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

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

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

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

[188] See UNMIK Regulation 9 (2001).

[189] Resolution 1244 (1999).

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

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

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

Taiwan[194]

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

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

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

193 See resolution 1410 (2002).

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

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

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

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

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

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

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

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

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

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

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

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

The Saharan Arab Democratic Republic[205]

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

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

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

Various secessionist claimants

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

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

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

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

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

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

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

Associations of states

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusions

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

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

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

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

Special cases

The Sovereign Order of Malta

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

The Holy See and the Vatican City[238]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Insurgents and belligerents

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

National liberation movements (NLMs)

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

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

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

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

246 See below, p. 251.

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

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

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

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

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

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

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

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

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

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

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

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

253 33 ILM, 1994, p. 622.

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

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

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

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

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

International public companies

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

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

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

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

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

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

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

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

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

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

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

Transnational corporations

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

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

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

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

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

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

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

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

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

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

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

The establishment of the legal right

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

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

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

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

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

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

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

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

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

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

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

> all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[291] (1998) 161 DLR (4th) 434–5.

The definition of self-determination

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

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

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

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

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

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

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

Individuals[301]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

International organisations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Suggestions for further reading

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

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

6

The international protection of human rights

The nature of human rights[1]

The preamble to the Universal Declaration of Human Rights adopted on 10 December 1948 emphasises that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. While there is widespread acceptance of the importance of human rights in the international structure, there is considerable confusion as to their precise nature and role in international law.[2] The question of what is meant by a 'right' is itself controversial and the subject of intense jurisprudential debate.[3] Some 'rights', for example, are intended as immediately enforceable

[1] See e.g. H. Lauterpacht, *International Law and Human Rights*, London, 1950; D. Weissbrodt, J. Fitzpatrick and F. Newman, *International Human Rights*, 3rd edn, Cincinnati, 2001; J. Rehman, *International Human Rights Law*, London, 2002; Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, p. 656; F. Sudre, *Droit International et Européen des Droits de l'Homme*, 3rd edn, Paris, 1997; M. S. McDougal, H. Lasswell and L. C. Chen, *Human Rights and World Public Order*, New Haven, 1980; L. Sohn and T. Buergenthal, *International Protection of Human Rights*, Indianapolis, 1973; *Human Rights in International Law* (ed. T. Meron), Oxford, 2 vols., 1984; A. H. Robertson and J. Merrills, *Human Rights in the World*, 4th edn, Manchester, 1996; A. Cassese, *International Law*, 2nd edn, Oxford, 2005, chapter 19; *Guide to International Human Rights Practice* (ed. H. Hannum), 4th edn, Ardsley, 2004; J. Donnelly, *International Human Rights*, Boulder, 1993; D. R. Forsythe, *Human Rights in International Relations*, 2nd edn, Cambridge, 2006; R. Higgins, *Problems and Process*, Oxford, 1994, chapter 6; *Human Rights: An Agenda for the Next Century* (eds. L. Henkin and L. Hargrove), Washington, 1994; T. Meron, *The Humanization of International Law*, The Hague, 2006; C. Tomuschat, *Human Rights*, Oxford, 2003; R. K. M. Smith, *Text and Materials on International Human Rights*, London, 2007, and H. Steiner, P. Alston and R. Goodman, *International Human Rights in Context*, 3rd edn, Oxford, 2008.

[2] See e.g. M. Moskowitz, *The Policies and Dynamics of Human Rights*, London, 1968, pp. 98–9, and McDougal *et al.*, *Human Rights*, pp. 63–8.

[3] See e.g. W. N. Hohfeld, 'Fundamental Legal Conceptions as Applied to Judicial Reasoning', 23 *Yale Law Journal*, 1913, p. 16, and R. Dworkin, *Taking Rights Seriously*, London, 1977. See also J. Shestack, 'The Jurisprudence of Human Rights' in Meron, *Human Rights in International Law*, vol. I, p. 69, and M. Cranston, *What Are Human Rights?*, London, 1973.

binding commitments, others merely as specifying a possible future pattern of behaviour.[4] The problem of enforcement and sanctions with regard to human rights in international law is another issue which can affect the characterisation of the phenomenon. There are writers who regard the high incidence of non-compliance with human rights norms as evidence of state practice that argues against the existence of a structure of human rights principles in international law.[5] Although sight must not be lost of violations of human rights laws, such an approach is not only academically incorrect but also profoundly negative.[6] The concept of human rights is closely allied with ethics and morality. Those rights that reflect the values of a community will be those with the most chance of successful implementation. Positive rights may be taken to include those rights enshrined within a legal system, whether or not reflective of moral considerations, whereas a moral right is not necessarily enforceable by law. One may easily discover positive rights. Deducing or inferring moral rights is another matter entirely and will depend upon the perception of the person seeking the existence of a particular right.[7]

Rights may be seen as emanating from various sources, whether religion or the nature of man or the nature of society. The Natural Law view, as expressed in the traditional formulations of that approach or by virtue of the natural rights movement, is that certain rights exist as a result of a higher law than positive or man-made law. Such a higher law constitutes a universal and absolute set of principles governing all human beings in time and space. The natural rights approach of the seventeenth century, associated primarily with John Locke, founded the existence of such inalienable rights as the rights to life, liberty and property upon a social contract marking the end of the difficult conditions of the state of nature. This theory enabled recourse to be had to a superior type of law and thus

[4] Compare, for example, article 2 of the International Covenant on Civil and Political Rights, 1966 with article 2 of the International Covenant on Economic, Social and Cultural Rights, 1966.

[5] See e.g. J. S. Watson, 'Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law', *University of Illinois Law Forum*, 1979, p. 609; Watson, 'Autointerpretation, Competence and the Continuing Validity of Article 2(7) of the UN Charter', 71 AJIL, 1977, p. 60, and Watson, *Theory and Reality in the International Protection of Human Rights*, Ardsley, 1999.

[6] See e.g. R. Higgins, 'Reality and Hope and International Human Rights: A Critique', 9 *Hofstra Law Review*, 1981, p. 1485.

[7] See M. Cranston, 'What are Human Rights?' in Laquer and Rubin, *Human Rights Reader*, pp. 17, 19.

was able to provide a powerful method of restraining arbitrary power.[8] Although this approach fell out of favour in the nineteenth century due to the problems of its non-empirical and diffuse methodology, it proved of immense value in the last century in the establishment of human rights within the international community as universal principles. Positivism as a theory emphasised the authority of the state and as such left little place for rights in the legal system other than specific rights emanating from the constitutional structure of that system,[9] while the Marxist doctrine, although based upon the existence of certain immutable historical laws governing the development of society, nevertheless denied the existence of rights outside the framework of the legal order.[10] Modern rights theories cover a wide range of approaches, and this clearly emphasises the need to come to terms with the requirements of an evolving legal system that cannot be totally comprehended in terms of that system itself.[11]

Of particular interest is the work of the policy-oriented movement that seeks to identify, characterise and order a wide variety of relevant factors in the process of human rights creation and equipment. Eight interdependent values are noted (viz. demands relating to respect, power, enlightenment, well-being, health, skill, affection and rectitude) and various environmental influences stressed. Human dignity is seen as the key concept in relation to these values and to the ultimate goal of a world community in which a democratic distribution of values is sought.[12]

All these theories emphasise the complexity of the nature of the concept of human rights in the context of general legal and political processes, but also the importance and centrality of such notions. The broad issues are similarly raised within the framework of international law.

[8] See e.g. Lauterpacht, *International Law*; R. Tuck, *Natural Rights Theories*, Cambridge, 1979; J. Finnis, *Natural Law and Natural Rights*, Oxford, 1980, and McDougal *et al.*, *Human Rights*, pp. 68–71. See also Tomuschat, *Human Rights*, chapter 2, and above, chapter 1.

[9] See e.g. D. Lloyd, *Introduction to Jurisprudence*, 4th edn, London, 1979, chapter 4. See also H. Hart, *The Concept of Law*, Oxford, 1961; McDougal *et al.*, *Human Rights*, pp. 73–5, and above, chapters 1 and 2.

[10] See e.g. Lloyd, *Jurisprudence*, chapter 10, and McDougal *et al.*, *Human Rights*, pp. 76–9. See also below, p. 268.

[11] See e.g. J. Rawls, *A Theory of Justice*, Oxford, 1971; E. Cahn, *The Sense of Injustice*, Bloomington, 1949; R. Nozick, *Anarchy, State and Utopia*, Oxford, 1974, and Dworkin, *Taking Rights Seriously*. See also S. Davidson, *Human Rights*, Buckingham, 1993, chapter 3.

[12] See McDougal *et al.*, *Human Rights*, especially pp. 82–93.

Ideological approaches to human rights in international law

The view adopted by the Western world with regard to international human rights law in general terms has tended to emphasise the basic civil and political rights of individuals, that is to say those rights that take the form of claims limiting the power of government over the governed. Such rights would include due process, freedom of expression, assembly and religion, and political participation in the process of government. The consent of the governed is seen as crucial in this process.[13] The approach of the Soviet Union was to note the importance of basic rights and freedoms for international peace and security, but to emphasise the role of the state. Indeed, the source of human rights principles was seen as the state. Tunkin wrote that the content of the principle of respect for human rights in international law may be expressed in three propositions:

> (1) all states have a duty to respect the fundamental rights and freedoms of all persons within their territories; (2) states have a duty not to permit discrimination by reason of sex, race, religion or language, and (3) states have a duty to promote universal respect for human rights and to co-operate with each other to achieve this objective.[14]

In other words, the focus was not upon the individual (as in Western conceptions of human rights) but solely upon the state. Human rights were not directly regulated by international law and individuals were not subjects of international law. Indeed, human rights were implemented by the state and matters basically and crucially within the domestic affairs of the state. As Tunkin emphasised, 'conventions on human rights do not grant rights directly to individuals'.[15] Having stressed the central function of the state, the point was also made that the context of the international human rights obligations themselves was defined solely by the state in the light of the socio-economic advancement of that state. Accordingly, the nature and context of those rights would vary from state to state, depending upon the social system of the state in question. It was the particular

[13] See e.g. R. Hauser, 'A First World View', in *Human Rights and American Foreign Policy* (eds. D. P. Kommers and G. Loescher), Notre Dame, 1979, p. 85.

[14] G. Tunkin, *Theory of International Law*, London, 1974, p. 81. See also K. Tedin, 'The Development of the Soviet Attitude Towards Implementing Human Rights under the UN Charter', 5 HRJ, 1972, p. 399; R. N. Dean, 'Beyond Helsinki: The Soviet View of Human Rights in International Law', 21 Va. JIL, 1980, p. 55; P. Reddaway, 'Theory and Practice of Human Rights in the Soviet Union' in Kommers and Loescher, *Human Rights and American Foreign Policy*, p. 115, and Tomuschat, *Human Rights*, chapter 3.

[15] Tunkin, *Theory*, p. 83.

socio-economic system of a state that would determine the concrete expression of an international human rights provision.[16] In other words, the Soviet Union was able and willing to enter into many international agreements on human rights, on the basis that only a state obligation was incurred, with no direct link to the individual, and that such an obligation was one that the country might interpret in the light of its own socio-economic system. The supremacy or centrality of the state was the key in this approach. As far as the different kinds of human rights were concerned, the Soviet approach was to stress those dealing with economic and social matters and thus to minimise the importance of the traditional civil and political rights. However, a new approach to the question of international human rights began to emerge by the end of the 1980s, reflecting the changes taking place politically.[17] In particular, the USSR began to take a different approach with regard to human rights treaties.[18]

The general approach of the Third World states has combined elements of both the previous perceptions.[19] Concern with the equality and sovereignty of states, together with a recognition of the importance of social and economic rights, has characterised the Third World view. Such countries, in fact constituting a wide range of nations with differing interests and needs, and at different stages of development, have been much influenced by decolonisation and the struggle to obtain it and by the phenomenon of apartheid in South Africa. In addition, economic problems have played a large role in focusing their attention upon general developmental issues. Accordingly, the traditional civil and political rights have tended to lose their priority in the concerns of Third World states.[20] Of particular interest is the tension between the universalism of human rights and the relativism of cultural traditions. This has led to arguments by

[16] *Ibid.*, pp. 82–3.

[17] See e.g. V. Vereshchetin and R. Müllerson, 'International Law in an Interdependent World', 28 *Columbia Journal of Transnational Law*, 1990, pp. 291, 300.

[18] *Ibid.* Note that on 10 February 1989, the USSR recognised the compulsory jurisdiction of the International Court of Justice with regard to six human rights treaties, including the Genocide Convention, 1948; the Racial Discrimination Convention, 1965; the Convention on Discrimination against Women, 1979, and the Torture Convention, 1984.

[19] See e.g. R. Emerson, 'The Fate of Human Rights in the Third World', 27 *World Politics*, 1975, p. 201; G. Mower, 'Human Rights in Black Africa', 9 HRJ, 1976, p. 33; R. Zvobgo, 'A Third World View' in Kommers and Loescher, *Human Rights and American Foreign Policy*, p. 90, and M. Nawaz, 'The Concept of Human Rights in Islamic Law' in Symposium on International Law of Human Rights, 11 *Howard Law Journal*, 1965, p. 257.

[20] See generally T. Van Boven, 'Some Remarks on Special Problems Relating to Human Rights in Developing Countries', 3 *Revue des Droits de l'Homme*, 1970, p. 383. See further below, p. 391, on the Banjul Charter on Human and Peoples' Rights.

some adherents of the latter tendency that human rights can only be approached within the context of particular cultural or religious traditions, thus criticising the view that human rights are universal or transcultural. The danger, of course, is that states violating human rights that they have accepted by becoming parties to human rights treaties, as well as being bound by relevant customary international law, might seek to justify their actions by pleading cultural differences.[21]

The development of international human rights law[22]

In the nineteenth century, the positivist doctrines of state sovereignty and domestic jurisdiction reigned supreme. Virtually all matters that today would be classified as human rights issues were at that stage universally regarded as within the internal sphere of national jurisdiction. The major exceptions to this were related to piracy *jure gentium* and slavery. In the latter case a number of treaties were entered into to bring about its abolition.[23] Concern also with the treatment of sick and wounded soldiers and with prisoners of war developed as from 1864 in terms of international instruments,[24] while states were required to observe certain minimum standards in the treatment of aliens.[25] In addition, certain agreements of a general welfare nature were beginning to be adopted by the turn of the century.[26] The nineteenth century also appeared to accept a right of humanitarian intervention, although its range and extent were unclear.[27]

An important change occurred with the establishment of the League of Nations in 1919.[28] Article 22 of the Covenant of the League set up

[21] See e.g. Steiner, Alston and Goodman, *International Human Rights*, pp. 517 ff.; E. Brems, *Human Rights: Universality and Diversity*, The Hague, 2001, and A. D. Renteln, *International Human Rights: Universalism versus Relativism*, Newbury Park, 1990.

[22] See e.g. *The International Protection of Human Rights* (ed. E. Luard), London, 1967; Sohn and Buergenthal, *International Protection*; Lauterpacht, *International Law*; M. Moscowitz, *International Concern with Human Rights*, London, 1968, and M. Ganji, *The International Protection of Human Rights*, London, 1962.

[23] See e.g. C. Greenidge, *Slavery*, London, 1958, and V. Nanda and M. C. Bassiouni, 'Slavery and the Slave Trade: Steps towards Eradication', 12 *Santa Clara Law Review*, 1972, p. 424. See also ST/SOA/4.

[24] See generally G. Best, *War and Law Since 1945*, Oxford, 1994, and *Studies and Essays on International Humanitarian Law and Red Cross Principles* (ed. C. Swinarski), The Hague, 1984.

[25] See below, chapter 14.

[26] E.g. regarding the Prohibition of Night Work for Women in Industrial Employment and regarding the Prohibition of the Use of White Phosphorus in the Manufacture of Matches.

[27] See below, chapter 20, p. 1155.

[28] See below, chapter 23.

the mandates system for peoples in ex-enemy colonies 'not yet able to stand by themselves in the strenuous conditions of the modern world'. The mandatory power was obliged to guarantee freedom of conscience and religion and a Permanent Mandates Commission was created to examine the reports the mandatory authorities had undertaken to make. The arrangement was termed 'a sacred trust of civilisation'. Article 23 of the Covenant provided for just treatment of the native populations of the territories in question.[29] The 1919 peace agreements with Eastern European and Balkan states included provisions relating to the protection of minorities,[30] providing essentially for equality of treatment and opportunities for collective activity.[31] These provisions were supervised by the League of Nations, to whom there was a right of petition.[32]

Part XIII of the Treaty of Versailles provided for the creation of the International Labour Organisation, among the purposes of which were the promotion of better standards of working conditions and support for the right of association.[33] The impact of the Second World War upon the development of human rights law was immense as the horrors of the war and the need for an adequate international system to maintain international peace and protect human rights became apparent to all. In addition, the rise of non-governmental organisations, particularly in the sphere of human rights, has had an immense effect.[34] While the post-Second World War world witnessed the rise of intergovernmental committees and organs and courts to deal with human rights violations, whether by public debate, states' reports, comments, inter-state or individual petition procedures, recent years have seen the interposition of domestic amnesty laws and this

[29] See above, chapter 5, p. 224.

[30] See generally P. Thornberry, 'Is There a Phoenix in the Ashes? – International Law and Minority Rights', 15 *Texas International Law Journal*, 1980, p. 421; C. A. Macartney, *National States and National Minorities*, London, 1934, and I. Claude, *National Minorities: An International Problem*, Cambridge, 1955. See also M. N. Shaw, 'The Definition of Minorities in International Law' in *Protection of Minorities and Human Rights* (eds. Y. Dinstein and M. Tabory), Dordrecht, 1992, p. 1.

[31] See e.g. the *Minority Schools in Albania* case, PCIJ, Series A/B, No. 64, 1935, p. 17.

[32] See Thornberry, 'Phoenix', pp. 433–54, and M. Jones, 'National Minorities: A Case Study in International Protection', 14 *Law and Contemporary Problems*, 1949, pp. 599, 610–24. See further below, p. 293.

[33] See further below, p. 338.

[34] See e.g. Steiner, Alston and Goodman, *International Human Rights*, pp. 1420 ff., and C. Chinkin, 'The Role of Non-Governmental Organisations in Standard Setting, Monitoring and Implementation of Human Rights' in *The Changing World of International Law in the 21st Century* (eds. J. J. Norton, M. Andendas and M. Footer), The Hague, 1998.

has given rise to the question of the acceptability of impunity.[35] Further developments have included the establishments of truth and reconciliation commissions[36] and various other alternative justice systems such as the Rwandan Gaccaca court system,[37] while the extent to which participants in the international legal system apart from states have become involved both in the process of formulating and seeking the implementation of human rights and in being the subjects of human rights concern and regulation is marked.[38]

Some basic principles

Domestic jurisdiction[39]

The basic rule of international law providing that states have no right to encroach upon the preserve of other states' internal affairs is a consequence of the equality and sovereignty of states and is mirrored in article 2(7) of the UN Charter. It has, however, been subject to a process of reinterpretation in the human rights field[40] as this and the two succeeding

[35] See e.g. J. Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court', 51 ICLQ, 2002, p. 91. See also C. Jenkins, 'Amnesty for Gross Violations of Human Rights: A Better Way of Dealing with the Past?' in *Comparative Law in a Global Perspective* (ed. I. Edge), London, 2000, p. 345, and J. Dugard, 'Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?', 16 Leiden JIL, 2000, p. 1. Note the Final Report of the Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights, E/CN.4/2000/62, January 2000, and *Chumbipuma Aguirre* v. *Peru*, the *Barrios Altos* case, where the Inter-American Court of Human Rights held that Peruvian amnesty laws were incompatible with the Inter-American Convention and thus void of any legal effect, judgment of 14 March 2001, 41 ILM, 2002, p. 93. Peru accepted this and altered its legislation, *ibid.*

[36] See e.g. Steiner, Alston and Goodman, *International Human Rights*, pp. 1344 ff.; the Promotion of National Unity and Reconciliation Act of South Africa 1995; R. G. Teitel, *Transitional Justice*, Oxford, 2001, and J. Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions' in *The Rome Statute of the International Criminal Court: A Commentary* (eds. A. Cassese, P. Gaeta and J. R. W. D. Jones), Oxford, 2002.

[37] See e.g. Steiner, Alston and Goodman, *International Human Rights*, pp. 1319 ff. See also below, chapter 8, p. 407.

[38] See e.g. *Non-State Actors and Human Rights* (ed. Philip Alston), Oxford, 2005, and A. Clapham, *Human Rights Obligations of Non-State Actors*, Oxford, 2006.

[39] See e.g. R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, Oxford, 1963; M. Rajan, *United Nations and Domestic Jurisdiction*, 2nd edn, London, 1961, and A. Cançado Trindade, 'The Domestic Jurisprudence of States in the Practice of the United Nations and Regional Organisations', 25 ICLQ, 1976, p. 715.

[40] Note that the question of the extent and content of domestic jurisdiction is a matter for international law: see *Nationality Decrees in Tunis and Morocco* cases, PCIJ, Series B, No. 4, 1923; 2 AD, p. 349. See also below, chapter 12.

chapters will make apparent, so that states may no longer plead this rule as a bar to international concern and consideration of internal human rights situations.[41] It is, of course, obvious that where a state accepts the right of individual petition under an international procedure, it cannot thereafter claim that the exercise of such a right constitutes interference with its domestic affairs.[42]

The exhaustion of domestic or local remedies rule[43]

This rule flows from the above principle. It is a method of permitting states to solve their own internal problems in accordance with their own constitutional procedures before accepted international mechanisms can be invoked, and is well established in general international law.[44] However, where such internal remedies are non-existent or unduly and unreasonably prolonged or unlikely to bring effective relief, the resort to international measures will not be required.[45] The existence of such a remedy must be certain not only in theory but also in practice.[46] A provision regarding the need to exhaust domestic remedies before the various international mechanisms may be resorted to appears in all the international and regional human rights instruments[47] and has been the subject of much consideration by the Human Rights Committee under the Optional Protocol

[41] See also the resolution of the Institut de Droit International, 1989, H/Inf (90) 1, p. 131.

[42] See e.g. *Miha* v. *Equatorial Guinea*, CCPR/C/51/D/414/1990, 10 August 1994, Human Rights Committee, para. 63.

[43] See e.g. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge, 1983; C. Law, *The Local Remedies Rule in International Law*, Geneva, 1961, and C. F. Amerasinghe, *Local Remedies in International Law*, 2nd edn, Cambridge, 2004. See also C. F. Amerasinghe, 'The Rule of Exhaustion of Local Remedies and the International Protection of Human Rights', 17 *Indian Yearbook of International Affairs*, 1974, p. 3. and below, chapter 14, p. 819.

[44] See e.g. the *Ambatielos* case, 23 ILR, p. 306; the *Finnish Ships* case, 3 RIAA, p. 1479; 7 AD, p. 231, and the *Interhandel* case, ICJ Reports, 1959, pp. 26–7; 27 ILR, pp. 475, 490.

[45] See e.g. the *Robert E. Brown* case, 6 RIAA, p. 120; 2 AD, p. 66. See also the *Salem* case, 2 RIAA, p. 1161; 6 AD, p. 188; the *Nielsen* case, 2 *Yearbook of the ECHR*, p. 413; 28 ILR, p. 210, and the *Second Cyprus* case (*Greece* v. *UK*), 2 *Yearbook of the ECHR*, p. 186. See also the cases cited in the succeeding footnotes.

[46] See e.g. *Johnston* v. *Ireland*, European Court of Human Rights, Series A, No. 112 (1986); 89 ILR, p. 154, and *Open Door and Dublin Well Woman* v. *Ireland*, European Court of Human Rights, Series A, No. 246 (1992).

[47] See e.g. article 41(c), Civil and Political Rights Covenant and article 2, Optional Protocol; article 11(3), Racial Discrimination Convention; article 26, European Convention; article 50, Inter-American Convention, and article 50, Banjul Charter. See also ECOSOC resolution 1503 and UNESCO decision 104 EX/3.3, 1978, para. 14(IX).

procedure of the International Covenant on Civil and Political Rights,[48] and within the European Convention[49] and Inter-American Convention human rights systems.[50]

Priorities of rights

Certain rights may not be derogated from in the various human rights instruments even in times of war or other public emergency threatening the nation. In the case of the European Convention[51] these are the rights to life (except in cases resulting from lawful acts of war), the prohibition on torture and slavery, and non-retroactivity of criminal offences.[52] In the case of the Inter-American Convention,[53] the following rights are non-derogable: the rights to juridical personality, life and humane treatment, freedom from slavery, freedom from *ex post facto* laws, freedom

[48] See e.g. S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights*, 2nd edn, Oxford, 2005, chapter 6; the *Weinberger* case, Reports of the Human Rights Committee, A/36/40, p. 114 and A/44/40, p. 142 and the *Sara* case, A/49/40, annex X, Section C, para. 8.3. States are required to provide evidence that there would be a reasonable prospect that available remedies would be effective, *Torres Ramírez* v. *Uruguay*, *Selected Decisions under the Optional Protocol*, CCPR/C/OP/1, 1985, p. 3. See also e.g. *Baboeram-Adhin* v. *Suriname*, A/40/40, p. 187; 94 ILR, p. 377; *Muhonen* v. *Finland*, A/40/40, p. 164; 94 ILR, p. 389; *Solórzano* v. *Venezuela*, A/41/40, p. 134; 94 ILR, p. 400; *Holland* v. *Ireland* 115 ILR, p. 277 and *Faurisson* v. *France* 115 ILR, p. 355. See also, with regard to the UN Convention against Torture, *AE* v. *Switzerland*, CAT/C/14/D/24/1995.

[49] See, as to the position under the European Convention on Human Rights, e.g. the *Nielsen* case, 2 *Yearbook of the ECHR*, p. 413; the *Second Cyprus* case (*Greece* v. *UK*), 2 *Yearbook of the ECHR*, p. 186; the *Donnelly* case, 16 *Yearbook of the ECHR*, p. 212; *Kjeldsen* v. *Denmark*, 15 *Yearbook of the ECHR*, p. 428; 58 ILR, p. 117; *Drozd and Janousek* v. *France and Spain* 64 DR 97 (1989) and *Akdivar* v. *Turkey* 23 EHRR, 1997, p. 143. See also D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, London, 1995, p. 608, and *Jacobs and White: European Convention on Human Rights* (eds. C. Ovey and R. C. A. White), 4th edn, Oxford, 2006, p. 485. The rule of exhaustion of domestic remedies applies also in inter-state cases: see *Cyprus* v. *Turkey* 2 DR 125 at 137–8 (first and second applications) and 13 DR 85, 150–3 (third application), although not with regard to legislative measures nor with regard to administrative actions in certain circumstances: see e.g. the *Greek* case, 12 *European Yearbook of Human Rights*, p. 196.

[50] See e.g. article 46(1)a of the Inter-American Convention on Human Rights, 1969 and article 37 of the Regulations of the Inter-American Commission on Human Rights. See also *Exceptions to the Exhaustion of Domestic Remedies in Cases of Indigency*, Advisory Opinion of the Inter-American Court of Human Rights, 1990, 12 HRLJ, 1991, p. 20, and *Annual Report of the Inter-American Commission on Human Rights 1993*, Washington, 1994, pp. 148, 185 and 266.

[51] Article 15. See generally, R. Higgins, 'Derogations Under Human Rights Treaties', 48 BYIL, 1976–7, p. 281.

[52] Articles 2, 3, 4(1) and 7. [53] Article 27.

of conscience and religion, rights of the family, to a name, of the child, nationality and participation in government.[54] By article 4 of the International Covenant on Civil and Political Rights, the rights to life and recognition as a person before the law, the freedoms of thought, conscience and religion and the prohibition on torture, slavery, retroactivity of criminal legislation and imprisonment on grounds solely of inability to fulfil a contractual obligation are non-derogable.[55]

Such non-derogable rights clearly are regarded as possessing a special place in the hierarchy of rights.[56] In addition, it must be noted, many rights are subject to a limitation or clawback clause, whereby the absolute right provided for will not operate in certain situations.[57] Those rights therefore that are not so limited may be regarded as of particular value.[58]

Customary international law and human rights

In addition to the many international and regional treaty provisions concerning human rights to be noted in this and the next two chapters,[59] certain human rights may now be regarded as having entered into the category of customary international law in the light of state practice. These would certainly include the prohibition of torture, genocide and slavery and the principle of non-discrimination.[60] In addition, human rights established under treaty may constitute obligations *erga omnes* for the states parties.[61]

[54] Articles 3, 4, 5, 6, 9, 12, 17, 18, 19, 20 and 23.

[55] Articles 6, 7, 8(1) and (2), 11, 15, 16 and 18. Note that the Banjul Charter contains no specific derogations clause.

[56] The fact that a right may not be derogated from may constitute evidence that the right concerned is part of *jus cogens.*

[57] See e.g. articles 8–11 of the European Convention, articles 12–14, 15–16 and 21–2 of the Inter-American Convention and articles 12, 18, 19, 21 and 22 of the Civil and Political Rights Covenant. See also Higgins, 'Derogations'.

[58] See e.g. the due process rights.

[59] Note that questions relating to the interpretation of and reservations to human rights treaties will be noted below in chapter 16, pp. 932 and 913, while the issue of succession to human rights treaties will be noted below in chapter 17, p. 981.

[60] See e.g. *Third US Restatement of Foreign Relations Law*, St Paul, 1987, vol. II, pp. 161 ff. and *Filartiga* v. *Pena-Irala* 630 F.2d 876; 77 ILR, p. 169. See also T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, 1989 and the articles published in the Special Issue on Customary International Human Rights Law, 25 *Georgia Journal of International and Comparative Law*, 1995–6.

[61] See below, chapter 14, p. 807.

Evolving principles

Certain areas of international human rights law are rapidly evolving. First, for example, the increasing extraterritoriality of human rights is becoming evident in the case-law of the European Convention on Human Rights,[62] the approach of the Human Rights Committee under the International Covenant on Civil and Political Rights[63] and the case-law of the International Court of Justice.[64] Secondly, the responsibility of states to prevent human rights abuses is beginning to be seriously considered, particularly with regard to genocide[65] and torture,[66] while more generally the obligation upon states and, for example, international organisations positively to protect human rights is becoming part of the agenda of international human rights law. Thirdly, increasing interest is being manifested in national human rights institutions.[67]

The United Nations system – general[68]

There are a number of human rights provisions in the Charter.[69] Article 1 includes in the purposes of the organisation the promotion and

[62] See below, chapter 7, p. 349.

[63] See *Extraterritorial Application of Human Rights Treaties* (eds. F. Coomans and M. Kamminga), Antwerp, 2004. See also below, p. 315.

[64] See the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 177 ff; 129 ILR. pp. 37, 96 ff.; and the *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, para. 183.

[65] See e.g. the *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, paras. 428 ff.

[66] See articles 2 and 16 of the Convention against Torture: see further below, p. 326. See also the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1973 (art. 4); the Convention on the Safety of United Nations and Associated Personnel, 1994 (art. 11), and the International Convention on the Suppression of Terrorist Bombings, 1997 (art. 15).

[67] See e.g. the Vienna Declaration on Human Rights adopted by the UN in 1993, para. 36; General Assembly resolution 48/134, adopting the Paris Principles Relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights, 1993; General Comment No. 10 of the Committee on Economic, Social and Cultural Rights, E/C.12/1998/25, and the Optional Protocol to the UN Convention against Torture, 2002, article 3.

[68] See generally *Bowett's Law of International Institutions* (eds. P. Sands and P. Klein), 5th edn, Manchester, 2001; Lauterpacht, *International Law*, pp. 145–220; *UN Action in the Field of Human Rights*, New York, 1981, and *Human Rights: Thirty Years after the Universal Declaration* (ed. B. Ramcharan), Dordrecht, 1979.

[69] Largely as a result of lobbying by non-governmental organisations at the San Francisco Conference: see J. Humphrey, 'The United Nations Charter and the Universal Declaration of Human Rights' in Luard, *International Protection*, chapter 3.

encouragement of respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Article 13(1) notes that the General Assembly shall initiate studies and make recommendations regarding the realisation of human rights for all, while article 55 provides that the United Nations shall promote universal respect for and observance of human rights. In a significant provision, article 56 states that:

> all members pledge themselves to take joint and separate action in co-operation with the organisation for the achievement of the purposes set forth in article 55.[70]

The mandate system was replaced by the trusteeship system, one of the basic objectives of which was, by article 76, the encouragement of respect for human rights, while, with regard to non-self-governing territories, the administering powers under article 73 of the Charter recognised the principle that the interests of the inhabitants were paramount, and accepted as a sacred trust the obligation to promote the well-being of the inhabitants. It can thus be seen that the Charter provisions on human rights were very general and vague. No enforcement procedures were laid down. Some have argued that the term 'pledge' in article 56 had the effect of converting the enumerated purposes of article 55 into legal obligations,[71] but this has been disputed.[72] Certainly, as of 1946, this would have been a difficult proposition to sustain, particularly in view of the hortatory language used in the provisions and the fact that the respect for human rights stipulation does not identify precise legal rights.[73] However, in the *Namibia* case of 1971, the Court noted that under the UN Charter:

> the former Mandatory had pledged itself to observe and respect, in a territory having international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead and to enforce,

[70] Under article 62, the Economic and Social Council has the power to make recommendations for the purpose of promoting respect for and observance of human rights.

[71] See e.g. Lauterpacht, *International Law*, pp. 47–9; Q. Wright, 'National Courts and Human Rights – the *Fujii* case', 45 AJIL, 1951, p. 73, and B. Sloan, 'Human Rights, the United Nations and International Law', 20 *Nordisk Tidsskrift for International Ret*, 1950, pp. 30–1. See also Judge Tanaka, *South West Africa* cases, ICJ Reports, 1966, pp. 6, 288–9; 37 ILR, pp. 243, 451–2.

[72] See M. O. Hudson, 'Integrity of International Instruments', 42 AJIL, 1948, pp. 105–8 and *Yearbook of the ILC*, 1949, p. 178. See also H. Kelsen, *The Law of the United Nations*, London, 1950, p. 29.

[73] See D. Driscoll, 'The Development of Human Rights in International Law' in Laquer and Rubin, *Human Rights Reader*, pp. 41, 43.

> distinctions, exclusions, restrictions and limitations, exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.[74]

It may be that this provision can only be understood in the light of the special, international status of that territory, but in the light of extensive practice since the 1940s in the general area of non-discrimination and human rights, the broader interpretation is to be preferred.

The Charter does contain a domestic jurisdiction provision. Article 2(7) provides that:

> nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state

but as noted later[75] this has over the years been flexibly interpreted, so that human rights issues are no longer recognised as being solely within the domestic jurisdiction of states.

The elucidation, development and protection of human rights through the UN has proved to be a seminal event. A range of declarations and treaties has emerged, coupled with the establishment of a variety of advisory services and implementation and enforcement mechanisms. Large numbers of studies and reports of various kinds have appeared, while the whole process has been accompanied by extensive debate and consideration in a variety of UN organs and committees. Notwithstanding a certain degree of cynicism, it can be concluded that the acceptance of the centrality of human rights concerns within the international community has been due in no small measure to the unceasing consideration of human rights issues within the framework of the United Nations.

The cornerstone of UN activity has been without doubt the Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948.[76] The Declaration was approved without a dissenting vote

[74] ICJ Reports, 1971, pp. 16, 57; 49 ILR, pp. 3, 47. See also I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford, 2003, pp. 546 ff.; E. Schwelb, 'The International Court of Justice and the Human Rights Clauses of the Charter', 66 AJIL, 1972, p. 337, and O. Schachter, 'The Charter and the Constitution', 4 *Vanderbilt Law Review*, 1951, p. 443.

[75] See below, p. 647.

[76] See e.g. *Oppenheim's International Law* (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992, p. 1001; M. Whiteman, *Digest of International Law*, Washington, 1965, vol. V, p. 237; J. Humphrey, 'The Universal Declaration on Human Rights' in Ramcharan, *Human Rights*, p. 21; J. Kunz, 'The United Nations Declaration of Human Rights', 43

(the Byelorussian SSR, Czechoslovakia, Poland, Ukrainian SSR, USSR, Yugoslavia and Saudi Arabia abstained). It was intended not as a legally binding document as such but, as its preamble proclaims, 'a common standard of achievement for all peoples and nations'. Its thirty articles cover a wide range of rights, from liberty and security of the person (article 3), equality before the law (article 7), effective remedies (article 8), due process (articles 9 and 10), prohibitions on torture (article 5) and arbitrary interference with privacy (article 12) to rights protecting freedom of movement (article 13), asylum (article 14), expression (article 19), conscience and religion (article 18) and assembly (article 20). One should also note that included in the Declaration are social and economic rights such as the right to work and equal pay (article 23), the right to social security (article 25) and the right to education (article 26).

Although clearly not a legally enforceable instrument as such, the question arises as to whether the Declaration has subsequently become binding either by way of custom[77] or general principles of law, or indeed by virtue of interpretation of the UN Charter itself by subsequent practice.[78] The Declaration has had a marked influence upon the constitutions of many states and upon the formulation of subsequent human rights treaties and resolutions.[79] It is also to be noted that in 1968, the Proclamation of Tehran at the conclusion of the UN-sponsored International Conference on Human Rights stressed that the Declaration constituted 'an obligation for members of the international community'.[80] The Declaration has also

AJIL, 1949, p. 316; E. Schwelb, 'The Influence of the Universal Declaration of Human Rights on International and National Law', PASIL, 1959, p. 217; A. Verdoodt, *Naissance et Signification de la Déclaration Universelle de Droits de l'Homme*, Paris, 1964; *The Universal Declaration of Human Rights: A Commentary* (eds. A. Eide, G. Alfredsson, G. Melander, L. A. Rehof and A. Rosas), Dordrecht, 1992; *The Universal Declaration of Human Rights: A Common Standard of Achievement* (eds. G. Alfredsson and A. Eide), The Hague, 1999, and P. R. Ghandi, 'The Universal Declaration of Human Rights at 50 Years', 41 German YIL, 1998, p. 206.

77 Note that the Foreign and Commonwealth Office in a document issued in January 1991 on 'Human Rights in Foreign Policy' took the view that, although the Declaration was 'not in itself legally binding, much of its content can now be said to form part of customary international law', UKMIL, 62 BYIL, 1991, p. 592.

78 See e.g. *Oppenheim's International Law*, p. 1002.

79 See e.g. Schwelb, 'Influence'; J. Humphrey, 'The International Bill of Rights: Scope and Implementation', 17 *William and Mary Law Review*, 1975, p. 527; *Oppenheim's International Law*, pp. 1002–5; Judge Tanaka, *South-West Africa* cases, ICJ Reports, 1966, pp. 6, 288 and 293; 37 ILR, pp. 243, 451, 454, and the European Convention on Human Rights, 1950, below, chapter 7, p. 347.

80 23 GAOR, A/Conf. 32/41. See also the non-governmental Montreal Statement, 9 *Review of the International Commission of Jurists*, 1968, p. 94.

been referred to in many cases,[81] and its importance within the context of United Nations human rights law should not be disregarded.[82] The intention had been that the Declaration would be followed immediately by a binding universal convention on human rights, but this process took considerably longer than anticipated. In the meantime, a number of important international conventions dealing with selective human rights issues were adopted, including the Genocide Convention[83] and the Convention on the Elimination of Racial Discrimination.[84]

The Vienna Declaration and Programme of Action, adopted in 1993, emphasised that all human rights were universal, indivisible and interdependent and interrelated. The protection of human rights was seen as a priority objective of the UN and the interrelationship of democracy, development and respect for human rights and fundamental freedoms underlined. Additional facilities for the UN Centre for Human Rights were called for as well as the establishment of a UN High Commissioner for Human Rights. The Declaration made particular reference *inter alia* to the problems of racial discrimination, minorities, indigenous peoples, migrant workers, the rights of women, the rights of the child, freedom from torture, the rights of disabled persons and human rights education.[85] The post of UN High Commissioner for Human Rights was indeed established several months later[86] and filled in April 1994. In General Assembly resolution 48/141, it is provided that the UN High Commissioner for Human Rights would be the UN official with principal responsibility for UN human rights activities. The High Commissioner is responsible

[81] See e.g. *In re Flesche* 16 AD, pp. 266, 269; *The State (Duggan)* v. *Tapley* 18 ILR, pp. 336, 342; *Robinson* v. *Secretary-General of the UN* 19 ILR, pp. 494, 496; *Extradition of Greek National* case, 22 ILR, pp. 520, 524 and *Beth El Mission* v. *Minister of Social Welfare* 47 ILR, pp. 205, 207. See also *Corfu Channel* case, ICJ Reports, 1949, pp. 4, 22; 16 AD, pp. 155, 158 and *Filartiga* v. *Pena-Irala* 630 F.2d 876 (1980).

[82] The Vienna Declaration and Programme of Action adopted on 25 June 1993 at the UN Conference on Human Rights referred to the Declaration as the 'source of inspiration' and the 'basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments', 32 ILM, 1993, pp. 1661, 1663. The private International Law Association adopted a resolution in 1994 in which it noted that 'the Universal Declaration of Human Rights is universally regarded as an authoritative elaboration of the human rights provisions of the United Nations Charter' and that 'many if not all of the rights elaborated in the Universal Declaration of Human Rights are widely recognised as constituting rules of customary international law', Report of the Sixty-sixth Conference, Buenos Aires, 1994, p. 29.

[83] See below, p. 282. [84] See further below, p. 311. [85] See 32 ILM, 1993, pp. 1661 ff.

[86] See General Assembly resolution 48/141, 20 December 1993. See also A. Clapham, 'Creating the High Commissioner for Human Rights: The Outside Story', 5 EJIL, 1994, p. 556.

for promoting and protecting the effective enjoyment by all of all civil, cultural, economic, political and social rights, providing through the UN Centre for Human Rights and other appropriate institutions, advisory services and other assistance including education and engaging in dialogue with all governments with a view to securing respect for human rights. The High Commissioner may also make recommendations to competent bodies of the UN system with a view to improving the promotion and protection of all human rights,[87] has engaged in a series of visits to member states of the UN and become involved in co-ordination activities.[88]

The protection of the collective rights of groups and individuals[89]

International law since 1945 has focused primarily upon the protection of individual human rights, as can be seen from the Universal Declaration of Human Rights. In recent years, however, more attention has been given to various expressions of the concept of collective rights, although it is often difficult to maintain a strict differentiation between individual and collective rights. Some rights are purely individual, such as the right to life or freedom of expression, others are individual rights that are necessarily expressed collectively, such as freedom of assembly or the right to manifest one's own religion. Some rights are purely collective, such as the right to self-determination or the physical protection of the group as such through the prohibition of genocide, others constitute collective manifestations of individual rights, such as the right of persons belonging to minorities to enjoy their own culture and practise their own religion or use their own language. In addition, the question of the balancing of the legitimate rights of the state, groups and individuals is in practice crucial and sometimes not sufficiently considered. States, groups and individuals have legitimate rights and interests that should not be ignored. All within a state have an interest in ensuring the efficient functioning of that state in a manner consistent with respect for the rights of groups and individuals, while the balancing of the rights of groups and individuals may itself prove difficult and complex.

[87] See the first Report of the United Nations High Commissioner for Human Rights, 1995, A/49/36, p. 2.

[88] *Ibid.*, pp. 3 ff. Further details as to activities may be found on the website, www.ohchr.org.

[89] See e.g. D. Sanders, 'Collective Rights', 13 HRQ, 1991, p. 368, and N. Lerner, *Group Rights and Discrimination in International Law*, 2nd edn, The Hague, 2003.

Prohibition of genocide

The physical protection of the group as a distinct identity is clearly the first and paramount factor. The Convention on the Prevention and Punishment of the Crime of Genocide signed in 1948[90] reaffirmed that genocide, whether committed in time of war or peace, was a crime under international law. Genocide was defined as any of the following acts committed 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such':

> (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.

The Convention, which does not have an implementational system,[91] provides that persons charged with genocide shall be tried by a competent tribunal of the state in the territory of which the act was committed or by an international penal tribunal. Several points should be noted. First, the question of intent is such that states may deny genocidal activity by noting that the relevant intent to destroy in whole or in part was in fact absent.[92] Secondly, the groups protected do not include political groups.[93]

[90] See e.g. W. Schabas, *Genocide in International Law*, Cambridge, 2000; N. Robinson, *The Genocide Convention*, London, 1960; R. Lemkin, *Axis Rule in Occupied Europe*, London, 1944; L. Kuper, *Genocide*, Harmondsworth, 1981, and *International Action Against Genocide*, Minority Rights Group Report No. 53, 1984; *Genocide and Human Rights* (ed. J. Porter), Washington 1982, and I. Horowitz, *Taking Lives: Genocide and State Power*, New Brunswick, 1980. See also N. Ruhashyankiko, *Study on the Question of the Prevention and Punishment of the Crime of Genocide*, 1978, E/CN.4/Sub.2/416; B. Whittaker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, 1985, E/CN.4/Sub.2/1985/6; 'Contemporary Practice of the United States Relating to International Law', 79 AJIL, 1985, pp. 116 ff.; M. Shaw, *War and Genocide*, Oxford, 2003; C. Fournet, *The Crime of Destruction and the Law of Genocide*, Ashgate, 2007; M. N. Shaw, 'Genocide and International Law' in *International Law at a Time of Perplexity* (ed. Y. Dinstein), Dordrecht, 1989, p. 797, and G. Verdirame, 'The Genocide Definition in the Jurisprudence of the *Ad Hoc* Tribunals', 49 ICLQ, 2000, p. 578.

[91] But see Sub-Commission resolution 1994/11.

[92] See Kuper, *Genocide*, pp. 32–5, and N. Lewis, 'The Camp at Cecilio Baez', in *Genocide in Paraguay* (ed. R. Arens), Philadelphia, 1976, p. 58. See also Ruhashyankiko, *Study*, p. 25.

[93] See e.g. Kuper, *Genocide*, pp. 25–30, and Ruhashyankiko, *Study*, p. 21. See also Robinson, *Genocide Convention*, p. 59.