form of a dual response: (1) The refusal to validate the purported changes in the status of the territory, by the initiation of a policy of collective non-recognition (one of the most significant revivals of the pre-war Stimson Doctrine) (Security Council Resolutions 216, 217 (1965), 277 (1970)); and (2) the imposition, for the first time in UN history, of a panoply of economic, financial and diplomatic sanctions under Article 41 of the Charter on the basis of a determination that the illegality of the situations resulting from the unilateral declaration of independence constituted a threat to international peace and security under Chapter VII of the Charter (Security Council Resolutions 232 (1966), 253 (1968)). As a corollary, UN resolutions affirmed the legitimacy of the National Liberation Movements of Southern Rhodesia, entailing their right to representation in the international

29 See also 277 (1970); 288 (1970); 328 (1973).

arena, recognition of the legitimacy of their struggle by all means at their disposal and their right to assistance by third parties.

Thus whilst seemingly prepared to concede to Rhodesia a certain degree of effectiveness, the United Nations nevertheless denied independence to that entity irrespective of the traditional indicia of statehood. It is evident that the United Nations was here distinguishing between ordinary recognition problems predicated on the existence of statehood, and where questions of legality do not arise, and this type of collective non-recognition of a situation based on a determination that an act contrary to international law has occurred. This becomes apparent from an analysis of the function, content and legal effects of this policy, duplicated in the call for non-recognition of South Africa's continued presence in Namibia, and the proclaimed independence of the South African bantustans. For behind the apparent object of an independent State of Rhodesia, what states were called on not to recognise was in fact the illegal and invalid situation created by the UDI. Hence efforts to argue from the existence or non-existence of the criteria of statehood in this situation obscured the true function of non-recognition – the refusal to validate the act of UDI and its consequences, considered contrary to international law and thus null and void.

Whilst, after the adoption of Resolution 181 (II), and the subsequent establishment of a State of Israel, the Palestine question was not immediately associated with the decolonisation process, the Palestinians initially being looked upon as refugees and treated within the context of an individual right of return, the General Assembly after 1969 shifted its perspective to acknowledge their status as a people belonging to a self-determination unit. At the same time the United Nations sought to illegitimatise all Israeli actions contrary to this right.

Thus in a number of resolutions the Assembly affirmed the following: (1) the legitimate inalienable right of the Palestinian people to self-determination, including the right to establish their own independent state; (2) the legitimacy of its representatives – the PLO – granted observer status in the General Assembly and a right to participate on an equal footing with member states in Security Council debates on the Middle East, as well as in all conferences on the Middle East held under the auspices of the UN; and (3) the illegality under international law and UN resolutions of Israel's occupation of Arab territories since 1967, including Jerusalem, considered contrary to the *jus ad bellum* (the principle of the inadmissibility of the acquisition of territory by force) as well as the *jus in bello*) (the 1949 Geneva Conventions), and the consequent invalidity of all legislative and administrative measures and actions taken by Israel purporting to alter their character and status, in particular, the so-called 'Basic Law' on Jerusalem, the establishment of settlements, the destruction of homes and property and the policy of deportations. However, the right of all states in the region to exist within secure and internationally recognised boundaries was also affirmed.

The Assembly's response to the decision of the Palestine National Council of 15 November 1988 in the form of General Assembly Resolution 43/177 acknowledging the proclamation of an independent State of Palestine must therefore be taken in the same vein as, but acting in an opposite direction to, the Assembly's response to the Southern Rhodesian unilateral declaration of independence. This proclamation is considered in the preamble to be in line with Resolution 181 (II) and '*in exercise of the inalienable right of the Palestinian people* ...'. The resolution '*affirms* the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967' and decides that, effective as of 15 December 1988, the designation 'Palestine' should be used in place of the

designation 'Palestinian Liberation Organisation' in the United Nations system.[30]

Not surprisingly, controversy arose over the legal significance of this 'acknowledgment'. The United States declared that by this resolution the General Assembly had expressly withheld the attribution of statehood from 'Palestine' since it was specified that the change of designation of the PLO to 'Palestine' was 'without prejudice to the observer status and functions of the PLO within the United Nations system'.[31] Japan, Australia and the United Kingdom, among others, expressed reservations on the fact that the draft resolution presupposed the establishment of the State of Palestine.[32]

However, it is clear that the function of this resolution was to recognise and affirm the intrinsic legality of a situation – the declaration of independence – considered to be in conformity with General Assembly Resolution 181 and other resolutions recognising the right to self-determination of the Palestinian people, including the right to a state of its own, and the consequent intrinsic illegality, despite its effectiveness, of the Israeli occupation which was preventing the state of Palestine from exercising authority over this territory. The Assembly was not concerned with cognition, in the sense of affirmation of the existence of the criteria of statehood, but with a process of legitimisation. In a sense, by implicitly acknowledging that the conditions for the establishment of a Palestinian State had now been met, several years after the adoption of Resolution 181, the Assembly may be said to have been asserting its competence, assumed on a number of occasions, and upheld by the Court as a discretionary right,[33] to determine the forms and procedures by which the right to self-determination was to be realised. It may be seen, therefore, as the crowning of the decolonisation process in Palestine.

The debate surrounding the adoption of this resolution supports this view. Arafat reiterated in the General Assembly that the independent state of Palestine had been declared by virtue, *inter alia*, of 'our belief in international legitimacy'.[34] Several member states spoke in similar vein. Egypt, amongst others, stated: 'We are thus called upon to adopt resolutions consistent with the norms of international legitimacy and the purposes and principles enshrined in the UN Charter'.[35] It was argued that 'some of the legal pretexts used to justify

30 The resolution, one of three adopted on Palestine on 15 December 1988, was carried by 104–2 (Israel and the United States) with 36 abstentions. The General Assembly took no vote at its 44th session in 1989 on a draft resolution, the operative paragraph of which would have decided 'that the designation Palestine shall be construed, within the United Nations, as the State of Palestine, without prejudice to the acquired rights of the Palestine Liberation Organisation in accordance with the relevant United Nations resolutions and practice' (UN Doc A/44/L50). The decision to defer consideration of the draft resolution occurred as a result of an appeal by the President of the General Assembly following a United States threat to withhold its assessed contribution to the budget of the UN, which the President of the General Assembly insisted was 'an obligation under the Charter'. See Kirgis, *loc cit* p 220 for the view that there are no legal grounds in this case justifying US withholding of its contributions.

31 A/43/PV 82, United States pp 46–47.

32 See A/43/PV 82, Australia, p 81, Japan, p 82, United Kingdom, p 83, Canada, p 86, France, p 87. Kirgis states: 'The United Nations did not thereby recognise a Palestinian state, nor did it call the PLO a provisional government' (*loc cit* p 220).

33 *Western Sahara* case [1975] *ICJ Reps* at p 36.

34 A/43/PV 78 pp 23, 27, 32–33.

35 See A/43/PV 78, p 48. See also Saudi Arabia, p 72; Iraq, p 87; A/43/PV 80, Sudan, p 6.

non-recognition of the State of Palestine are clearly no longer part of the spirit of our age'.[36] Even those states which had not yet recognised the State of Palestine stated that they nevertheless welcomed the proclamation as the exercise of the right to self-determination, including the establishment of a state of its own, by the Palestinian people through its legitimate representatives, differing only in the view that recognition of statehood could take place only within the context of a comprehensive Middle East settlement.[37]

There have been similar claims to establish a state on the basis of legitimacy. Indeed the declaration of independence of a Palestinian State reflects the wording of the Declaration on the Establishment of the State of Israel made also 'by virtue of our Natural and Historic Right and on the Strength of the Resolution (181)'.[38]

Another significant precedent was admission of Namibia to membership of, *inter alia*, the International Labour Organisation despite the clear absence of the traditional criteria of statehood, on the basis that the ILO was not prepared to allow the legitimate rights of the Namibian people to be frustrated by the illegal occupation of South Africa, in the absence of which Namibia would have qualified for independent statehood. The Resolution reads:[39]

> Noting that Namibia is the only remaining case of a former Mandate of the League of Nations where the former mandatory Power is still in occupation,
>
> Considering that an application for membership in terms of Article I is prevented only by the illegal occupation of Namibia by South Africa, the illegal nature of this occupation having been confirmed by the International Court of Justice in its Advisory Opinion of 21 June 1971,
>
> Affirming that the International Labour Organisation is not prepared to allow the legitimate rights of the Namibian people to be frustrated by the illegal actions of South Africa,
>
> Making it clear that in now granting the application for membership it does not overlook the wording of Article I and believes that in the near future the illegal occupation of Namibia by South Africa will be terminated,
>
> Decides to admit Namibia to membership in the Organisation, it being agreed that, until the present illegal occupation of Namibia is terminated, the United Nations Council for Namibia, established by the United Nations as the legal administering authority for Namibia empowered, *inter alia*, to represent it in international organisations, will be regarded as the government of Namibia for the purpose of the application of the Constitution of the Organisation.

As has been pointed out,[40] the ILO was, by the adoption of this resolution, exercising its function of legitimisation. Whilst General Assembly Resolution

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36 A/43/PV 78, Iraq, p 87.

37 A/43/PV 79, Sweden, p 74; A/43/PV 80, Chile pp 18–20, Austria pp 21–22, New Zealand, p 132, Canada, pp 172–76. A/43/PV 82, Australia, p 81, Japan, p 82, France, pp 87–88.

38 Quoted in Dugard, *Recognition and the United Nations*, 1987, Cambridge: Grotius Publications at pp 60–61.

39 ILO, 64th Session (Geneva, June 1978) Provisional Record, No 24 pp 19–20.

40 Osieke, 'Admission to Membership in International Organisations: the *Case of Namibia*', (1980) 51 *BYIL* pp 189–229 at pp 214–15. Referring to this resolution Osieke concludes: 'Here then lies the justification, the *raison d'être*, for the admission of Namibia as a member of the ILO. By regarding the rights of the Namibian people as subsisting irrespective of the illegal …

43/177 was not related to admission of the State of Palestine, it nevertheless appeared to be implying much the same thing.

V LEGAL CONSEQUENCES OF LEGITIMISATION

Security Council Resolution 277 (1970) calling for collective non-recognition of an independent State of Rhodesia was clearly a mandatory resolution adopted by the Council on the basis of powers conferred under Chapter VII. General Assembly Resolution 43/177 on Palestine, on the other hand, can place no corresponding obligation on member states to acknowledge the proclamation or *a fortiori* to recognise the State of Palestine, in the absence of admissions procedures,[41] though naturally it has determinative effect on the status of the entity for internal purposes (the change of appellation in particular).

However, the characterisation by the Organisation of the situation could not remain without legal effect. In the case of Southern Rhodesia, there existed, beyond the conventional obligation, a general international law duty on the part of states not to recognise a situation determined to be contrary to a fundamental norm – that of self-determination – and hence invalid. It could therefore be argued along the same lines that acknowledgment by the Assembly of the proclamation of an independent State of Palestine, a proclamation determined in this case to be in conformity with that right, could not similarly remain without legal effects.

This means, at the very minimum, that recognition by states of this entity cannot be held to be illegal in the sense of premature recognition. This is not to say that in recognition of statehood, the traditional criteria have been totally replaced, but that where this concerns certain postulated legal rules considered essential for the international community, different considerations operate depending on whether a situation of legality or illegality is involved and whether the object is the upholding of the maxim *ex injuria non oritur* over its rival principle *ex factis jus oritur* or the law-creating influence of facts.[42]

As a legal mechanism, this process of legitimisation, which attempts to override considerations of effectiveness, may be criticised for creating an unbridgable gap between the facts and the law. However, just as the lack of legal title may serve to weaken a situation of fact, assumption of legal title may serve to strengthen it. It is undeniable that the ostracism and diplomatic isolation of the European minority regime in Rhodesia and denial to it of international personality had a

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40 [cont] occupation of their territory by South Africa, and by refusing to recognise the illegal acts committed by South Africa or to allow that country to benefit from such acts, the Conference appears to have resorted to the principle *ex injuria jus non oritur* according to which 'an illegality cannot as a rule, become a source of legal right to the wrongdoer' (*ibid*, p 217).

41 Even where admission to the United Nations is involved, there has been controversy as to the effects of such admission on recognition of the entity as a state. The majority of authors agree that in the case of ordinary recognition problems, ie where a question of legality does not arise, it is not a function of the United Nations to grant or withhold recognition, since admission to the United Nations is only predicated on the existence of statehood for purposes of the Charter, and other considerations, such as ability to fulfil the obligations of membership, may be relevant. Dugard has, however, convincingly argued that admission to the United Nations constitutes or confirms the existence of a state. (It is generally agreed, however, that membership of an international organisation does not impose an obligation of recognition on member states of that organisation.)

42 Lauterpacht, *Recognition in International Law*, 1947, London: Cambridge University Press, at pp 426–27. Dugard points out that criteria such as effective government and independence are no longer insisted on in matters of admission to the United Nations where they run counter to developments in international law regarding the right of self-determination (*op cit*, p 72).

constitutive effect to the extent that it undermined its effectiveness: it is enough to think of the corollary of UN policy, had Rhodesia been accepted into the United Nations under a white minority regime in 1965. The application of a similar process of legitimisation to Namibia, where the maintenance of the fiction of a United Nations territory contributed to undermining the effectiveness of South Africa's hold over the territory, has had a similarly successful outcome.

Whilst, therefore, in the case of Palestine the UN may be accused of perpetuating a legal fiction, it may be argued that acknowledgement of the legitimacy of the proclamation of an independent Palestinian state, coupled with individual state recognition, may likewise serve to create the very effectiveness that is said to be lacking and contribute towards consolidation of its status. Cassese states that traditionally international law has provided that only those claims and situations which are effective can produce legal effects, in other words, international legitimacy. [43] Today, however, there is evidence that only those claims and situations which are legitimate can produce legal effects and hence be effective.

United Nations collective responses in terms of denial of legal effects to acts or situations in breach of certain norms deemed fundamental, by a determination that such acts are both illegal and invalid, and by the application, in consequence, of a policy of collective non-recognition, have had an extensive and consistent basis.[44] The contrary process of legitimisation of the proclamation of an independent Palestinian State is in line with and strengthens this practice. This practice has been considered as important evidence in the process of identifying and shaping fundamental norms, recognised as essentially dynamic concepts, the content of which evolves in accordance with the changing requirements of the international community.

This tendency to entrust to political organs the task of validating or invalidating claims and situations by means of legal judgments has been contested, but it may be said that it is in keeping with the contemporary tendency to reject, at the international level, municipal law concepts of separation of powers, as the Nicaragua case underlined.[45] It is in keeping with the concept formulated by the International Law Commission, in relation to the defence of fundamental norms, of the need for collective action within an institutionalised framework. Finally, it is in keeping with a noticeable tendency of the contemporary international community to promote a more dynamic and hence interventionist international law, concerned no longer merely with jurisdictional issues but with the evolution, if not transformation, of the international system.

43 Cassese, *International Law in a Divided World*, 1986, Oxford: Clarendon Press at pp 26–27.

44 In addition to the cases of Southern Rhodesia, the occupation of Arab territories by Israel, Namibia, and the independence of the South African bantustans already referred to above, one can cite the cases of the declaration of a Turkish Cypriot Republic (SC Res 541 (1983) and 550 (1984)); and the condemnation by the General Assembly in GA Res 35/169B of all partial agreements and separate treaties violating the recognised rights of the Palestinian people (alluding to the Treaty of Peace between Israel and Egypt of 1980). (See also the reaction to the Iraqi invasion of Kuwait in August 1990.)

45 See [1984] *ICJ Rep*, para 92 where the Court refers to Nicaragua's statement regarding the US arguments as to the delineation of powers between the Security Council and the Court.

6.7 The legal effects of recognition in municipal law: UK practice

Since recognition is basically a political act, it is a decision for the executive branch of government and in the UK it is the Foreign Office which will answer questions about the status of entities which purport to have international personality. Such answers are usually given by means of an executive certificate. As has already been noted, in 1980 the British government announced that it was no longer intending to accord formal recognition to governments, although it would continue to recognise states. Of course the substantive question of whether or not an entity is a government and thus entitled to the consequent immunities and privileges still remains but the courts will no longer have the benefit of an executive certificate to assist them. In *The Republic of Somalia v Woodhouse Drake and Carey SA* (1993)[46] Hobhouse J had to decide whether the interim government of Somalia, which was in a state of civil war at the time, was entitled to bring proceedings as the legitimate government of that state. In the course of his judgment Hobhouse J identified four questions which the courts would consider when deciding whether a regime existed as the government of a state:

(1) had the regime come to power by constitutional means?

(2) what was the degree, nature and stability of administrative control exercised by the regime over the territory of the state?

(3) did the British government maintain any form of relationship with the regime?

(4) what was the extent of international recognition of the regime?

The status of international organisations raises a particular problem. Parliament passed the International Organisations Act 1968 which allows domestic legal personality to be conferred on international organisations by means of an Order in Council. As has already been seen, international organisations are established by agreement between states. The House of Lords confirmed in *Maclaine Watson v Department of Trade and Industry* (1990)[47] that the courts have no power to adjudicate on or enforce rights arising out of transactions entered into by sovereign states between themselves and that treaties do not automatically become part of English law.

There are a number of consequences of recognition and non-recognition and these will be illustrated here by reference to a number of important decisions made by the English courts.

6.7.1 Locus standi

Perhaps one of the most important consequences of recognition is that it gives the recognised entity *locus standi* in the courts. In the *City of Berne v The Bank of England* (1804)[48] the court refused to allow the revolutionary government of

46 [1993] QB 54.

47 [1989] 3 All ER 523.

48 (1804) 9 Ves Jun 347.

Berne to bring an action against the Bank of England because the government was not recognised by the UK. A number of cases have arisen where recognition has been accorded to both a *de facto* and a *de jure* government. Since the British government declared that it would no longer accord formal recognition to governments the problem may not arise in the same way in the future but nonetheless the cases are of historic interest and do shed some light on the way the courts deal with the whole problem of the status of foreign governments. In *Haile Selassie v Cable and Wireless Ltd (No 2)* (1939)[49] the Emperor of Abyssinia (Ethiopia) was suing a British company for money owed under contract. At the time the action was brought, the British government recognised Haile Selassie as the *de jure* sovereign but recognised the Italian authorities as the *de facto* government. At first instance it was held that since the case concerned a debt recoverable in England and not the validity of acts done in Ethiopia, it was the *de jure* sovereign that was entitled to sue. The defendants appealed. Before the appeal was heard the UK government extended *de jure* recognition to the Italian authorities. A basic principle of recognition is that it operates retroactively to the date when the authority of the government was first accepted as being established. The Court of Appeal therefore found that the *de jure* recognition of the Italian government of Ethiopia was deemed to operate from the date of *de facto* recognition. Since that occurred prior to the commencement of the action for the debt, Haile Selassie was deprived of any *locus standi* in the case.

In *Gur Corporation v Trust Bank of Africa* (1986)[50] the Court of Appeal had to consider the status of the Republic of Ciskei, one of the homelands established by the government of South Africa. At first instance, Steyn J considered whether Ciskei had *locus standi* and asked the Foreign Office for its attitude to Ciskei. The Foreign Office replied that Ciskei was not recognised as an independent state and Steyn J therefore found that it had no *locus* to be joined as a party to the dispute. The issue was taken to the Court of Appeal who investigated the establishment of Ciskei. The court found that the British government continued to regard South Africa as internationally responsible for the territory of Ciskei. Furthermore it found that the government of the 'Republic of Ciskei' had been established under the South African Status of Ciskei Act 1981. It therefore held that the government of the Republic of Ciskei was a subordinate body set up by the Republic of South Africa to act on its behalf and it therefore had *locus standi* in the present case.

The question of recognition was raised more recently in *Arab Monetary Fund v Hashim* (1990).[51] The case was brought by the Arab Monetary Fund which was an international organisation created by treaty. The UK was not a party to the treaty and no Order in Council had been made with respect to the AMF under the provisions of the International Organisations Act 1968. In those circumstances the Court of Appeal found that the AMF could not bring the action. The decision was overturned by the House of Lords on the basis not that

49 [1939] Ch 182.

50 [1986] 3 WLR 583.

51 [1991] 2 WLR 729.

it was an international organisation and therefore entitled to sue irrespective of recognition but that it had been incorporated in Abu Dhabi law and therefore could be regarded as an Abu Dhabi corporation. The decision was more based on pragmatism than strict legal principles and followed a line of reasoning which had been used in the earlier case of *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* (1967).

6.7.2 Effectiveness of legislative and executive acts

A further consequence of recognition is that the courts will give effect to the legislative and executive acts of foreign governments. The classic example of this rule is the case of *Luther v Sagor* (1921).[52] The plaintiffs in the case had owned a timber factory which had been nationalised by the government of the Soviet Union in 1919. The defendants had bought a quantity of timber produced at the factory from the Soviet government in 1920. The plaintiffs claimed the timber on the basis that the nationalisation of the factory by the Soviet government should be ignored. When the case was heard at first instance, the Soviet government was not recognised by the UK, and the court therefore found in favour of the plaintiffs. By the time the case was heard by the Court of Appeal, the Soviet government had been accorded *de facto* recognition. The Court found that recognition would operate from the date when the Soviet government had taken effective control which was accepted as being December 1917. The nationalisation decree was therefore the act of a sovereign government and would have to be given effect to in the UK courts. On that basis the appeal was allowed.

In the *Arantzazu Mendi* (1939)[53] the House of Lords had to consider the rival claims of *de facto* and *de jure* government. The *Arantzazu Mendi* was a private ship registered in Bilbao, Spain. In the summer of 1937 following the capture of the region by Nationalist forces, the Republic government issued a decree requisitioning all ships registered in Bilbao. In early 1938 the Nationalist authorities issued a similar decree. While the *Arantzazu Mendi* was in London the Republican government issued a writ to obtain possession of the ship in accordance with its requisition decree. This was opposed by the owners of the ship who accepted the Nationalists' requisition. The Nationalists argued that since they had been recognised as the *de facto* government over the areas they actually controlled and since they controlled the region around Bilbao, the courts must give effect to their requisition decree and dismiss the Republican action. The House of Lords accepted this view, basing their finding on the fact that the Nationalist government was in effective control of the area and therefore was entitled to be regarded as the government of a sovereign state.

In the early 1950s two cases raised again the distinctions between the *de facto* and *de jure* recognition and the question of retroactivity. *Gdynia Ameryka Linie v Boguslawski* (1953)[54] concerned recognition of the Polish government in 1945. During the Second World War the Polish government in exile was recognised as

52 [1921] 1 KB 456.

53 [1939] AC 256.

54 [1953] AC 70.

the *de jure* government of Poland. On 28 June 1945 the communist provisional government took effective control of the country and was recognised as the *de jure* government on 5 July. The case concerned the effect of executive action taken by the Polish government in exile on 3 July. The House of Lords emphasised the general principle of retroactivity which would normally mean that all acts of the communist government would be given effect to as from 28 June. However the acts of the government in exile with respect to issues under their control remained effective up until the withdrawal of recognition on 5 July. Therefore the action taken by the government in exile on 3 July would be effective. A similar result obtained in *Civil Air Transport Inc v Central Air Transport Corporation* (1953).[55]

6.7.3 Sovereign immunity

One of the underlying principles of international law has been the doctrine of sovereign equality and the consequence that one sovereign cannot exercise authority over another. The practical application of the doctrine means that the many activities carried out by a foreign state cannot be the subject of municipal court proceedings. For example, in *Kuwait Airways Corporation v Iraqi Airways Company* (1995) an English court dismissed a claim by Kuwait Airways arising out of the confiscation of civilian aircraft as a result of an Iraqi government directive on the grounds that the directive was an exercise of sovereign authority and was therefore entitled to immunity. The law relating to sovereign immunity is discussed in detail in Chapter 8.

55 [1953] AC 70.

CHAPTER 7

TERRITORIAL RIGHTS

7.1 Introduction

Territory is a tangible attribute of statehood and within that particular geographical area which it occupies a state enjoys and exercises sovereignty. Territorial sovereignty may be defined as the right to exercise therein, to the exclusion of any other state, the functions of a state. A state's territorial sovereignty extends over the designated land mass, sub-soil, the water enclosed therein, the land under that water, the territorial sea (the nature and extent of the territorial sea will be discussed in Chapter 10) and the airspace over the land mass and territorial sea (airspace will be considered in Chapter 11). It has already been seen in Chapter 5 that territory is undoubtedly a basic requirement of statehood.

The fundamental nature of territory and sovereignty over territory can be appreciated when an attempt is made to identify the causes of wars and international disputes throughout history – 99 per cent of them could be classified ultimately as territorial disputes. As Philip Allott has written:

> Endless international and internal conflicts, costing the lives of countless human beings, have centred on the desire of this or that state-society to control this or that area of the earth's surface to the exclusion of this or that state-society.[1]

Rights and duties with respect to territory have therefore had a central place in the development of international law, and the principle of respect for the territorial integrity of states has been one of the most fundamental principles of international law. It should be pointed out, however, there is a growing body of international law which operates outside concepts of exclusive territorial rights. As the need for interdependence has grown and as technology has presented increasing problems as well as benefits so international law has responded by developing concepts such as the 'common heritage of mankind' and rules regional and global protection of human rights and environmental rights. These matters will be dealt with in more detail in Chapters 15 and 17. It is also important to note that title to territory in international law is more often than not relative rather than absolute. Thus, resolving a territorial dispute is a question of deciding who has the better claim rather than accepting one claim and dismissing another.

7.2 Basic concepts

7.2.1 Terra nullius[2]

Terra nullius (sometimes *res nullius*) consists of territory which is capable of being acquired by a single state but which is not yet under territorial sovereignty. In the age of European imperialism there was a tendency for the

1 Allott, Eunomia, *New Order for a New World*, 1990, Oxford: Oxford University Press at p 330.

2 *Terra nullius* may be contrasted with *res communis* – ie territory not capable of being claimed by any single State, for example, the high seas and outer space.