INTRODUCTION TO INTERNATIONAL LAW

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International law is the body of rules which are legally binding on states in their intercourse with each other. These rules are primarily those which govern the relations of states, but states are not the only subjects of international law.

International organisations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by international law. International law in the meaning of the term as used in modern times began gradually to grow from the second half of the middle Ages. As a systematised body of rules, it owes much to the Dutch jurist Hugo Grotius, whose work, *De Jure Belli ac Pacis, Libriiii*, appeared in 1625, and became a foundation of later development.

That part of international law that is binding on all states, as is far the greater part of customary law, may be called *universal* international law, in contrast to particular international law which is binding on two or a few states only.

General international law is that which is binding upon a great many states. *General* international law, such as provision of certain treaties which are widely, but not universally, binding and which establish rules appropriate for universal application, has a tendency to become universal international law.

One can also distinguish between those rules of international law which, even though they may be of universal application, do not in any particular situation give rise to rights and obligations *ergaomnes*, and those which do. Thus, although all states are under certain obligations as regards the treatment of aliens, those obligations (generally speaking) can only be invoked by the state whose nationality the alien possesses: on the other hand, obligations deriving from the outlawing of acts of aggression, and of genocide, and from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination, are such that all states have an interest in the protection of the rights involved.11 Rights and obligations *ergaomnes* may even be created by the actions of a limited number of states.

The traditional view
The view expressed in the most recent edition of Oppenheim represents are treat from the traditional conception of international law as the law of nations, exclusively the province of nation states. For example, Hall in 1890 wrote:
International law consists in certain rules of conduct which modern civilised states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of the country, and which they also regard as being enforceable by appropriate means in case of infringement.

Four years later Westlake stated, 'international law is the body of rules prevailing between states'.
Oppenheim was even more explicit when he wrote, 'states solely and exclusively are the subjects of international law'.

In 1927, the Permanent Court of International Justice was called upon to decide a dispute between France and Turkey. In the course of the judgment the court found it necessary to set down the parameters of international law:
International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.

The modern view
Although international law may have developed as a system of rules governing the relations between sovereign states, it has developed beyond that. The establishment of the League of Nations after the First World War marked a shiftin approach to international relations which received further impetus with the setting up of the United Nations Organisation in 1945.

The Nuremberg War Crimes Tribunal in 1946 raised questions of the international obligations of individuals and the *Universal Declaration of Human Rights* 1948 suggested the possibility of individual international rights. In the wake of the United Nations, a number of other super-national organisations were established, all rising questions of their status within the community of nation states.

In 1949 the International Court of Justice was asked by the General Assembly of the United Nations for its opinion on matters arising out of the assassination of a UN representative in Jerusalem. In the course of its judgment the court stated:

… the United Nations Organisation] is a subject of international law and capable of possessing international rights and duties, and … has capacity to maintain its rights by bringing international claims.

It was becoming clear that it was no longer adequate to discuss international law in terms of a system of rules governing exclusively the relations between states. Later definitions reflected this fact:
International law can no longer be adequately or reasonably defined or described as the law governing the mutual relations of states, even if such a basic definition is accompanied by qualifications or exceptions designed to allow for modern developments; it represents the common law of mankind in an early stage of development, of which the law governing the relations between states is one, but
Only one, major division.

Some definitions continued to stress the primacy of states, for example:
'International law' is a strict term of art, connoting that system of law whose primary function it is to regulate the relations of states with one another. As states have formed organisations of themselves, it has come also to be concerned with international organisations and an increasing concern with them must follow from the trend which we are now witnessing towards the integration of the community of states. And because states are composed of individuals and exist primarily to serve the needs of individuals, international law has always had a certain concern with the relations of the individual, if not to his own state, at least to other states ... even the relations between the individual and his own
state have come to involve questions of international law ... *Nevertheless, international law is and remains essentially a law for states* and thus stands in contrast to what international lawyers are accustomed to call municipal law …

Is international law really law?
One particular aspect of the discussion about international law has been the questioning by some writers of the very claim made to legal status. Much of the debate surrounding international law's status as law can be traced to the Sourcebook on Public International Law
Positivist legacy of John Austin. In his major theoretical work, *The Province of Jurisprudence Determined*, he wrote:
Laws properly so called are a species of commands … And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author.

The positive moral rules which are laws improperly so called, are laws set or imposed by general opinion: that is to say, by the general opinion of any class or any society of persons. For example, some are set or imposed by the general opinion of persons who are members of a profession or calling: others by that of persons who inhabit a town or province: others, by that of a nation or independent political society: others, by that of a larger society formed of various nations.

The body by whose opinion the law is said to be set, does not command; expressly or tacitly, that conduct of the given kind shall be forborne or pursued. For, since it is not a body precisely determined or certain, it cannot, as a body, express or intimate a wish. As a body, it cannot signify a wish by oral or written words, or by positive or negative deportment. The so called law or rule which its opinion is said to impose is merely the sentiment which it feels, or is merely the opinion which it holds, in regard to a kind of conduct.

The law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.

HLA Hart also questioned the nature of international law contrasting the 'clear standard cases' of law constituted by the legal systems of modern states with the 'doubtful cases' exemplified by primitive law and international law.
Many serious students of the law react with a sort of indulgence when they encounter the term 'international law', as if to say, 'well, we know it isn't *really* law, but we know that international lawyers and scholars have a vested interest in calling it law'. Or they may agree to talk about international law *as if* it were law, a sort of quasi-law or near-law. But it cannot be true law, they maintain, because it cannot be enforced: how do you enforce a rule of law against an entire nation, especially a superpower such as the United States or the Soviet Union?

The enforcement of international law
International law is not imposed on states in the sense that there is no international legislature. As has been seen, the traditional Western view is that international law is founded essentially on consensus. It has traditionally been created in two ways: by the practice of states (custom) and through agreements entered into by states (treaties).

Once international rules are established they have an imperative character and cannot be unilaterally modified at will by states. Unlike municipal law, however, there is no uniform enforcement machinery. The full details of the various ways in which states are made to conform to their international obligations will be discussed throughout the book. The aim here is simply to introduce the range of mechanisms available.

The United Nations

Under Chapter VII of the Charter of the United Nations, the UN Security Council may take enforcement measures where it has determined the existence of a threat to the peace, breach of the peace, or act of aggression. This topic will be dealt with in more detail in Chapter 13. Suffice it to say at this stage that the measures available to the Security Council range from the use of economic sanctions, as in the case of the severance of air links with Libya as a result of the Lockerbie bombing in 1992, to the use of armed force in the case of Iraq. The
Security Council's main role is in maintaining international peace and security rather than in enforcing international law, but the two functions will often overlap.

Judicial enforcement

Reference has already been made to judgments of the International Court of Justice, which is the judicial organ of the United Nations. Its main role is to resolve legal disputes between states and its judgments are binding on the parties to the dispute. In addition to the ICJ there are a number of specialised international tribunals dealing with particular areas of the law and it is not uncommon for states to establish *ad hoc* tribunals to resolve differences.

Loss of legal rights and privileges

A common enforcement method used by states is the withdrawal of legal rights and privileges. The best known example is the severing of diplomatic relations, but sanctions falling short of this may include trade embargoes, the freezing of assets, and suspension of treaty rights. The adoption of such measures, and indeed the mere threat of them, can very often prove effective in enforcing international obligations.

Self-help

In very limited situations, international law does countenance self-help in the sense of use of armed force. It is a fundamental rule of international law that the first use of armed force is prohibited but a right of self-defence does exist and again the actual use or threat of action in self-defence may be effective in enforcing international obligations.
Two further points can be made about enforcement. First, an important aspect of law is its role in helping to predict future action. The action of individuals and states is generally predicated on a presumption that the law will be observed. Although the existing laws may be criticised and reforms demanded, it is in the general interest that law is upheld. An important factor influencing the observance of international law is therefore reciprocity.
For example, it is in a state's own interests to respect the territorial sovereignty of other states as they will in turn respect *its* territorial sovereignty. Over 300 years ago Grotius could state:
... law is not founded on expediency alone. There is no state so powerful that it may not some time need the help of others outside itself, either for the purposes of trade or even to ward off the forces of many foreign nations untied against it .
All things are uncertain the moment men depart from law.

The final point involves public opinion. Allusion has already been made to the role of law in the legitimisation of action. States are ever keen to show that their actions are compatible with international law and fear criticism based on the fact that they are failing to observe its rules. One only has to look at the role played by organisations such as Amnesty International in publicising abuses of international human rights law to recognise the effect that informed public opinion can have on state practice. Of course, no system of law can prevent atrocities being carried out. Just as municipal criminal law does not necessarily prevent the occurrence of murder and rape, international law cannot necessarily prevent genocide. It is worth considering whether multiracial elections would have taken place in South Africa if there existed no system of international law.
For, arguably, it was the international law prohibition of apartheid, and the United Nations sanctions that were imposed on South Africa for its breach of the prohibition, that led to the demise of the white minority regime.

The Relationship between Municipal law and International law

This relationship gives rise to two main areas of discussion:
1 The theoretical question as to whether international law and municipal law are part of a universal legal order ('monism') or whether they form two distinct systems of law ('dualism');
2 The practical issue of what rules govern the situation where there appears to be a conflict between the rules of international law and the rules of municipal law: This may occur either:
(a) Before an international court; or
(b) Before a municipal court

The theoretical issue

Historically there have been two main schools of thought: monism and dualism. Their ideas are outlined here but it should be noted that many modern writers doubt the utility of the monism/dualism dichotomy. Furthermore, courts faced with practical problems involving potential conflicts between the rules of international law and municipal law rarely refer to the theoretical issues. It is, however, instructive when considering actual court decisions to question their theoretical underpinnings.

The relationship between international law and municipal law has been the subject of much doctrinal dispute. At opposing extremes are the 'dualist' and 'monist' schools of thought.

According to the former, international law and the internal law of states are totally separate legal systems. Being separate systems, international law would not as such form part of the internal law of a state: to the extent that in particular instances rules of international law may apply within a state they do so by virtue of their adoption by the internal law of the state, and apply as part of that internal law and not as international law. Such a view avoids any question of the supremacy of the one system of law over the other since they share no common field of application: and each is supreme in its own sphere. On the other hand, according to the monistic doctrine, the two systems of law are part of one single legal structure, the various national systems of law being derived by way of delegation from the international legal system. Since international law can thus be seen as essentially part of the same legal order as municipal law, and superior to it,1 it can be regarded as incorporated in municipal law, giving rise to no difficulty of principle in its application as international law within states.

These differences in doctrine are not resolved by the practice of states or by such rules of international law as apply in this situation. International developments, such as the increasing role of individuals as subjects of international law, the stipulation in treaties of uniform internal laws and the appearance of such legal orders as that of the European Communities, have tended to make the distinction between international law and national law less clear and more complex than was formerly supposed at a time when the field of application of international law could be regarded as solely the relations of states amongst themselves.

Moreover, the doctrinal dispute is largely without practical consequences, for the main practical questions which arise – how do states, within the framework of their internal legal order, apply the rules of international law, and how is a conflict between a rule of international law and a national rule of law to be resolved? – are answered not be reference to doctrine but by looking at what the rules of various national laws and of international law prescribe.

Monism

Monism considers international law and municipal law to be both part of the same body of knowledge – law. They both operate in the same sphere of influence and are concerned with the same subject matter and thus can come into conflict. If there is a conflict, it is international law that prevails. Some, like Kelsen, argue that this is because international law is a higher law from which the state derives its authority and thus its ability to make municipal laws:

Since the basic norms of the national legal orders are determined by a norm of international law, they are basic norms only in a relative sense. It is the basic norm of the international legal order which is the ultimate reason of validity the national legal orders too.

Others, including Lauterpacht, argue on natural law grounds that international law prevails because it protects individuals, and the state itself is only a collection of individuals. It is supported by the natural law doctrine that authority and legal duty are both subject to the universality of natural law. A recent articulation of this view is to be found in the writing of Philip Allott:

Every legal power in every society in the world is connected with every other legal power in every other society in the world through the international law of the international society, the society of all societies, from which all law-making.

Dualism

The dualist doctrine developed in the 19th century partly because of the development of theories about the absolute sovereignty of states and partly alongside the development of legal positivism.

Dualist doctrine considers international law and municipal law to be two separate legal orders operating and existing independently of one another. International law is the law applicable between sovereign states and is dependent on the common will of states for its authority; municipal law applies within the state regulating the activities of its citizens and has as the source of its authority the will of the state itself.

On this basis neither system has the power to create or alter rules of the other. Since both systems may deal with the same subject matter it is possible for conflicts between the two systems to arise. Where there is a conflict between the two systems, a municipal court following the dualist doctrine would apply municipal law. This might lead to a state being in breach of its international obligations, but that would be a matter for an international tribunal.

A third way?

Both monism and dualism take the view that international law and municipal law can deal with the same subject matter. A third school of thought can be identified which, while subscribing to the dualist concept of two separate legal orders, argues that the two orders deal with different subject matters.

Foremost among the advocates of this doctrine are two former judges at the World Court: SirGeraldFitzmauriceandDionisioAnzilotti.Inanopiniongiveninacasein1939 Anzilotti stated:

It is clear that, in the same legal system, there cannot at the same time exist two rules relating to the same facts and attaching to these facts contradictory consequences...It is for instance impossible that the relations between the two states should be governed atone and the same time by a rule to the effect that, if certain conditions are fulfilled, the Court has jurisdiction and by another rule to the effect that, if certain conditions are fulfilled, the Court has no jurisdiction–by a

rule to the effect that inertia in circumstances the state concerned may have recourse to the Court and by another to the effect that in the same circumstances the state has no right to doso,etc,etc.

Municipal law before international tribunal

There is ample judicial and arbitral authority for the rule that a state cannot rely upon the provisions or deficiencies of its municipal law to avoid its obligations under international law.

One of the earliest authorities is the decision in the *Alabama Claims Arbitration* (1872).During the American Civil War, a number of ships were built in England for private buyers. The vessels were unarmed when

They left England but it was generally known that they were to be fitted out by the Confederates in order to attack Union shipping. They were so fitted and caused considerable damage to American shipping. The US sought to make the UK liable for these losses on the basis that it had breached its international obligations as a neutral during the War. The UK argued that under English law as it stood there was no way in which it could prevent the sailing of the vessels. The arbitrator rejected the UK argument and had no hesitation in upholding the supremacy of international law.

Similar rulings were made in the *Serbian Loans Case*

(1929).In the Draft Declaration on the Rights and Duties of States 1949 prepared by the International Law Commission, Article 13 states:

Every state has the duty to carryout in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.

Similarly, Article 27 of the Vienna Convention on the Law of Treaties 1969 provides:

A party may not invoke the provisions of its internal law as justification for its failure to performa treaty.

International law in municipal courts

Transformation and incorporation

Beforeconsideringanumberofexamplesofthetreatmentofinternationallaw by municipal courts it is necessary to explain briefly the concepts of transformation and incorporation. If, as the dualist theory maintains, international law and municipal law constitute two distinct legal systems, a practical consequence is that before any rule of international law can have effect within domestic jurisdiction it requires express and

Specific‘ transformation’ Into municipal law by the use of the appropriate constitutional machinery, such asamunicipalstatute.Adifferentviewandonereflectingthemonistposition,

isthatrulesofinternationallawautomaticallybecomepartofmunicipallawas a result of the doctrine of ‘incorporation’.

Putatits simplest, transformation doctrine views rules of international law as being excluded from municipal law unless specifically included; the incorporation doctrine holds that rules of international law are included as part of municipal law unless they are specifically excluded.

Customary international law

As far as the rules of customary international law are concerned the English courts have generally adopted the doctrine of incorporation. Provided that they are not inconsistent with Acts of Parliament or prior authoritative judicial decisions, then rules of customary international law automatically form part of English law: customary international law is incorporated into English law. The 18th century lawyer, Blackstone, wrote:

The law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and it is held to be a part of the law of the land.

In *Buvotv Barbuit* (1737) Lord Talbot declared that ‘the law of nations nits full extent was part of the law of England’. Lord Talbot’s statement was followed in a series of 18th and early 19th century cases. Cynics may suggest that the reason for this view was that at the time the international community was small and Britain had a major impact on the formation of customary international law.

Treaties

The British practice regarding treaties is different from that regarding customarylaw.Themainreasonforthisisthattheconclusionandratification of treaties are matters for the executive, coming as they do under the scope of the prerogative. Parliament has no say in the making of treaties. If they were to have direct effect, the Crown could alter the law without recourse to Parliament: therefore it is established that treaties only become part of English law if an

EnablingactofParliamenthasbeenpassed.Thispointhasbeenreiteratedby the courts in a number of cases and should be familiar to those who have studied the doctrine of Parliamentary supremacy and the effect of British membership of the European Union.

Recent discussion of the place of treaties in English law took place in the House of Lords in *Department of Trade v Maclaine Watson* (1990).The question for the courts was whether a member state of an international organisation could be sued directly for the liabilities of the organisation. As has already been stated the Court of Appeal saw the matter as raising issues of customary international law. The House of Lords viewed the matter differently they saw

it as an issue of treaty rights, and explicitly confirmed that a treaty to which the UnitedKingdomisapartycannotautomaticallyalterthelawsoftheUK.Only if a treaty is transformed into UK law by statute

can it be enforced by the courts in this country; hence the need for the European Communities Act 1972 to transform the Treaty of Rome.
A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty Becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at The behest of a sovereign government or at the behest of a private individual.

The relationship between regional international law and international law
Since 1945, particularly in the areas of human rights and environmental protection, there has been a growth in the number of treaties setting down rules applicable to particular regions of the world. Specific treaties are discussed in subsequent chapters but it is worth highlighting here the potential problems
Which have yet to be fully resolved? In the event of a conflict between the regional rule and the rule of universal application, which rule is to prevail? As will be seen, the problem may be resolved by use of one of the principles: *lexposterior derogatpriori* (a later law repeals an earlier law),*lexposterior generalis non derogat priori speciali*(a later law, general in character, does not derogate from an earlier law which is special in character),or the principle *lexspecialis derogat generali* (a special law prevails over a general law). However, suchprinciplesarenotalwayseasilyapplicabletospecificcircumstancesandit is not always clear which the special law is and which is the general law. It will only be as state practice builds up that it will be possible to state with any degree of certainty the relationship between rules of international law of limited regional application and those rules which have universal, global application.

Sources of International law
Article 38 of the Statute of the International Court of Justice
1 The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
(a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
(b) International custom, as evidence of a general practice accepted as law;
(c) The general principles of law recognised by civilised nations;
(d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, a subsidiary means for the determination of rules of law.

2 This provisions hall not prejudices the power of the Court to decide a case *exaequoetbono*, if the parties agree thereto.

The traditional starting point for any discussion of the sources of international law has been Article 38 of the Statute of the International Court of Justice. Apart from a few formal changes the Statute is similar to the Statute of the Permanent Court of International Justice.

Treaties
Treaties represent a source of law whose importance has grown since 1945. In this chapter we are only concerned with treaties as a source of law. Treaties may be bipartite/bilateral or multipartite/multilateral and they may create particular or general rules of international law. A distinction is often drawn between **law-making treaties** (*traité-lois*) and **treaty contracts** (*traitécontracts*).

The essence of the distinction lies in the fact that **treaty contracts**, being agreements between relatively few states, can only create a particular obligation between the signatories, an obligation which is capable of fulfilment, eg an agreement between France, Germany and the UK to develop and build a new fighter jet.

Law-making treaties create obligations which can continue as law, eg an agreement between 90 states to outlaw the use of torture. There has been a great increase in the number of law-making treaties throughout this century. One reason for this growth is the increase in the number of states and the fact that many new states have a lack of faith in any rules of customary international law in which they have not played apart increasing.
The term 'law-making' can lead to confusion and it should be used with care – strictly speaking no treaty can bind non-signatories. Even a multipartite treaty only binds those states which are party to it. The mere fact that a large number of states are party to a multilateral convention does not make it binding on non- parties although its existence may be evidence of customary international law as
Was discussed in the *North Sea Continental Shelf* cases (1969). For this reason sometimes the term law-making is replaced by 'normative'. Normative treaties bind signatories as treaties, but may also provide evidence of rules of custom which bind all states. Examples of normative treaties would include treaties operating a general standard setting instrument – eg International Covenant on Civil and Political Rights 1966; and treaties creating an internationally recognised regime – eg the Antarctic Treaty 1959.

Customary law and treaty law have equal authority. However if there is a conflict between the two it is the treaty that prevails. This point is illustrated by the *Wimbledon* case (1923). In that case the PCIJ, while recognising that customary international law prohibited the passage of armaments through the territory of a neutral state into the territory of a belligerent state, upheld the Treaty of Versailles Article 380,which provided that the Kiel canal was to be free and open to all commercial vessels and warships belonging to states at peace with Germany. In stopping a vessel of a state with which it was at peace, Germany was in breach of treaty obligations. It should, however, be noted that there is a presumption against there placement of custom by treaty–treaties will be construed to avoid conflict with rules of custom unless the treaty is clearly intended to overrule existing custom.

Custom

In any society rules of acceptable behaviour develop at an early stage and the international community is no exception. As contact between states increased, certain norms of behaviour crystallised into rules of customary international law. Until comparatively recently the rules of general international law were nearly all customary rules.

Definitions of international custom

Custom in international law is a practice followed by those involved because they feel legally obliged to behave in such a way. Custom must be distinguished from mere usage, such as acts done out of courtesy, friendship or convenience rather than out of obligation or a feeling that non-compliance would produce legal consequences. Article 38 circumscribes customary law as 'international custom, as evidence of a general practice accepted as law.' The Court cannot apply custom, only customary law Judge Hudson of the International Law Commission listed the following criteria for the establishment of a customary rule:

(a) Concordant practice by a number of states with reference to a type of situation falling within the domain of international relations;
(b) Continuation or repetition of the practice over a considerable period of time;
(c) Conception that the practice is required by, or consistent with, prevailing international law; and
(d) general acquiescence in the practice by other states.

General principles of law

The general object, then, of inserting the phrase['general principles of law recognised by civilised nations']in the statute seems to have been, essentially, to make it clear that the Court was to be permitted to reason, though not to legislate, and by, for instance, the application of analogies from the law within the state, to avoid ever having to declare that there was no law applicable to any question coming before it. This was a problem which troubled the Continental jurists who assisted in the drafting of the Statute, but did not trouble the Anglo-Saxons,who of course expected judges to reason without express instructions.

The prevailing view as to the meaning of Article 38(1) (c) is that it authorises the Court to apply the general principles of municipal jurisprudence, in particular of private law, in as far as they are applicable to the relations of states. It is not thought to refer to principles of international law itself, which are to be derived from custom or treaty. International tribunals will often refer to'well-known'or 'generally recognised' principles such as the principle of the independence and equality of states. Such principles do not come within Article 38(1) (c).

[General principles] are, in the first instance, those principles of law, private and public,whichcontemplationofthelegalexperienceofcivilisednationsleadsone to regard as obvious maxims of jurisprudence of a general and fundamental character–such as the principle that no one maybe judge in his own cause, that a breach of legal duty entails the obligation of restitution, that a person cannot invoke his own wrong as areas on for release from legal obligation, that the law will not countenance the abuse of aright, that legal obligations must be fulfilled and rights must be exercised in good faith ,and the like.

Some examples

A number of decisions of the International Court help illustrate the nature of 'general principles'.In the *Chorzow Factory (Jurisdiction)*case,thePermanent Court enunciated the principle that:

one party cannot avail himself of the fact that the other has not fulfilled some obligation, or has not had recourse to some means of redress, if the former party has, by some illegal act ,prevented the latter from fulfilling the obligation inquestion, or from having recourse to the tribunal which would be open to him.

Later on in the same case, the Court observed:

that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.

Judicial decisions

In the event of the court being unable to solve a dispute by reference to treaty law,custom or general principles, Article 38 provides a subsidiary means of judicial decisions and the teachings of the most highly qualified publicists of the various nations be employed – although the increase of treaty law has led to a decline in the use of the subsidiary source. Judicial decisions may be applied subject to the provisions of Article 59 which states:

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Article 38 does not limit the judicial decisions that may be applied to international tribunals. If a municipal court's decision is relevant it may be taken into account – the weight attached will depend on the standing of the court – eg the US Supreme Court is held in high regard, particularly in disputes on state boundaries; similarly the decisions of the English Prize Courts contributed to the growth of prize law – the law relating to vessels captured at sea during war.

The teachings of the most highly qualified publicists of the various nations

Historically, writers have performed a major role in the development of international law. The significance of jurists such as Grotius, Suarez and Gentilis has already been discussed in Chapter 1. Even today states make plentiful reference to academic writings in their pleadings before the Court. Writers have played an important part in the development of international law for two main reasons, the comparative youth of a comprehensive system of international law and the absence of any legislative body. In the formative period writers helped to determine the scope and content of international law.However as the body of substantive law has increased so the influence of writers has decreased – although writers still have an important role in developing new areas of law, eg marine pollution. Who are the most qualified writers is a matter for subjective assessment – as usual in these matters death is often seen as an important qualification! It should be noted that the Court itself does not usually make reference to specific writers.

Other Sources of International Law

The judges of the ICJ:

We cannot reasonably expect to get very far if we try to rationalise the law of today solely in the language of Article 38 of the Statute of the international Court of Justice, framed as it was in 1920. It too needs urgent rethinking and elaboration ...To use Article38 as it stands, as we constantly do still, for the purposes of analysing and explaining the elements and categories of the law today has a strong element of absurdity.

It is therefore necessary to consider a number of other sources of international law.

Resolutions of international organisations

The exact status of resolutions of international organisations, in particular resolutions of the United Nations General Assembly, has long been an area of controversy. Nonetheless it is certainly true that the resolutions passed by the UN General Assembly have a far more significant role to play in the formation of international law than was envisaged in1945,let alone in1920 when Article 38 was drafted. When discussing the effect of resolutions it may be useful to consider the categories suggested by Sloan, who identifies three main categories of resolution:

• Decisions

By virtue of Article 17 of the UN Charter, the General Assembly may take decisions on budgetary and financial matters which are binding on the members. Failure to abide by budgetary decisions can ultimately lead to suspension and expulsion from membership. In addition, Article 2(5) of the Charter provides that:

All members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

Thus arguably, resolutions that commit the UN to taking 'action'can be binding on member states.

•Recommendations

Article10:The General Assembly may discuss any questions or any matters within the scope of the present Charter...and...may make recommendations to the members of the United Nations or to the Security Councilor to both on any such questions or matters.

The essence of 'recommendations' is that they are non-binding. They cannot, therefore, instantly create binding rules of international law in themselves. However, recommendations can be used as evidence of state practice and thus go towards the creation of customary rules of international law.

•Declarations

Declarations are a species of General Assembly resolutions based on established practice outside the express provisions of Chapter IV of the Charter...While the effect of declarations remains controversial, they are not recommendations and are not to be evaluated as such.

• Resolutions of regional organisations

Regional organisations, for example, the European Union, the Council of Europe, the Organisation of American States, and the Organisation for African Unity can, via their internal measures, demonstrate what they, as a regional group, consider to be the law.

• The International Law Commission and codification

The major difficulty with customary law is that it is diffuse and often lacks precision. In the light of this, attempts have been made to codify international law, an early example of which is provided by the Hague Conferences of 1899 and 1907 which did much to codify the laws relating to dispute settlement and the use of armed force. The codification and

development of international law was a concern of the founders of the UN and that concern is reflected in Article 13(1) of the UN Charter which provides:
The General Assembly shall initiate studies and make recommendations for the purpose of:
(a) Promoting international co-operation in the political field and *encouraging the progressive development of international law and its codification*'(emphasisadded).

• **'Soft law' & 'Hard Law'**
A recent development in the study of the sources of international law has been the claim that international law consists of norms of behaviour of varying decrees of density or force. On the one hand there are rules, usually contained in treaties, which constitute positive obligations binding states objectively. On the other hand, there are international instruments which, while not binding on states in the manner of treaty provisions, nonetheless constitute normative claims and provide standards or aspirations of behaviour. Such instruments can have an enormous impact on international relations and the behaviour of states but would not be considered law in the positivist sense. A growing body of writers has argued that both types of norms should be considered law and the distinction between the two is indicated by the terms 'hard law' and 'soft law'.

• ***Jus cogens*or peremptory norms**
Having discussed the distinction between hard and soft law it seems appropriate to turn to consideration of a duality of levels within hard law itself. Many municipal systems distinguish between *jus cogens* (rules or principles of public policy which cannot be derogated from by legal subjects, often referred to as *ord republic*) and *jusdispositivum* (norms which can be replaced by subjects in their private dealings). The idea that there are certain non-derogable fundamental norms in international law is not new.

TREATIES
Definitions
VCT 1969 only applies to written agreements between states, VCIO 1986 deals with written agreements between states and International Organisations or between International Organisations. Although both Conventions only apply to written agreements, this should not be taken to mean that agreements not in writing have no effect in international law – such unwritten agreements will still be regarded as treaties and will be governed by the customary law on treaties – subject to difficulties of proof of content.

There is no precise nomenclature for international treaties: 'treaty','convention','agreement'or'protocol' are all interchangeable. Furthermore them earning of most of the terms used in the law of treaties is extremely variable, changing from country to country and from Constitution to Constitution; in international law it could even be said to vary from treaty to treaty:each treaty is, as it were, a microcosm laying down in its final clauses the law of its own existence in its own terms. The uncertainty in wording is a result of the relativity of treaties.

Despite the terminological jumble, a definition is needed if only to delimit the scope of the rules to be discussed.
The suggested definition is as follows:' Atreaty is an expression of concurring wills attributable to two or more subjects of international law and intended to have legal effects under the rules of international law.

An example of an oral agreement is to be found in the case involving the *Legal Status of Eastern Greenland* (1933).The case arose from a dispute between Norway and Denmark over claims to sovereignty in Eastern Greenland. Denmark based its claim on the fact that during negotiations between government ministers, the Danish minister suggested to MIhlen, the Norwegian Foreign Minister,that Denmark would raise no objection toNorwegian claims to Spitzbergen if Norway would not oppose Danish claims to Greenland at the Paris Peace Conference. A week after this conversation, in further negotiations, MIhlen declared that Norway would 'not make any difficulty' concerning the Danish claim. The PCIJ found that the Spitzbergen question was interdependent on the Greenland issues and as such the Court found that a binding agreement existed between the two states.

Unilateral agreements
The matter was discussed in the *Nuclear Tests* cases (1974).The cases arose out ofoppositionbyNewZealandandAustraliatoatmosphericnucleartestingcarried out by France in the South Pacific. Australia and New Zealand brought proceedingsbeforetheICJbutbeforeanydecisionwasmadeFranceindicated its intention not to hold any further tests in the region. The ICJ found that in the light of the French declaration it was no longer appropriate for it to give a decision on the merits of the case. In the course of its judgment, the ICJ declared:
It is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind maybe, and often are, very specific. When it is the intention of the state making the declaration that it should be bound according to its terms,that intention confers on the declaration the character of a legal undertaking, the state being thenceforth legally required to follow a course of conduct consistent with the declaration.

Subjects of international law

Only those with international personality can be parties to treaties – effectively this means states and international organisations. Whilst the majority of treaties are concluded between states, it should already be clear that it is possible for international organisations to undertake treaty obligations. It is not possible under international law for private individuals or companies to enter into treaties.

Agreements between states themselves create no problem here but a number of marginal cases are becoming increasingly common. Instead of states themselves the parties to an agreement may be other legal entities such as municipalities or public institutions. In such situations the question arises as to whether such bodies have the power to commit their state, and if they do not, the degree to which it can it be said that they have concluded a treaty. On the whole the problem is dealt with by application of the principles of agency and is resolved by looking at the extent to which the particular body can be implied to be acting as agent for the state concerned.

Another problem arises in the case of agreements between states and entities which do not yet qualify as states (for example, national liberation organisations or provisional governments) but have been accorded some measure of international personality. In 1982 the Palestine Liberation Organisation issued a communication in which it purported to accede to the Geneva Conventions 1949 and additional Protocols dealing with the laws of war. Switzerland, as depository of the treaties, declined to accept the accession and sent a note to state parties declaring:

Due to the uncertainty with in the international community as to the existence or the non-existence of a state of Palest in e and as long as the issue has not been settled in an appropriate frame work, the Swiss government, in its capacity as depository...is not in a position to decide whether this communication can be considered as an instrument of accession ...The unilateral declaration of application of the four Geneva Conventions and of the additional Protocol Imadeon 7June 1982 by the Palestine Liberation Organisation remains valid.

Anintenti on to produce legal effects

An analogy may be drawn with the requirement in municipal contract law of an intention to be bound. Agreements will not be legally enforceable as treaties if it can be shown that one or more of the parties did not intend that the agreement should create binding legal obligations. So, for example, the Final Act of the Helsinki Conference on Security and Co-operation in Europe 1975 provided that it was to be 'not eligible for registration [as a treaty] under Article 102 of the Charter of the United Nations' and throughout the conference it wasunderstood by the participants that the Final Act would not be legally binding. Such agreements may create 'soft law' as discussed in Chapter 3.

Legal effects under public international law

Perhaps the most important requiremen to fa treaty is that it is an agreement 'governed by international law'. In 1962 the ILC started a detailed study of the law of treaties and the Special *Rapporteur* , Sir Humphrey Waldock, state din his first report to the ILC that:

The elemen to f subjection to international law issoessential apart of an international agreement that it should be expressly mentioned in the definition. There may be agreements between states, such as agreements for the acquisition of premises for adiplomati cmissionor for some purely commercial transaction, the incidents of which are regulated by the local law of one of the part iesor by a private laws ystem determined by reference to conflict of laws principles. Whetherinsuchcasesthetwostatesareinternationallyaccountabletoeachother at all may be anicequestion; but even if that were held to be so–it would not follow that the basis of the irinternational accountability was atreaty obligation.

An illustration of this point is provided by the *Anglo-Iranian Oil Co* case (1952).[22]In that case, which ar oseafter Iran had national ised the oil industry, the UK sought to rely on an agreement made in 1933 between the Anglo-Iranian Oil Co and the government of Iran. The UK argued that the agreement was a treaty and therefore was binding on Iran. The argument was rejected by the ICJ whichfoundthattheagreementwasnothingmorethanaconcessionarycontract between a government and a foreign corporation.

Designation

It should also be noted that the particular designation of the agreement does not govern its validity as a treaty – agreements may be entitled Conventions, Accords, Final Acts, Statutes, Exchange of Notes, Protocols – they are all to be regarded as treaties for these purposes. The designation given may however be of relevance in indicating the nature of the transaction. For example an 'agreement' is usually less formal than a 'treaty' and the term 'convention' will generally indicate a multilateral agreement.

Conclusion and entry into force of treaties

Accrediting of negotiators

Once a state has decided to create a treaty, it is necessary to appoint representatives to conduct the negotiations. It is necessary that such representatives should be fully accredited and given sufficient authority to conduct negotiations, and conclude and sign the final treaty. As a general rule such authority is contained in a formal document known as 'Full Powers' or often '*PleinsPouvoirs*'. Full Powers can be dispensed with if practice between the negotiating states shows an intention to consider them as read and a gradual reduction in the use of Full Powers by states can be identified in the recent conduct of international relations.

In the case of multilateral agreements which are generally concluded at international conferences, the practice is

for a committee to be set up to investigate the validity of the accreditation of all delegates.
Article 7 of the VCT reflects the rules in customary international law and in the *Legal Status of East Greenland* case(1933)thes pecial position offoreign ministers as representatives for the purpose of entering into international agreements was expressly recognised by the Permanent Court.
If an unauthorised person were to enter into an agreement, his/her actions wouldbewithoutlegaleffectunlesssubsequentlyconfirmedbythestate.Article8 of the VCT 1969 provides a further safeguard against abuse by enabling a state todenounceanagreemententeredintobyanunauthorisedperson.

Negotiationandadoption
Negotiationsconcerningatreatyareconductedeitherthrough *pourparlers*inthe case of bilateral treaties or at a diplomatic conference in the case of multilateral treaties. The negotiators will maintain contact with their governments and usually, before actually signing a treaty, they will obtain a new set of instructions indicating the manner of signature. The procedure at diplomatic conferences runs to a standard pattern with the appointment of committees and *rapporteurs* to manage the conference as efficiently as possible.
Theaimofnegotiationistheproductionofanagreedtextofatreaty.The text is adopted by the consent of the parties. Article 9 of the VCT 1969 provides that the adoption of a treaty text at an international conference requires a two- thirds majority of those present and voting, unless a two-thirds majority decides otherwise.Acommonpracticeoverrecentyearshasbeenforthefinaltextof
multilateraltreaties to be adopted by a meeting of the relevant international organisation, for example, the UN General Assembly.

Authentication,signatureandexchange
When the text of the treaty has been agreed upon and adopted, the treaty is ready for signing. Signing the treaty, which is usually a formal occasion, serves to authenticate the text. Signing is, therefore, essential to the validity of the treaty unless other methods of authentication have been agreed.

Effectofsignature
The effect of signature depends upon whether the treaty is subject toratification, acceptance or approval. If this is the case, then the signature means no more than that the delegates have agreed a text and have referred it to their governmentsforapprovalandratification.Thusinthe *NorthSeaContinental Shelf* cases (1969), although the Federal Republic of Germany had signed the ContinentalShelfConvention1958itwasnotboundbyitsprovisionssinceit had not ratified it. For this reason, Denmark and Holland had to base their arguments on rules of customary international law.
In keeping with the general requirement of good faith, Article 18 of the VCT 1969 provides that where a state signs a treaty which is subject to ratification there is an obligation to do nothing to defeat the object of the treaty until the state has made its intentions clear. Sometimes the treaty will provide that it is to operate on a provisional basis as from the date of signature.
If the treaty is not expressed to be subject to ratification or is silent on the matterthetreatyisbindingasfromthedateofsignature(Article12oftheVCT1969).

Ratification
The next stage, if necessary, is for the delegates to refer the treaty back to their governments for approval. Ratification is the approval by the head of state or government of the signature to the treaty. Article 2 of the VCT 1969 defines ratification as the international act whereby a state establishes on theinternational plane its consent to be bound by a treaty. Ratification does not have retroactive effect, so states are only bound from the date of ratification, not the date of signature.
It used to be thought that ratification was always essential, but that is no longer the case. Nowadays, it is a question of the intention of the parties as to whether ratification is a mandatory requirement.
Itshouldbenotedthatthemethodbywhichratificationisactuallyaccomplished is a matter for individual states. In the UK, although treaties are signed and ratified under the royal prerogative without the need for reference to Parliament, the practice is to lay the text of any treaty before both Houses of Parliament for 21 days beforeratification(thispracticeisknownasthe*PonsonbyRule*).

Generally, ratification has no effect until some notice of it is given to the other parties to the treaty. In the case of bilateral treaties, ratifications are simply exchanged between the parties. This is clearly impractical in the case of multilateraltreaties,somultilateraltreatiesusuallyprovideforthedepositofall ratifications with one central body – in nearly all cases this function is performed by the Secretariat of the United Nations.

Accessionsandadhesions
When a state has not signed a treaty it can only accede or adhere to it. Accession indicates that a state is to become a party to the whole treaty, whereas adhesion only involves acceptance of part of a treaty. Strictly speaking states can only accede or adhere to a treaty with the consent of all the existing parties. In practice, the consent of existing parties to accession is often implied.

Entryintoforce

When a treaty is to enter into force depends upon its provisions, or upon what the parties may otherwise have agreed. Treaties may be operative on signature, or on ratification. Multilateral treaties usually provide for entry into force only after the deposit of a specific number of ratifications, for example, Article 19 of the International Convention on the Elimination of all Forms of Racial Discrimination 1986 provides:
ThisConventionshallenterintoforceonthethirtiethdayafterthedateof the depositwiththeSecretaryGeneralof theUnitedNationsof thetwenty-seventh instrumentofratificationorinstrumentofaccession.
VCT1969itselfenteredintoforceafterthereceiptbytheSecretaryGeneralof the 35th ratification. Sometimes a precise date for the entry into force of a treaty is given irrespective of the number of ratifications received.

Registrationandpublication
Article 102 of the United Nations Charter provides that all treaties entered into by members of the United Nations shall 'as soon as possible' be registered with the Secretariat of the United Nations and be published by it. A similar provision was laid down in Article 18 of the League of Nations Covenant. Failure to so registerandpublishthetreatywillmeanthatthetreatycannotbeinvokedin any UN organ. Most significantly this would mean that a state would be unable to rely on an unregistered treaty in proceedings before the ICJ. This provision wasincludedtotrytocombattheuseofsecrettreatieswhichwereconsidered to have a detrimental effect on international relations. Article 80 of the VCT 1969 provides that treaties shall, after their entry into force, be transmitted to the Secretariat of the UN for registration or filing and recording, as the case may be, and for publication.

In fact a considerable proportion of treaties are not registered. Paul Reuter suggests that statistical research based on the League of Nations and the United Nations Treaty Series shows that 25% of treaties have not been registered. Although the effect of non-registration of treaties has been discussed ona number ofoccasionsbeforetheICJ,itisnotpossibletodrawanydefiniteconclusions.

Reservations
It can frequently happen that a state, while wishing to become a party to a treaty, considers that it can do so only if it can exclude or modify one or more particularprovisionscontainedinthetreaty.Ideally,suchastatewillbeableto convince the other parties to amend the text of the treaty to incorporate its specific wishes. However, often this will not be possible and the regime of reservations allows a state, in certain circumstances, to alter the effect of the treaty in respect of its own obligations while preserving the original treaty intact as between the other parties.

Definitions
The growth of reservations to treaties coincides with the growth in multilateral conventions. With regard to bilateral treaties, the two parties to the treaty may disagree over the precise terms of the treaty which is to bind them. If this is the case, they may re-negotiate the terms until they achieve full agreement. There will be no treaty in existence until both sides agree on the terms. From this it follows that there can be no question of reservations to a bilateral treaty. In the case of multilateral treaties, it may not always be possible to get the full agreement of all the negotiating parties to every provision of the treaty. The general practice is for the text of such treaties to be adopted by two-thirds majorities. In the event of such a vote, those parties in the minority are in something of a dilemma: they can either refuse to become parties to the whole treaty,ortheycanacceptthewholetreatyeventhoughtheydisagreewithone or more of its provisions. The regime of reservations provides something of a compromise: those in the minority can become parties to the treaty without accepting all of the provisions therein.
Reservations should be distinguished from so-called 'interpretative declarations' whereby a state indicates the view which it holds about the substance of the treaty. Interpretative declarations are not intended as an attempt to derogate from the full legal effect of provisions of the treaty. In practice, the distinction between reservations and interpretative declarations may not always be clear cut. In *Belios v Switzerland* (1988) the European Court of Human Rights had to consider the nature of a declaration made by Switzerland when it ratified the European Convention on Human Rights. Switzerland argued against a finding of the Commission that the declaration was a mere interpretative declaration which did not have the effect of a reservation. The Court found that the declaration was a reservation and in the course of its judgment said:
Thequestion whether adeclaration described as'interpretative' mustbe regardedasa'reservation' isadifficultone...Inordertoestablishthelegal characterofsuchadeclaration,onemustlookbehindthetitlegiventoitand seektodeterminethesubstantivecontent.

Validityofreservations
The formerly accepted rule for all kinds of multilateral treaty was that reservationswerevalidonlyifthetreatyconcernedpermittedreservationsand if all the other parties accepted the reservation. On this basis a reservation constituted a counter-offer which required the acceptance of the other parties, failingwhichthestatemakingthecounter-offerwouldnotbecomeapartyto the treaty.
During the period of the League of Nations the practice with regard to multilateralconventionswasinconsistent.In1927theCommitteeofExpertsforthe Progressive Codification of International Law, the League of Nations' equivalent of the International Law Commission, adopted a policy based on the absolute integrity of treaties and argued that reservations to treaties would not be effective without the full acceptance of all parties. At the same time, the members of the Pan-American Union (the forerunner of the Organisation of

American states) adopted a more flexible policy including the following key elements:
(a) asbetweenstateswhichratifyatreatywithoutreservations,thetreaty applies in the terms in which it was originally drafted and signed;
(b) asbetweenstateswhichratifyatreatywithreservationsandstateswhich accept those reservations, the treaty applies in the form in which it may be modified by the reservations; and
(c)as between states which ratify a treaty with reservations and states which, having already ratified, do not accept those reservations, the treaty will not be in force.
A small number of states, principally from Eastern Europe, adhered to the view that every state had a sovereign right to make reservations unilaterally and at will, and to become a party to treaties subject to such reservations, even if they were objected to by other Contracting States.

Application of treaties

Theobservanceoftreaties
Thedoctrineof *pactasuntservanda*,therulethattreatiesarebindingonthe parties and must be performed in good faith, is a fundamental principle of international law. The rule is included in the VCT 1969 by Article 26 which provides that 'every treaty in force is binding on the parties to it and must be performed in good faith'.

Non-retroactivity
Article 28 of the VCT 1969 reflects the customary rule of non-retroactivity of treaties. The provisions of a treaty do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the treaty entered into force for that state, unless a different intention appears from the treaty or is otherwise established.

Territorialapplication
The general rule, reflected in Article 29 of the VCT 1969, is that, unless some other intention is made clear, a treaty applies to the entire territory of each party. The issue of territorial application arises where parties to a treaty have overseas territorial possessions, and the presumption is that a treaty applies to all the territory for which Contracting States are internationally responsible. Thus, unless the contrary is explicitly indicated, treaties to which the UK is a party apply to the British colonies and all territory for which the UK is internationally responsible,forexampletheChannelIslandsandtheIsleofMan.

Successivetreaties
The problem of a later treaty inconsistent with an earlier one is a complex issue, but Article 30 of the VCT 1969 sets out general rules that deal with the majority ofcases.AsfarasUNmembersareconcerned,theUNCharterprevailsover any other international agreement which conflicts with it. Otherwise, the basic rules are:
(a) a prior treaty prevails over a later one in any instance of apparent disagreement when the later one specifies that it is subject to, or not incompatible with, the earlier one;
(b)whereallthepartiestotheearliertreatyarealsopartiestothelatertreaty, the earlier (if still in effect) applies only to the extent that its provisions are compatible with those of the later treaty;
(c) when the parties to the two treaties are not identical, the earlier applies betweenstatesthatarepartiestobothonlytotheextentthattheearlieris not incompatible with the later, while as between a state which is party to both treaties and a state which is a party to only one of the treaties, the treaty to which both are parties governs their mutual rights and obligations.

Treatiesandthirdparties
Thegeneralruleexpressedinthemaxim,*pactatertiisnecnocentnecprosunt*,is that treaties cannot bind third parties without their consent. The rule is affirmed in Article 34 of the VCT 1969. However, situations in which the rights and duties of third parties are involved have occasionally been created by treaties which are said to establish objective regimes, creating rights and obligations valid universally (*ergaomnes*). *Ergaomnes*is not a term used in VCT 1969 but Article 36 does provide:
1 Arightarisesfora thirdstatefroma provisionofa treatyifthepartiestothe treatyintendtheprovisiontoaccordthatrighttoathirdstate,ortoagroup ofstates...

Amendment and modification
Prior to VCT 1969 the customary law rule was that a treaty could not be revised without the consent of all the parties, although there was evidence that by 1969 state practice had already begun to depart from the rule. The ILC, when considering the draft convention on treaties, noted the enormous increase in the number of multilateral treaties and the fact that obtaining the consent of all the parties would not always be possible (there are parallels here with the discussionsaboutreservations).TheVCT1969nowdrawsadistinctionbetween
'amendments'and'modifications'.Amendment,coveredbyArticle40,denotes a formal change in a treaty intended to alter its provisions with respect to all the parties. Modification, dealt with in Article 41, indicates an *inter se* agreement concludedbetweencertainofthepartiesonly,andintendedtoaltertheprovisions
ofthetreatybetweenthemselvesalone.Modificationisonlyallowedif:
(1)it is permitted by the treaty;

(2)it is not prohibited by the treaty;
(3)it does not affect the other parties to the treaty; (4)it is not incompatible with the treaty.
More usually amendment or modification is achieved in the case of multilateral treaties by another multilateral treaty which comes into force only for those states which agree to the changes.

Treaty interpretation

Aimsandgoalsofinterpretation

There is a measure of disagreement among jurists as to the aims of treaty interpretation. There are those who assert that the primary, and indeed only, aim of treaty interpretation is to ascertain the intention of the parties – this is generally referred to as the *subjective approach*. On the other hand, there are those who start from the proposition that there must be a presumption that the intention of the parties are reflected in the text of the treaty which they have drawn up, and that the primary aim of interpretation is to ascertain the meaning of this text– generally referred to as the *objective*or*textual approach*. Finally, there are those who maintain that the decision-maker must first ascertain the object and purpose of a treaty and then interpret it so as to give effect to that object and purpose – the *teleological* or *object and purpose approach*.

TheViennaConventionontheLawofTreaties1969Section3

Section 3 of the VCT 1969 adopts a composite position. Article 31 states that treaties 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose'.

Goodfaith

The principle of good faith underlies the most fundamental norm of treaty law – *pactasuntservanda*.Ifthepartiestoatreatyarerequiredtoperformtheobligations ofatreatyin'goodfaith',itislogicaltointerpretthetreatyin'goodfaith'.

Ordinarymeaning

The ordinary meaning does not necessarily result from a strict grammatical analysis. In order to arrive at the ordinary meaning account will need to be taken of all the consequences which reasonably flow from the text. It is also clear that the ordinary meaning of a phrase cannot be ascertained divorced from the context the phrase has in the treaty as a whole. In the*Employment of Women During the Night* case (1932), Judge Anzilotti said:
Idonotseehowitispossibletosaythatanarticleofaconventionisclearuntil thesubjectandaimof theconventionhavebeenascertained,forthearticleonly assumesitstrueimportinthisconventionandinrelationthereto.Onlywhenit is knownwhatthecontractingpartiesintendedto doandtheaimthattheyhadin viewisit possibletosayeitherthat thenaturalmeaningoftermsusedina particulararticlecorrespondswiththerealintentionof theparties,or thatthe naturalmeaningofthetermsusedfallsshortoforgoesfurtherthansuch intention.[27]
This view can be contrasted with the decision of the ICJ given in the advisory opinion in the *Competence of the General Assembly for the Admission of a State to the UN* case (1950)[28]where the Court said that:
thefirstdutyofa tribunalwhichiscalledupontointerpretandapplythe provisionsofa treatyistoendeavourtogiveeffecttothemintheirnaturaland ordinarymeaninginthecontextinwhichtheyoccur.Iftherelevantwordsin theirnaturalandordinarymeaningmakesenseintheircontext,thatisanendof thematter.

Specialmeaning

Paragraph 4 of Article 31 provides that a special meaning shall be given to a termifitisestablishedthatthepartiessointended.Inthe *EasternGreenland* case, the PCIJ stated:
Thegeographical meaningoftheword'Greenland', iethenamewhichis habituallyusedin mapsto denotethe wholeisland,mustberegardedas the ordinarymeaningoftheword.If it is allegedby oneofthepartiesthatsome unusualorexceptionalmeaningistobeattributedtoit,itliesonthatpartyto establishitscontention.

Thecontextandtheobjectandpurpose

The context, for the purposes of interpretation, includes the text, its preamble and annexes and any agreement relating to the treaty made between all the parties, or made by some of the parties and accepted by the other, in connection with the conclusion of the treaty. The text of the treaty must be read as a whole. The preamble to the treaty will often provide assistance in ascertaining the object and purpose of a treaty.

Supplementarymeansofinterpretation

Although Article 32 talks of 'supplementary means of interpretation', in practice international tribunals do tend to blur any differences between Article 31 and Article 32 and the preparatory work often referred to by the French term *travauxpréparatoires*isregardedasaconsiderableaid.Inthe *EmploymentofWomen*case the PCIJ referred to the *travauxpréparatoires*to confirm the clear meaning of the text. One possible restriction on the use

of*travauxpréparatoires*as an aid to interpretation arises where some of the parties to the dispute have not been involved in the preparatory work leading to the treaty. So, for example, in the *River Oder*case (1929) the PCIJ refused to allow reference to the preparatory workoftheTreatyofVersailles1919onthegroundsthatseveraloftheparties to the dispute had not taken part in the work of the Conference which had prepared the treaty.

Multilingual treaties

Treaties are often drafted in two or more languages. In the case of bilateral treaties,thenormalpracticeisthatthetreatytextsshouldbedrawnupinthe two languages of the parties, both texts being equally authentic. Multilateral conventions may be concluded in many languages: conventions concluded under the auspices of the UN will be drawn up in Arabic, Chinese, English, French, Russian and Spanish; the treaty by which Greece became a member of the European Union was concluded in eight languages. A more common practice is to conclude a treaty in two or three widely spoken languages and for these two or three texts to be equally authentic, and for a number of official translations to be deposited with the signed original. If a number of texts are equally authentic, they may be read in conjunction in order to ascertain the meaning of the convention.

Validity of treaties

The VCT 1969 represents both codification of existing rules of customary international law and also the progressive development of international law. Part V of the Convention which deals with invalidity, termination and suspension represents more a 'progressive development' of the law than simple codification.InlookingatthegroundsofinvaliditycontainedintheVCT1969, itshouldbeborneinmindthatthecustomarylawrulesonvaliditymaywell not be as rigid or as settled.

Non-compliancewithmunicipallawrequirements

A state cannot plead a breach of its constitutional provisions as to the making of treaties as a reason for invalidating an agreement. For example, where the representative of the state has had her/his authority to consent on behalf of the state made subject to a specific restriction which is ignored, the state will still be bound by that consent except where the other negotiating states were aware of the restriction on authority prior to the expression of consent.

Error

Unlike the role of mistake in municipal contract law, the scope of error in internationallawisverylimited.Inpractice,giventhenumberofpeopleand the character of states involved in the negotiation and conclusion of treaties, errors are not very likely to occur.

Article 48 declares that a state may only invoke an error in a treaty as invalidating its consent to be bound, if the error relates to a fact or situation which was assumed by that state to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound. The ground is not open to the state if it contributed to the error by its own conduct or the circumstances were such as to put it on notice of a possible error, or if the error related only to the wording of the text of the treaty.

Fraudandcorruption

Where a state consents to be bound by a treaty as a result of the fraudulent conductofanothernegotiatingstate,thatstatemayunderArticle49oftheVCT 1969 invoke the fraud as invalidating its consent to be bound. Fraud itself is not defined in the VCT 1969 and since there are no examples of treaties being invalidated as a result of fraud there is a lack of international precedents as to what constitutes fraudulent conduct.

If a state's consent to a treaty has been procured through the corruption of its representative, directly or indirectly by another negotiating state, the former state isentitledtoclaimthatthetreatyisinvalidunderArticle50oftheVCT1969.

Coercion

Coercionofstaterepresentatives

Article 51 of the VCT 1969 provides that the expression of a state's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him/her shall be without any legal effect. It has long been an accepted rule of customary international law that duress exercised against a representative concluding a treaty has been a ground for invalidating the treaty.

Coercionofastate

There was considerable discussion about Article 52. In the 19th century force had often been seen as a legitimate extension of diplomacy and treaties procured by force were not uncommon. The concept that a treaty may be void if itsconclusionhasbeenprocuredbythreatoruseofforceisthereforeoforigin.AttheViennaConferencediscussioncentredontheexactdefinitionof'force'.Agroupof19African,AsianandLatinAmericanstatessoughttodefine'force'asincludinganyeconomic orpoliticalpressure.ThevastmajorityofWesternstatesopposedsuchadefinition,arguingthatitwouldseriously underminethestabilityoftreatyrelationsgiventhewidthofpossibleinterpretationsofpressure.Intheevent,the19states didnotpushtheissuetoavote,althoughtheConferenceadoptedadeclarationwhichcalleduponstatestorefrainfromeconomicand politicalcoercionwhennegotiatingandconcludingtreaties.It should be noted that it is acceptance of the treaty that must be coerced. A peace treaty which is signed as a matter of choice between two independent states is valid even though its

terms may have been influenced by a prior use of force.
There have been few recent examples of treaties brought about by the use of coercion.OneofthebestknowncasesinvolvedthetreatybetweenGermany and Czechoslovakia under which a German Protectorate was established in former Czechoslovakian territory. The treaty was signed by President Hacha of Czechoslovakia in Berlin at 2.00am after he had allegedly been subject to considerable personal threats and told that, if he did not sign, German bombers could destroy Prague within two hours.

Unequaltreaties
Many non-Western states take the view that treaties not concluded on the basis of the sovereign equality of all parties are invalid. Thus, treaties between economically powerful states and much weaker states under which the latter grants extensive privileges or facilities to the former should be set aside. For example, the 19th century treaties between the UK and China under which China ceded Hong Kong Island and Kowloon and leased the New Territories to the UK was challenged by the Chinese government on the basis that they were not concluded between two equal states. On the whole, Western writers have regarded the concept of unequal treaties as too vague to be implemented.

Juscogens
In the ILC's preparation of the Vienna Convention considerable discussion took place about whether there were in international law certain rules sofundamental and of such universal importance that a state would not be entitled to derogate from them even by agreement with another state in a treaty. The ILC concluded that such rules did exist, for example, the prohibition on the unlawful use of force and the use of genocide.

Theeffectofinvalidity
Article 69 of the VCT 1969 provides that where the invalidity of a treaty is established, the treaty is void and its provisions have no legal effect. If acts have been performed in reliance on a void treaty then states may require other parties to establish, as far as possible, the position with regard to their mutual relations that would have existed if the acts had not been performed. Acts performed in good faith in reliance on a treaty before its invalidity was invoked arenotrenderedunlawfulbyreasononlyoftheinvalidityofthetreaty.
Article 71 deals with the specific consequences arising where a treaty conflicts with *jus cogens.*Insuchasituationthepartiestothevoidtreatyareunderanobligation to bring their mutual relations into conformity with the peremptory norm. Where the treaty becomes void and terminates as a result of the development of a new rule of*jus cogens*under Article 64, the parties are released from any obligations further to perform the treaty, but rights and obligations created through the treaty prior to its termination are unaffected provided that such rights or obligations do not themselves conflict with the new peremptory norm.
Termination, suspension of and withdrawal from treaties

Byconsent
Articles 54 to 59 of the VCT 1969 provide for various situations where a treaty may be terminated or suspended or where a party may withdraw from a treaty by consent. The most straightforward situation will arise where the treaty either makes provision for termination, denunciation or withdrawal or where all parties consent to a change.
Where a treaty makes no provision for termination, denunciation or withdrawal then the rule is that withdrawal and denunciation will not be allowed unless it is established that the parties intended to admit its possibility, or a right of termination and denunciation can be implied by the nature of the treaty.

In such a case a party wishing to denounce or withdraw from a treaty should give a minimum of 12 months' notice. The operation of a treaty may be suspended if provided for in the treaty or if all parties consent. In the case of multilateral conventions, two or more parties may conclude an agreement to suspend the treaty as between themselves provided such suspension is not prohibited by the treaty and provided that it is notincompatible with the object and purpose of the treaty. If such an agreement to partially suspend a treaty is concluded there is a duty on the two or more states to inform the other parties to the treaty.

Materialbreach
It has always been a rule of customary law that the breach of an important provision of a treaty by one party entitles the other parties to regard that agreement as at an end. The main question that arises is how important a breach needstobebeforeitwilljustifytheterminationofatreaty.Amaterialbreach will entitle the other parties to a treaty to terminate or suspend a treaty in whole or in part. In the case of multilateral treaties, those not in breach might decide to terminate or suspend the treaty only in respect of the party in breach. It is clear that a party responsible for a material breach cannot itself rely on that breach to terminate a treaty.

Superveningimpossibilityofperformance
Article 61 of the VCT 1969 introduces a rule analogous to the doctrine of frustration in municipal contract law. If a treaty becomes impossible to perform as a result of the permanent disappearance or destruction of an object indispensable for the execution of the treaty, that impossibility may be invoked as a reason for terminating or suspending the treaty. Where the impossibility is only temporary, it may only be invoked as a ground for suspension of the treaty. An example of the operation of Article 61 would be the case of a treaty governing rights pertaining to a river. The treaty

could be terminated if the river dried up permanently. The impossibility of performance cannot be invoked by a party, where the impossibility results form the conduct of that party.

Fundamentalchangeofcircumstances

A fundamental change of the circumstances existing at the time the treaty was concluded has traditionally been a ground for withdrawal or termination. The rule is often referred to as the doctrine of*rebus sic stantibus*. Before the First World War a number of treaties were brought to an end by states relying on fairly minor changes. Since that time the law has been tightened up and it is clear that any change must be such as to alter radically the circumstances on the basisofwhichatreatywasconcluded.Inthe *FisheriesJurisdiction*case(1973)the ICJ declared that:

...international lawadmitsthatafundamental changeinthecircumstances whichdeterminedthepartiesto accepta treaty,ifit hasresultedina radical transformationof theextentof theobligationsimposedbyit, may,undercertain conditions,affordthepartyaffecteda groundforinvokingthetermination or suspensionofthetreaty.Thisprinciple,andtheconditionsandexceptionsto whichitissubject,havebeenembodiedinArticle62oftheViennaConvention ontheLawofTreaties, whichmayinmanyrespects beconsidered asacodificationofexistingcustomarylawonthesubject...

THESUBJECTSOFINTERNATIONALLAW

International personality meanscapacitytobeabearerofrightsandduties underinternationallaw.Anyentitywhichpossessesinternationalpersonalityis aninternationalpersonorasubjectofinternationallaw,asdistinctfromamereobjectofinternationallaw.

A subjectof internationallawisconsideredto beanentitycapableof possessing internationalrightsandduties and endowedwiththecapacitytotakecertain typesofactionontheinternationalplane.Thetermsinternationallegalpersonorlegalpersonalityarecommonlyusedwhenreferrin gtosuchentities.

Independentstates

Statesaretheprincipalsubjectsofinternationallaw.Oftheterm‘state’noexact definitionispossible,butsofarasmodernconditionsgo,theessentialcharacteristicsofastatearewellsettled. Thenormalcriteriawhichthegovernmentapplyforrecognitionasastateare thatit shouldhave,andseem likelytocontinuetohave,a clearlydefined territorywitha population,a governmentwhoareableofthemselvestoexercise effectivecontrolofthatterritory,andindependenceintheirexternalrelations.Otherfactors,includingsomeUnitedNationsresol utions,mayalsoberelevant.

The traditional definition of a state for the purposes of international law is the one to be found in the Montevideo Convention on the Rights and Duties of States 1933:

Montevideo Convention on the rights and duties of states1933

Article1

Thestateasaperson ofinternational lawshould possess thefollowing qualifications:

(a) apermanentpopulation;

(b) adefinedterritory;

(c) government;and

(d) capacitytoenterintorelationswithotherstates.

Colonies

Traditionally international law has not regarded colonies as possessing any international personality, because the control of the colony’s foreign relations rested entirely in the hands of the colonial power. We have already seen when looking at the law of treaties that there is a presumption that treaties will apply to a colonial power and its colonial possessions. However with the development of the principle of self-determination, international law has come to recognise that for certain purposes ‘pre-independent states’ and national liberation movementsmayhavesomedegreeofinternationalpersonality.Forexample,in

1974 the Palestine Liberation Organisation was accorded observer status at the United Nations, a position previously reserved solely for the representatives of sovereign states that were not at the time members of the United Nations. The head of the PLO was subsequently invited to address the UN General Assembly and PLO representatives have attended various UN conferences and meetings. Similarly the General Assembly recognised the South West African People’s Organisation (SWAPO) as the sole representative of the people of Namibia.

Protectorates

There are three situations where protection may be given by a foreign state:

Protection may be exercised over a territory which did not haveinternationalpersonalitybeforetheprotectoratewascreated.Thisoccurred in the late 19th century in respect of a number of European states. In such situations the territory in question will only gain full international personality when it is clear that they are acting independently of the protecting state. For example, Kuwait became a British protectorate in 1899 and was gradually given increased control over its own affairs. Itsindependence was only formally

acknowledged by the UK in 1961, but it is clear that Kuwait had achieved statehood and international personality before that time.

MandatesandTrustTerritories
TheMandatesystemwasintroducedbytheLeagueofNationstoprovidefor the administration of the colonies and dependencies of the losing states in the First World War 'inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world'.

Internationalorganisations
Accordingly, theCourthascometotheconclusionthatthe[UnitedNations] Organisationisaninternationalperson.Thatisnotthesamethingassayingthat it isa state,whichit certainlyisnot,orthatitslegalpersonalityandrightsand dutiesarethesameasthoseofa state...Whatit doesmeanisthatit isa subjectof internationallawandcapableofpossessinginternationalrightsandduties,andthatithascapacitytomaintainitsrightsbybringingi nternationalclaims.

Individuals
An individual,forexample,cannotacquireterritory,he cannotmaketreaties,andhe cannothavebelligerentrights.Buthe cancommitwarcrimes,andpiracy,and crimesagainsthumanityandforeignsovereignsandhe canownpropertywhich international lawprotects,andhecanhaveclaimstocompensationforactsarising*excontractu*or*exdelicto*.

Anyindividualwhocommitsacrimeagainstthepeaceandsecurityofmankind isresponsibleforsuchcrime.

RECOGNITIONANDLEGITIMATION

It has already been seen that an important requirement of statehood is the capacity to enter into international legal relationships. This inevitably concerns theattitudeofotherstatesandinparticularraisesthequestionofrecognition. Do other states recognise the new entity as a state? What are the implications if they do recognise it? What are the implications if they do not?

The theoretical issue
Asissooftenthecasewithinternationallaw,discussionofrecognitionhasled to the development of two competing theories. The principal question which the two theories attempt to answer is whether recognition is a necessaryrequirement for or merely a consequence of international personality.

Theconstitutivetheory
Underlying the constitutive theory is the view that every legal system requires someorgantodeterminewithfinalityandcertaintythesubjectsofthesystem. In the present international legal system that organ can only be the states, acting severally or collectively, and their determination must have definitive legal effect.
The constitutive theory developed in the 19th century and was closely allied to a positivist view of international law. According to that view the obligation to obey international law derives from the consent of individual states. The creation of a new state would create new legal obligations and existing states would need to consent to those new obligations. Therefore the acceptance of the new state by existing states was essential. A further argument prevalent during the late 19th century was based on the view of international law as existing between 'civilised nations'. New states could not automatically become members of the international community, it was recognition which created their membership. This had the further consequence that entities not recognised as states were not bound by international law, nor were the 'civilised nations' so bound in their dealings with them. Oppenheim stated the position thus:
Theformationofanewstateis...amatteroffactandnotlaw.Itisthrough recognition,whichisamatteroflaw,thatsuchanewstatebecomessubjecttointernationallaw.

Thedeclaratorytheory
An early example of the declaratory theory is to be found in two provisions of the Montevideo Convention:

Thepoliticalexistenceof thestateisindependentof recognitionbyotherstates. Even beforerecognition thestatehastherighttodefenditsintegrity and independence...andtoorganiseitselfasitseesfit.Theexerciseoftheserights hasnootherlimitationthantheexerciseof therightsof otherstatesaccordingto internationallaw–Article3.
Therecognition ofastatemerelysignifiesthatthestatewhichrecognises it acceptsthepersonalityof theother,withalltherightsanddutiesdeterminedby internationallaw–Article6.

For the adherents to the declaratory theory the formation of a new state is a matter of fact, not law. Recognition is a political act by which the recognising state indicates a willingness to initiate international relations with the recognised state and the question of international personality is independent of recognition. However, the act of recognition is not

totally without legal significance because it doesindicatethattherecognisingstateconsidersthatthenewentityfulfilsall therequiredconditionsforbecominganinternationalsubject.
The declaratory theory is more widely supported by writers on international law today and it accords more readily with state practice, as is illustrated by the fact that non-recognised 'states' are quite commonly the object of international claims by the very states which are refusing recognition, for example Arab states have continued to maintain that Israel is bound by international law although few of them, until recently, have recognised Israel.

Non-recognition
The legal regime established by the Covenant of the League of Nations 1919 and the Kellogg-Briand Pact 1928 was the basis for the development of the principle that 'acquisition of territory or special advantages by illegal threat or use of force' would not create a title capable of recognition by other states. The principle achieved particular significance as a result of the Japanese invasion of Manchuria in 1931. The US Secretary of State, Stimson, declared that the illegal invasion would not be recognised as it was contrary to the Kellogg-Briand Pact which outlawed the use of war as an instrument of national policy. Thereafter the doctrine of not recognising any situation, treaty or agreement brought about by non-legal means was often referred to as the Stimson Doctrine.
However, state practice before the Second World War did not seem to support the view that the Stimson Doctrine contained a binding rule of internationallaw.TheItalianconquestofAbyssinia(Ethiopia)wasrecognised aswastheGermantake-overofCzechoslovakia.After1945theprinciplewas re-examined and the draft Declaration on the Rights and Duties of States prepared by the ILC emphasised that territorial acquisitions achieved in a manner inconsistent with international law should not be recognised by other states. Similarly the Declaration on Principles of International Law 1970 adopted by the UN General Assembly included a provision to the effect that no territorial acquisition resulting from the threat or use of force shall be recognised as legal.

Recognition of governments
Although the practice of states is far from establishing the existence of a legal duty to recognise an entity which has established the factual characteristics of statehood, with regard to governments the position is even more difficult. The problem of recognition of governments will arise when a new regime has taken power:
(a)unconstitutionally;
(b)by violent means; or
(c)with foreign help,
In a state who's previous and legitimate government was recognised by other states. Recognition in such circumstances may appear an endorsement of the new regime, and the recognising state may not wish to offer such endorsement or approval. Alternatively, it may be impractical not to acknowledge a factual situation, in which case the recognising state may wish to indicate that recognition is inevitable once a given set of facts arise. Two approaches can therefore be identified: an*objective* approach, whereby recognition will occur if a given set of facts have occurred, or a*subjective* test, whereby recognition will depend on whether or not the new regime is going to act properly in the eyes of the recognising state.

One possible resolution of the problem of when to recognise is to avoid recognition altogether. In 1930, the Mexican Foreign Minister, SeñorEstrada, rejected the whole doctrine of recognition on the ground that 'it allows foreign governmentstopassuponthelegitimacyorillegitimacyoftheregimeexisting in another country, with the result that situations arise in which the legal qualifications or national status of governments or authorities are apparently made subject to the opinion of foreigners'.

Henceforward, the Mexican government refused to make declarations granting recognition of governments. This Estrada Doctrine, as it came to be known, denies the need for explicit and formal acts of recognition; all that needs to be determined is whether the new regime has in fact established itself as the effective government of the country.

***De facto* and *de jure* recognition**
A distinction has sometimes been made in cases where governments have been accordedrecognitionbetween*defacto*and*dejure*recognition.Recognitionofan entityasthe *defacto* governmentcanbeseenasaninterimsteptakenwhere there is some doubt as to the legitimacy of the new government or as to its long- term prospects of survival. For example, the UK recognised the Soviet government*de facto*in 1921 and*de jure*in 1924. In some situations, particularly where there is a civil war, both a*de facto*and a*de jure*government may be recognised, as for example during the Spanish Civil War when the Republican government continued to be recognised as the*de jure* government, but as the Nationalist forces under General Franco took increasingly effective control of Spain,*defacto* recognitionwasaccordedtotheNationalistgovernment. Eventually the Nationalist government obtained full *de jure* recognition.

Collective recognition
Collective responses to the unilateral declaration so f independence of southern Rhodesia and Palestine: anapplication of the legitimising function of the United Nations.

TERRITORIALRIGHTS

Territory is a tangible attribute of statehood and within that particular geographical area which it occupies a state enjoys and exercises sovereignty. Territorial sovereignty may be defined as the right to exercise therein, to the exclusion of any other state, the functions of a state. A state's territorial sovereignty extends over the designated land mass, sub-soil, the water enclosed there in, the land under that water ,the territorial sea.

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

Endlessinternationalandinternalconflicts,costingthelivesofcountlesshuman beings,havecentredonthedesireofthisorthatstate-societytocontrolthisor thatareaoftheearth'ssurfacetotheexclusionofthisorthatstate-society.

Intertemporallaw

Inmanydisputestherightsofthepartiesmayderivefromlegallysignificant acts concluded a long time ago at a time when particular rules of international law may well have been different to what they are today. It has long been accepted as a principle of international law that in such cases the situation must beappraisedorthetreatyinterpretedinthelightoftherulesofinternational lawastheyexistedatthetime.Thisprinciplewasre-affirmedbyJudgeHuber in the *Island of Palmas* casewhen he stated that:

Bothpartiesarealsoagreedthatajuridicalfactmustbeappreciatedinthelight of the law contemporary with it, and not of the lawin for ceat the time when a dispute inregard to it arisesor falls to be settled. The effect of discovery by Spain isthereforetobedeterminedbytherulesofinternationallawinforceinthefirst half of the sixteenth century.

Criticaldate

The date on which a dispute over territory 'crystallises' is known as the 'critical date'. In many disputes a certain date will assume particular significance in deciding between rival claims.

Title to territory

Traditionally, writers have referred to five means by which territory and title to territory may be acquired:

1 occupation of *terra nullius*;
2 prescription;
3 conquest;
4 accretion;
5 cession.

These five modes will bed is cussed here, but it is important in this matter to note the words of Ian Brownlie:

A tribunal will concern itself with proof of the exercise of sovereignty at the criticaldateor dates ,and in doing so will not apply the or thodoxanalys is to describe eitsprocess of decision.The issue of territorial sovereignty, or title, is oftencomplex,andinvolvestheapplicationofvariousprinciplesofthelawto thematerialfacts.

The result of this process cannot always beascribedto any single dominan trule of 'mode of acquisition'.The orthodoxanalysis does not prepare the student for the interaction of principles of acquiescence and recognition with the other rules.

***Occupation of* terranullius**

Occupation is preceded by discovery. Discovery alone is insufficient to establish title; it can only serve to establish a claim which in a reasonable period of time must be completed by effective occupation. Published discovery can obviously establish a better claimintime ,but is in effective against proof of continuous and peaceful display of authority by another state.

The exact nature of effective occupation and title to territory was considered in the *Island of Palmas* case. Under the Treaty of Paris 1898, which brought to an end the Spanish-American War of 1898, Spain ceded the Philippines to the United States. The United States based its claim, as successor to Spain, principally on discovery. There was evidence that Spain had discovered the island in the 17th century, but there was no evidence of any actual exercise of sovereignty over the island by Spain.

Prescriptionandacquiescence

Brownlie's warning should be taken seriously and it can be read in conjunction with his comments referred to earlier regarding the dangers of too zealously looking for a single dominant mode of acquisition.Nevertheless, reference is made,bystates,bywritersandbyinternationaltribunalstoprescriptionand it is necessary to have some understanding as to what is meant by it.

Acquis it ivepre scription is the means by which ,under international law, legal recognition is given to their ghtofa state to exercises overeignty overlandor sea territory in cases where that's tate has,infact,exercised its authority in a continuous, uninterrupted, and peace ful manner over the area concerned for a sufficientperiodoftime,providedthatallotherinterestedandaffectedstates(in thecase of land territory, the previous possessor ,in the case of sea territory neighbouring state and other states whos emaritime in terestsare affected)have

acquies cedin this exercise of authority. Such acquiescence is implie din cases where the interested and affected state have failed with in areas on abletimeto refer the matter to the appropriate international organisation or international tribunalor–exceptionally in cases where no such action was possible–have failed to manifest their opposition in a sufficiently positive manner through the instrumentality of diplomatic protests. The length of timer equired for the establish men to fa prescriptive title on the one hand, and the extent of the action required to prevent the establishment of aprescriptive title on the other hand, are in variable matters of factto be decided by the international tribunalbe fore which the matter is eventually brought for adjudication.

Conquest/annexation

The third traditional mode of acquisition is of historic interest only. Under the Kellogg-Briand Pact 1928war was outlawed as an instrument of national policy. In 1932 the US declared that it would not recognise 'any situation, treaty, or agreement which may be brought about contrary to the covenants and obligations of the Pact of Paris of 27 August 1928'and specifically would not recognise the state of Manchukuo as it resulted from the conquest of Manchuria by the Japanese. Article 2(4) of the UN Charter prohibits states from using or threatening force against the territorial integrity or political independence of any state, and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nationsstates that 'No territorial acquisition resultingfrom the threat or use of force shall be recognised as legal'.

Cession

Cession involves a complete transfer of sovereignty by the owner state to some other state, and may involve a part or all of the owner state's territory. Traditionally there was no bar on the extent to which one state could cede territory to another, although today, a treaty which purported to provide for the cession of territory in conflict with principles of self-determinationwouldviolate*juscogens*andthereforebeinvalid.Itshould be noted that the principle *nemodat quod non habet*applies in international law just as in municipal law: it is not possible for a state to cede what it does not possess.
Cession need not only arise in cases of transfer of territory from losing to victorious state following a war. In the past, land has been ceded in an exchange agreement, for example Britain and Germany exchanged Heligolandand Zanzibar by a treaty made in 1890, and in 1867 Russia ceded Alaska to the United States in exchange for payment.

Accretion

Itispossibleforstatestogainorloseterritoryasaresultofphysicalchange. Such changes are referred to as 'accretion' and 'avulsion'. Accretion involves the gradual increase in territory through the operation of nature, for example, the creation of islands in a river delta. Avulsion refers to sudden or violent changes, such as those caused by the eruption of a volcano. The distinction between avulsion and accretion can be significant in boundary disputes which will be discussed at 7.4 (below).

Otherpossiblemodesofacquisition

As has already been stated, issues of title to territory are complex and will usually involve the application of a number of principles. In practice, cases rarely fall neatly into one of the five categories mentioned, and claims to territory will be based on a combination of factors. In addition to the five modes of acquisition that have been discussed, a number of others have been suggested fromtimetotime .Among those that can be clearly identified are'adjudication', 'disposition by joint decision' and 'continuity and contiguity'.

Adjudication

In certain situations, territory may accrue to one state by virtue of a decision of an international tribunal. This is most likely to occur in the context of boundary disputes. Thus in the *Frontier Dispute* case (1985), Burkina Faso and Mali agreed to submit their boundary dispute to a chamber of the ICJ and agreed to accept that tribunal's finding.

Rightsof foreign states over territory

It is a general rule of international law that states have exclusive sovereignty over their territory. However, there are a number of exceptions to this general rule where a foreign state(s) may be granted certain rights over the territory of another independent sovereign state. Such situations include leases – for example the 99-year lease granted by China to the UK in respect of the New Territories and Kowloon – and servitudes.

Servitudes occur where territory belonging to one state is made to serve the interests of territory belonging to another state. The state enjoying the benefit may be entitled to do something on the territory concerned, for example, exercise a right of way, or take water for irrigation. Alternatively, the state on whom the burden falls may be obliged to refrain from doing something, for example, an obligation not to fortify.

Lossof state territory

To the five modes of acquiring sovereignty over territory correspond five modes of losing it–namely,cession,dereliction,operationsofnature,subjugation,prescription. But there is a six thmode of losing territory–namely ,revolt .No special details are necessary with regard to the loss of territory through subjugation, prescription ,and cession, but the operations of nature, revolt ,and dereliction require discussion.

Operations of nature
As a mode of losing territory correspond to accretionasa mode of acquiring it. Just as through accretion as tatemay beenlarged, soitmay bed im inished through the disappearance of land and other operations of nature. And the loss of territory through operations or nature takes place *ips of acto* by such operations.

Revolt followed by secession has been accepted as a mode of losing territory to which there is no corresponding mode of acquisition.The question at what time a loss of territory through revolt is consummated cannot be ans were done and for all, since nohard and fastrule can be laid down regarding the time when a state which has broken offfrom another can be said to have established itself safely and permanently .It is perhaps now questionable whether the termrevolt is entirely a happy one in this legal context. It would seem to indicate a particular kind of political ituation rather than a legal mode of the loss of territorial sovereignty.

Dereliction (orabandonment orrelinquishment) as amode of losing territory corresponds to occupation as a mode of acquiring it. Dereliction frees a territory from the sovereignty of the presentstate-owner. It is effected through the owner-state completely abandoning territory with the intention of withdrawing from it forever, thus relin quishings over eignty over it. Just as occupation requires first, the actual taking of possession(*corpus*)of territory, and, secondly, the intention (*animus*) of acquiring sovereignty over it, soderelicti on requires, first, actual aband on mentofa territory, and, secondly, the intention of giving up sovereignty

Principles of jurisdiction
There are three types of jurisdiction generally recognised in international law. These are the jurisdiction to prescribe, the jurisdiction to enforce, and the jurisdiction to adjudicate. The jurisdiction to prescribe is the right of a state to make its law applicable to the activities, relations, the status of persons, or the interests of persons in things.
This paper deals almost exclusively with the jurisdiction top rescribe. However, it is useful here to not ethe distinction between the jurisdiction top rescribe a rule of law for a particular action and the jurisdiction to enforce that rule. This paper will not discuss extradition.
Underinternational law,there are six generally accepted bases of jurisdiction, usually listed in the order of preference:
1 Subjective territoriality
2 Objective territoriality
3 Nationality
4 Protective principle
5 Passive nationality
6 Universality
These bases of jurisdiction are the oriesunder which a state may claim to have jurisdiction to prescribea rule of law over an activity. Even where one of the bases of jurisdictionis present, the exercise of jurisdiction must still be reasonable.
Subjective territoriality
Is by far the most important of the six. I fanactivity takes place with in the territory of the forumstate, then the forum state has the jurisdiction to prescribe a rule for that activity. The vast majority of criminal legislation in the world is of this type.

Objective territoriality
Is invoked where the action takes place outside the territory of the forum state, but the primary effect of that activity is with in the forum state. The classic case is that of arifleman in Canada shooting an Americana cross Niagara Falls in NewYork. The shooting takes place in Canada; themurder–theeffect–occurs in the UnitedStates. United States would have the jurisdiction to prescribe under this principle. This is sometimes called ‘effects jurisdiction’. This has obvious implications for cyberspace, as will be discussed below.

Nationality
is the basis for jurisdiction where the forum state as serts the right to prescribe a law for an action based on the nationality of the actor. Under Dutch law, forexample, a Dutch national ‘is liable to prosecution in Holland for an offence committed abroad, which is punishable under Netherlands law and which is also punishable under the law of the country where the offence was committed’. Many other civil law countries have similar laws, not ably France.

Passive Nationality
is at heory of jurisdiction based on the nationality of the victim. Of ten passive and ‘active’ nationality are in voked to get her to establish jurisdiction. A state has more interest in prosecuting an offence when both the offend er and the victim are nationals of that state. This principle is rarely used for two reasons. First, it is offensive to in sist that for eign laws are not sufficient to protect your citizens abroad. One of the complaints that’s parked the Boxer rebellionin China in 1901 was the privilege of for eigners to be tried only by their own laws. There actually was a US District Court for China during this period. Second, the victim is not being prosecuted. You need to seize the actor in order to have a criminal prosecution.

The Protective Principle

Is often seen as the ugly stepchild of Objective Territoriality. This principle expresses the desire of a sovereig n to punish actions committed in other places solelybecauseit feels threatened by those actions. This principle is invoked wherethe 'victim' would be the government or sovereignty it self. Forexample, in *UnitedStatesv Rodriguez*,182F Supp479 (SDCal1960), the defendants were charged with making false statements in immigration applications while they were outside the United States. This principle is dis favoured for the obvious reason that it can easily offend the sovereignty of an other nation. Such cases are usually referred to the State Department, not the Justice Department.

The finalbasisofjurisdictionis**Universaljurisdiction**,sometimesreferredtoas 'universalinterest'jurisdiction.Historicallythiswastherightofanysovereigntocatchandpunishpirates.Thishasexpandeddurin gthepastcenturyandahalf toincludemoreof*juscogens*:slavery,genocide,andhijacking(airpiracy).
Althoughthismayat firstglanceseemextendibleto netpiracyin thefuture,to computerhackingandviruses,thisisunlikelygiventhetraditionally tortoise- likedevelopment oftheuniversal jurisdiction. Justasimportant, universaljurisdiction traditionallycoversonlyveryseriouscrimes.Becauseitcoversseriouscrimes,allnationshavedue-process-likeproblemswithconvictionsunderthisprinciple.
Thegeneralmodeinternationalconflicts-of-lawanalysisistoweightheinterests ofcompetingstatesindetermining whetherthereisjurisdiction toprescribe. Althoughsubjectiveterritorialityusuallytrumpsotherinterests,a strongstate interest inprotecting itsnationals canoutweigh aweakstateinterest in prosecutingthecrimeonitsownsoil.
Itisnotalwaysclearwhatitmeansforanindividualdefendantifthestatelacks thejurisdiction toprescribelaw.Under somedomestic legalsystems, a defendantwillbereleasedif thecourtpurportedtoconvictthedefendantwhere therewasnojurisdictionto prescribe.In theUnitedStates,thisquestionisnastily intertwined withdueprocessanalysisandpresumptions abouttheintentof Congresstoviolateinternational law.ThecourtwillconstrueUSlaw,where possible,toconformtointernationallaw.Iwillnotattempttoextricateithere.At aminimum underinternational law,aclaimwillaccruetothestatewhose sovereigntyisoffendedbytheconvictionofitsnational.

Double jeopardy

It has already been seen that very often it will be the case that more than one state has jurisdiction over a particular act. In such situations the question of doublejeopardyarises:ifapersonisacquittedorconvictedinonestate,can that person subsequently be prosecuted for the same offence in another state? There is no unequivocal answer: the Harvard Draft Convention does provide that no state should prosecute or punish an *alien* who has been prosecuted in anotherstateformuchthesamecrime.Butnoreferenceismadeto *nationals* who have been prosecuted in another state. The English courts have generally held that an acquittal or conviction by a court of competent jurisdiction outside England is a bar to indictment for the same offence before any court in England. However,beforeapleaof*autrefoisconvict*or*acquit*canbesustaineditmustbe

Extradition

The term extradition denotes the process whereby, under treaty or upon a basis of reciprocity, one state surrenders to another state at its request a person accused or convicted of a criminal offence committed against the laws of the requesting state, such requesting state having jurisdiction. The rationale behind the law and practice of extradition is as follows:
(a)a desire not to allow serious crimes to go unpunished. Frequently a state in whose territory a criminal has taken refuge cannot prosecute the offence because of a lack of jurisdiction. It will therefore surrender the criminal to a state that can try and punish the offence;
(b)thestateonwhoseterritorytheoffencehasbeencommittedisthebestable to try the offence because of the availability of evidence etc.
Extradition developed in the 19th century through the use of bilateral treaties, and the principle was accepted that there was no right to extradite, although there is also no rule forbidding the surrender of offenders. In England, extradition is governed by the Extradition Act 1989. Extradition is more principally a matter for municipal law although a number of general principles can be discerned.

Before extradition can be ordered two conditions must be satisfied:
1 there must be an extraditable person;
2 theremustbeanextraditioncrime.Suchcrimesareusuallylistedinthe extradition agreement and very often political crimes, military offences and religious offences are not extraditable. Obviously the definition of such crimes is an area for much argument and there have been a number of cases involving arguments about the extent to which acts of terrorism constitute political crimes.

Asylum

Linked to the question of extradition is asylum. It involves two elements: shelter andadegreeofactiveprotection.Itmaybeeitherterritorialasylum,grantedby astateonitsterritory,orextra-territorialasylum,grantedinconsularpremises, diplomatic missions, etc. The general view is that every state has a right to grant territorial asylum subject to the provisions of any extradition treaty in force. The granting of territorial asylum is

regarded as an aspect of state territorial sovereignty. A more important question iswhether there ever exists any duty to grant asylum. The right to grant extra-territorial asylum is more controversial and needs to be established in each case, since it involves a derogation from territorial sovereignty.

Article 14, Universal Declaration of Human Rights 1948 provides that:

1 Everyonehastherightto seek andenjoyin othercountriesasylumfrom persecution.

2 Thisrightmaynotbeinvokedinthecaseofprosecutionsgenuinelyarising fromnon-political crimes orfromactscontrary tothepurposes and principlesoftheUnitedNations.

A resolution of the UN General Assembly, the Declaration on Territorial Asylum, which was adopted on 14 December 1967 recommended a number of practices and standards:

1 apersonseekingasylumfrompersecutionshouldnotberejectedatthe frontier – the individual case should be considered properly. This is generally known as the principle of *non-refoulement*;

2 ifastatefindsdifficultyingrantingasylum,internationalmeasuresshould be taken to try and alleviate the burden;

3 asylum should be respected by all other states.

State immunity

Thebasisofstateimmunity

The traditional view of immunity was set out by Chief Justice Marshall of the United States Supreme Court in *Exchange v McFaddon*(1812).The case concerned a ship, the Exchange, whose ownership was claimed by the French government and by a number of US nationals. The US Attorney General argued that the court should refuse jurisdiction on the ground of sovereign immunity. Chief Justice Marshall stated:

Thefullandabsoluteterritorialjurisdiction beingalikethe attributeofevery sovereign,andbeingincapableofconferringextraterritorial power,wouldnotseemtocontemplateforeignsovereignsnortheirsovereignrightsasitsobjects. Onesovereignbeingin norespectamenableto another;and beingboundby obligationsof thehighestcharacternotto degradethedignityof hisnation,by placinghimselfor itssovereignrightswithinthejurisdictionof another,canbe supposedtoentera foreignterritoryonlyunderanexpresslicence,orinthe confidencethattheimmunitiesbelongingto hisindependentsovereignstation, thoughnotexpressly stipulated, arereserved byimplication, andwillbe extendedtohim.

State immunity developed from the personal immunity of sovereign heads of state. At an international level all sovereigns were considered equal and independent. It would be inconsistent with this principle if one sovereign could exercise authority over another sovereign. The immunity of sovereigns is expressed in the maxim *par in parem non habet imperium*. In medieval times ruler and state were regarded as synonymous, and sovereignty was regarded as a personalised concept. By the time of *Exchange v McFaddon*it was clear that sovereign had a representative character and that actions taken on behalf of the sovereign, or in the name of the sovereign, were capable of attracting the same immunities.

State immunity can also be linked to the prohibition in international law on one state interfering in the internal affairs of another. In*Buck v AG*(1965),[2]the Court of Appeal was called upon to discuss the validity of certain provisions of the Constitution of Sierra Leone and refused on the basis that it lacked jurisdiction. In the course of his judgment, Diplock LJ stated:

Theonlysubject-matterofthisappealisanissueastothevalidityofa lawofa foreignindependentsovereignstate...Asa memberofthefamilyofnations,the Government oftheUnitedKingdomobservestherulesofcomity,*videlicet*the acceptedrulesof mutualconductas betweenstateandstatewhicheachstate adoptsinrelationtootherstatesandexpectsotherstatestoadoptinrelationto itself.Oneofthoserulesisthatitdoesnotpurporttoexercisejurisdictionover theinternalaffairsofanyotherindependent state,ortoapplymeasuresof coerciontoitoritsproperty,exceptinaccordance withtherulesofpublic internationallaw.Oneofthecommonestapplicationsofthisrule... isthewell knowndoctrineofsovereignimmunity...theapplication ofthedoctrineof sovereignimmunitydoesnotdependuponthepersonsbetweenwhomtheissue isjoined,butuponthesubject-matteroftheissue.

Thequestionarisesastowhetherimmunityarises *rationepersonae*or*rationemateriae*. This quotation would seem to support the view that immunity applies only *rationemateriae*, but other writers are not so sure:

...does[immunity] apply*rationepersonae*or*rationemateriae*?Theansweris probablyboth.Immunityapplies*rationepersonae*to identifythecategoriesof persons,whetherindividuals, corporatebodiesorunincorporated entities, bywhomitmay*primafacie*beclaimable;and*rationemateriae*toidentifywhethersubstantivelyitmayproperlybeclaimed...

It seems better to suggest a twofold test: first, is the entity concerned entitled to immunity (*rationepersonae*) and then, if the answer is yes, is the act itself one which carries immunity (*rationemateriae*).

Absoluteandrestrictiveimmunity

The traditional doctrine of state immunity was absolute in that immunity attached to all actions of foreign states. With the rise of industrialisation during the 19th century, States became more involved in commercial activities,

particularly in the area of railways, shipping and postal services. The emergence of the Communist states in the first half of the 20th century and the increasing use of nationalisation as a tool of economic development resulted in a massive growth in the commercial activity of states. It became increasingly common for private individuals and corporations to enter into contracts with foreign state trading organisations. Should a dispute subsequently arise the foreign state trading organisation would be able to rely on the doctrine of sovereign immunity and deny the other party the protection of municipal law. This situationledtocallsforthemodificationoftheabsoluteimmunityofstatesand it was suggested that a distinction could be drawn between the public acts of states (acts *jure imperii*) and private acts (trading and commercial acts – acts*jure gestionis*).Underarestrictiveviewofimmunityitwouldonlybeacts*jureimperii*thatwouldattractimmunity.In*DrallevRepublic ofCzechoslovakia*(1950)theSupremeCourtofAustriacarriedoutacomprehensivesurveyofstatepracticeandconcludedthatint helightoftheincreasedcommercialactivityofstatestheclassicdoctrineofabsoluteimmunityhadlostitsmeaningandwasnolonge raruleofinternationallaw.In1952theUSStateDepartmentissuedtheTateLetterwhichstatedthatimmunitywouldonlybegivento publicactsandnolongertoprivateacts.Thisrestrictiveapproachwassupportedbyfourjusticesofthe SupremeCourtin*AlfredD unhillofLondonIncvRepublicofCuba*(1976)[5]andthedoctrineofrestrictiveimmunitywasconfirmedintheUSForeignSoverei gnImmunities Act 1976.

It should be noted that the doctrine of absolute immunity still applies to Heads of State and is usually extended to such members of their family that form part of their household.

TheBritishposition

British practice with regard to state immunity has undergone a series of changes. In the mid-19th century the authorities seemed to conflict and there wascertainlysomeevidenceofarestrictiveviewbeingtaken.Forexample,in *De Haber v Queen of Portugal*(1851),[6]the Lord Chief Justice seemed to favour a restrictive view of immunity when he said:

...anactioncannotbemaintainedinanEnglishcourtagainstaforeignpotentate foranything doneoromitted tobedonebyhim*inhispublic capacity* as representative ofthenationofwhichheishead...noEnglish Courthas jurisdictiontoentertainanycomplaintsagainsthiminthatcapacity(atp207–emphasisadded).

Thecaseseenforalongtimeasthemainauthorityonstateimmunitywas *The ParlementBelge*(1880).[7]In that case, which concerned a mail ship owned and controlled by the King of Belgium and crewed by the Royal Belgian Navy, the Court of Appeal held that it lacked jurisdiction 'over the person of any sovereign ... of any other state, or over the public property of any state which is destined to its public use'. Forty years later, the Court of Appeal in*The Porto Alexandre*(1920)[8]reliedon*TheParlementBelge*tofindthatimmunityattachedto a ship which had been requisitioned by the government of Portugal and used to carry cargo belonging to a private company. It was argued that the ship was engaged on an ordinary commercial undertaking, but the court held that that wasnotcapableofdisplacingtheruleofabsoluteimmunitylaiddownin*TheParlementBelge*. The doctrine of absolute immunity was seen at its most extreme in *Krajina v The Tass Agency* (1949).In that case, Krajina claimed damages for a libel contained in the Soviet Monitor which was published by the London office of the Tassnews agency. The Soviet Ambassador to the United Kingdom certifiedthatTasswasadepartmentofstateoftheSovietUnionandtheCourt ofAppealaccordinglydecidedthatitwasentitledtoimmunity.Thedecision provoked widespread criticism and led to the setting up of a government committee to consider the whole question of state immunity. The committee found that the UK did accord a greater immunity than that granted by many other states but was unable to agree on the question of the degree of immunity required by international law. The courts continued to apply the absolute doctrine,althoughin*RahimtoolavNizamofHyderabad*(1958)LordDenning,in a dissenting judgment, put the case strongly for adopting a restrictive approach.

The State Immunity Act 1978 provides in s 1 that states are immune from the jurisdiction of the courts of the United Kingdom except as provided in the Act. The Act contains 10 provisions which create exceptions to the main rule. Probably the most important exception is provided in s 3:

(1)Astateisnotimmuneasrespectsproceedingsrelatingto

(a)acommercialtransactionenteredintobythestate;or

(b) anobligation ofthestatewhichbyvirtueofacontract(whether a commercialtransactionofnot)fallstobeperformedwhollyorpartlyin theUnitedKingdom.

Subsection 3(3) lists those transactions which will be considered commercial:

(a) anycontractforthesupplyofgoodsorservices;

(b) anyloanorothertransaction fortheprovision offinanceandany guaranteeorindemnity inrespectofanysuchtransaction orofany otherfinancialobligation;and

(c) anyothertransactionoractivity(whetherofacommercial,industrial, financial,professional orothersimilarcharacter) intowhichastate entersorinwhichit engagesotherwisethanintheexerciseofsovereign authority;

Foreign armed forces

Members of the armed forces usually enjoy limited immunities from local jurisdiction while in the territory of a foreign state. Obviously such immunities only apply where the forces are present with the consent of the host state. The nature and extent of the immunities generally depend on the circumstances under which they were admitted, although simple admission itself can produce legal consequences. The receiving state impliedly agrees not to exercise

jurisdiction in such a way as to impair the integrity and the efficiency of the force. The general rule is that the commander of visiting forces has exclusive jurisdiction over offences committed within the area where the force is stationed or while members of the force are on duty. Usually the status and immunities of foreign troops will be the subject of specific agreement. Thus under the North Atlantic Treaty Agreement 1951 the sending state has the primary right to exercise jurisdiction over NATO troops stationed abroad in other member states.

Thebasisofdiplomaticimmunity
There have been three principal theories justifying diplomatic immunity: (a)personal representation;
(b)extra-territoriality; and
(c)functional necessity

Personal representation
This theory dates back to the time when diplomatic relations involved the sending of personal representatives of the sovereign. Immunity attaching to diplomatic representatives was seen as an extension of sovereign immunity.

Extra-territoriality
This theory was founded on the belief that the offices and homes of the diplomat were to be treated as though they were the territory of the sending state. In 1758 Emmercich de Vattel wrote, 'an ambassador's house is, at least in all common cases of life, like his person, considered as out of the country'. The theory always rested on a fiction and is now no longer respected.

Functional necessity
The preferred rationale for the privileges and immunities attaching to diplomats is that they are necessary to enable them to perform diplomatic functions. Modern diplomats need to be able to move freely and be unhampered as they report to their governments. They need to be able to report in confidence and to negotiateonbehalfoftheirgovernmentswithoutfearofletorhindrance.

Diplomatic immunity
Diplomatic immunity is not for the benefit of individuals, but to ensure the efficient performance of the functions of diplomatic missions as representing states.

Thediplomaticmission
The premises of the diplomatic mission, which include the embassy buildings and compound together with the residence of the head of the mission, are inviolablebyvirtueofArticle22oftheViennaConvention.Thisisnottosay that the premises of the diplomatic mission constitute part of the territory of the sending state, but does mean that they are inaccessible to agents of the receiving state without the consent of the head of the mission. In observing this rule, the English courts refused to issue a writ of *habeas corpus* with regard to a Chinese dissident who was being held against his will in the Chinese embassy in London in what was known as the Sun YatSenincident. Similarly, the inviolabilityofthediplomaticmissionpreventedthearrestofthosesuspected of shooting WPC Fletcher from within the Libyan Embassy in London in 1984.

The inviolability of the diplomatic mission also means that the receiving state is under a duty to afford all reasonable protection to it. It was a failure adequatelytoprotecttheUSEmbassyinTehranwhichledtothe *USDiplomatic andConsularStaffinIran*case (1980).On4November1979,followingtherevolution in Iran, a number of Iranian nationals seized the US Embassy and took the personnel inside hostage. Although the ICJ found that the initial hostage taking could not be attributed to the Iranian government, it had been aware of the threat posed to the embassy and had the means available to provide adequate protection. The court therefore found that Iran's failure to prevent the seizure of the embassy amounted to a breach of its international obligations.

Diplomatic personnel
The Vienna Convention provides for varying degrees of immunity which are dependent on the status of the person concerned. There are five main categories of person each attracting differing degrees of immunity:
- the head of the mission (the ambassador or *charge d'affaires*);
- the members of the diplomatic staff;
- the members of the administrative and technical staff;
- the members of the service staff;
- private servants.

The appointment of the head of the mission requires the consent of the receiving state and details of all other members of the mission must be given to the receiving state if immunity is to be invoked. The receiving state can set limits on the size of a particular mission or refuse, on a non-discriminatory basis, to accept officials of a particular category.

The head of the mission and the members of the diplomatic staff are also referred to as diplomatic agents, and they receive the highest degree of immunity. Article 29 of the Vienna Convention provides that the person of a

diplomaticagentshallbeinviolable. Heorsheshallnotbesubjecttoanyform of arrest or detention, and the receiving state has a duty to ensure his or her protection. Article 31 further provides that diplomatic agents enjoy complete immunity from the criminal jurisdiction of the receiving state and extensive immunityfromcivilandadministrativejurisdiction.Theseimmunitiesextend to the families of diplomatic agents if they are not nationals of the receiving state.

Members of the administrative and technical staff and their families, providedtheyarenotnationalsofthereceivingstate, enjoysimilarimmunities to diplomatic agents apart from the fact that their immunity from civil and administrative jurisdiction does not extend to acts performed outside the course of their duties.

Members of the service staff who are not nationals of the receiving state enjoy immunity in respect of acts performed in the course of their duties. Private servants who are not nationals of the receiving state only enjoy exemption from local taxation, unless there is specific agreement which extends their immunities.

The immunities granted to diplomatic personnel can be seen to be quite extensive although Article 41 provides that all persons enjoying such immunities are under a duty to respect the laws and regulations of the receiving state. Fromtimetotimeaparticularinstanceoflaw-breakingbyadiplomaticagent receives widespread publicity and there are calls for the immunities to be restricted. It is always possible for immunity to be waived by the sending state under Article 32 of the Vienna Convention. Furthermore, in cases of serious abuse of immunity it is possible for the receiving state to declare the diplomatic agent *persona non grata*.

Diplomatic communications

As has already been indicated, one of the functions of a diplomatic mission is to report on conditions and developments within the receiving state. This function can only be achieved if diplomatic staff enjoy a reasonable freedom of movement and communication. Article 26 of the Vienna Convention provides that all members of the diplomatic mission shall enjoy freedom of movement subject to restrictions imposed on grounds of national security.Article 24 provides that the archives and documents of the mission shall be inviolable. Perhaps the area of diplomatic law which has led to the greatest amount of debate concerns the diplomatic bag. Article 27 requires the receiving state to allow and protect freedom of communication for the mission and states that the official correspondence of the mission shall be inviolable. Paragraph 3 provides that 'the diplomatic bag shall not be opened or detained'. Apart from the requirement that the bag shall be externally marked and only used for diplomatic documents or articles intended for official use, there is no indication astowhatconstitutesthediplomaticbag.Inpracticethe'bag'hasrangedfrom a small package to collection of large crates. There have been allegations of the use of diplomatic bags to smuggle drugs and weapons. In 1964 a crate purporting to be an Egyptian diplomatic bag was opened at Rome airport and inside was found a bound and drugged Israeli. In 1984 a former Nigerian minister was kidnapped in London and placed in a crate. The crate was taken to Stansted Airport by a Nigerian diplomat, but since the crate did not itself contain any external diplomatic markings it was opened and Mr Dikkowas released.Anumberofstateshavesincearguedthatitispermissibletosubject the diplomatic bag to electronic or other similar screening, although this has not been universally accepted.

Consular immunity

The primary function of consulates, vice consulates, and consular posts is to represent and deal with nationals of the sending state. They enjoy certain immunities, but not as extensive as those enjoyed by diplomatic agents. The law relating to consular relations is contained in the Vienna Convention on Consular Relations 1963 which entered into force in 1967. Asinthecaseofdiplomaticrelations,consularrelationscanonlyexistby agreementbetweenthetwostatesandbyvirtueofArticle23oftheConvention it is possible for the receiving state to declarea consular official *persona non grata*. The Convention provides for the inviolability of the consular premises and the consular archives and documents. Consular staff are entitled to freedom of movement, subject to the requirements of national security, and to freedom of communication. Consular officials do not, however, enjoy complete immunity from the local criminal jurisdiction. Although they are not liable to arrest or detention, save in the case of a grave crime, they can be subjected to criminal proceedings. Their immunity from civil and administrative jurisdiction only extends to acts performed in the exercise of consular functions. Members of the consular staff's family do not enjoy significant immunities.

International organisations

International organisations operate in particular states and will often require the same immunities and privileges as diplomatic missions if they are to carry out theirfunctionseffectively.Unfortunatelythereisnogenerallawapplicableto the relations between international organisations and host states. Such immunities and privileges as particular international organisations enjoy must therefore be the subject of specific agreement between the organisation and the host state. Very often the privileges and immunities are provided for in the constituent charter of the organisation or in subsequent supplementary agreements. The position of the UN is dealt with in the Convention on the Privileges and Immunities of the UN 1946.

With the growth in the number of international organisations and the consequent increase in the number of agreements dealing with their immunities and privileges there has been some debate as to whether there exist any rules of

customary international law governing the matter. The Third Restatement of the Foreign Relations Law of the United States seems to suggest that there is, stating that international organisations are entitled to:
...suchprivilegesandimmunities asarenecessaryforthefulfilmentofthe purposesoftheorganisation, includingimmunityfromlegalprocessandfrom financialcontrols,taxesandduties.
However, the English courts in the*International Tin Council* cases (1987–89) took the view that customary international law gave no such entitlement to international organisations. The position does not seem to be clear and the subject is currently being examined by the ILC.

STATERESPONSIBILITY
A corollary of binding legal obligations is legal responsibility for a breach of those obligations. This sectionis concerned with the general rules ofinternational law which determine whether a state is in breach of itsinternationalobligations.

Theserulesareoftenreferredtoassecond-levelrules in that, while they seek to determine the consequences of a breach of a legal obligation, they do not concern themselves with the nature and content of that obligation. The obligation will be found in the law of the sea, the law of treaties etc.

However, in common with the majority of textbooks, reference will be made in this chapter to the particular content of the rules relating to the treatment of foreign nationals.

Fault
There has been some debate as to whether the responsibility of states for unlawful acts or omissions requires an element of fault or whether liability is strict. The ILC Draft Articles provide no assistance in the matter and there are a number of conflicting authorities. Brownliehas argued that the nature of liabilitywilldependontheprecisenatureoftheparticularobligationinissue and suggests that the discussions of the ILC tend to support this view.

Objectiveorriskresponsibility
Theviewthatseemstoattractmajoritysupportisthatanobjectivetestshould be applied to the actions of states. Provided that the acts complained of can be attributed to the state then it will be liable if those acts constitute a breach of international law regardless of any question of fault or intention. There are certain defences available but the burden of establishing them will be placed upon the defence once the fact of the breach of an obligation is established.

The most cited example of the objective test is to be found in the judgment of Verzijl in the *Caire Claim* (1929). Caire was a French national who was asked to obtain a largesumofmoneybyamajorintheMexicanarmy.Hewasunabletoobtain themoneyandwassubsequentlyarrested,torturedandkilledbythemajorand a number of soldiers. France successfully pursued a claim against the Mexican government which was heard by the French-Mexican Claims Commission.

The principal question for the Commission was whether Mexico could beresponsible for the actions of individual military personnel who were acting without orders and against the wishes of their commanding officer and independently of the needs and aims of the revolution. Verzijl gave support to the objective responsibility of the state according to which a state is responsible for the acts of its officials and organs even in the absence of any fault of its own. He continued by finding a state to be responsible:
... forallteactscommittedbyitsofficialsororganswhichconstituteoffencesfrom thepointof viewof thelawof nations,whethertheofficialor organin questionhas actedwithinorexceededthelimitsofhiscompetence... [providedthat]theymust haveactedatleasttoallappearancesascompetentofficialsororgans,ortheymusthaveusedpowersof methodsappropriateto theirofficialcapacity.

Similarly in the *Jessie* case (1921) the British-American Claims Arbitral Tribunal held the United States responsible for the action of its revenue officers who had boarded and searched a British ship on the high seas. The officers had acted in good faith, mistakenly believing that they were empowered to carry out the search by virtue of municipal law and an agreement between the UK and the USA. The tribunal laid down the principle that:
Anygovernmentisresponsibletoothergovernmentsforerrorsinjudgementof
itsofficialspurportingtoactwithinthescopeoftheirdutiesandvestedwithpowerstoenforcetheirdemands.

Subjectiveresponsibility
A number of writers, most notably HerschLauterpacht, have argued that the responsibility of states depended on some element of fault. Such fault is often expressedintermsofintentiontoharm(*dolus*)ornegligence(*culpa*).Anumber of cases are commonly cited to support the subjective view. The *Home MissionarySocietyClaim* (1920)arosefollowingarebellionintheBritish
protectorateofSierraLeone.Duringthecourseoftherebellionpropertybelonging to the Home Missionary Society was destroyed or damaged and a number of missionaries were killed. The US brought a claim on behalf of the Missionary Society against the UK. The tribunal dismissed the claim and noted that:

Itisawell-establishedprincipleofinternationallawthatnogovernmentcanbe heldresponsiblefortheactofrebelliousbodiesofmencommittedinviolationof itsauthority, whereitisitselfguiltyofnobreachofgoodfaith,orofnonegligenceinsuppressinginsurrection.
Those advocating the objective doctrine have argued that the *Home Missionary SocietyClaim*wasconcernedwithaspecificquestionofstateresponsibilityfor the acts of rebels (which is discussed at 9.3.3) and that the case cannot be used to establish a general rule.

Another case which has been cited in support of subjective responsibility is the*CorfuChannel(Merits)*case(1949).Thecasearosefollowingthesinkingby a mine of a British warship in Albanian territorial waters. The UK brought a claim against Albania arguing firstly that Albania itself had laid the mines. However,itadducedlittleevidenceonthispointanditsmainargumentwas thattheminescouldnothavebeenlaidwithouttheknowledgeorconnivanceof the Albanian authorities. The ICJ found that the laying of mines could not have been achieved without the knowledge of the Albanian government. This being so, Albania's failure to warn British naval vessels of the risk of mines gave rise to international responsibility. In the course of its judgment the Court stated that:
Itcannotbeconcludedfromtheme refactofthecontrolexercisedbyastateover itsterritoryandwatersthatthatstateknew,or oughtto haveknown,of any unlawfulactperpetratedtherein,noryetthatit necessarilyknew,orshouldhave known,theauthors.Thisfact,by itselfandapart fromothercircumstances, neitherinvolves*primafacie*responsibilitynorshiftstheburdenofproof.

Imputability
As has already been stated, international law is concerned with theresponsibility of international persons and in the main that will mean states. Because, ultimately, a state can act only through individuals, and individuals may act for reasons of their own distinct from the intentions of their state, it becomesnecessarytoknowwhichactionsofwhichpersonsmaybeattributed, or imputed, to the state. A state will only be liable for acts which can be attributed or imputed to it, it is not liable for all the private actions of its nationals.

Organsofthestate
Article 5 of Part I of the ILC Draft Articles provides that:
...conductofanystateorganhavingthatstatusundertheinternallawofthat stateshallbeconsideredas anactof thestateconcernedunderinternationallaw, providedthatorganwasactinginthatcapacityinthecaseinquestion and Article 6 states that:
Theconductofanorganofthestateshallbeconsideredasanactofthatstate underinternational law,whether thatorganbelongs totheconstituent, executive,judicialorotherpower,whetheritsfunctionsareofaninternationalor aninternalcharacterandwhetheritholdsasuperiororasubordinatepositionintheorganisationofthestate.
This reflects the customary law position that a state is liable for the actions of its agents and servants whatever their particular status. Thus, when, in July 1985, French secret agents sank the Greenpeace ship Rainbow Warrior, France became internationally liable and the tribunal was not concerned with the issue of whether this act of state terrorism was ordered at a high or low level within the French government (*Rainbow Warrior Arbitration* (1987)).

Article 7 extends responsibility to quasi-governmental organisations, iethose organs which, although not part of the formal structure of government, exercise elements of governmental authority, when they act in a governmental capacity.TheCommentarytotheDraftArticlesgivesasanexamplethecaseof a railway company to which certain police powers have been granted.

Where one state or an international organisation has made available its representatives to another state, as, for example, where it sends members of its medical agencies to assist in an epidemic or natural disaster, responsibility for their actions lies with the receiving state. This is often provided for in the agreementunderwhichsuchassistanceisgivenanditisalsoreflectedinArticle9oftheDraftArticles.TheCommentarytoArticle9 givesthespecificexample of the UK Privy Council acting as the highest court of appeals for New Zealand.

Individuals
Article 8 of the Draft Articles provides that:
Theconductofapersonoragroupofpersonsshallalsobeconsideredasanact ofthestateunderinternationallawif:
(a) itisestablishedthatsuchpersonorgroupofpersonswasinfactacting onbehalfofthatstate;or
(b) suchpersonor groupof personswasin factexercisingelementsof the governmental authorityintheabsenceofofficialauthorities andin circumstanceswhichjustifiedtheexerciseofthoseelementsofauthority.
In the *US Diplomatic and Consular Staff in Tehran*case (1980),[24]the ICJ considered the status of the students who initially took possession of the US Embassy in Tehran:
Nosuggestionhasbeenmadethatthemilitants,whentheyexecutedtheirattack ontheEmbassy,hadanyformofofficialstatusasrecognised'agents'ororgans oftheIranianstate.Theirconductinmounting theattack,overrunning the Embassyandseizingits inmatesas hostagescannot,therefore,be regardedas imputabletothatstateonthatbasis... Theirconductmightbeconsideredasitself directlyimputabletotheIranianstateonlyifitwereestablishedthat,infact,on theoccasionin

questionthemilitantsactedonbehalfof thestate,havingbeen chargedby somecompetentorganoftheIranianstatetocarryouta specific operation.

UltraVires *acts*

The mere fact that a state organ or official acts outside municipal law or express authority does not automatically mean that a state will not be responsible for their actions. Article 10 of Part I of the Draft Articles provides that:

The conduct of an organ of a state, of a territorial government entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the state under international law even if, in the particular case, the organ exceeded its competence according to international law or contravened instructions concerning its activity.

An act may be attributed to a state even where it is beyond the legal capacity of the official involved, providing, as Verzijl noted in the *Caire Claim*, that the officials'haveactedatleasttoallappearancesascompetentofficialsororgans or ... have used powers or methods appropriate to their official capacity'. In the words of the Commentary to the ILC Draft Articles, 'the state cannot take refuge behind the notion that, according to the provisions of its legal system, those

Actions or omissions ought not to have occurred or ought to have taken a different form'.

In the *Union Bridge Company Claim* (1924) a British government official wrongly appropriated neutral property during the Boer War. The arbitration tribunal held Britain liable and commented:

That liability is not affected either by the fact that[the official appropriated the property]under a mistake as to the character and ownership of the material or that it was a time of pressure and confusion caused by war, or by the fact, which, on the evidence, must be admitted, that there was no intention on the part of the British authorities to appropriate the material in question.

Insurrectionaries

Article 11 of the Draft Articles makes it clear that the conduct of a person or persons not acting on behalf of the state will not be considered as an act of the state under international law. It therefore follows that the actions of rebels and insurrectionaries will not normally be considered as acts of the state and this is provided for in Article 14. However, the state is required to show due diligence, and may be liable if it has provided insufficient protection for aliens (the special protections for diplomatic and consular staff should be noted in this context).

Where an insurrectionary movement is successful and the revolutionaries take over the government, the new government will be liable for the actions of the in surrectionaries before they took power. In the *Bolivar Railway Company Claim* (1903) the tribunal held Venezuela liable for the acts of successful revolutionaries committed before they had taken power. The conclusion was justified on the grounds that:

Nations do not die when there is a change of their rulers or in their forms of government ...The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented *abinitio*a changing national will, crystallising in the finally successful result...success demonstrates that from the beginning it was registering the national will.

International crimes

A distinction is sometimes drawn between international crimes and international delicts.Article19 of PartI of the ILC Draft Articles provides that all breaches of international obligations are internationally wrongful acts. But an internationally wrongful act which results from the breach by a state of 'an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole' constitutes an international crime. All other wrongful acts are international delicts. Article 19(3) lists some examples of specific international crimes:

- serious breaches of the law on peace and security;
- serious breaches of the right to self-determination;
- serious breaches of international duties on safeguarding the human being

(eg slavery, genocide, apartheid);

- serious breaches of obligations to protect the environment.

The Commentary to the Draft Articles makes clear that an international crime is not the same as a crime at international law. It is states who are responsible for international crimes, whilst individuals bear responsibility for crimes at international law.

Principle of the Peaceful Settlement of Disputes between States under the Charter of the United Nations

The Charter of the United Nations provides in its Chapter I (Purposes and Principles)that the Purposes of the United Nations are:

Tomainta in international peace and security, and to that end, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means ,and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace (Article1,para1).

The Charter also provides in the same Chapter that the Organisation and its Members, in pursuit of the Purposes stated in Article1,shallactinaccordance with, among others, the following principle: 'All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered' (Article2,para3).It furthermore, in Chapter VI(Pacific Settlement of Disputes),states that:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, firs to fall, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice(Article33,para1).

Declarations and Resolutions of the General Assembly

The principle of the peaceful settlement of disputes has been reaffirmed in a number of General Assembly Resolutions, including Resolutions 2627(XXV)of24October1970,2734(XXV)of16 December1970 and40/9of8November1985. It is dealt with comprehensively in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations(Resolution2625(XXV),annex),in the sectionentitled'Theprinciplethatstatesshallsettletheirinternationaldisputes by peaceful means in such a manner that international peace and security and justice are not endangered', as well as in the Manila Declaration on the Peaceful Settlement of International Disputes (Resolution 37/10,annex), in the Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this field(Resolution43/51, annex)and in the Declaration on Fact- finding by the United Nations in the Field of the Maintenance of International Peace and Security(Resolution46/59,annex).

Corollary and related principles

The principle of the peaceful settlement of international disputes is linked to various other principles of international law. It may be recalled in this connection that under the Declaration on Friendly Relations, the principles dealt with in the Declaration– namely, the principle that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner in consistent with the purposes of the United Nations; the principle that states shall settle their international disputes by peaceful means in such a manner that international peace andsecurityandjusticearenotendangered;theprincipleconcerningthedutynot to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter; the duty of states to co-operate with one another in accordance with the Charter; the principle of equal rights and self-determination of peoples; the principle of sovereign equality of states; and the principle that states shall fulfil in good faith the obligations assumed by them in accordance with the Charter– are interrelated in their interpretation and application and each principle should be construed in the context of other principles.

The Final Act of the Conference on Security and Co-operation in Europe, adoptedatHelsinkion1 August1975,statesthatalltheprinciplessetforthinthe Declaration on Principles Guiding Relations between Participating states–ie, sovereign equality ,respect for the rights inherent in sovereignty; refraining from the threat or use of force; inviolability of frontiers; territorial integrity of states; peaceful settlement of disputes; non-intervention in internal affairs; respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief; equal rights and self-determination of peoples; co- operation among states; and fulfilment in good faith of obligations under international law–'are of primary significance and, accordingly, they will be equally and unreservedly applied, each of them being interpreted taking in to account the others.'

The links between the principle of the peaceful settlement of disputes and other specific principles of international law are highlighted both in the Friendly Relations Declaration and in the Manila Declaration as follows:

Principle of non-use of force in international relations

The inter relation between this principle and the principle of peaceful settlement of disputes is highlighted in the fourth preamble paragraph of the Manila Declaration and is also referred to in sectionI,para13,thereof,under which neither the existence of a dispute nor the failure of a procedure of peaceful settlement of disputes shall permit the use of force or threat or force by any of the states parties to the dispute.

The links between the principle of peaceful settlement of disputes and the principle of non-use of force are also highlighted in a number of other international instruments, including the 1945 Pact of the League of Arab States (art5),the 1948 American Treaty on Pacific Settlemen t(Pact of Bogota)(artI),the1947 Inter-American Treaty of Reciprocal Assistance (arts1and2) and the last paragraph of section II of the Declaration on Principles Guiding Relations between Participating states contained in the Final Act of the Conference on Security and Co-operation in Europe.

Principle of non-intervention in the internal or external affairs of states

The inter relation between this principle and the principle of the peaceful settlement of disputes is highlighted in the fifth preambular paragraph of the Manila Declaration. The links between the principle of peaceful settlement of disputes and the principle of non-intervention areal so highlighted in Article V ofthe1948Pactof Bogota.

Principle of equal rights and self-determination of peoples

The links between this principle and the principle of peaceful settlement of disputes are highlighted in the Manila Declaration which

(1)reaffirms in its eighth preambular paragraph the principle of equal rights and self-determination as enshrined in the Charter and referred to in the Friendly Relations Declaration and in other relevant Resolutions of the General Assembly;

(2)stresses in its ninth preambular paragraph the need for all states to desist from any forcible action which deprives peoples, particularly peoples under colonial and racist regimes or other forms of alien domination, of their in alien able right to self- determination, freedom and independence;

(3)refers in section I, para12,to the possibility for parties to a dispute to have recourse to the procedures mentioned in the

Declaration 'in order to facilitate the exercise by the peoples concerned of the right to self-determination ';and (4)declares in its pen ultimate paragraph that'nothing in the present Declaration could in anyway prejudice the right to self- determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations, particularly peoples under colonial or racist regimes or other forms of alien domination; nor the right of these peoples t o struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration'.

Principle of the sovereign equality of state

The links between this principle and the principle of the peaceful settlement of disputes are highlighted in the fifth paragraph of the relevant section of the Friendly Relations Declaration which provides that 'International disputes shall be settled on the basis of the sovereign equality of states'as well as in section I, para3 of the Manila Declaration.

Principles of international law concerning the sovereignty, independence and territorial integrity of states

Paragraph 4 of section I of the Manila Declaration enunciates the duty of states parties to a dispute to continue to observe in their mutual relations their obligations under the fundamental principles of international law concerning the sovereignty, independence and territorial integrity of states.

Good faith in international relations

The Manila Declaration enunciates in its sectionI, para1,the dutyof states to'act in good faith', with a view to avoiding disputes among themselves likely to affect friendly relations among states. Other references to good faith are to be found in para5,under which good faith and a spirit of co-operation are to guide states in their search for an early and equitable settlement of their disputes;in para11,which provides that states shall in accordance with international law implement in good faith all the provisions of agreements concluded by them for the settlement of their disputes; in para 2 of section II, under which Member states shall fulfil in good faith the obligations assumed by them in accordance with the Charter of the United Nations; and in one of the concluding paragraphs of the declaration, whereby the General Assembly urges all states to observe and promote in good faith the provisions of the declaration in the peaceful settlement of their international disputes.

Aprovisionsimilartopara5 of section I of the Manila Declaration is to be found in the third paragraph of section V of the Declaration on Principles Guiding Relations between Participating states contained in the Final Act of the Conference on Security and Co-operation in Europe.

Principles of justice and international law

The 'principles of international law'are mentioned together with the principlesofjusticeinArticle1,para1oftheCharterunderwhichoneofthepurposesof the United Nations is 'to bring about, by peaceful means, and in conformity with the principles of justice and international law, adjust mentor settlement of international disputes or situations which might lead to a breach of the peace'.The principles of international law areal so mentioned jointly with the principlesofjusticeinsectionI,para3oftheManilaDeclarationunderwhich'international disputes shall be settled on the basis of the sovereign equality of states and in accordance with the principle of free choice of means in conformity with obligations under the Charter of the United Nations and with the principles of justice and international law'.

Paragraph 4 of section I of the Manila Declaration provides that 'States Parties to a dispute shall continue to observe in their mutual relations ... generally recognised principles and rules of contemporary international law'.

'Justice'isreferredtoinArticle2, para3, of the Charter and in the first paragraph of the relevant section of the Friendly Relations Declaration, both of which provide for the settlement of international disputes'by peaceful means in such a manner that international peace and security and justice are not endangered'.

The peaceful methods of international dispute settlement that exist can be dividedintodiplomaticandlegalsettlement.Legalsettlementreferstomodes of dispute settlement which result in binding decisions and will involve either arbitration or judicial settlement. The following can be identified as forms of diplomatic settlement:

- negotiation and consultation;
- good offices;
- mediation;
- conciliation;
- inquiry.

Negotiation and consultation

Negotiation is by far the most popular means of dispute settlement and consists of discussions between the interested parties. It is distinguished from other diplomatic means of settlement in that there is no third party involvement. Negotiations are normally conducted through 'normal diplomatic channels' (foreign

ministers,ambassadors,etc),althoughsomestateshavesetupsemi- permanent 'mixed commissions' consisting of an equal number of representatives of both parties which can deal with disputes as and when they arise, for example the Canadian-US Joint Commission. Negotiation is used to try and prevent disputes arising in the first place and will also often be used at the start of other dispute Resolution procedures. In the *Mavrommatis Palestine Concessions(Jurisdiction)*case(1924)the PCIJ indicated that negotiation should be a preliminary to bringing a case before the Court in order that the subject matter of a dispute be clearly defined. Inthe *Free Zonesof UpperSavoy* case (1932) the PCIJ stated that:

Before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by diplomatic negotiations. It is clear that states are under a general obligation to negotiate in good faith:
The parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation of a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.

Good offices
'Good offices' involves the involvement of a third party, with the consent of the states in dispute, to help them establish direct contacts or to take up negotiations. The person providing the 'good offices' will usually be a neutral party who is trusted by both sides.The UN Secretary General is often used in this role to facilitate communication between contending parties,andhemay, on behalf of a concerned international community, play an active role in encouraging negotiations and promoting a successful outcome.

Mediation
Whereas in good offices the third party is doing little more than providing a channel for communication, in mediation the third party plays a more active role by offering advice and proposals for a solution of the dispute. In practice it is often hard to establish a clear distinction between the two. What may begin as provision of good offices may end up as mediation.

Conciliation
Conciliation also involves the use of third parties, but the third party plays a more detached role. Rather than becoming involved in the negotiations, the conciliator will investigate the dispute and present formal proposals for a solution. Conciliation is often undertaken by a commission of conciliation acting as a formal body. In 1922 the League of Nations adopted a Resolution encouraging states to submit their disputes to conciliation commissions which would undertake both a mediation and an inquiry role.

Inquiry
Inquiries prove useful where a dispute is largely concerned with issues of fact. The need for some independent inquiry procedures was illustrated by events leading to the Spanish-American War of 1898. In February 1898 a US warship, at anchor in Cuba, was destroyed by an explosion which killed large numbers of US sailors. Relations between Spain and the US were already strained and the US quickly blamed Spain for the explosion. Spain held a commission of inquiry which found that the explosion was caused by factors present on the ship whilst a US inquiry found that the ship had been destroyed by a mine. The conflicting findings of the two inquiries only served to exacerbate the situation.

Arbitration
The1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes described the object of international arbitration as the settlement of disputes between states by judges chosen by the parties themselves and on the basis of respect for law. They further provided that recourse to the procedure implied submission in good faith to the award of the tribunal. Accordingly, one of the basic characteristics of arbitration is that it is a procedure which results in binding decisions up on the parties to the dispute.

The power to render binding decisions is, therefore, a characteristic which arbitration shares with the method of judicial settlement by international courts whose judgments are not only binding but also, as in the case of the International Court of Justice, final and without appeal, as indicated in Article 60 of the ICJ Statute. Forth is reason arbitration and judicial settlement are both usually referred to as compulsory means of settlement of disputes.

Judicial settlement
By judicial settlement is meant a settlement brought about by a properly constituted international judicial tribunal, applying rules of law. The most well known of the international judicial tribunals is the International Court of Justice. There are also a number of regional international tribunals and also tribunals with jurisdiction over particular disputes. For example, the Law of the Sea Convention 1982 provides arrangements for the establishment of an International Tribunal for the Law of the Sea and the Sea Bed Disputes Chamber for dealing with disputes arising from the Convention. There is no absolute distinction between arbitration and judicial settlement, although judicial settlement generally involves reference of the dispute to a permanent tribunal which applies fixed rules of procedure.

The World Court

The World Court refers to both the Permanent Court of International Justice (PCIJ) and its successor, the International Court of Justice (ICJ).The PCIJ sat for the first time in the Hague on 15 February1922 and between 1922 and 1939 it dealt with 79 cases. The PCIJ was dissolved together with the League of Nations in April1946. It was succeeded by the ICJ which is the principal judicial organ of the UN. The ICJ is an integral part of the UN established under Article 92 of the UN Charter. The Statute of the ICJ, which broadly follows the text of the Statute of the PCIJ, contains the basic rules of the Court which are supplemented by the Rules of the Court adopted bythe court under Article 30. The present rules were adopted on 14 April 1978 and represent a major revision of the original 1946 rules. The Rules govern the procedure of the Court.

Jurisdiction of the Court

Jurisdiction in contentious cases

Article 34 of the Statute of the Court declares that only states may be parties before the ICJ and the court is open to all members of the UN (who are automatically parties to the Statute). states which are not UN members may become parties to the Statute on conditions set by the UN General Assembly (Article 93 of the UN Charter) and two states, Switzerland and Nauru, have taken advantage of this provision. Access to the Court is also available to non-parties to the Statute if they lodge a declaration with the court accepting the obligations of the Statute and Article 94 of the UN Charter. Declarations can be particular to a particular dispute, or they can be general.

In contentious cases, in principle, the exercise of the court's jurisdiction is conditional on the consent of the parties to the dispute. This was confirmed in the separate opinion of Judge Lauterpach tgiven in the *Case Concerning the Application of the Genocide Convention* (1993) where he stated:

The Court can only act in a case if the parties, both applicant and respondent, have conferred jurisdiction upon it by some voluntary act of consent...and he indicated that consent could be given in one of three ways:

(i) under the provisions of a treaty;

(ii)by acceptance of the court's compulsory jurisdiction under Article36(2) of the Statute;

(iii)by acceptance of jurisdiction by the respondent through its conduct following the unilateral initiation of proceedings by the applicant.

A joint decision to make reference to the court will usually be drawn up in a special agreement (*compromis*). A unilateral reference by one state will be sufficient to vest the court with jurisdiction if the other state subsequently consents under the doctrine known as *forum prorogatum*. Such a situation arose in the *Corfu Channel* case (1947). If there is no consent, then the court cannot hear the case. Nor can the court hear a case in the absence of a materially interested state.

Incidental jurisdiction

The ICJ may be called upon to exercise an incidental jurisdiction, independently of the main case: hearing preliminary objections, applications to intervene, and taking interim measures.

Preliminary objections: often, before it looks at the merits of the case, the Court will be asked to consider objections to jurisdiction. These jurisdictional issues are decided first. As has already been stated, it is the Court itself which has authority to settle disputes about jurisdiction by virtue of Article 36(6) of the Statute of the ICJ. *Intervention*:a state not a party to the dispute may intervene under Article 62 and 63 of the Statute if it considers it has an interest in the case and it is for the ICJ to decide as a preliminary matter whether or not such an interest exists. In The *Continental Shelf*case (1982) the Court rejected Malta's application to intervene. While Malta did have an interest similar to other states in the area in the case in question, the Court said that in order to intervene under Article 62 it had to have an interest of a legal nature which may be affected by the Court's decision in the instant case. In the *Land, Island and Maritime Frontier* case (1992) the ICJ gave permission to Nicaragua to intervene in the dispute between Honduras and El Salvador. In doing so it suggested a number of general principles which would apply with regard to any application to intervene. First, the intervening state has the burden of proving it has an interest of a legal nature which may, rather than will, be affected by the dispute. Secondly, the court can grant permission to intervene even if one or both of the other parties object. Thirdly, if permission is granted, the intervening state does not become a party to the dispute and no binding determination of its rights will occur. The purpose of intervention is to allow the intervening state to remind the Court of rights that may be affected by Resolution of the dispute between the two parties.

Interim measures: under Article 41 of the Statute the Court may grant provisional measures of protection in order to preserve the respective rights of the parties. These are awarded to assist the Court to ensure the integrity of the proceedings and are not to be regarded as judgments on the merits of the case. Interim measures have been awarded in a number of cases but compliance with such orders has been poor. In making interim indications, which are heard first, the court has to be satisfied that there is a *primafacie* basis for jurisdiction. In the *Lockerbie*case (1992) the ICJ refused Libya's requests for interim measures of protection from the use of sanctions and possible use of force against it. The principal ground for refusal was that the sanctions and possible use of force were being affected by a UN Security Council Resolution and the Court drew back at the interim stage from ruling such a Resolution *ultravires*. The Court was therefore unable to find that there was a risk of Libya's interests in the case suffering irreparable damage. The Court was also required to consider the effect of a conflict between treaty obligations and Security Council Resolutions and Judge Lachs, in a separate

opinion, expressly stated his view that treaty obligations could be over ridden by Resolutions passed by the Security Council. It seems likely that when the court considers the merits of the case it will have to consider the relationship between itself and other organs of the UN and the extent to which it can rule on the validity of Resolutions passed under provisions of the UN Charter.

Use of Force

The definition of force

It can immediately be noted that Article2 (4) is not concerned with outlawing 'war' but prohibits the use of'force'. The problem is then to define what is meant by'force'.Use of armed force is certainly covered, but the position as regards threats or action short of actual use of armed force is less clear. There has been dispute as to whether only armed force should be covered or whether the prohibition should extend to economic force .In the *travauxpréparatoires* of the UN Charter Brazil proposed that a prohibition on the use of economic force should be included in Article 2(4). The proposal was rejected although the significance of the rejection is disputed, some writers arguing that it indicated a desire not to outlaw economic force, others suggesting that the proposal was rejected because 'force' would encompass all forms of force including economic force. No further definition was provided by the 1970 Declaration, although the section dealing with the prohibition on intervention in the domestic affairs of foreign states provides that:

No state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.

There is also some argument over whether Article 2(4) is absolute in its prohibition on the use of force or whether it only prohibits force directed against territorial integrity, political independence or force that is contrary to the purposes of the UN.

Brownlie argues that territorial integrity and political independence constitute the sum total of legal rights which a state has, and thus all force is prohibited unless specifically allowed by the UN Charter. This view is often referred to as the *restrictive view of force*. But others, for example Bowett, argue for a *permissive view of force*, suggesting that the use of force which does not result in the loss or permanent occupation of territory, does not compromise a state's ability to make independent decisions and which is not contrary to the purposes of the United Nations is not unlawful. state practice since 1945 would appear to favour the restrictive view and no state has relied solely upon the permissive view to justify its use of force. In the *Corfu Channel* case (1949) the UK sought to argue that its mine-sweeping operation in Albanian territorial waters was not unlawful since it did not threaten the territorial integrity or political independence of Albania, but the argument was rejected by the ICJ.

The justifications for the unilateral use of force

Self-defence

Although Article 2(4) of the UN Charter prohibits the use of force, the prohibition has to be read in the light of Article 51 which states that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

The UN Charter is intended to provide a water tight scheme for the contemporary reality on the use of force. Article 2(4) explains what is prohibited, Article51what is permitted. But almost every phrase in Article 2(4) and Article 51is open to more than one interpretation. Further, what happens if Articles 2 (4) and 51 are not in fact a water tight system, are not entirely opposite sides of the same coin? Can there be, for example, a use of force that is *not* against the territorial integrity or political independence of a state (and thus not, on the face of it,violative of Article2(4))– but is also not individual or collective self-defence (and thus manifestly permitted under Article51)?It is unlikely–most uses of force, no matter how brief, limited or transitory, do violate a state's territorial integrity. A simple aerial military incursion will do so. So,too,will an attempt to exercise self-help even if in international straits. Self-help is the use of force to obtain legal rights improperly denied. In the *Corfu Channel* case the United Kingdom engaged in mine-sweeping in the Corfu Straits(an international straitbutal so Albanian territorial waters)in order to make effective its legal right to free passage. The Court found such action unlawful –the action violated Albanian territorial sovereignty and legal rights were not to be vindicated through the manifestation of a policy of force.Clearly, if a crisis can be avoided by diplomatic representations, or if the'danger'is so remote as to be nothing more than a feeling or suspicion,self-defence is not justified. Similarly, an attack on a naval vessel cannot be used as an excuse for a full-scale occupation of the territory of the offending state, for this would not be a proportionate response. However if these flexible conditions are satisfied, the customary right of self-defence permits the use of force in any of the following circumstances:

(a) force is lawful in self-defence against an ongoing armed attack against state territory;

(b) force is lawful in anticipatory self-defence, so that a state may strike first, with force, to neutralise an immediate but potential threat to its security;

(c) Force is lawful in self-defence in response to an attack (threatened or actual) against state interests, such as territory, nationals, property and rights guaranteed under international law. If any such interests are threatened, then the state may use force to protect them;

(d) force is lawful in self-defence even if the'attack'doesnot it self involve measures of armed force, such as economic aggression and propaganda. All that is required is that there is an instant and overwhelming necessity for forceful action.

It can be seen that the customary right of self-defence is not a narrow exception to the general ban on use of force. It allows the use of force in a variety of situations, so long as there is some element of 'defence' of the 'state'. Importantly, customary self-defence may go beyond the right guaranteed by the Charter and for this reason it is important to determine whether customary self- defence has survived the Charter. In many of the recent examples of the use of force, the invasion of Grenadain 1983 by the US, the bombing of Libya by the US in 1986 and the destruction of the Iraqi nuclear reactor at Osarik by the Israeli airforce in 1981, the customary right of self-defence has been in part used as a justification by the state resorting to force.

Invitation and civil wars

In traditional international law it was quite clear that the principle *volentinonfit injury* applied to the effect that a state was free to allow another to use force in any form in its own territory. The question arises as to whether the principle survives the UN Charter. In other words, is consent one of the exceptions to the prohibition on use of force? There seems little doubt from state practice and interpreting Article 51 that international law permits states to use armed force to assist another state to assert its rights to self-defence if an express request is made. Thus Kuwait was able to ask for assistance from outside states in asserting its rights to self-defence against Iraq. The only rationale for such organisations as NATO is that an attack on one member state constitutes an attack on all members.

The more problematic area is where armed assistance is requested by a state in the putting down of an internal insurrection. A large number of states have argued that use of armed force is legitimate if requested by a government even if it is to put down an insurrection. In 1958, the UK sent troops to Jordan to assist the Jordanian government to put down a rebellion. However, a number of writers have argued that international law has been gradually restricting such rights of intervention. First, it was not always easy to be certain that assistance had genuinely been asked for, and secondly, where intervention resulted in armed force being used against an insurrection which had widespread popular support, there were possible conflicts with rights of self-determination. Examples of intervention besides the Jordanian illustration are: USSR interventions in Hungary (1956), Czechoslovakia (1968), Afghanistan (1979); USA intervention in Lebanon (1958), in the Dominican Republic (1965) and Grenada (1983).

Arend and Beckin their study of the use of force suggest that the following four types of internal unrest can be identified and distinguished, each of which will give rise to different rights of foreign intervention:

Low Intensity Unrest: this is the least serious form of internal conflict and would be characterised by scattered riots or limited terrorist action. Organised opposition groups may exist but the objectively viewed purpose of such groups would not be the complete overthrow of the state.

Civil War: a civil war is characterised by the existence of a group or groups that seeking to overthrow the existing government and establish themselves in its place. The classic example would be the Spanish Civil War of the 1930s and more recent examples are provided by Afghanistan, Iran and Sri Lanka. In the case of civil wars a further distinction is often drawn between a state of Insurgency and a state of be lligerency.The distinction is principally based on the degree of recognition accorded to the rebels. A situation of insurgency exists when the rebels have received little international recognition and becomes a state of belligerency when it is acknowledged that both rebels and government have a similar degree of legitimacy and exercise a similar degree of authority over the population of the territory. Such a situation may well give rise to recognition of separate *de facto* and *de jure* governments.

Wars of Secession: such wars occur when a particular ethnic, religious or racial group seeks to break away and form a new separate state. The two main examples of a war of secession are the Biafran war in the late 1960s and the Bangladesh war in 1971. To some extent recent events in former Yugoslavia have had the characteristics of a war of secession.

Wars of Unification: such wars may be characterised as double wars of secession. They arise where a particular group lays claim to an area of territory which crosses international borders. The particular group wishes to unite to form its own new state. The principal examples of potential wars of unification are provided by the situation of the Kurds (who at present live in Turkey, Iraq and Iran) and the Armenians (who live in Iran and the territory of the former USSR).

Protection of nationals and property abroad

On several occasions since the Second World War states have used armed force without the consent of the territorial state to protect their nationals and property in danger in the foreign territory. One of the earliest examples is the Anglo-French invasion of Egypt in 1956. UK and French troops occupied positions along the Suez Canal. France did not seek to justify its actions on the basis of a right to protect nationals abroad, but the UK government repeatedly asserted that nothing in the UN Charter abrogated the right of governments to use force to protect the lives of nationals abroad. In the debate in the House of Lords that followed the invasion the Lord Chancellor, Viscount Kilmuir, argued that the right to protect nationals abroad was an extension of the right of self- defence stating:

Self-defence undoubtedly includes a situation in which the lives of a state's nationals abroad are threatened and it is necessary to intervene on that territory for their protection.

Viscount Kilmuir then set down three conditions for the use of such protective action to be legitimate:

(1) the nationals must be in imminent danger of injury;
(2) there must be a failure or inability on the part of the territorial sovereign to protect the nationals in question;
(3) the measures taken must be strictly limited to the object of protecting the nationals against injury.

The invasion was heavily criticised by other states and in fact in the UN debates which followed, the UK relied little on a right to protect nationals and instead sought to justify the action on the basis of the need to safeguard international navigation through the Canal.

Humanitarian intervention

Humanitarian intervention can be distinguished from action taken to protect nationals in that it applies to action taken to protect non-nationals. As has already been seen the distinction is not always a clear one in practice and states often claim to be protecting both their own and other nationals when intervening in foreign states. The topic being discussed here must also be distinguished from humanitarian intervention authorised by the organs of the UN which will be discussed at 14.6.3. What is to be discussed here is the situation where a state or group of states use armed force to protect the inhabitants of the target state from large-scale human rights violations.

There are a number of cases where states have partly justified their use of force on the grounds of humanitarian intervention. The most cited example is India's invasion of East Pakistan in December 1971.

Self-determination

The use of force to achieve self-determination and for the assistance of national liberation movements has increasingly been claimed as legitimate in recent years, on the ground that it furthers the principles of the UN Charter.

The issue may arise in three ways. First, may the colonial power use force to suppress self-determination movements? This would seem to be unlawful being contrary to customary and to Charter law. According to the Declaration of Principles of International Law, 'every state has the duty to refrain from any forcible action which deprives peoples of their right to self-determination and freedom and independence'. Similarly, Article 2(4) prohibits the use of force in any manner inconsistent with the purposes of the UN and this may have been designed specifically to protect peoples who have not yet achieved statehood.

Secondly, may national liberation movements use force to overthrow the colonial power and thereby achieve self-determination? This is more problematic, although many developing countries argue that such a right is implicit in the Declaration on Principles of International Law. Generally speaking the use of force within a state will remain an internal matter and will

Thus not be a concern of international law, although as will be seen in Chapter15, there are now rules of international law governing the actual conduct of hostilities in non-international conflicts.

Thirdly, can an established state use force to assist a national liberation movement in its fight for self-determination, as was partly claimed by India in respect of its invasion of East Pakistan. Once again, several states have argued that the obligation in Article 2(4) does not prohibit force for this beneficial purpose and further that it is implicitly recognised in a number of UN resolutions. Yet, as has already been seen at14.5.2 and14.5.4,if the struggle for self-determination is an internal affair states are generally under a duty not to intervene.