One of the questions that the Court of Appeal addressed in *Maclaine Watson* v. *International Tin Council*[280] was whether in such circumstances the doctrine of non-justiciability survived. It was emphasised that the two concepts of immunity and non-justiciability had to be kept separate and concern was expressed that the *Buttes* non-justiciability principle could be used to prevent proceedings being brought against states in commercial matters, contrary to the Act.[281]

The issue of justiciability was discussed in *Maclaine Watson* v. *Department of Trade and Industry* both by the Court of Appeal[282] and by the House of Lords[283] in the context of the creation of the collapsed International Tin Council by a group of states by a treaty which was unincorporated into English law. Kerr LJ emphasised that the doctrine in this context rested upon the principles that unincorporated treaties do not form part of the law of England and that such international agreements were not contracts which the courts could enforce.[284] However, this did not prevent reference to an unincorporated treaty where it was necessary or convenient, for example in order to assess the legal nature of the International Tin Council.[285] Lord Oliver in the House of Lords decision reaffirmed the essence of the doctrine of non-justiciability. He noted that it was

> axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law.[286]

However, this did not mean that the court must never look at or construe a treaty. A treaty could be examined as a part of the factual background against which a particular issue has arisen.[287] It was pointed out that the creation of the Council by a group of states was a sovereign act and that the adjudication of the rights and obligations between the member states of the Council and the Council itself could only be undertaken on the international plane.[288] In other words, the

[280] [1988] 3 WLR 1169; 80 ILR, p. 191.
[281] [1988] 3 WLR 1169, 1188 per Kerr LJ; 80 ILR, p. 209.
[282] [1988] 3 WLR 1033; 80 ILR, p. 49.
[283] [1989] 3 All ER 523; 81 ILR, p. 671.
[284] [1988] 3 WLR 1033, 1075; 80 ILR, pp. 49, 86.
[285] [1988] 3 WLR 1033, 1075–6. See also Nourse LJ, *ibid.*, p. 1130; 80 ILR, p. 148.
[286] [1989] 3 All ER 523, 544; 81 ILR, pp. 671, 700. See also *R* v. *Director of the Serious Fraud Office and BAE Systems* [2008] EWHC 714 (Admin), para. 107.
[287] [1989] 3 All ER 523, 545; 81 ILR, p. 701.
[288] [1989] 3 All ER 523, 559; 81 ILR, p. 722. See also Ralph Gibson LJ in the Court of Appeal judgment, [1988] 3 WLR 1033, 1143–4; 80 ILR, pp. 49, 163.

situation appeared to involve not only the *Buttes* form of act of state non-justiciability, but also non-justiciability on the basis of an unincorporated treaty.[289]

Hoffmann LJ in *Littrell* v. *USA (No. 2)*[290] pointed out in the context of a status of forces agreement (providing for the placement of NATO troops in the UK) that the courts could look at such agreement to ensure that the foreign troops were here by invitation since the conclusion of a treaty was as much a fact as any other,[291] but this could not be taken to mean that the courts would actually enforce the terms of an unincorporated treaty. Additionally, it would not be open to the courts to determine whether a foreign sovereign state had broken a treaty.[292] The basic position is that: 'Ordinarily speaking, English courts will not rule upon the true meaning and effect of international instruments which apply only at the level of international law.'[293] Further, the English courts are likely to decline to seek to determine an issue where this could be 'damaging to the public interest in the field of international relations, national security or defence'.[294] Lord Bingham noted in *R* v. *Jones* that the courts would be 'very slow to adjudicate upon rights arising out of transactions entered into between

[289] But see *Re McKerr*, where Lord Steyn noted that faced with the narrowness of this decision, a critical re-examination of this area of the law might become necessary in the future in the light of the 'growing support for the view that human rights treaties enjoy a special status', [2004] UKHL 12, paras. 51–2.

[290] [1995] 1 WLR 82, 93.

[291] Similarly, Colman J in *Westland Helicopters Ltd* v. *Arab Organisation for Industrialisation* [1995] 2 WLR 126, 149, held that reference to the terms of the treaty establishing an international organisation and to the terms of the basic statute of that organisation in order to ascertain the governing law of that organisation and its precise nature did not transgress the boundary between what was justiciable and what was non-justiciable.

[292] See *British Airways Board* v. *Laker Airways Ltd* [1985] AC 58, 85–6; *Ex parte Molyneaux* [1986] 1 WLR 331; 87 ILR, p. 329 and *Westland Helicopters Ltd* v. *Arab Organisation for Industrialisation* [1995] 2 WLR 126, 136. See also *Minister for Arts Heritage and Environment* v. *Peko-Wallsend Ltd* (1987) 75 ALR 218, 250–4; 90 ILR, pp. 32, 51–5, where the Australian Federal Court held that a Cabinet decision involving Australia's international relations in implementing a treaty was not a justiciable matter, and *Arab Republic of Syria* v. *Arab Republic of Egypt* 91 ILR, pp. 288, 305–6, where the Supreme Court of Brazil held that the courts of a third state could not exercise jurisdiction in a matter essentially of state succession between two other states even where the property was within the jurisdiction.

[293] *CND* v. *Prime Minister of the UK and Others* [2002] EWHC 2777 (Admin), paras. 23, 36 and 47. See also *R* v. *Lyons* [2002] 3 WLR 1562; 131 ILR, p. 538.

[294] *CND* v. *Prime Minister of the UK*, para. 47, cited with approval by the Irish High Court in *Horgan* v. *An Taoiseach*, judgment of 28 April 2003, as emphasising 'the strictly circumspect role which the courts adopt when called upon to exercise jurisdiction in relation to the Executive's conduct of international relations generally', 132 ILR, pp. 407, 440.

sovereign states on the plane of international law'.[295] However, the rule is not absolute.[296] The courts are willing to look at the terms of an unincorporated treaty in specific situations: first, as noted above, in order to ascertain certain facts such as the existence and terms of, and the parties to, a treaty or where the treaty in question is incorporated into a contract or referred to in domestic legislation and is necessary to a particular decision, and secondly, where the national courts have to adjudicate upon the interpretation of a particular international treaty in order to determine private rights and obligations under domestic law.[297] The latter proposition would operate, for example, with regard to extradition and asylum cases where a view has to be taken with regard to the Geneva Convention Relating to the Status of Refugees, 1951 as a result of domestic legislation, the Asylum and Immigration Act 1996.[298] In *Republic of Ecuador* v. *Occidental Exploration and Production Co.*, the Court of Appeal, while affirming this principle, emphasised that context was always important, so that a treaty intended by its signatories to give rise to rights in favour of private investors capable of enforcement under the treaty in consensual arbitration against one or other of its signatory states in domestic proceedings would fall within this exception and thus be justiciable.[299] The exception to non-justiciability laid down in the *CND* and *Occidental* cases was reaffirmed in *In the Matter of AY Bank Ltd*,[300] where it was held that the right to prove in the liquidation of a joint venture bank in the UK (involving the National Bank of Yugoslavia), upon the dissolution of the Federal Republic of Yugoslavia and its National Bank and consequential apportionment among the successor states, arose in domestic law, so

[295] [2006] UKHL 16, para. 30; 132 ILR, p. 684. See also *R (Islamic Human Rights Commission)* v. *CAA* [2006] EWHC 2465; 132 ILR, p. 707, and *R (Gentle)* v. *Prime Minister* [2008] UKHL 20, above, p. 181, note 272.

[296] See Lord Oliver in *JH Rayner (Mincing Lane) Ltd* v. *Department of Trade and Industry* [1990] 2 AC 418, 500. Lord Steyn in *Kuwait Airways Corporation* v. *Iraqi Airways Co. (Nos. 4 and 5)* [2002] 2 AC 883, 1101 considered that the principle was not 'a categorical rule'. See also Fatima, *Using International Law*, pp. 273 ff.

[297] See e.g. *CND* v. *Prime Minister* [2002] EWHC 2777 (Admin), paras. 35–6 (Simon Brown LJ) and 61(iii) (Richards J).

[298] See e.g. *Ex parte Adan* [2000] UKHL 67.

[299] [2005] EWCA Cic 1116, paras. 31 and 37. Mance LJ went on to say that 'For the English Court to treat the extent of such rights as non-justiciable would appear to us to involve an extension, rather than an application, of existing doctrines developed in different contexts', *ibid.* See also paras. 39–42. Somewhat confusingly, Mance LJ concluded that the doctrine of non-justiciability could not be ousted by consent, *ibid.*, para. 57.

[300] [2006] EWHC 830 (Ch), paras. 51 ff. See also *R* v. *Director of the Serious Fraud Office and BAE Systems* [2008] EWHC 714 (Admin), paras. 118–20.

that the existence of the Agreement on Succession Issues, signed by the successor states formally apportioning the assets and debts of the Former Yugoslavia, did not render the question non-justiciable.

The principle of non-justiciability, which includes but goes beyond the concept of act of state,[301] must exist in an international system founded upon sovereign and formally equal states.[302] Having said that, there is no doubt that the extent of the doctrine is open to question. While the courts would regard a question concerning the constitutionality of a foreign government as non-justiciable[303] and would not as a general rule inquire into the validity of acts done in a sovereign capacity, such as the constitutionality of foreign laws,[304] the latter proposition may be subject to exceptions. The House of Lords addressed the question in *Kuwait Airways Corporation* v. *Iraqi Airways Company*.[305] Lord Nicholls noted that in appropriate circumstances it was legitimate for an English court to have regard to the content of international law in deciding whether to recognise a foreign law and it did not flow inevitably from the non-justiciability principle that the judiciary must ignore a breach of international law committed by one state against another 'where the breach is plain and, indeed, acknowledged'.[306] In such cases, the difficulty discussed by Lord Wilberforce in *Buttes Gas and Oil* concerning the lack of judicial or manageable standards by which to deal with a sovereignty dispute between two foreign states did not apply.[307] The acceptability of a provision of foreign law had to be judged by contemporary standards and the courts had to give effect to clearly established rules of international law.[308] Where foreign legislation

[301] A distinction has recently been drawn between a narrower doctrine of act of state, which concerns the recognition of acts of a foreign state within its own territory, and a broader principle of non-justiciability in respect of 'certain sovereign acts' of a foreign state: see Mance J in *Kuwait Airways Corporation* v. *Iraqi Airways Company* 116 ILR, pp. 534, 568, basing himself upon Lord Wilberforce in *Buttes Gas and Oil* v. *Hammer* [1982] AC 888, 930–2; 64 ILR, p. 331. Mance J's analysis was approved by Lord Lloyd in *Ex Parte Pinochet* (*No. 1*) [2000] 1 AC 61, 102; 119 ILR, pp. 51, 91.

[302] See e.g. the decision of the Belgian Conseil d'État in *T* v. *Belgium* on 9 April 1998 that the process of declaring a foreign diplomat persona non grata was not justiciable both because the request from the receiving state was a matter between states and because it was the sending state that had to recall the person in question or terminate his functions and the Conseil d'État had no jurisdiction over an act emanating from a foreign state: 115 ILR, p. 442.

[303] See e.g. *Ex parte Turkish Cypriot Association* 112 ILR, p. 735.

[304] See *Buck* v. *Attorney-General* [1965] 1 Ch. 745; 42 ILR, p. 11.

[305] Decision of 16 May 2002, [2002] UKHL 19; 125 ILR, p. 677.

[306] *Ibid.*, para. 26. [307] See above, p. 182.

[308] [2002] UKHL 19, para. 28. See also *Blathwayt* v. *Baron Cawley* [1976] AC 397, 426 and *Oppenheimer* v. *Cattermole* [1976] AC 249, 278.

was adopted consequential upon a fundamental breach of international law (such as the Iraqi invasion of Kuwait in 1990 and seizure of its assets), enforcement or recognition of such law by the courts would be 'manifestly contrary to the public policy of English law'. Further, it was emphasised that international law recognised that a national court may decline to give effect to legislative and other acts of foreign states which are in violation of international law.[309] Lord Steyn noted that the extension of the public policy exception to recognition of foreign laws from human rights violations to 'flagrant breaches of international law' was correct. Reference was made to the UN Charter, binding Security Council resolutions and international opinion in general.[310] Lord Hope emphasised that 'very narrow limits must be placed on any exception to the act of state rule', but there was no need for restraint on grounds of public policy 'where it is plain beyond dispute that a clearly established norm of international law has been violated'.[311] He concluded that 'a legislative act by a foreign state which is in flagrant breach of clearly established rules of international law ought not to be recognised by the courts of this country as forming part of the lex situs of that state'.[312]

The courts may also not feel constrained in expressing their views as to foreign sovereign activities where a breach of international law, particularly human rights, is involved[313] and may not feel constrained from investigating, in a dispute involving private rights, the legal validity of an act done by a citizen purporting to act on behalf of the sovereign or sovereign state.[314] It is clear that the courts will regard as non-justiciable policy decisions by the government concerning relationships with friendly foreign states, on the basis that foreign policy is pre-eminently an area for the government and not the courts.[315] In particular, a number of cases have laid down the proposition that decisions taken by the executive in its dealings with foreign states regarding the protection of British citizens abroad are non-justiciable.[316]

[309] [2002] UKHL 19, para. 29. See also *Oppenheim's International Law*, pp. 371 ff.
[310] [2002] UKHL 19, para. 114. [311] *Ibid.*, paras. 138–40.
[312] *Ibid.*, para. 148. See also Lord Scott, *ibid.*, para. 192.
[313] See e.g. *Abbasi* v. *Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ. 1598, paras. 57 and 66 (per Lord Phillips MR); 126 ILR, pp. 710 and 713.
[314] See e.g. *Dubai Bank* v. *Galadari*, *The Times*, 14 July 1990.
[315] See *Ex parte Everett* [1989] 1 QB 811; 84 ILR, p. 713; *Ex parte Ferhut Butt* 116 ILR, pp. 607, 620–1, and *Foday Saybana Sankoh* 119 ILR, pp. 389, 396. See further above, p. 180.
[316] See e.g. *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] 1 AC 374, 411 (per Lord Diplock); *Ex parte Pirbhai* 107 ILR, pp. 462, 479; *Ex parte Ferhut Butt* 116 ILR, pp. 607, 615 and 622 and *R (Suresh and Manickavasagam)* v. *Secretary of State for the Home Department* [2001] EWHC Admin 1028, para. 19; 123 ILR, p. 598.

This approach, however, is subject to some qualification.[317] This concerns in particular the evolving law of judicial review[318] both with regard to its scope concerning the executive and in terms of 'legitimate expectation',[319] or a reasonable expectation that a regular practice will continue. Where diplomatic protection of a national abroad is concerned, the Court of Appeal has noted that 'The Secretary of State must be free to give full weight to foreign policy considerations, which are not justiciable. However, this does not mean the whole process is immune from judicial scrutiny. The citizen's legitimate expectation is that his request will be "considered", and that in that consideration all relevant factors will be thrown into the balance.'[320] Taylor LJ referred, for example, in *ex parte Everett* to the 'normal expectation of every citizen' that, if he were subjected abroad to a violation of a fundamental right, the British government would not simply wash their hands of the matter and abandon him to his fate.[321] The Court in *Abbasi* concluded that judicial review would lie where the Foreign and Commonwealth Office, contrary to its stated policy, refused even to consider whether to make diplomatic representations on behalf of a subject whose fundamental rights were being violated. However, beyond this, no general proposition could be stated, being dependent upon the precise circumstances. In particular, there was no enforceable duty to protect the citizen, only a discretion.[322] In *Al-Rawi* v. *Secretary of State for Foreign and Commonwealth Affairs*, the Court of Appeal denied that any such legitimate expectation as to the exercise of discretion would extend to the position of non-nationals.[323]

The approach in *Abbasi* was approved in *Kaunda* v. *The President of the Republic of South Africa* by the Constitutional Court of South Africa,

[317] See Lord Phillips MR in *Abbasi* v. *Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ. 1598, paras. 80 ff; 126 ILR, p. 718.

[318] See e.g. S. A. De Smith, H. Woolf and J. Jowell, *Judicial Review*, 5th edn, London, 1998, pp. 419 ff.

[319] See *Secretary of State for the Foreign and Commonwealth Office* v. *The Queen (on the application of Bancoult)* [2007] EWCA Civ 498, paras. 72 ff.

[320] Per Lord Phillips MR in *Abassi* v. *Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ. 1598, para. 99.

[321] [1989] 1 QB 811, paras. 96–8.

[322] [2002] EWCA Civ 1598, paras. 104–7. The court concluded that this discretion was a very wide one but there was no reason why the decision or inaction of the Foreign Office should not be reviewable if it can be shown that the same is irrational or contrary to legitimate expectation. However, the court could not enter into the forbidden areas, including decisions affecting foreign policy, *ibid.*, para. 106(iii). See also *R* v. *Director of the Serious Fraud Office and BAE Systems* [2008] EWHC 714 (Admin), para. 56.

[323] [2006] EWCA Civ 1279, para. 89.

which noted that 'A decision as to whether, and if so, what protection should be given, is an aspect of foreign policy which is essentially the function of the executive.'[324] This did not mean that the South African courts had no jurisdiction to deal with issues concerned with diplomatic protection. Since the exercise of all public power was subject to constitutional control, this would also apply to an allegation that the government has failed to respond appropriately to a request for diplomatic protection. If, for instance, the decision were to be irrational or made in bad faith, the court could intervene to require the government to deal with the matter properly.[325]

Australian courts also have emphasised the importance of separation of powers and the need for courts to exercise considerable caution with regard to foreign policy, expressly citing the *Buttes* case.[326] The question of justiciability was one for the federal judicial branch.[327] It has been noted, for example, that any question of a dispute as to the assessment made by the executive and legislative branches of government of the 'terrorist threat' to the safety of the public would not be justiciable, but that this situation would change upon the adoption of relevant legislation.[328]

The US courts have similarly recognised the existence of areas of non-justiciability for sensitive political reasons. This is usually referred to as the political question doctrine and operates to prevent the courts from considering issues of political delicacy in the field of foreign affairs.[329] In

[324] CCT 23/04, [2004] ZACC 5, para. 77 (per Chief Justice Chaskalson). See also *Swissborough Diamond Mines* v. *South Africa*, Supreme Court, Transvaal Provincial Division, 1997, 132 ILR, p. 454, and the decision of the German Federal Constitutional Court in *Hess*, where it was held that 'the Federal Government enjoys wide discretion in deciding the question of whether and in what manner to grant protection against foreign States', BVerfGE 55, 349; 90 ILR 386, 395.

[325] CCT 23/04, [2004] ZACC 5, paras. 78–80.

[326] See the decision of the High Court of Australia in *Thorpe* v. *Commonwealth of Australia (No. 3)* (1997) 144 ALR 677, 690–1; 118 ILR, p. 353; *Re Ditfort* (1988) 19 FCR 347, 369; 87 ILR, p. 170; *Petrotimor Companhia de Petroleos SARL* v. *Commonwealth of Australia* [2003] FCAFC 3, and *Victoria Leasing Ltd* v. *United States* (2005) 218 ALR 640. See also G. Lindell, 'The Justiciability of Political Questions: Recent Developments' in *Australian Constitutional Perspectives* (eds. H. P. Lee and G. Winterton), Sydney, 1992, p. 180, and R. Garnett, 'Foreign States in Australian Courts', *Melbourne University Law Review*, 2005, p. 704.

[327] *Wilson* v. *Minister for Aboriginal and Torres Strait Islander Affairs* [1996] HCA 18; (1996) 189 CLR 1 at 11.

[328] *Thomas* v. *Mowbray* [2007] HCA 33, para. 107.

[329] See e.g. *Underhill* v. *Hernandez* 168 US 250 (1897), *Baker* v. *Carr* 369 US 181 (1962) and *American Insurance Association* v. *Garamendi*, US Court of Appeals for the Ninth Circuit, 23 June 2003. See also Henkin *et al.*, *International Law: Cases and Materials*, p. 178;

the *Greenham Women against Cruise Missiles* v. *Reagan* case,[330] for example, the Court held that a suit to prevent the US deployment of cruise missiles at an air force base in the UK constituted a non-justiciable political question, not appropriate for judicial resolution.[331] Similarly, issues relating to rights of succession to the assets of a foreign state were non-justiciable.[332] Much will depend upon the particular circumstances of the case. In *Linder* v. *Portocarrero*,[333] for instance, concerning the murder of a US citizen working for the Nicaraguan government by rebel forces (the Contras), the US Court of Appeals for the Eleventh Circuit held that the political question doctrine was not implicated since the complaint neither challenged the legitimacy of US policy on Nicaragua nor sought to require the Court to decide who was right and who was wrong in the civil war in that country. The complaint was rather narrowly focused on the lawfulness of the conduct of the defendants in a single incident. In *Koohi* v. *United States*,[334] the US Court of Appeals for the Ninth Circuit held that the courts were not precluded from reviewing military decisions, whether taken during war or peacetime, which caused injury to US or enemy civilians. The Court in *Baker* v. *Carr*,[335] the leading case on the political question doctrine, while noting that not every case touching foreign relations was non-justiciable, provided a list of six factors that might render a case non-justiciable.[336] The Court of Appeals underlined

L. Henkin, 'Is There a "Political Question" Doctrine?', 85 *Yale Law Journal*, 1976, p. 597; J. Charney, 'Judicial Deference in Foreign Relations', 83 AJIL, 1989, p. 805, and T. M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?*, Princeton, 1992.

330 591 F.Supp. 1332 (1984); 99 ILR, p. 44.

331 But see *Japan Whaling Association* v. *American Cetacean Society* 478 US 221 (1986), where the Supreme Court held that the judicial interpretation of a US statute, even if it involved foreign relations, was not a political question precluding justiciability. See also *Dellums* v. *Bush* 752 F.Supp. 1141 (1990).

332 See e.g. *Can and Others* v. *United States* 14 F.3d 160 (1994); 107 ILR, p. 255.

333 963 F.2d 332, 337 (1992); 99 ILR, pp. 54, 79.

334 976 F.2d 1328, 1331–2 (1992); 99 ILR, pp. 80, 84–5.

335 369 US 186, 211 (1962).

336 That there should be (1) a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of respect due co-ordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment of multifarious pronouncements by various departments on one question, *Baker*, 369 US at 217. See also *Schneider* v. *Kissinger* 412 F.3d 190 (DC Cir. 2005); *Bancoult* v. *McNamara* 445 F.3d 427 (DC Cir. 2006); *Gonzalez-Vera* v. *Kissinger* 449 F.3d 1260 (2006).

in *Kadić* v. *Karadžić*[337] that 'judges should not reflexively invoke these doctrines [political question and act of state doctrines] to avoid difficult and somewhat sensitive decisions in the context of human rights'. The fact that judicially discoverable and manageable standards exist would indicate that the issues involved were indeed justiciable.[338] In *Corrie* v. *Caterpillar*, the US Court of Appeals for the Ninth Circuit reaffirmed that the political question doctrine was a jurisdictional issue and that the *Baker* v. *Carr* factors precluded justiciability, noting in particular that the provision of military assistance by the US to foreign states constituted such a political question.[339]

Also relevant in the context of non-justiciability is the doctrine of act of state. The *Third US Restatement of Foreign Relations Law*[340] provides that 'in the absence of a treaty or other unambiguous agreements regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there'.[341] In *Banco Nacional de Cuba* v. *Sabbatino*,[342] the US Supreme Court held that the act of state concept was not a rule of public international law, but related instead to internal constitutional balances.[343] It was a rule of judicial self-restraint. The Court declared that the judicial branch would not examine the validity of a taking of property within its own territory by a foreign sovereign government,[344] irrespective of the legality in international law of that action.[345] This basic approach

[337] 1995 US App. LEXIS 28826.

[338] See e.g. *Klinghoffer* v. *SNC Achille Lauro* 937 F.2d 44 (1991); *Nixon* v. *United States* 122 L.Ed.2d 1 (1993); *Can* v. *United States* 14 F.3d 160 (1994); *Schneider* v. *Kissinger* 310 F.Supp. 2d 251, 257–64 (DDC 2004).

[339] 503 F.3d 974 CA 9 (Wash.), 2007.

[340] 1987, para. 443, pp. 366–7.

[341] This doctrine is subject to modification by act of Congress, *ibid.*, para. 444.

[342] 376 US 398 (1964); 35 ILR, p. 2.

[343] 376 US 398, 427–8 (1964); 35 ILR, p. 37. In *United States* v. *Noriega* 746 F.Supp. 1506, 1521–3 (1990); 99 ILR, pp. 143, 163–5, the US District Court noted that the act of state doctrine was a function of the separation of powers, since it precluded judicial examination of the acts of foreign governments which might otherwise hinder the executive's conduct of foreign relations.

[344] 376 US 398 (1964); 35 ILR, p. 2.

[345] This approach was reversed by Congress in the Hickenlooper Amendment to the Foreign Assistance Act of 1964, Pub. L No. 86–663, para. 301(d)(4), 78 Stat. 1013 (1964), 79 Stat. 653, 659, as amended 22 USC, para. 23470(e)(2), (1982). Note that in *Williams & Humbert Ltd* v. *W & H Trade Marks (Jersey) Ltd* [1986] 1 All ER 129; 75 ILR, p. 312, the House of Lords held that an English court would recognise a foreign law effecting

was supported in a subsequent case,[346] whereas in *Alfred Dunhill of London Inc.* v. *Republic of Cuba*[347] the Supreme Court employed sovereign immunity concepts as the reason for not recognising the repudiation of the commercial obligations of a state instrumentality as an act of state. However, it now appears that there is an exception to the strict act of state doctrine where a relevant treaty provision between the parties specifies the standard of compensation to be payable and thus provides 'controlling legal principles'.[348]

In an important case in 1990, the Supreme Court examined anew the extent of the act of state doctrine. *Kirkpatrick* v. *Environmental Tectonics*[349] concerned a claim brought by an unsuccessful bidder on a Nigerian government contract in circumstances where the successful rival had bribed Nigerian officials. The Court unanimously held that the act of state doctrine did not apply since the validity of a foreign sovereign act was not at issue. The Court also made the point that act of state issues only arose when a court '*must decide* – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign'.[350] While the doctrine clearly meant that a US court had to accept that the acts of foreign sovereigns taken within their jurisdictions were to be deemed valid, this did not extend to cases and controversies that might embarrass foreign governments in situations falling outside this. Act of state was not to be extended.[351]

Executive certificates

There is an established practice adopted by the British courts of applying to the executive branch of government for the conclusive ascertainment

compulsory acquisition and any change of title to property which came under the control of the foreign state as a result and would accept and enforce the consequences of that compulsory acquisition without considering its merits.

346 *First National City Bank* v. *Banco Nacional de Cuba* 406 US 759 (1972); 66 ILR, p. 102.

347 96 S. Ct. 1854 (1976); 66 ILR, p. 212. See also M. Halberstam, 'Sabbatino Resurrected', 79 AJIL, 1985, p. 68.

348 See *Kalamazoo Spice Extraction Co.* v. *Provisional Military Government of Socialist Ethiopia* 729 F.2d 422 (1984). See also *AIG* v. *Iran* 493 F.Supp. 522 (1980) and Justice Harlan in the *Sabbatino* case, 376 US 398, 428 (1964); 35 ILR, pp. 25, 37.

349 110 S. Ct. 701 (1990); 88 ILR, p. 93.

350 110 S.Ct. 701, 705 (1990).

351 See also *Third US Restatement of Foreign Relations Law*, pp. 366–89; *Bandes* v. *Harlow & Jones* 82 AJIL, 1988, p. 820, where the Court of Appeals held that the act of state doctrine was inapplicable to takings by a foreign state of property located outside its territory, and *First American Corp.* v. *Al-Nahyan* 948 F.Supp. 1107 (1996). Note that the party claiming the application of the doctrine bears the burden of proving its applicability: see *Daventree Ltd* v. *Republic of Azerbaijan* 349 F.Supp.2d 736, 754 (SDNY 2004).

of certain facts. Examples include the status of a foreign state or government, questions as to whether a state of war is in operation as regards a particular country or as between two foreign states, and whether or not a particular person is entitled to diplomatic status. This means that in such matters of state the courts will consult the government and regard the executive certificate (or Foreign Office certificate as it is sometimes called), which is issued following the request, as conclusive, irrespective of any relevant rules of international law.[352] This was firmly acknowledged in *Duff Development Co. Ltd* v. *Kelantan*,[353] which concerned the status of the state of Kelantan in the Malay Peninsula and whether it was able to claim immunity in the English courts. The government declared that it was regarded as an independent state and the House of Lords noted that 'where such a statement is forthcoming, no other evidence is admissible or needed', and that:

> it was not the business of the Court to inquire whether the Colonial Office rightly concluded that the Sultan [of Kelantan] was entitled to be recognised as a sovereign by international law.[354]

This basic position was reaffirmed in *R* v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte Trawnik*,[355] in which it was held that certificates under section 40(3) of the Crown Proceedings Act 1947 and section 21 of the State Immunity Act 1978 were reviewable in the courts only if they constituted a nullity in that they were not genuine certificates or if, on their face, they had been issued outside the scope of the relevant statutory power. The contents of such certificates were conclusive of the matters contained therein and, in so far as they related to recognition of foreign states, were matters within the realm of the royal prerogative and not subject to judicial review.

Problems have arisen in the context of the decision of the UK announced in 1980 not to accord recognition to governments, but rather to treat the question of an unconstitutional change of regimes as one

[352] See e.g. *Oppenheim's International Law*, pp. 1046 ff.

[353] [1924] AC 797; 2 AD, p. 124. See also *The Fagernes* [1927] P. 311; 3 AD, p. 126 and *Post Office* v. *Estuary Radio Ltd* [1968] 2 QB 740; 43 ILR, p. 114. But cf. *Hesperides Hotels* v. *Aegean Turkish Holidays* [1978] 1 All ER 277; 73 ILR p. 9.

[354] Note that under s. 7, Diplomatic Privileges Act 1964 and s. 21, State Immunity Act 1978, such certificates are 'conclusive evidence' as to issues of diplomatic and state immunity. See also s. 8, International Organisations Act 1968, and see further below, chapter 13.

[355] *The Times*, 18 April 1985, p. 4. See also C. Warbrick, 'Executive Certificates in Foreign Affairs: Prospects for Review and Control', 35 ICLQ, 1986, p. 138, and E. Wilmshurst, 'Executive Certificates in Foreign Affairs: The United Kingdom', 35 ICLQ, 1986, p. 157.

relating to diplomatic relations.[356] In *Republic of Somalia* v. *Woodhouse Drake and Carey (Suisse) SA*,[357] the court was faced with a confused situation concerning whether the interim government of Somalia was actually in effective control and the extent to which other factions controlled different areas of the country. The court noted that in reaching its decision as to whether the interim government was or was not the valid successor to the former legitimate government in the light of the degree of actual control exercised over the country, letters from the Foreign and Commonwealth Office became part of the evidence in the case. In so far as the three letters concerned statements as to what was happening in the country, 'such letters may not be the best evidence', but in so far as they dealt with the question as to whether and to what extent the UK government had dealings with the foreign government, such letters 'will almost certainly be the best and only conclusive evidence of that fact'.[358]

The United States State Department similarly offers 'suggestions' on such matters, although they tend to be more extensive than their British counterparts, and include comments upon the issues and occasionally the views of the executive.[359]

Suggestions for further reading

A. Cassese, 'Modern Constitutions and International Law', 192 HR, 1985 III, p. 335

S. Fatima, *Using International Law in Domestic Courts*, Oxford, 2005

D. Feldman, 'Monism, Dualism and Constitutional Legitimacy', 20 Australian YIL, 1999, p. 105

J. F. Murphy, *The United States and the Rule of Law in International Affairs*, Cambridge, 2004

J. J. Paust, *International Law as Law of the United States*, Durham, NC, 1996

Y. Shany, *Regulating Jurisdictional Relations Between National and International Courts*, Oxford, 2007

[356] See further below, chapter 9, p. 454.

[357] [1993] QB 54, 64–8; 94 ILR, pp. 608, 618–23.

[358] [1993] QB 54, 65; 94 ILR, pp. 608, 619. See also *Sierra Leone Telecommunications Co. Ltd* v. *Barclays Bank* [1998] 2 All ER 821; 114 ILR, p. 466 and *North Cyprus Tourism Centre Ltd* v. *Transport for London* [2005] EWHC 1698 (Admin).

[359] O'Connell, *International Law*, pp. 119–22. See *The Pisaro* 255 US 216 (1921); *Anderson* v. *NV Transandine Handelmaatschappij* 289 NY 9 (1942); 10 AD, p. 10; *Mexico* v. *Hoffman* 324 US 30 (1945); 12 AD, p. 143, and the *Navemar* 303 US 68 (1938); 9 AD, p. 176. See also M. Chorazak, 'Clarity and Confusion: Did *Republic of Austria* v. *Altmann* Revive State Department Suggestions of Foreign Sovereign Immunity?', 55 *Duke Law Journal*, 2005, p. 373.

5

The subjects of international law

Legal personality – introduction

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

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

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

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

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

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

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

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

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

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

States

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

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

Creation of statehood[8]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[15] See below, p. 251.

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

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

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

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

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

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

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

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

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

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

> [t]his certainly did not take place until a stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the state without the assistance of the foreign troops.[23]

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

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

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

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

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

[27] See further below, p. 204.

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

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

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

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

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

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

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

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

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

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

[32] See M. N. Shaw, *Title to Territory in Africa: International Legal Issues*, Oxford, 1986, pp. 161–2. See also OAU Resolution CM.Res.493 (XXVII), General Assembly resolution 31/61A and Security Council statements on 21 September 1979 and 15 December 1981. Note that the Minister of State at the Foreign and Commonwealth Office declared that 'the very existence of Bophuthatswana is a consequence of apartheid and I think that that is the principal reason why recognition has not been forthcoming', 126, HC Deb., cols. 760–1, 3 February 1988.

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

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

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

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

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

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

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

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

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

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

Self-determination and the criteria of statehood

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

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

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

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

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

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

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

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

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

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

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

Recognition

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

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

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

Extinction of statehood[51]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[62] See 31 ILM, 1992, pp. 148–9.

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

[64] See further below, p. 960.

[65] See below, chapter 17.

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

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

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

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

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

[70] General Assembly resolution 55/12.

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

The fundamental rights of states

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

Independence[73]

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

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

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

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

[74] *Yearbook of the ILC*, 1949, p. 286. Judge Huber noted in the *Island of Palmas* case that 'independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state', 2 RIAA, pp. 829, 838 (1928); 4 AD, p. 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Equality[87]

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

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

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

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

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

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

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

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

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

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

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

Peaceful co-existence

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

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

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

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

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

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

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

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

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

Protectorates and protected states[95]

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

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

[94] Tunkin, *Theory*, pp. 35–48.

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

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

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

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

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

Federal states[101]

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

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

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

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

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

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

[102] See also below, p. 219.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[122] 68 ILR, p. 181.

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

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

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

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

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

[124] *Ibid.*, pp. 223–4.

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

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

[127] Article 4(1) of the International Law Commission's Articles on State Responsibility, 2001, provides that: 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.'

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

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

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

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

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

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

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

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

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

133 See also below, chapters 13 and 14.

Sui generis territorial entities

Mandated and trust territories[134]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Germany 1945

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

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

[151] ICJ Reports, 1971, pp. 52–8.

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

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

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

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

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

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

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

Condominium

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

International administration of territories

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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