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*For Matty, Clea, and Jessica
(15 August 1995 – 19 March 2015) who took her
life to another universe during the final
phases of this book*
Hennie Strydom

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Preface

This book was conceived and completed during a time of major developments in international affairs, all of which underscore the relevance of international law for an orderly coexistence of states and the conducting of international relations in accordance with the rule of law. In North Africa and the Middle East, ongoing armed conflict, civil strife, random violence and terrorism have caused and are still causing unimaginable destruction to livelihoods and life-supporting infrastructure amid the senseless killing of civilians. In Europe, political leaders are frantically trying to find solutions for thousands of desperate refugees and migrants seeking a life free from fear and want. In Africa, old conflicts – most notably in Sudan, Somalia and the DRC – remain unsolved, while new ones in Burundi, the Central African Republic and Nigeria present significant challenges to the ability of the African Union to execute its peace and security mandate successfully. And on the Korean Peninsula, tensions between North and South Korea have again seized the attention of the international community.

Other developments making international headlines have included the historic deal the United States and other world leaders reached with Iran to prevent the Islamic Republic from pursuing a nuclear weapons programme; the rising tension on a global climate agreement while states are preparing for the 21st UN Conference on Climate Change during November/December 2015 in Paris; and the renewed controversies about the exercise of universal jurisdiction for mass atrocities involving sitting heads of state, which have also made headlines in South Africa in legal proceedings on the Al Bashir matter. Those who follow the debates on these matters will have noticed that states and commentators always rely on international law in defence of a certain position or cause of action; they do not choose to denounce the existence of international law.

In conceptualising this volume and in determining the scope of the contents for the different chapters, it was our aim to provide sufficient knowledge for readers to place world events in their international law context and to find and apply, where relevant, the applicable national law component of a subject matter that has a domestic element as well. Our targeted readership includes students, practitioners, judges, international law scholars, and other readers of the subject. We have done our utmost to ensure that the most recent legal developments are accounted for in the text. As far as relevant South African law developments are concerned, we have made the required references but we still want to defer to John Dugard's seminal work, *International Law: A South African Perspective* 4th ed (2011). In this context, we also want to mention another recent contribution by TW Bennett and J Strug, *Introduction to International Law* (2013).

The structure of the book aims to bring more coherence to this body of law and to prevent the separation or fragmentation of themes that belong together. The golden thread that runs through Part I is the significance of the rise of the modern state in creating the conditions for the development of international law as a legal discipline, and in explaining how international law is made. Historical material is covered more extensively in Part I than is usually the case and is motivated by the belief that, to be properly educated in the subject, an historical consciousness is essential. The reader will also find more critical reflection on the role of colonialism in the West's interpretation and application of international law in this Part.

Part II covers topics that are core to understanding the foundational principles of international law and how they are enforced. The standard approach in textbooks is to deal with these subject matters much later in the text. In our view, students need to familiarise themselves with these elements before they are confronted with issues such as jurisdiction, immunity, extradition and international human rights law. We are also of the opinion that the contents of Part II have a logical

connection with the contents of Part I and logically precede the contents of the chapters that follow in Parts III and IV.

The reader will also note that issues such as sustainable development and the legal protection of the environment are dealt with fairly extensively in Part IV. The reasons for this are two-fold. First, in international affairs and in legal development, these issues now rank in importance with peace and security, and the international protection of human rights, and form an interconnected whole when considering the international law of human security. Secondly, they have a specific relevance for the developing world and even more notably for Africa. In essence, they also form part of the concerns relating to factors that threaten the existence and livelihoods of human beings the world over. This should explain the selection and grouping of the chapters under Part IV.

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Professor Gus Waschefort, LLB (Pretoria), PhD (London), Associate Professor in the Department of Public, Constitutional and International Law, University of South Africa, and Co-Editor-in-Chief: South African Yearbook of International Law, for his authorship of the ancillary teaching materials that augment this book.

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[Figure 12.3](#) The distinctive marking (in blue and white) of cultural property under the Hague Convention

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PART ONE

Interstate relations: origins, development and international law making

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Chapter 1

Defining epochs

HENNIE STRYDOM AND CHRISTOPHER GEVERS

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1.1 Introduction

It is generally agreed that the term ‘international law’ was invented by British philosopher Jeremy Bentham in his famous book, *An Introduction to the Principles of Morals and Legislation* (1789). For Bentham, this branch of the law applied exclusively to the relations between states and it became established as such in the nineteenth century, replacing the older concept of the law of nations.¹ Following this development, most writers of our time still use the term to describe a legal order that regulates the external relations between states. States are therefore the main subjects of international law and their relations may be bilateral (one state to another) or multilateral (several states co-operating with one another under a multilateral treaty, or as members of an international organisation).

The development of international human rights law after World War II (by way of multilateral treaties)² has caused some writers to argue that individuals have also become subjects of international law. However, such a conclusion must be adopted with caution. The fact that the protection of human rights is taken up in an international law instrument (such as a treaty) does not change the nature of the legal relationship between the state and the individual whose rights are protected. Put differently, the protection of human rights in the substantive sense of the word (as opposed to the formal source of the rights – in this instance, the treaty) remains a public law matter in national law (the domestic law of the state). The protection of human rights therefore remains a part of the government/individual relationship. Thus, even in claiming protection under a human rights treaty, the individual can only do so as a legal subject in national law.

As a concept, ‘international law’ more correctly refers to ‘public international law’, which is often used in the titles of international law textbooks. This distinguishes the subject from ‘private international law’, also known as ‘conflict of laws’. The latter forms part of the national law of a state for resolving conflicting legal positions involving the private law of different countries as it applies to the relationships between individuals. Thus, when we speak of ‘international law’ in this volume, we have ‘public international law’ in mind.

At this point, it must be clear that the whole body of international law operates in a world of sovereign, independent states; and the purpose of the international legal order is to define and delimit the respective spheres within which each of the states is entitled to exercise its authority and defend its interests. Although there are voices that oppose such a state-centred view of the international legal system, there is no convincing alternative analysis. Consequently, there is still much force in Koskenniemi’s argument that ‘no alternative to statehood has emerged’ and that:

[n]one of the normative directions – human rights, economic or environmental values, religious ideals – has been able to establish itself in a dominating position. On the contrary, what these values may mean and how conflicts between them should be resolved is decided largely through ‘Westphalian’ institutions.³

The concept ‘Westphalian institutions’ or ‘Westphalian states’ is often used in international law writings and refers to the coming into being of the modern state system, epitomised by the Peace of Westphalia in 1648. Three core principles were accepted at the time for interstate relations, and they are still valid today – namely, the principle of state sovereignty,⁴ the principle of the legal equality of states and the principle of non-intervention in the affairs of another state. The historical developments leading up to this point and their meaning for the world thereafter, are dealt with below.

1.2 The beginnings of the modern state system

This chapter is based on the premise that independent and sovereign statehood was and still is the central organising idea behind international relations;⁵ and that it is the source of the legal power that creates international law.⁶ Hence, the historical evolution of international law is an integral part of the phenomenon of state formation. This process owed its influence to the conditions that started to prevail towards the end of the 1500s in parts of Europe and which account for what is usually referred to as the Eurocentric nature of ‘early’ international law.⁷

This period is characterised by the progressive eradication of the medieval world and its institutions. To this development, we owe the demise of the feudal overlords and their privately owned dominiums, which, over time, were replaced by the state as a *res publica*, a public matter, with a central governmental authority. This historically important moment in the formation of the state, as we know it today, was influenced by the idea of government in the public or general interest as opposed to feudal rule in the private interest of the feudal overlord.⁸

The appearance of international relations thus coincided with the rise of several sovereign states as they entered into external relations with one another or when they sought the formation of alliances between themselves for the protection of their own or collective interests. For these reasons, the claim that international law developed out of the Roman *ius gentium*⁹ should not be endorsed without some critical reflection. The Roman *ius civile* (civil law) pertained exclusively to members of the Roman population, while non-members were considered outside the law and hence rightless. With the rise of the Roman Republic, this rather primitive law was replaced by the *ius gentium*, which was a general law applicable to all on Roman territory, regardless of origin. Further development followed in the wake of the territorial expansion of the Roman Empire. The Empire now not only encompassed various cultures but also made possible increased trade with foreign communities. In these circumstances, the *ius gentium* provided the legal basis for private and commercial transactions between Romans and non-Romans¹⁰ and was thus the forerunner of what we refer to today as private law. It had nothing to do with public international law.¹¹

The confusion that equates the *ius gentium* with international law seems to be created by the idea of humanity as an all-inclusive totality. In late scholastic thought,¹² ‘humanity’ was compared to a state with legislative authority whose laws were referred to as *ius gentium*. We encounter these views in the work of Francisco de Vitoria (1483–1546) but there is no suggestion of an

international community of states – only of a community of world citizens who live and act according to the *ius gentium*.¹³

The first meaningful attempt to deal with the concept of *ius gentium* in relation to the distinction between a national and international legal order dates back to the work of Francisco Suarez (1548–1617). This Spanish author distinguished between the *ius gentium inter se* (applicable to relations between different nations (states)) and the *ius gentium intra se* (referring to the legal systems individual states apply within their borders). The latter was also referred to as *ius gentium* in view of the similarities in legal rules that individual states use in their national legal orders.¹⁴ Today, this is called comparative national law. Informative in this regard are the examples used by Suarez to illustrate the distinction. On the one hand, under the *ius gentium inter se*, he classified issues such as the law of war and peace, armistices, diplomatic relations and trade agreements; he based these on the interdependence of states. Even today, these fall squarely within (public) international law. On the other hand, the *ius gentium intra se* is reserved by Suarez for matters such as religion, marriage, occupation of land, private contracts and monetary matters – namely, what we normally encounter in private relations and which are governed by private law.¹⁵

1.2.1 The period from 1500 to 1648

The period from 1500 to 1648 is known for the emergence of modern Europe and was characterised by vigorous economic expansion, followed by social, political and cultural transformations. After two centuries of decline, most areas in Europe now experienced an expansion in population growth with commercial activities becoming stronger and more close-knit within Europe. Geographic discoveries and expansion helped integrate Europe into a kind of world economic system.¹⁶

To understand the real significance of this period and its influence on the development of international law, three features of the period must be singled out. The first is the role of the two main political powers in the Iberian Peninsula, Portugal and Spain.

Portugal had won its independence towards the end of the 1400s and succeeded in developing a centralised government, enabled by internal political and social unity and motivated by a desire to extend the outposts of Christendom. Spain gained a dominant position through the unification of two kingdoms, Castile and Aragon. This was achieved through the marriage in 1469 of Queen Isabella of Castile (1451–1504) and King Ferdinand II of Aragon (1450–1516). By successfully squashing feudal opposition, internal unity and the consolidation of political power were established. Through agreements with the Holy Roman Empire, Ferdinand succeeded in bringing the Spanish church under the control of the state, bringing religious and national unity under one umbrella.¹⁷

These conditions also provided a platform for the newly established political power to embark on an expansion of its influence beyond its territorial borders. Involving itself in the Italian Wars (1494–1559) fought by France and other European states for the control of Italy, Spain succeeded in creating Spanish-Habsburg¹⁸ domination in Italy, thus shifting the power to northwestern Europe. But Spain's real dominance occurred as a result of expanding its sphere of influence to the Atlantic. Motivated by a search for profit and national wealth, by the end of the 1700s,

Spanish colonial control had expanded over Mexico, the Caribbean, Central America and large parts of South America, excluding Brazil, which was officially colonised by Portugal in 1549.¹⁹

These events were preceded by Portuguese expansion into Africa, India and the East Indies. The Portuguese were motivated by the need to contain Muslim power and the desire to establish a monopoly over trade around the African coast and in the Indian Ocean. Their expansion was facilitated by their circumnavigation of Africa²⁰ and was achieved gradually over roughly a hundred years through the use of force. By the early 1500s, Portugal altered and controlled a trade network through a maritime empire that stretched from Europe to China.²¹

The increase in trade between the two Iberian powers and their overseas possessions led to their involvement in the slave trade to meet the demands in the colonies for labour. At the time, Arabic slave hunters and traders were already active on the African continent; in Portugal and Spain, they found new business partners. Other European countries would follow soon to take part in a practice that facilitated a three-way traffic involving goods and people: European goods to Africa, African slaves to the Atlantic, and raw materials from the Atlantic back to Europe.²²

By the middle of the 1500s, Portugal's power and influence had started to decline through a series of misfortunes, which spanned both internal and external matters, succession problems and disastrous military crusades against the Moors. In this weakened state, it could no longer successfully defend its overseas interests against a number of powerful rivals, such as the Ottoman Empire, the Anglo-Iranian Alliance and the Dutch, who were fast becoming the new commercial and maritime power in Asia. In 1580, Portugal suffered a final blow when a successful invasion by the Spanish army brought Portugal and its possessions under Spanish rule. Drawn into Spain's European Wars, Portugal remained under the Spanish wing until the recovery of its independence in 1668.²³

But Spain too was in decline as a dominant European power, although still boasting significant influence in its overseas possessions. In Europe, the struggles with England and France as rising powers and the revolt by the Netherlands against oppressive Spanish rule were tapping Spain's resources. These came under more strain in 1609 with the treasury facing bankruptcy.²⁴ Their financial woes were the result, not only of maladministration by the Spanish rulers, but also the eventual consequence of economic greed and envy, and of racial and religious hatred against non-Catholics. In 1492, the Jewish population, among others, and their considerable economic assets were targeted and expelled in the course of the Spanish Inquisition,²⁵ which was introduced in Spain in 1481 at the request of King Ferdinand and Queen Isabella.²⁶

This piece of Spanish history is a convenient point at which to introduce the second feature of the period 1500–1648 – namely, the Thirty Years War (1618–1648). This changed the map of Europe irrevocably and left much of Central Europe devastated. Approximately 60–70 per cent of the population perished through acts of war, disease, famine and expulsion.²⁷ The prolonged struggle between religious and political power, in which most of the European powers became involved, also marked the peak of the struggle between Catholics and Protestants. The year 1517 marked the start of the Protestant Reformation, when John Calvin and Martin Luther and their followers publicly denounced the doctrines, rituals, leadership and ecclesiastical structure of the Roman Catholic Church and the Papacy.²⁸

The overarching influence in these times still came from the two major universal medieval institutions – being the Papacy and the Holy Roman Empire (800–1806) – representing, respectively, the spiritual and temporal realms responsible for the governing of a Christian commonwealth. The Emperor, as head of the empire, claimed political and moral authority over the whole of Christendom.²⁹ This also explains why the international law that developed in these times was essentially an international law of Christian Europe and continued as such until the late 1700s, when other, non-Christian states, were allowed to become members of the international community of independent nations. Another consequence of the universalistic idea of a *República Christiana* (a Christian Republic) under the control of the Emperor was that little scope existed for the development of autonomous and independent states other than as constituent parts or components of a larger empire. The historical occasion for bringing about a decisive break with this state of affairs was the Peace of Westphalia (1648). This brought the Thirty Years War to an end and deprived the Emperor of any further effective control over the states that joined in the peace negotiations or that emerged thereafter as new states.³⁰

The Peace of Westphalia forms the third and perhaps most significant feature of the period under discussion. It is associated with a significant endorsement and accelerated future development of the international relations that existed at the time. The Peace of Westphalia replaced the dominant idea of a Christian commonwealth governed by the universal institutions of Pope and Emperor. The secular state system that emerged from the peace agreements is referred to as the Westphalian system or model and refers to:

an international order consisting mainly or exclusively of independent sovereign States ... which exercised untrammelled authority within their respective territories and freely co-ordinated their mutual relations in accordance with their perceived self-interest on the basis of equality.³¹

The sovereign equality of states and respect for their independence, ideas that developed between 1500 and 1648, are still, in our time, part of the fundamental principles of international law, and are enshrined in the UN Charter.³²

The treaties that established the peace were concluded between France and the Holy Roman Empire, and between the latter and Sweden, in the town of Münster, Westphalia, a territory in the north-west of Germany. A third treaty, concluded earlier in the same year, between Spain and the Netherlands expressed Spain's recognition of the independence of the Netherlands. The terms and conditions of these treaties provide us with historical material that formed the basis for the development of certain important international law principles.³³

Following a series of wars that was in part a religious conflict, the acceptance of the principle of equality between Protestant and Catholic states sanctified a principle of immense importance for the future – namely, religious tolerance and the irrelevance of religious convictions for the enjoyment of civil and political rights.³⁴ A second important principle featuring in the peace treaties is the sanctity of treaties – namely, that treaties must be performed by the parties in good faith.³⁵ The guarantees accepted by the parties to uphold and defend the terms and conditions written into the treaties, although not entirely new, became a regular point of reference for similar guarantees in treaties between European states subsequent to the Peace of Westphalia. In the third instance, the Westphalian treaties provided for certain rules (novel at the time) aimed at the peaceful settlement of disputes.³⁶ For instance, hostilities were prohibited for a period of three

years in the case of a breach of a treaty by one of the parties. During such a time, the parties were to seek a peaceful settlement of the dispute. Failing this, the other parties, together with the injured party, were entitled to take collective action against the party responsible for the breach.³⁷ A fourth consequence is the practical illustration in the peace arrangement of the importance of the principle of a balance of power, or political equilibrium,³⁸ for an orderly coexistence to be maintained, sovereign states must relinquish their hegemonic and expansive aspirations and instead strive for peaceful co-existence and friendly co-operation.³⁹

In concluding this section, brief reference must be made to the main writers of the time whose works formed the intellectual origins of international law and the basis for the establishment in time of international law as a separate legal discipline. Earlier on in this section, reference was made to two important Spanish authors, Vitoria and Suarez. Their intellectual tradition was enriched by the Italian jurist, Alberico Gentili (1550–1608), the two Dutch jurists, Hugo Grotius (1583–1645) and Cornelius van Bynkershoek (1673–1743), the English civil law professor at Oxford, Richard Zouche (1590–1660), and the German professor at Heidelberg University, Samuel Pufendorf (1632–1694).

Among these early writers, Grotius, commonly referred to as the ‘father of international law’, deserves special mention for laying the foundations of international law through a number of important works. Having lived through the war between Spain and the Netherlands, and the Thirty Years War between the Catholic and Protestant nations, it is not surprising that one of his major works was entitled *De Jure Belli ac Pacis Libri Tres* (*Three Books On the Laws of War and Peace*), published in 1625. In this monumental work, Grotius dealt with the just causes for war (*jus ad bellum*) – namely self-defence, reparation for injury and punishment. It also addressed the rules for the conduct of hostilities once war has broken out – what we today would refer to as international humanitarian law, also known as the law of war or the *jus in bello*. In his other major work, *Mare Liberum* (*The Free Sea*), published in 1609, Grotius formulated the principle of the freedom of the high seas to be used by all nations for seafaring trade. This principle is now codified in the United Nations Convention on the Law of the Sea of 1982.

1.2.2 The period from 1648 to 1815

In Europe, the period after 1648 was marked by the rivalry between three new powers, the Netherlands, Britain and France. The Netherlands had freed itself from oppressive Spanish rule in 1609 and was formally recognised in 1648. It had developed a strong economy as well as a strong army and navy. Trade with the East Indies was on a firm footing. Facilitated by the use of the Cape route and the establishment of the Dutch East India Company in 1602, the maritime interests of the Netherlands were considerably strengthened and prepared the way for Dutch rule in the Indies, which began in 1609.⁴⁰ However, the Netherlands faced stiff opposition from England (the Kingdom of Great Britain after 1707), as well as France, who, in the age of discovery pioneered by Portugal and Spain, had also expanded their spheres of influence by establishing colonies and trade networks in the Americas, Africa and Asia.⁴¹

Mostly, however, the epoch displayed the domineering influence of France, which succeeded in replacing Spain as the hegemonic power in Europe. France acquired this position in part as a result of territorial settlements after the Peace of Westphalia and the Treaty of the Pyrenees (1659), which ended the war between France and Spain that had started in 1635 as part of the Thirty Years War. Symbolic of the political and cultural domination of France at the time was the

ascent of the French language as the language of diplomacy and of education. However, the reign of France did not bring peace to Europe. On the continent, counterforces tried to contain French expansionary tendencies and the establishment of a new monarchical power⁴² that started to meddle in the affairs of other countries. Further afield, a conflict erupted between France and Britain for control of maritime interests and overseas territories.⁴³

A significant event affecting this rivalry was the American War of Independence (1775– 1783). A group of British colonies in North America, claiming political self-determination and supported by France, freed themselves from British rule and declared their independence from the British monarch on 4 July 1776. A new subject of international law was born as the United States of America.⁴⁴ This major loss for Britain, also in revenue terms, followed only a few years after France, unable to match British military power, had lost its colonial possessions to Britain in North America and Canada after the Seven Years War (1756–1763). Often referred to as a world war, this conflict involved most of the great powers and their alliances at the time and affected their overlapping interests in North America, Europe, India and the Philippines. However, it was the American War of Independence that introduced an entirely new element into the process of state formation and in the relationship between a government and its people.

This event, described as the ‘most important event in modern history’,⁴⁵ called into being a new form of state. Referred to as the nation state, it was based on a set of rules that were entirely different from those applicable in the colonial motherland at the time that the colonial *émigrés* started to settle in the new world. What emerged here was the concept of the nation as a political entity that was a voluntary association of a people under a common set of laws and represented by the same government. Connected to this historical notion of state formation were the aspirations of peoples or nations to independent statehood in the political and legal sense of the word. This led to the often interchangeable use of concepts such as ‘nation’ and ‘state’ in international law and in international relations. Examples are the ‘Law of Nations’, the ‘League of Nations’ and the ‘United Nations’.⁴⁶

The manner in which the United States of America emerged was revolutionary at the time – in the sense that it was based on the democratic will of the people, as opposed to the monarchical decision-making and arrangements applicable in the colonial empires in their early stages. This political shift also represented the historical breakthrough of the concept of republican government, based on popular will and freedom of choice as opposed to hereditary succession. In the case of monarchical rule, the monarch was supreme and sovereign and all officials and institutions existed at his or her pleasure.⁴⁷ By the start of the American Revolution, the inhabitants of the colonies already had a collective outlook characterised by self-reliance, their own popular forms of local government, and a desire to be free from the foreign dictate of colonial powers from whom they had become alienated over time.⁴⁸

In 1799, Napoleon Bonaparte seized power in France by overthrowing the revolutionary government. Using the twin forces of the revolution – liberalism and nationalism – Napoleon embarked on a military offensive against other European leaders to carry the ideas of the revolution into their lands⁴⁹ and to bring about a new international order that would impose unity on the European continent. Between 1803 and 1815, the expansionist policies of the Napoleonic Wars succeeded in creating an empire comprising layers of subjugated or dependent states and political allies covering large parts of Europe from Spain to the Russian Empire.⁵⁰ From 1811 onwards, Napoleon’s vast continental system started to melt down. Financially drained and

overextended, his government and military forces could no longer contain the counter-offensive by Great Britain, Russia, Prussia and Austria. These powers acted in coalition to bring an end to French expansionism, culminating in Napoleon's notorious defeat at Waterloo in June 1815.⁵¹ The peace settlement that followed is an important illustration of a consultative and co-ordinating mechanism between great powers for the restoration and maintenance of peace to prevent a single state from threatening the existence of others.

Following a series of treaties and armistice agreements between the various warring parties,⁵² the victorious states met at the Congress of Vienna in 1815. Their purpose was to decide on a future governance structure for Europe under the collective leadership of the great powers of the time (Great Britain, Russia, Prussia, Austria) and on what to do with France.⁵³ The envisioned great power governance structure was not institutionalised and there was no formal agreement to meet regularly or to meet at all. The idea was to come together as a self-appointed coalition for the enforcement of peace whenever the occasion demanded concerted action.⁵⁴ Between 1815 and 1870, the great powers assembled 20 times under the consensus that was reached in Vienna. They dealt with revolutionary uprisings within states or inter-state conflicts of various kinds, succeeding at least during the first three decades of this period to prevent war between the great powers. From 1850 onwards, the solidarity between the great powers started to unravel with disputes between them resulting in war that drastically altered the balance of power in Europe once again, and with that, the commitment to honour the undertakings agreed to in Vienna.⁵⁵

The developments summarised in this section provided the foundation for the establishment of a new international order based on a European balance of power; with that, international law became the preserve of the European Christian states. Thus, by the end of the epoch under discussion, the new international order reflected European values. Access to this order by foreign states and overseas possessions was possible only with the consent of the Western powers and on conditions determined by them.

The nineteenth century was also the age of the European conferences between the major powers. These contributed significantly to the development of rules governing the waging of war and the settlement of disputes. Through a network of international relations, the application of international law principles expanded and necessitated the academic study of state practice at institutions of higher learning.⁵⁶

1.2.3 The period from 1815 to 1914

The seeds of a new series of conflicts were already sown during the Vienna peace settlement. Fully concentrated on the issue of political and military hegemony and the prevention of conflict between the great powers, the settlements neglected the other sources of conflict that the French Revolution brought to light in the context of the time – namely, national liberation, national unification and liberal government. From 1848, political uprisings and liberal revolts sprung up throughout Europe. Eventually, they also fed Otto von Bismarck's ambition to create a unified Germany out of the German confederation of 38 loosely consolidated states left behind by Napoleon's military defeat in 1815.⁵⁷ The unification of Germany occurred as a result of a series of wars fought by Prussia between 1864 and 1871 against Denmark, France and Austria.⁵⁸ The creation of the German Empire is regarded as the greatest political and diplomatic event of the nineteenth century. However, the successes of Bismarck's wars, and his strategies of rapid deployment of military units and surprise attacks with technologically advanced weaponry,

created a military insecurity among rival states. The awakening of great power competitiveness in military capacity and deterrent effect eventually set the scene, at least in part, for the outbreak of World War I (1914–1919).

The successes of the Concert of Europe⁵⁹ have been ascribed to three factors: the underlying common moral standards and commitment, in the common interest, to hold in check a limitless desire for power; the accommodation of conflicting interests; and the role of brilliant diplomats and statesmen who knew how to make peace and preserve it.⁶⁰ In the latter instance, there was the question of what to do with the defeated power (France) and the need to ensure a conciliatory peace. The temptation to further humiliate the vanquished and to impose on it unforgiving punitive measures is often irresistible. However, it is seldom in the interest of lasting peace. The victorious powers were aware of this in 1814. Through a peace treaty settlement with France, they allowed the latter, whose conquered territories were taken away from it, nevertheless to take a seat at the negotiating table and to become co-responsible for policing the new order.⁶¹ At the end of the German unification wars, France was less fortunate. Not only had it suffered a humiliating defeat in 1870 against the Prussian army, but it also lost its provinces in Alsace-Lorraine to Germany. As a wounded nation, it was looking for revenge and the repossession of its lost territories.⁶² To strengthen its hand, a treaty of alliance was concluded with Russia in 1894, which was itself isolated by an alliance between Germany and Austria that divided Europe between two armed camps. Britain felt increasingly threatened by Germany's accumulation of power and the growing strength of the German naval forces and, fearing isolation, it joined France and Russia in 1907 in a tripartite alliance.⁶³

This period is also known for another significant development – namely, the rather notorious Berlin Conference of 1884, called by Bismarck at the request of Portugal for managing relations among increasingly voracious colonial powers in Africa, and laying a legal foundation for colonialism.⁶⁴ Of the 14 countries attending the conference, Great Britain, Portugal, France and Germany⁶⁵ were already in control of certain coastal areas. This meant that the conference was about agreement on the rules – without the participation of African representatives⁶⁶ – that would determine the further acquisition of territory in Africa by the colonial powers and their chartered companies. The outcome of the conference, the Berlin Act of 26 February 1885,⁶⁷ dealt with this issue in two short articles. Article 34 imposed an obligation on any signatory to the Berlin Act that acquired possession of land on the coast of the African continent to notify the other signatories of the acquisition. Article 35 purported to establish a kind of legal basis for the acquisition of territory, and for the exercise of sovereignty over such territory, by requiring the establishment of authority in occupied regions 'sufficient to protect existing rights, and, as the case may be, freedom of trade and of transit under the conditions agreed upon'. Vague as it was, this condition easily met with agreement, also because it was geographically limited to coastal acquisitions and furthermore not applicable to existing ones. For instance, this left untouched the existing British protectorates established by treaty with tribal chiefs, and the main instruments for promoting the commercial objectives of the British Empire, as well as the canvas for future acquisitions in the interior of the African continent.⁶⁸

Two other issues were a focus of the Berlin Conference and were subsequently regulated in the Berlin Act – namely, the establishment of a free-trade zone in the basin of the Congo River and the promotion of the well-being of the inhabitants in the territories under colonial rule.⁶⁹ This included a prohibition on slavery and the slave trade, which the Berlin Act in article 9 considered forbidden under international law. Freedom of trade and navigation in the Congo Basin received

considerable attention during the conference, evidenced by the fact that the Berlin Act allocated three of its seven chapters to this issue.⁷⁰ The navigation of the Congo River was to fall under the authority of an International Commission, authorised to determine the rules of navigation, tariffs and the measures needed for assuring the navigability of the river in the interest of international trade. The Commission was never established and the envisaged free trade and navigation zone lost significance in the face of King Leopold of Belgium's personal monopoly over the Congo. This came about through the extraordinary recognition in 1884 by the United States and all European states that a private association – the *Association Internationale Africaine*, established at the initiative of Leopold, ostensibly for philanthropic reasons – could raise its flag over the Congo as a demonstration of the exercise of sovereignty over an 'independent' Congolese state with Leopold as its head. For all practical purposes, the Congo was henceforth ruled, in true feudalistic style, as a personal possession of the King, who abandoned all modesty when it came to wealth extraction, servitude and ruthlessness.⁷¹

A prominent debate then emerged on the legal justification for the acquisition of territories that the colonial powers considered not to be states or nations by Western standards and whose inhabitants did not exercise governmental sovereignty, as it was understood by the colonial powers.⁷² The legal construction that some international lawyers of the time⁷³ put on colonial acquisitions was that while the presence of an indigenous population in these territories could prevent or limit the acquisition of private law rights, it could not prevent occupation of the territory for the purpose of asserting state sovereignty rights. Hence, any inhabited territory that was not the sovereign territory of a state, or a protectorate of a state, could become the object of occupation.

From the very different perspective of the modern thinker, it is worth considering further the *terra nullius* theory used to justify colonial conquests at the time. Whether it was then supported by a gymnastic cynicism or a disingenuous and prejudiced ignorance, the theory now seems very unpalatable. The following excerpt is notable in this regard:

Around 1885, it was well known in Europe that Africa was not *terra nullius* in the same sense that an uninhabited island is *terra nullius*. On the contrary, everywhere it was more or less densely populated by peoples who were organised into various political systems. This problem was eliminated by a theory that appeared at about the time of the Conference of Berlin, and, very quickly thereafter, received widespread currency. It showed that 'occupation' had to be interpreted as the taking into possession of *terra nullius*.

The plausible premise of this theory was that a territory was ownerless in international law as long as it belonged to no subject of international law – in the same way that it was ownerless in civil law, as long as no one had a right of property over it. The mere fact of settlement was still no protection against ownerlessness in international law. According to this theory, subjects of international law were only those states that exercised all rights of sovereignty and performed state functions in the same way as modern European states did. In Africa, although there were more or less distinct forms of political organisation, these were not sufficient to make it possible to speak of a real state. Therefore they were not subjects of international law and their territory was ownerless in international law. Any recognised subject of international law could occupy Africa as *terra nullius*.⁷⁴

The absence of a government with sovereign powers as a prerequisite for asserting a legal title to occupation of a territory was in fact paradoxical. Since the territories in question were not empty but inhabited, this became clear when the colonial powers had to enter into some kind of ‘diplomatic’ relations with the inhabitants. This took the form of protectorate treaties of various kinds. Since valid treaties can only come about between sovereign states, of which the occupied territory was not one (according to the colonising power), it raised questions about the legal validity of such treaties. Moreover, for the colonial power to gain control over the territory and establish an effective administration, as was required by the Berlin Act, the inhabitants had to sign away certain of their rights in, or control over, the land or parts thereof. But the act of signing away such rights or control assumed the existence of a sovereign power to do so, a power the inhabitants were supposed not to have. According to the thinking of the time, these contradictions were resolved in favour of a theory that the treaties that European states concluded with African leaders were not genuine treaties in international law since the African signatories were not real subjects in international law. As a result, these treaties were not binding in law but merely created moral obligations for the parties. This also meant that if the treaties were not honoured, no legal consequences would follow; for the colonial state, the non-observance of a treaty by either party therefore remained an internal matter for that state to resolve. What did this construction mean for the acquisition of rights by the colonial power? If the acquisition could not result from the ‘treaty’, then occupation by the colonial power must be the real source of the acquisition. This explains the link in article 35 of the Berlin Act between occupation and the duty of the occupying power to establish an authority sufficient for the protection of existing rights and freedom of trade.⁷⁵

The ramifications of these inconsistencies, and the effect the colonial arrangements had on the rights and well-being of the inhabitants of the territories, were to remain an international rallying point, even decades after the establishment of the trusteeship system by the UN Charter. In 1975, for instance, the *terra nullius* issue ended up before the International Court of Justice (ICJ) in proceedings relating to the granting of independence to Western Sahara by Spain. The granting of independence was objected to by Morocco and Mauritania, which argued that Western Sahara belonged to them at the time the territory was colonised by Spain (in the 1880s), a fact Spain denied. An advisory opinion was then sought from the ICJ on the question whether Western Sahara, at the time of its colonisation by Spain, belonged to no one – that is, whether it was *terra nullius*. The ICJ rejected the *terra nullius* argument by arguing:

At the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them. ... Spain did not proceed on the basis that it was establishing its sovereignty over *terra nullius* Spain proclaimed that the king was taking the Río de Oro under his protection on the basis of agreements which had been entered into with the chiefs of the local tribes.⁷⁶

On the issue of agreements between a colonial power and local rulers, the advisory opinion follows an interpretation that had relevance, not only for Spain, but for the rest of Africa where these agreements were in existence. State practice at the time, the court pointed out, showed that:

in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through ‘occupation’ of a ‘*terra nullius*’ by original title but through agreements concluded with local rulers. On occasion, it is true, the word ‘occupation’ was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not

signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an ‘occupation’ of a *terra nullius* in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual ‘cession’ of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*.⁷⁷

This advisory opinion further confirmed the fictitious nature of the ‘occupation’ approach in the Berlin Act: where there is no *terra nullius*, there can be no occupation in the true sense of the word. But it also shows the fallacy of the thinking at the time – namely, that the treaties concluded with African rulers were not real treaties in international law and therefore not enforceable in international law. In the understanding of the court, the treaties (being formal agreements between a colonial power and a ruler capable and with the authority of representing the inhabitants of a territory) assumed the nature of treaties in international law – with the result that non-observance of a treaty would amount to a breach of the treaty in international law.

1.2.4 The World Wars and thereafter

Before the main causes and consequences of the World Wars are outlined, note should be taken of two other historical events shortly before the outbreak of World War I. The events in question are the Hague International Peace Conferences of 1899 and 1907. Their legacy in the years to come would feature strongly in three areas of concern for international law – namely, peaceful settlement of disputes, disarmament, and the law of armed conflict.

The 1899 conference was called by Tsar Nicholas II of Russia for the purpose of finding agreement on restraints on war, reduction of national spending on armaments, and the building of lasting peace between the nations of the world. Of the 59 states invited, 26 sent delegations, of which six came from outside Europe. None of the six sovereign African nations was invited.⁷⁸ Although the plenipotentiaries could not reach a final agreement on the reduction of armaments, which remains even today an unsolved matter, a number of other outcomes are accredited to the conference. These include a Convention for the Peaceful Settlement of Disputes; a Convention with respect to the Laws and Customs of War by Land; and a Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. In addition, the conference adopted the Hague Declarations prohibiting the discharge of projectiles and explosives from balloons and the use of asphyxiating gases and of expanding bullets.⁷⁹ During the follow-up conference in 1907, the above three conventions were revised and the Hague Declarations incorporated them into an Annex of the 1907 Convention Concerning the Laws and Customs of War on Land. Various new conventions met with the approval of the participating states covering such issues as the commencement of hostilities, various aspects of naval warfare and the establishment of an international prize court (which never materialised) to deal with the capture of neutral ships in times of armed conflict.⁸⁰

1.2.4.1 Outbreak of World War I

The Hague conferences produced the first, landmark codification of international law principles, inspired by humanitarian and peace concerns, but had no mitigating effect on Britain’s scorched earth policy and the use of concentration camps in its war against the Boer Republics in South Africa (1899–1902). Nor could it prevent the outbreak of World War I, ignited by the assassination of Archduke Franz Ferdinand of Austria by a Serbian nationalist on 28 June 1914.

This single incident caused Austria to declare war on Serbia (allied to Russia at the time) a few days later and met with the approval of Germany. It was certainly not the sole reason for the war that followed, but was the spark that set in motion a series of moves by other states on the European continent. The armed hostilities that resulted eventually involved all the major powers on the continent. The factors that precipitated the great powers of the time to ‘sleepwalk’ into an armed conflict, as Christopher Clark has put it,⁸¹ were manifold and present us with a lesson worth contemplating. Two hostile mistrustful alliances already existed: on the one side, Germany, Austria-Hungary and the Ottoman Empire, and on the other, France, Great Britain and Russia. To protect fellow Slavs in Serbia, Russia mobilised against Austria, in reaction to which Germany first attacked France (with the idea to then turn against Russia), causing Britain to join forces with France and Russia against Germany. In August 1914, Japan, allied to Britain, declared war on Germany and in October, the Ottoman Empire in Turkey entered the war on the side of Germany and Austria-Hungary.⁸²

The nationalist and ethnic tensions and fears that existed between the main rivals prior to the outbreak of World War I were psychologically compounded by the intense and economically sustainable military competition and build-up in armaments in the region, especially between France and Germany.⁸³ This featured prominently during the Hague Peace Conferences in the discussions on arms limitation, on which no agreement could be reached. These circumstances were not conducive to the peaceful coexistence of nations. On the contrary, they have a tendency to make war inevitable, especially if counter forces aimed at finding diplomatic solutions are absent or weak, or fail to offer viable alternatives.

1.2.4.2 Wilson’s Fourteen-Point plan and the establishment of the League of Nations

With 20 million people dead at the end of World War I and with former empires in tatters, it is understandable that a new conviction was needed – one that would concentrate on the sources of war, as opposed to the aims of war, and on the construction of an international order capable of successfully managing the conflicts of the future. At a deeper level, the senseless destruction brought about by World War I caused a reconsideration of the rationalisation of the competitive expansion of military arsenals, secret alliances and power politics, and its replacement with a more idealistic world view infused with a liberal theory of international relations.⁸⁴

Illustrative of this new aspiration were the Fourteen Points formulated by the American President, Woodrow Wilson. These were given in a speech before the US Congress on

8 January 1918, in preparation for a peace settlement that eventually commenced in January 1919.⁸⁵ Wilson’s speech was preceded by a Russian invitation to the Western powers on 5 January 1918 to join in negotiations between Russia and the Central Powers (Germany, Austria-Hungary, the Ottoman Empire and Bulgaria) aimed at an immediate armistice, followed by a ‘democratic peace without annexations and indemnities and with the right of all nations to self-determination’.⁸⁶

Some of the most salient aspects of Wilson’s Fourteen-Point plan need reiteration.⁸⁷ For current purposes, five of the 14 points are selected. The democratic ideal found expression in his call for peace agreements to be held with open doors so that the whole world could be familiar with what parties agreed to. This was not followed in the actual preparations for the peace treaties with the Central Powers. Perhaps the most politically charged issue Wilson included in his plan was the

one about disarmament, captured in point IV, and which called for adequate guarantees that national armaments would be reduced to the lowest level consistent with domestic safety.⁸⁸ A third salient matter was the adjustment of colonial claims, based on the principle that questions about sovereignty must be dealt with by giving equal weight to the interests of the local populations concerned. This would later become a contentious issue in the administration of the mandate territories under the League system.⁸⁹ A number of points dealt with the evacuation and restoration of the territories occupied during the war. This eventually also led to the establishment on 11 November 1918 of a sovereign and independent Polish state, the territory of which was formerly under Russian rule. The last, and perhaps most important point Wilson included in his Fourteen-Point plan, was the idea of an association of nations established for the purpose of providing guarantees of political independence and territorial integrity to great and small states alike and that would act as an instrument by which the peace of the world could be guaranteed. He called this association the League of Nations and considered it to be the most essential part of the peace settlement.

Wilson's idea of a League of Nations reached fulfillment when the Treaty of Versailles, signed on 28 June 1919 between the Allied and Associated Powers and Germany, entered into force on 10 January 1920⁹⁰ (without the ratification of the United States).⁹¹ Part I contained the 26 articles that made up the Covenant of the League of Nations.⁹² A few important provisions in the Covenant should be noted.

Article 8 contained Wilson's disarmament idea. It states that the members of the League recognise that the 'maintenance of international peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations'. To allow the Council of the League to formulate plans for this reduction in armaments, the League members were required to provide reliable information on the scale of their armaments and the extent to which their industries were adaptable for war-like purposes. The first practical experience with disarmament came from article 159 of the Versailles Peace Treaty, which called for the demobilisation and reduction of the German military forces after World War I. In 1926, Germany became a member of the League of Nations, and in 1928, together with 64 other countries, signed the Pact of Paris, which sought to resolve all disputes between countries by peaceful means. This pact, also known as the Kellogg-Briand Pact,⁹³ and still in force, contains a solemn declaration in article 1 by the states parties condemning recourse to war for the solution of international disputes and renouncing it as an instrument of foreign policy.

Collective security under the League system took the form of an undertaking by the League members in article 10 to act against external aggression threatening the territorial integrity and political independence of a member. In such instances, the League's Council had to advise on the means by which this obligation had to be fulfilled. By virtue of article 11, any war or threat of war was declared a matter of concern to the whole League, which could take any action for purposes of safeguarding the peace of nations.

The peaceful settlement of disputes received considerable attention in articles 12, 13 and 15, which provided for arbitration and judicial settlement as peaceful means of dispute resolution. Judicial settlement was given further substance in article 14, which made provision for the establishment of the Permanent Court of International Justice (PCIJ), the predecessor of the current International Court of Justice (ICJ). The PCIJ was inaugurated in 1922 and dissolved in 1946.

The obligation to settle disputes by peaceful means also contained certain consequences for member states that resorted to war in disregard of their Covenant obligations to pursue peaceful settlement of disputes. Such a state, according to article 16, would *ipso facto* be deemed to have committed an act of war against all members of the League and could be subjected to sanctions in the form of the severance of all trade and financial relations. The Council of the League could also recommend the use of military force to protect the covenants of the League in such circumstances.

1.2.4.3 The mandate system

The last provision deserving special attention is article 22. This provision formed the basis of the three-tiered system of mandates according to which the colonial ‘possessions’ of the defeated powers were to be placed under the guardianship of certain states. These states would, on behalf of the League of Nations, administer these territories and lead them to political self-determination over time. The first paragraph of article 22 reads as follows:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization

Article 22 further provided that the tutelage of such peoples would be ‘entrusted to advanced nations’ and that the ‘character of the mandate must differ according to the stage of development of the people’. By these terms, Anghie has persuasively argued that the mandate system, in its attempt to transfer sovereignty to non-European peoples, coincided with the ‘creation of new systems of subordination and control administered by international institutions’.⁹⁴ Thus, the mandate system transferred sovereignty to mandate peoples without the real powers of government. At the same time, the mandate territory and its people were transformed into an economic entity for (economic) development purposes – a key objective of the mandate system. But here they were trapped in a subordinate role in a vast network of economic relationships extending from the village to the international economy, still shaped at the time by the colonial political economy.⁹⁵ It is further argued that the political and economic management systems developed under the mandate project to manage the relations between colonisers and the colonised were replicated in later years by the establishment of international financial institutions (the World Bank and International Monetary Fund)⁹⁶ to manage the relationships between the developed and developing countries. Thus, like the mandate system, international financial institutions:

seek to ensure the ‘well-being and development’ of Third World countries, and attempt to do so by integrating their economies into the international economic system in ways which are often disadvantageous to Third World peoples.⁹⁷

The object and purpose of article 22 were given effect to by a system that provided for A, B and C mandates. Under the ‘A’ category fell communities that formed part of the Turkish Empire and that had reached such a state of development that their independence could be provisionally recognised, subject to administrative advice and assistance by the mandatory power – in this case, Great Britain and France. The ‘B’ mandates referred to territories in Central Africa that were

placed under the administration of Great Britain, France and Belgium on condition that freedom of conscience and religion and equal opportunities for trade would be guaranteed, and that the slave trade and traffic in arms and liquor would be prohibited. ‘C’ mandates included South West Africa (now Namibia) and a number of Pacific islands. In terms of article 22(6) of the Covenant, these territories were to be administered under the laws and as ‘an integral part’ of the Mandatory Power subject to certain safeguards in the interest of the indigenous population. Under this arrangement, South West Africa was given to the Union of South Africa,⁹⁸ which as Mandatory Power had ‘full power of administration and legislation over the territory … as an integral portion of the Union of South Africa’.⁹⁹ South Africa’s administration of the territory would eventually result in a protracted dispute before the International Court of Justice in the famous South West Africa cases.¹⁰⁰

1.2.4.4 The build-up to World War II

The peace settlement described above and which ended in the League of Nations as the new guarantor of international peace lasted barely 20 years. From the 1930s onwards, four countries were instrumental in preparing the ground for the second international war of the twentieth century; all four pursued geopolitical expansion under the leadership of dictatorial regimes.

In Germany, Adolf Hitler’s Nazi Party came to power in 1933 with the idea of expanding the borders of the German state in an attempt to reclaim, by force if necessary, the German provinces ceded to other states after World War I. Hitler’s fascist ideology of race, flag and fatherland simply meant the absorption into one grand German Empire those Germans who were living in Austria, Czechoslovakia and Poland. The ideology was made more acceptable to the German nation as a result of the harsh conditions imposed on Germany by the Treaty of Versailles, and more achievable by the rapid rearmament Germany was pursuing at the time with the help of a flourishing industrial economy.¹⁰¹ On 7 March 1935, Hitler repudiated the disarmament clauses of the Versailles Peace Treaty.

In the same year, Hitler and Joseph Stalin, the dictator of Soviet Russia, concluded so-called non-aggression agreements, which in fact were arrangements between them on how to carve up Eastern Europe into spheres of influence in the interest of both parties. This prepared the way for the invasion and occupation of Poland by both parties in 1939 and for Stalin’s invasion of Finland and the Baltic states (Latvia, Estonia and Lithuania) in the same year.¹⁰²

These developments coincided with aggressive acts by Japan and Italy. In 1931, the Japanese Imperial Army invaded Manchuria, China’s north-eastern province, ignoring governmental orders to the contrary. In 1932, the military took over the government and suspended parliamentary rule, paving the way for a militarised state that would pursue a more active military policy. For decades, Imperial Japan had pursued a foreign policy aimed at the military and economic dominance of China in order to gain control over the vast raw materials and other resources that China possessed. In 1937, these aspirations led to the second Sino-Chinese war,¹⁰³ when Japan invaded mainland China, a conflict that lasted until 1941.¹⁰⁴

In Italy, Benito Mussolini established a military dictatorship in 1922 after his Fascist Party came to power. In a drive to restore pride lost in a military defeat against the Abyssinians in 1896, Mussolini, increasingly mimicking Adolf Hitler,¹⁰⁵ invaded Abyssinia (now Ethiopia) without warning in 1935 and replaced Haile Selassie with the Italian King. This event brought Germany

and Italy closer together. In 1936, they formed the Berlin Axis Alliance. In 1940, they were joined by Japan. The Allied forces of Great Britain and France had declared war on Germany (and Italy) in response to Hitler's invasion of Poland in 1939. The United States joined the Allied forces after Japan's surprise air attack on the Pearl Harbor naval base in 1941.¹⁰⁶ In August 1945, the United States dropped atomic bombs on the Japanese cities of Hiroshima and Nagasaki, after an ultimatum to surrender was ignored by the Japanese government.¹⁰⁷

The period of the build-up to World War II is described by the historian Paul Johnson as the 'high noon of aggression' under which the League system 'broke down completely, opening an era of international banditry in which the totalitarian states behaved simply in accordance with their military means'.¹⁰⁸ He further writes that 'Italy, Japan, Russia and Germany played a geopolitical game together, whose whole object was to replace international law and treaties with a new *Realpolitik* in which, each believed, its own millennium vision was destined to be realized'.¹⁰⁹ In none of the instances of aggressive behaviour by the three Axis powers before the outbreak of the war could the League respond with effective countermeasures.

The League's effectiveness as an instrument of world peace suffered as a result of various factors. The United States never joined the League and followed an isolationist policy at the time. Russia only joined in 1934 and was expelled in 1939 upon Stalin's invasion of Poland. Thus, at no time did the League represent the balance of forces at the time. Economically, the Allied powers were in decline as a result of the stock market crash on 29 October 1929 and the resulting longest and deepest economic depression of the twentieth century.¹¹⁰ In these circumstances, the appetite for a military confrontation with the Axis powers was low.

1.2.4.5 Establishment of the United Nations

Even before the end of World War II, the Allied forces, determined not to repeat the failures of the Versailles settlement, set in motion a process for bringing about a stable post-war world order. This process took the form of several meetings and conferences in the period from 1941 to 1945 between the Allied powers.¹¹¹ Only three are mentioned here. In August 1941 at a secret meeting, the Atlantic Charter was agreed to by President Roosevelt of the United States and Winston Churchill, the Prime Minister of Great Britain, leading to an outline of principles for a future peaceful coexistence of states based on the following: a prohibition on territorial expansion; the acceptance of only those territorial changes that coincide with the wishes of the people concerned; the right of peoples to choose the form of government they wish to live under; the enjoyment of free trade on equal terms by all states; the pursuit of economic co-operation between states; the right of people to live a life without want and fear; and freedom of the high seas.¹¹²

The next year, the United States, the Soviet Union,¹¹³ Great Britain, China and 22 other states signed the United Nations Declaration containing a pledge to unite against the Axis powers and to employ all means to defeat them. This event set the stage in the final days of the war for the conference of 50 states in April 1945 to draft the United Nations Charter in San Francisco.¹¹⁴ In February of the same year, the Yalta Conference confirmed the commitment of the Allied Powers to completely disarm Germany, to divide it into four zones of occupation (US, British, French and Soviet), and to institute war crimes trials for Nazi and Japanese atrocities committed during the war. In the latter instance, words were put into action with the establishment of the Nuremberg and Tokyo Tribunals in 1945 and 1946 respectively.

1.2.4.6 The Cold War between the East and the West

Since the United Nations Charter is dealt with more fully in other chapters, there remain only two significant post-World War II developments to discuss in concluding this historical reflection.

The first is the Cold War¹¹⁵ between the East and the West and which only ended when the communist regimes imploded between 1989 and 1993. The stand-off and breakdown in co-operation between the two main powers (the United States and the Soviet Union) after World War II were in part the result of ideological differences (capitalism versus communism) and each side's disdain for the other's corresponding political and economic system.¹¹⁶ Another source of friction was the conflicting security concerns in response to which both sides wanted to maintain or expand their spheres of influence in different parts of the world.

Western Allied powers' post-war conciliatory stance towards Germany was not trusted by the Soviet Union and led to the division of Germany into a communist-controlled East Germany and a US/Great Britain-aligned West Germany. This lasted until German reunification in 1990. Korea split up into a communist North and a capitalist South in 1948 (and remains split today). In Africa, where rebel and liberation wars were emerging, each side to the conflict could count on military or other forms of assistance, from either the United States or the Soviet Union, depending on whose interests were at stake. Apart from this geopolitical contest, the destructiveness of nuclear weapons (demonstrated for the first time with the nuclear bombing of Hiroshima and Nagasaki) caused both sides to rethink their military strategies. This kind of weapon made winning wars impossible so that both sides opted for a strategy of deterrence that would mean mutually assured destruction if ever one side should decide to strike first. The result was an arms race between the United States and the Soviet Union, with defence spending and increasing militarisation on both sides intensifying interbloc hostilities and creating insecurities in several parts of the world.

Considered the most dangerous international crisis ever, the Cuban Missile Crisis of 1962¹¹⁷ had its origin in a secret Soviet plan for the deployment of ballistic missiles (some containing nuclear warheads) in Cuba, within striking distance of US territory. Construction work for the missile site was discovered on 14 October 1962 by a high-altitude US spy plane at a time when shipments of missiles were already on their way to Cuba. After several meetings with his security advisors, President Kennedy of the United States publicly revealed the discovery and demanded the withdrawal of the missiles from Cuba. In addition, the US government decided on the implementation of a naval quarantine – that is, a defensive naval blockade intended to prevent the missiles from reaching Cuba. Both the UN Security Council and the Organization of American States (OAS) were informed about the crisis. The OAS Council found that Cuba had endangered the peace in the area by allowing the Soviet missiles on its soil and recommended the taking of all necessary measures, including the use of force, to prevent the deployment of the missiles.¹¹⁸ Initially rejecting the quarantine as illegal under international law and as an act of war, the Soviet Union nevertheless redirected its missile-carrying ships away from Cuba within days and a potentially very destructive confrontation between the two world powers was averted.

1.2.4.7 The United Nations and decolonisation

The second post-World War II development of note is decolonisation. The United Nations played a defining role in this process, which was helped along by the principles of equal rights and self-determination of peoples in articles 1 and 55 of the UN Charter. In practice, it manifested itself in

the attainment of independence by the former colonial territories, mandates and non-self-governing territories.¹¹⁹ This naturally increased the membership of the United Nations and added a significant number of developing countries to the UN membership profile. For South Africa, this also meant the beginning of a protracted confrontation with the United Nations over the white minority government's policies on racial segregation ('apartheid') and the denial of the black majority's right to self-determination in a united South Africa. The intransigence of successive governments between 1945 and 1988 in understanding the raw nerve left by colonial exploitation in the Third World, and the atrocities committed against the Jews in World War II in the name of racial superiority, was at the heart of an unprecedented response by the United Nations. It succeeded in isolating South Africa by means of sanctions from the international community and in bringing minority rule to an end.

1.2.5 The rise of international organisations

'International organisations'¹²⁰ have become key actors in international society over the past two centuries, and are now considered subjects of international law in their own right. One scholar has gone so far as to suggest that 'there is hardly a human activity which is not, to some extent, governed by the work of an international organisation'.¹²¹ The establishment and proliferation of international organisations is generally attributed to the changing nature of international society, which has seen a marked increase in the degree of interactions between states, as well as the complexity of issues involved. In such circumstances, the traditional bilateral and ad hoc relations between states are said to have become outmoded, presenting a need to devise new forms and institutions of organisation. For some scholars, these developments form part of a progressive narrative charting the ongoing transformation of international law itself, from a law of coexistence to co-operation (and perhaps, community). That being said, within the scholarship on international organisations, the question of 'theory' remains under-considered,¹²² partly because scholars tend to ascribe the growth of international organisations to 'necessity'¹²³ rather than a philosophical or ideological commitment to a 'world or global government'.¹²⁴

This section will consider the rise of international organisations over the past two centuries, from the unambitious, administrative 'river commissions' of the early nineteenth century, to the highly integrated and politically powerful regional organisations that have emerged since the end of the Cold War.

Before doing so, an important distinction should be noted. This section deals with international organisations (whose members are ordinarily states)¹²⁵ as distinct from 'private international unions' or, their modern manifestations, 'non-governmental organisations' (NGOs) (whose members are private individuals and organisations).¹²⁶ Notably, while NGOs are *private* in terms of their constitution, they perform public functions in many respects and, at times, have 'anticipated and antedated the development of the public unions [international organisations]'.¹²⁷

1.2.5.1 Nineteenth century developments

Like many grand projects, the development of international organisations began with the mundane – in this case, the regulation of river traffic. The Central Commission for Navigation on the Rhine, created by the Congress of Vienna in 1815, is generally considered to be the first international organisation. The Commission was established in order to 'secure the freedom of navigation on the Rhine and other international rivers by creating a form of international authority

in order to remove tolls and other obstacles'.¹²⁸ The Commission began to function in 1815 in Mainz (in modern-day Germany). Although its membership has changed and it is now located in Strasbourg (France), it continues to function to this day. It was followed by a number of other river commissions in Europe.¹²⁹ Notably, the International Commission of Navigation of the Congo (established by the infamous Conference of Berlin in 1885 in order to supervise the free navigation of the Congo River Basin) never came into operation.¹³⁰ Had it done so, it would have been the first international organisation established on African soil, albeit not by Africans.

Over the next 100 years, similar international organisations were established in the areas of rail transportation,¹³¹ communication,¹³² and health services.¹³³ However, none of these was of the breadth and scope of those that would be established after World War I. Up until this point, the role of international organisations was limited to the 'low politics'¹³⁴ of the 'administrative' arena.¹³⁵ This changed with the establishment of the League of Nations.

1.2.5.2 The League of Nations and the interwar period

As explained earlier on in this chapter, after World War I, the League of Nations was established in order to 'promote international cooperation and to secure international peace and security'.¹³⁶ Although the idea of a 'League of Nations' has a long history,¹³⁷ it gained considerable momentum following US President Woodrow Wilson's '14 points' speech towards the end of World War I.¹³⁸

Much has been written about the League of Nations and its shortcomings. On its own terms, it was an abject failure.¹³⁹ However, its obvious shortcomings have overshadowed its 'relative successes' in a number of other areas,¹⁴⁰ chief among them being the development of international organisations. Arguably, the League 'made a far greater contribution to the progress of international organisations than any other institution in history'.¹⁴¹

In this regard, the League was revolutionary in a number of respects. First, prior to the League, international organisations had been established in order to address *specific* challenges of interstate interaction. The League was far more ambitious; it aimed to do nothing less than 'organise the international life of the family of nations'.¹⁴² Secondly, the League's membership was open to '[a]ny fully self-governing State, Dominion or Colony', and was not limited to the states that participated in the Versailles Peace Conference, nor to a particular region.¹⁴³ It aspired to universal membership.¹⁴⁴ Thirdly, the League represented a shift in the subject matters that occupied international organisations; from the 'low politics' of co-operation, to the 'high politics' of peace and security.¹⁴⁵ Finally, the League expanded the reach and powers of international organisations, through the introduction of new 'technologies' for intervention. In particular, under the mandate system, 'international institutions, rather than being the product of sovereign states, *were given the task of creating sovereignty out of the backward peoples and territories brought under the mandate regime*'.¹⁴⁶ [own emphasis].

Despite the ignominious collapse of the League, it indelibly shaped both international law and its (more successful) successor, the United Nations, in both form and function.¹⁴⁷ What is more, international organisations and institutions established (or reworked) under the auspices of the League outlived its short lifespan and many continue to exist. One example is the International Labour Organization.

1.2.5.3 The United Nations and the Bretton Woods institutions

While the League was a failure, the idea behind it (the creation of a general international organisation with a mandate to promote international peace and security) survived relatively unscathed.¹⁴⁸ In fact, ‘[o]nce the Second World War began, most states took for granted the idea that a new international organisation would be needed by its end’.¹⁴⁹ This was so much the case that negotiations for the establishment of the United Nations began before World War II was even finished.¹⁵⁰ Initially, these were between the major powers of the time, led by President Roosevelt.¹⁵¹ The process culminated in the Dumbarton Oaks Conference in August 1944.¹⁵² In April 1945, the conversation was opened up to a wider audience of states (once the key issues were settled among the major powers)¹⁵³ at a conference held in San Francisco. Delegates from 50 nations attended and it was here that the Charter of the United Nations was finalised.

While the UN Charter drew its inspiration from the League of Nations, it was different in a number of other respects.¹⁵⁴ Like the League of Nations, the principal function of the United Nations is the maintenance of international peace and security. However, the UN drafters went about it differently by choosing to give the ‘Great Powers’ of the day a special role in the maintenance of international peace and security through their permanent membership and special powers on the Security Council.¹⁵⁵

While the work of the United Nations was negatively affected by the onset of the Cold War, it nevertheless succeeded in preventing the outbreak of another world war and played an important role in the process of decolonisation. Furthermore, despite the many failings of the United Nations, the faith in international organisations has grown steadily since its establishment.¹⁵⁶ The United Nations has, over the past 70 years, fostered the development of a number of international organisations. Under the UN system, 15 ‘specialised agencies’ have been established or maintained as separate international organisations. These include the International Labor Organization (ILO), the Food and Agriculture Organization (FAO), the International Civil Aviation Organization (ICAO), the International Fund for Agricultural Development (IFAD), the International Maritime Organization (IMO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

Notably, one month prior to the Dumbarton Oaks Conference, where the post-World War II political framework was decided, a number of states met at the Bretton Woods Conference¹⁵⁷ where ‘the future of economic cooperation was mapped’.¹⁵⁸ As a result, two significant international organisations were established – namely, the International Monetary Fund, and the International Bank for Reconstruction and Development (the World Bank).¹⁵⁹ As with the United Nations (their political counterpart), these economic institutions also came about through preliminary negotiations between major powers (the United States and the United Kingdom), and were later formalised at the Bretton Woods conference in July 1944.¹⁶⁰

1.2.5.4 The rise of regional (international) organisations

The UN Charter foresaw the establishment of ‘regional arrangements or agencies’ for the maintenance of international peace and security.¹⁶¹ In the years following the Charter’s adoption, a number of *regional* international organisations (whose membership was limited to states of a particular geographic area) were established. However, these regional organisations initially focused primarily on matters of regional co-operation on economic and social issues, and it was

not until later (after the end of the Cold War) that regional organisations took up the Charter's invitation to take part in the maintenance of peace and security.¹⁶²

The first regional organisation of the era was the League of Arab States, which was established in the final months of World War II in order to encourage co-operation among member states on economic, communication, cultural, social welfare and health matters.¹⁶³ However, it is the Organization of American States (OAS) – created in order to 'achieve an order of peace and justice', promote solidarity and collaboration among American states, and 'defend their sovereignty, their territorial integrity, and their independence'¹⁶⁴ – that can lay claim to being the oldest regional organisation. This is because the OAS has a history that pre-dates the Charter by almost half a century. Its origins can be traced back to the 'First International Conference of American States' (1889–90), when the International Union of American Republics was founded. Following World War II, this organisation was transformed into the OAS upon the adoption of the Charter of the Organization of American States.¹⁶⁵ That meeting also adopted the American Declaration of the Rights and Duties of Man, which would later form the basis of the Inter-American System of Human Rights.¹⁶⁶

This development was soon replicated on the other side of the Atlantic, where the idea of a 'United States of Europe'¹⁶⁷ was proposed by Winston Churchill in 1946. After some initial disagreement regarding the structure of the proposed organisation, the Council of Europe (CoE) was established in May 1949 in terms of the Treaty of London.¹⁶⁸ The CoE aims 'to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress'.¹⁶⁹ It was under the auspices of the CoE in 1950 that the European Convention on Human Rights¹⁷⁰ was adopted; this forms the basis of the European System of Human Rights.

However, the CoE was not the sole regional organisation in Europe. Shortly after its establishment, the European Coal and Steel Community (1951)¹⁷¹ was formed in order to prevent further conflict between historic rivals Germany and France by making it 'not merely unthinkable, but materially impossible'.¹⁷² The organisation's membership and mandate expanded over time and, together with the European Economic Community (1958),¹⁷³ it was later transformed into the European Union.¹⁷⁴ Notably, the Organisation for European Economic Cooperation (1948)¹⁷⁵ and the Organization for Security and Co-operation in Europe (1973),¹⁷⁶ while European in name, include non-European member states and are therefore, strictly speaking not regional organisations.

Following the independence of a number of African countries in the decade following World War II, the Organization of African Unity (OAU) was formed in 1963. The OAU's mandate was significantly influenced by the continent's recent history and, along with the standard aims of regional solidarity and economic co-operation, its aims included the eradication of 'all forms of colonialism from Africa'.¹⁷⁷ The structure of the OAU was similar to that of other regional organisations, save that its Charter placed greater emphasis on security issues,¹⁷⁸ and it did not have a dedicated human rights instrument until 1986.¹⁷⁹

Regional organisations were subsequently established in Southeast Asia (the Association of Southeast Asian Nations, formed in 1967), South Asia (the South Asian Association for Regional Cooperation, formed in 1985), and the Caribbean (the Caribbean Community, formed in 1973).

1.2.5.5 After the Cold War

The end of the Cold War coincided with a resurgence in many regional international organisations, and an increased role being played by such organisations in the maintenance of international peace and security. For its part, since the beginning of the 1990s, the United Nations has gradually accepted a more robust role for regional organisations in the maintenance of international peace and security, along the lines of those initially imagined by Chapter VIII of the UN Charter. In his *Agenda for Peace* report, then-UN Secretary-General Boutros-Ghali explained this shift as follows:

In the past, regional arrangements often were created because of the absence of a universal system for collective security; thus their activities could on occasion work at cross-purposes with the sense of solidarity required for the effectiveness of the [United Nations] ... But in this new era of opportunity, regional arrangements or agencies can render great service if their activities are undertaken in a manner consistent with the Purposes and Principles of the Charter, and if their relationship with the United Nations, and particularly the Security Council, is governed by Chapter VIII.¹⁸⁰

This development coincided with renewed impetus on the African continent in so far as the regional collective security mechanisms are concerned. First, under the OAU, the ‘Mechanism for Conflict Prevention, Management and Resolution’ was introduced in 1993 in order to anticipate and prevent conflicts or ‘to undertake peace-making and peace-building functions in order to facilitate the resolution of these conflicts’.¹⁸¹ Then, in 2002, the OAU was replaced by the African Union, which adopted, as a founding principle, a commitment to promote ‘peace, security, and stability on the continent’.¹⁸² To this end, the AU Constitutive Act establishes an ambitious institutional framework for the maintenance of peace and security, including a ‘Peace and Security Council’,¹⁸³ and proclaims a right of intervention for the AU in member states in certain circumstances.¹⁸⁴

While some European regional organisations have themselves also taken on a greater role in the peace and security arena, the principle resurgence within these organisations has been in the economic and social arenas. For its part, the European Union membership expanded considerably after the fall of the Berlin Wall,¹⁸⁵ as did the degree of integration in the economic, political and social spheres among member states. For example, in the economic sphere, the Maastricht Treaty (1992) led to the establishment of a single market (where goods, services, people and money can move freely); and a single currency (the Euro) was introduced in 1999.¹⁸⁶ As far as the CoE is concerned, its membership also expanded following the end of the Cold War¹⁸⁷ – the most significant new member being the Russian Federation.¹⁸⁸ In particular, the European Court of Human Rights has experienced a significant rise in the number of cases filed before it since 1989, to the extent that it is now over-extended.

1.3 Some critical perspectives

This chapter has explained how international relations were shaped by certain defining epochs in the formation of independent states and their interaction with one another. The approach followed is based on a specific world view – namely, that the history of international law coincides with the history of the modern state system, and that theories or views about the nature, role and function of international law cannot be studied or properly understood without realising the influence of

the prevailing political, economic, social and cultural conditions within which they are formed and applied. But one should be careful not to *reduce* the meaning and function of international law to the concrete circumstances in which it finds application. For it to be able to respond to state behaviour and to regulate it, international law must have an existence as a normative framework independent of the will and interests of the individual members of the international community. It is this normative quality of international law that makes it possible to provide legally justifiable and rational solutions to international disputes.¹⁸⁹

It must be pointed out, albeit briefly and rather superficially, that there are alternative approaches to the understanding of the nature and function of international law. One such approach is that imperialism and colonialism¹⁹⁰ were central to the early formation of international law and the doctrine of state sovereignty; both played a key role in exporting European notions of international law and institutions to non-European societies.¹⁹¹ The point is that the early distinctions between European and non-European nations, and between the ‘civilised’ and the ‘uncivilised’ world, have been reproduced in distinctions that contemporary international law and relations make use of.¹⁹² Examples are the standard contrasts drawn between the First World with the so-called Third World, and between developed and developing states. Western framing of issues in international law may also play a role in the tendency to impose universal standards of governance on developing states that essentially further Western (economic) interests;¹⁹³ and in the classification of certain states as ‘rogue states’ in the US-led war on terror.¹⁹⁴

Another approach, not very dissimilar to the one above, is informed by the intersection of law and power. The pervasive element responsible for the uneven application of international law to different states is identified as the ‘legalised hegemony’ of the Great Powers at key moments in the development of the international legal system – most notably in 1815 at the Congress of Vienna and in 1945 at the formation of the United Nations. Seen as fundamental to the discipline rather than accidental, this phenomenon is said to explain why the Great Powers ‘occupy a position of authority within each of the legal regimes that has arisen since 1815’ and in each instance ‘have policed the international order from a position of assumed cultural, material and legal superiority. A key prerogative of this position has been a right to intervene in the affairs of other states in order to promote some proclaimed community goal’.¹⁹⁵ According to this view, institutionalising the hegemonic position of certain states qualifies the principle of the sovereign equality of states, which is a fundamental principle of the post-war international legal order, and widens the scope for the Great Powers to modify existing legal regimes to satisfy their own security and other needs.¹⁹⁶

Yet another interpretation emerged after the collapse of the communist states in the early 1990s. Somewhat paradoxically in view of the triumph of capitalism, communist collapse created a fresh opportunity for the reconsideration and re-application of Marxist theories,¹⁹⁷ including their implications for the study of international law.¹⁹⁸ Based on some central themes in classical Marxist readings, one enduring approach to the interpretation of international law is based on the materialist view of history according to which an understanding and analysis of the world remains inadequate if accounted for in accordance with a belief in the (autonomous) power of ideas. What is needed is an understanding and analysis of the material conditions that caused the emergence of the ideas and their application in a specific manner. Applied to international law and international institutions it would, in Marxist terms, mean an understanding and analysis of the forces within the world economic system, as well as of the features of capitalist production, exchange and accumulation. Once knowledge of these phenomena deepens, understanding grows that poverty,

underdevelopment and unequal development are not a given, but are produced and historically constructed, and just as these phenomena shape international law, so does international law shape them.¹⁹⁹

In concluding this section, it must be noted that since the elimination of the divisions of the past (between colonial powers and colonial possessions, and between a capitalist West and a communist East), the maintenance of the basic framework of international law has been recognised by all states. This is also illustrated by the current UN membership, which underscores the universal appeal of the basic framework despite its European nucleus. Although contested positions remain, as well as tangible differences in approach, especially between the North and the South, no state will seriously defend a position that amounts to a denial of that basic framework. On the contrary, the approach is always to find a justification in international law in defence of a certain position.

SUGGESTED FURTHER READING

H Bull, B Kingsbury & A Roberts (eds) *Hugo Grotius and International Relations* Oxford: Clarendon Press (1990)

L Ehrlich ‘The development of international law as a science’ 105 *Recueil des Cours* (1962) 173–265

B Fassbender & A Peters *The Oxford Handbook of the History of International Law* Oxford: Oxford University Press (2012)

WG Grewe *The Epochs of International Law* Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publishing (2000)

SC Neff ‘A short history of international law’ in MD Evans *International Law* 4th ed Oxford: Oxford University Press (2014) 3–24

JE Nijman *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* The Hague: TMC Asser (2004)

A Orakhelashvili (ed) *Research Handbook on the Theory and History of International Law* Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publishing (2011)

JB Scott *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* London: The Lawbook Exchange Ltd (2000)

H Wheaton *History of the Law of Nations in Europe and America* Buffalo, NY: WS Hein (1982)

¹ See also WG Grewe *Epochen Der Völkerrechtsgeschichte* (1984) 540.

² See chapter 11 of this book.

³ M Koskenniemi ‘What is international law for?’ in MD Evans (ed) *International Law* 4th ed (2014) 29 at 33.

[4](#) See also JE Alvarez ‘State sovereignty is not withering away: A few lessons for the future’ in A Cassese (ed) *Realizing Utopia: The Future of International Law* (2012) 26.

[5](#) See also K Knop ‘Statehood: Territory, people, government’ in J Crawford & M Koskenniemi (eds) *The Cambridge Companion to International Law* (2012) 95; A Anghie *Imperialism, Sovereignty and the Making of International Law* (2007) 33: ‘... despite subsequent attempts to reformulate the foundations of international law, the basic positivist position, that states are the principle actors of international law and that they are bound only by that to which they have consented, continues to operate as the basic premise of the international legal system.’

[6](#) See also Grewe op cit 26.

[7](#) See also M Koskenniemi ‘A history of international law histories’ in B Fassbender & A Peters (eds) *The Oxford Handbook of the History of International Law* (2012) 943; AB Lorca ‘Eurocentrism in the history of international law’ in Fassbender & Peters op cit 1034.

[8](#) JS McClelland *A History of Western Political Thought* (1996) 278.

[9](#) See SA Korff ‘An introduction to the history of international law’ 18(2) *American Journal of International Law* (1924) 253.

[10](#) K Hildenbrandt *Geschichte und System der Rechtst- und Staatsphilosophie: Das Klassische Altertum* (1962) 612; HJ van Eikema Hommes *Major Trends in the History of Legal Philosophy* (1979) 36, 37.

[11](#) A Nussbaum *Geschichte des Völkerrechts in Gedrängten Darstellung* (1960) 15–16; M Kaser *Römische Rechtsgeschichte* 2nd ed (1967) 137. See also M Kintzinger ‘From the late Middle Ages to the Peace of Westphalia’ in Fassbender & Peters op cit 607 at 618 *et seq.*

[12](#) This refers to the thinking in philosophy and religion among certain schools (scholes) of theologians and philosophers during the Middle Ages. These schools were known for their use of reason to deepen understanding of faith and for giving faith a rational content.

[13](#) See F de Vitoria ‘De Indis III’ 2 in JB Scott (ed) *The Classics of International Law; De Indis et De Jure Belli Relectiones* by Franciscus de Vitoria (1917); also *De Potestate Civile* 21 in A Truyol y Serra *The Principles of Political and International Law in the Work of Francisco de Vitoria* (1946). See also J Soder *Die Idee der Völkergemeinschaft: Francisco de Vitoria und die philosophischen Grundlagen des Völkerrechts* (1955) 53–4, 56; FA von der Heydte ‘Franciscus de Vitoria und sein Völkerrecht’ *Zeitschrift für Öffentliches Recht* (1933) 241. For a critical view on the work of de Vitoria, see A Anghie ‘Francisco De Vitoria and the colonial origins of international law’ 5(3) *Social & Legal Studies* (1996) 321–36.

[14](#) F Suarez De Legibus ac Deo Legislatore II 19, para 8 in JB Scott (ed) *The Classics of International Law: Selections from Three Works of Francisco Suarez* (1944). See also J Soder *Francisco Suarez und das Völkerrecht: Grundgedanken zu Staat, Recht und Internationalen Beziehungen* (1973) 213–15.

15 See Suarez op cit II 20, para 7: ‘... since the law in question, as it exists within the said state, is intrinsically ... nothing more nor less than civil law, and is called *ius gentium* only because of its kinship and harmony with the law of other states, or because it is so closely related to the natural law that it is in consequence applied universally to all or almost all nations. Considered in itself, however, as it exists in each separate state, this form of law is dependent upon the particular determination of general law, the power and the custom of that state in itself, without respect to any other. Therefore such law may be changed in any country, by that country even though the others do not consent; for individual nations are not bound to conform to others.’

16 See also J Hart *Empires and Colonies* (2008) Ch 1.

17 Grewe op cit 165. See also AG Keller *Colonization: A Study of the Founding of New Societies* (1908) 80 *et seq.*

18 The Habsburg Monarchy ruled from 1526 to 1918 over a vast territory that included Austria and Hungary, hence its alternative designation as the Austrian-Hungarian Empire.

19 On the Spanish expansion into these areas see DK Fieldhouse *The Colonial Empires: A Comparative Survey from the 18th Century* (1966) ch 2 and for a detailed account Keller op cit chs V–IX.

20 See Keller op cit 89.

21 See Fieldhouse op cit 29 *et seq.*; Hart op cit 20 *et seq.*

22 See Hart op cit 29, 30. See also M Craven ‘Colonialism and domination’ in B Fassbender & A Peters (eds) *The Oxford Handbook of the History of International Law* (2012) 862 *et seq.*; A Fitzmaurice ‘Discovery, conquest and occupation of territory’ in *ditto* 840 *et seq.*

23 See Hart op cit 62 *et seq.*

24 Ibid, 93.

25 The Inquisition was a Roman Catholic Tribunal for the discovery and punishment of heresy, instituted by Pope Innocent III (1198–1216) in Rome.

26 See also Keller op cit 82.

27 See B Fassbender ‘Westphalia, Peace of (1648)’ in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* Vol X (2012) 865 para 4.

28 T Kaufmann ‘Reformation’ in W Heun, M Honecker, M Morlok & J Wieland (eds) *Evangelisches Staatslexikon* (2006) 1948 *et seq.*

29 See R Grote ‘Westphalian System’ in Wolfrum op cit vol X, 870 para 4.

30 Ibid.

31 Ibid. See also Fassbender op cit para 7.

32 See UN Charter, arts 1(2) and 2(1). See also L Gross ‘The Peace of Westphalia 1648–1948’ 42(1) *American Journal of International Law* (1948) 20 *et seq.*

33 See Gross op cit 22–3, 24, 25, 27.

34 See UN Charter, arts 1(3); 55; International Covenant on Civil and Political Rights (1966), art 2(1).

35 This principle now enjoys international customary law status and is codified in art 26 of the Vienna Convention on the Law of Treaties (1969).

36 See also S Verosta (June 2007) ‘History of international law: 1648–1815’ in Wolfrum op cit Vol IV, 823 para 5. That states must settle their disputes by peaceful means is now a fundamental obligation of states in terms of the UN Charter. See UN Charter, art 2(3).

37 This mechanism provides an early example of what the Covenant of the League of Nations (1919) wanted to achieve. See arts 10, 12 and 16 of the Covenant, and Gross op cit 25.

38 Gross op cit 27.

39 D Vagts (Sept 2007) ‘Balance of power’ in Wolfrum op cit Vol I, 786, 787.

40 For an extensive account of these developments, see Keller op cit chs X–XII. See also Grewe op cit 345 *et seq.* on the role of commercial companies in facilitating colonial expansion and rule.

41 See Hart op cit ch 4.

42 The unification of Spain and France and their respective colonies was prevented by England, the Netherlands and Portugal, which sided with the Holy Roman Empire against Spain and France in the War of the Spanish Succession between 1701 and 1714. As a result, Spain abandoned its unification aspirations and lost its Empire in Europe.

43 See Grewe op cit 325 *et seq.*; Hart op cit 125 *et seq.* See also H Durchhardt ‘From the Peace of Westphalia to the Congress of Vienna’ in Fassbender & Peters op cit 628 at 630, 631.

44 See Grewe op cit 400 *et seq.*; Hart op cit 127, 128.

45 HE Egerton *The Causes and Character of the American Revolution* (1923) 1.

46 See also A von Bogdandy (October 2008) ‘Nations’ in Wolfrum op cit Vol VII (2012) 517.

47 See G Stourzh *Alexander Hamilton and the Idea of Republican Government* (1970) 45; C Rossiter *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty* (1953) 12 *et seq.*

48 See Rossiter op cit 3 *et seq.*; Egerton op cit 1 *et seq.*

49 See also Grewe op cit 492.

50 CW Kegley & GA Raymond *From War to Peace: Fateful Decisions in International Politics* (2002) 86–9.

51 Ibid, 88, 89.

52 For the list see ibid, 90–2.

53 See also Grewe op cit 502, 503.

54 HJ Morgenthau *Politics Among Nations: The Struggle for Power and Peace* 4th ed (1967) 446; Kegley & Raymond op cit 95.

55 Kegley & Raymond op cit 98, 99.

56 MN Shaw *International Law* 7th ed (2014) 19–20.

57 Kegley & Raymond op cit 108, 110; Grewe op cit 511 *et seq.*

58 Kegley & Raymond op cit 110 *et seq.*

59 Referring to the system of international relations in Europe that existed after the Congress of Vienna until the outbreak of World War I.

60 Morgenthau op cit 214, 446–7.

61 Kegley & Raymond op cit 94, 95, 99, 100.

62 See ibid, 118, 119.

63 SM Harrison *World Conflict in the Twentieth Century* (1987) 10.

64 See the following comment on the importance of this event by GN Uzoigwe ‘The results of the Berlin West Africa Conference: An assessment’ in S Förster, WJ Mommsen & R Robinson (eds) *Bismarck, Europe and Africa: The Berlin Conference 1884–1885 and the Onset of Partition* (1988) 541: ‘... the Berlin West Africa Conference is a landmark in world history. Never before, in the history of mankind, had a concert of one continent gathered together to plan how to share out another continent without the knowledge of the latter’s leaders. It was a dangerous precedent, which, thankfully, has never been followed up’. During this period, a number of other treaties were agreed between European states in relation to the control of Africa and her people. See TO Elias *Africa and the Development of International Law* (1988) 17–18.

65 The other countries were Russia, Austria-Hungary, Belgium, Denmark, the Netherlands, Sweden-Norway, Spain, Italy, the United States, and the Ottoman Empire. See A Anghie ‘Berlin West Africa Conference’ in Wolfrum op cit vol I, 906; WJ Mommsen ‘Bismarck, the Concert of Europe, and the future of West Africa’ in Förster, Mommsen & Robinson op cit 151 *et seq.*

66 This also meant that African rulers lost control over the subsequent boundary agreements between the European powers by means of which territories in Africa were carved up and over external relations affecting them, having been subsumed under the sovereigns of the colonial powers. See also Elias op cit 15–19.

67 Reprinted in part in LL Snyder *The Imperialism Reader: Documents and Readings on Modern Expansionism* (1962) 209.

68 M Koskenniemi *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002) 123 [op cit 155].

69 Berlin Act, ch 1 art 6.

70 Berlin Act, chs 1, 2 and 4.

71 See Koskenniemi *The Gentle Civilizer* op cit 155 *et seq.*

72 See ibid, 136 *et seq* for an extensive account of these issues. For a lucid explanation, see J Fisch ‘Africa as *terra nullius*: The Berlin Conference and international law’ in Förster, Mommsen & Robinson op cit 347, 354 *et seq*. For a critical discussion, see A Anghie, ‘Finding the peripheries: Sovereignty and colonialism in nineteenth-century international law’ 40(1) *Harvard International Law Journal* (1999) 1–80.

73 Instrumental in this debate were the members of the *Institut de Droit International*, an independent institute for the development of international law founded in 1873 in Ghent, Belgium and which still exists. See <http://justitiaetpace.org/>. In the same year, the English counterpart of the Institute, the International Law Association, was established in Brussels.

74 Fisch op cit 356. See also Craven op cit 874 *et seq.*

75 See also Fisch op cit 366.

76 *Western Sahara* (Advisory Opinion) ICJ Reports 1975, 12 at 101, para 81.

77 Ibid, para 80.

78 B Baker (November 2009) ‘Hague Peace Conferences (1899 and 1907)’ in Wolfrum op cit Vol IV, 689 para 11.

79 These and many other instruments are available on the web page of the International Committee of the Red Cross (ICRC) at www.icrc.org.

80 Baker op cit para 27. See also G Best ‘Peace conferences and the century of total war: The 1899 Hague Conference and what came after’ 75(3) *Royal Institute of International Affairs* (1999) 619 at 625 *et seq.*

81 CM Clark *The Sleepwalkers: How Europe Went to War in 1914* (2013).

[82](#) Kegley & Raymond op cit 129–33.

[83](#) See CJ Bartlett *The Global Conflict: The International Rivalry of the Great Powers 1880–1990* 2nd ed (1994) 57 *et seq*, 77–9.

[84](#) See Kegley & Raymond op cit 137, 138.

[85](#) J Schwietzke (March 2007) ‘Fourteen points of Wilson’ in Wolfrum op cit Vol IV, 203 para 1.

[86](#) See quote in Schwietzke op cit para 2.

[87](#) See Schwietzke op cit paras 11, 14, 15, 17–19, 24.

[88](#) See also TN Dupuy & GM Hammerman (eds) *A Documentary History of Arms Control and Disarmament* (1973) 78, 79.

[89](#) See the discussion below on art 22 of the League Covenant.

[90](#) The Versailles Peace Treaty consisted of 440 articles. A trilingual version (English, French and German) was published in 1919 by the Deutsche Verlagsgesellschaft für Politik und Geschichte.

[91](#) On this, see Bartlett op cit 114–16.

[92](#) F Schorkopf (October 2010) ‘Versailles Peace Treaty (1919)’ in Wolfrum op cit Vol X, 657 para 10.

[93](#) So named after the initiators of the agreement, namely the French Foreign Minister Aristide Briand and his American counterpart, Frank B Kellogg. On the historical circumstances surrounding this initiative, see R Lesaffer (October 2010) ‘Kellog–Briand Pact (1928)’ in Wolfrum op cit Vol VI, 579.

[94](#) Anghie op cit at 179.

[95](#) Ibid, 179–81.

[96](#) Discussed below in 1.2.5.3 of this chapter.

[97](#) Anghie op cit 263, 264.

[98](#) At the time, the Union of South Africa (the predecessor of the Republic of South Africa) was a self-governing dominion of the British Empire. It gained full independence when it became a Republic on 31 May 1961.

[99](#) Article 2 of the agreement between the League Council and Great Britain. See J Dugard *The South West Africa/Namibia Dispute* (1973) 70–1, 72.

100 *South West Africa Cases* (Advisory Opinion) ICJ Reports 1950, 128; *Admissibility of Hearings of Petitioners by the Committee on South West Africa* (Advisory Opinion) ICJ Reports 1956, 23; *South West Africa Cases* (Preliminary Objections) ICJ Reports 1962, 319; *South West Africa* (Second Phase) ICJ Reports 1966, 6; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970) ICJ Reports 1971, 16. For a commendable study on this dispute, see Dugard op cit.

101 See Kegley & Raymond op cit 155, 156.

102 P Johnson *A History of the Modern World: 1917 to the 1980s* (1984) 360, 361.

103 The first Sino-Chinese war took place from 1894–1895.

104 On the historical circumstances and the chronological build-up to this conflict, see Johnson op cit 311 *et seq.*

105 Ibid, 321.

106 See Kegley & Raymond op cit 157 *et seq.*

107 This happened after WWII had already come to an end with the surrender of Germany on 8 May 1945. The war in the Pacific was still ongoing.

108 Johnson op cit 309.

109 Ibid, 311.

110 See also ibid, 344 *et seq.*

111 For a list see Kegley & Raymond op cit 164, 165. See also B Simma et al (eds) *The Charter of the United Nations: A Commentary* 3rd ed Vol I (2012) 1 *et seq.*

112 M Bennouna (November 2007) ‘Atlantic Charter (1941)’ in Wolfrum op cit Vol I, 734.

113 The Soviet Union joined the Allied forces in 1941, after Hitler decided to invade the Soviet Union. Up to this point, Stalin benefitted from the Nazi-Soviet Pact in many ways. It allowed him to recover most of the territory Russia had lost during WWI, including eastern Poland where Stalin also had 15 000 Polish officers murdered, some near Katyn, others in Soviet concentration camps. The Nazis also helped Stalin to hunt down his own enemies to be killed by his secret police, a fate Trotsky also suffered as far afield as Mexico. See Johnson op cit 373.

114 Kegley & Raymond op cit 162.

115 See Bartlett op cit 254 *et seq.*; E Afsah (June 2009) ‘Cold War: 1947–1991’ in Wolfrum op cit Vol II, 300.

116 Kegley & Raymond op cit 179.

117 D Munton & E Rennie (August 2010) ‘Cuban Missile Crisis’ in Wolfrum op cit Vol II, 892 para 1.

118 UN Doc S/5193, 23 October 1962.

119 See also UN Charter, chs XI, XII and XIII.

120 While there is no universally accepted definition of what constitutes an ‘international organisation’, Amerasinghe proposes the following defining features: (i) they are established by some kind of international agreement among states; (ii) they have some form of constitution; (iii) they are made up of organs that are separate from their membership; (iv) they are established under international law; and (v) they are made up predominantly, but not always exclusively, of states and governments (CF Amerasinghe *Principles of the Institutional Law of International Organizations* 2nd rev ed (2005) 10). See further J Klabbers *An Introduction to International Institutional Law* (2009) 6–12.

121 Klabbers op cit 20. Similarly, Amerasinghe notes: ‘Generally, it is unusual for a new problem in international relations to be considered without at the same time some international organisation being developed to deal with it’ (Amerasinghe op cit 7).

122 On the theory of international organisations, see Klabbers op cit 31–7.

123 Amerasinghe, for example, suggests that ‘the growth of the international organisation was the result of a universal human need’ (Amerasinghe op cit 3).

124 P Sands & P Klein *Bowett’s Law of International Institutions* 5th ed (2001) 1. In this regard Kennedy notes: ‘Scholars writing about international institutions do not worry about the normative or historical relationship between their doctrinal or theoretical work and the practice of the institutions they study. Theirs is not, in this sense, a normative or idealist discipline. They worry, rather, about capturing the functional relationship between institutions and states and the details of institutional design on paper. In its practice, the discipline considers problems of situated and pragmatic management rather than normative authority and application’ (D Kennedy ‘The move to institutions’ 8(5) *Cardozo Law Review* (1987) 841, 843).

125 Exceptionally, international organisations are themselves members of other organisations, alongside states.

126 One of the first NGOs was the World Anti-Slavery Convention (1840). Possibly the most famous NGO still operating today is the International Committee of the Red Cross (ICRC).

127 Amerasinghe op cit 3. Sands & Klein note: ‘The activities of these private unions underlined, in many cases, the need for governmental and state action in many of the areas in which these private actors were active’ (Sands & Klein op cit 5).

128 B Reinalda *Routledge History of International Organizations: From 1815 to the Present Day* (2009) 28. Article 109 of the Final Act of the Congress of Vienna stated: ‘The navigation of the rivers ... along their whole course from the point where each of them becomes navigable to its

mouth shall be entirely free and shall not, as far as commerce is concerned, be prohibited to anyone.' For a discussion, see Reinalda op cit 28–34.

129 See, for example, the European Commission for the Danube (1856).

130 See the General Act of the Conference of Berlin concerning the Congo (1885), art 8 and arts 13–25.

131 The International Union of Railway Freight Transportation (1890). For a discussion, see Reinalda op cit 18.

132 The International Telegraph Union (1865); the Universal Postal Union (1974) (initially the General Postal Union) and the International Radiotelegraphic Union (1906). See further Reinalda op cit 85, 89 respectively.

133 International Office of Public Health (1907), the predecessor to the World Health Organization.

134 Klabbers op cit 17.

135 Amerasinghe op cit 3.

136 Covenant of the League of Nations, preamble.

137 See Sands & Klein op cit 10.

138 The speech was delivered by Wilson on 8 January 1918.

139 According to Sands & Klein, the failures of the League's collective security regime include the invasion of Manchuria in 1931; the Italo-Abyssinian War of 1935; German marches into the Rhineland (1936), Austria (1938), and Czechoslovakia (1939); as well as the Soviet Union's invasion of Finland in 1939 and the German invasion of Poland in 1939 (Sands & Klein op cit 9).

140 As Sands & Klein note: 'The relative progress of the League in the field of economics, finance, public health, mandates, transport and communications, social and labour problems, was overshadowed by its failure to prevent the outbreak of the Second World War' (Sands & Klein op cit 12).

141 Sands & Klein op cit 13.

142 AD McNair *International Law Opinions: Selected and Annotated* (1956) 99 (cited in Anghie op cit 147).

143 See Covenant of the League of Nations, art 1.

144 Amerasinghe op cit 5.

145 Ibid, 3 and Klabbers op cit 17.

[146](#) Anghie op cit 133.

[147](#) In this regard, Klabbers notes: ‘Without the League, the United Nations would have looked different indeed. And even some practices developed in the UN were really tried and tested within the league, peacekeeping being a prominent example’ (Klabbers op cit 17–18).

[148](#) The approach at the time, which is repeated by many scholars today, was to lay the blame for the failures of the League at the feet of its political masters, rather than its international organisational structure, which was ‘redeemed’ shortly thereafter by the creation of the United Nations. See for example, Sands & Klein op cit 13.

[149](#) See S Pahuja *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011) 11.

[150](#) See the Atlantic Charter, concluded by American President Theodor Roosevelt and British Prime Minister Churchill in August 1941. Roosevelt himself suggested that one of the mistakes of the League of Nations was ‘waiting until the end of the war to set up the machinery of peace’. See Pahuja op cit 12.

[151](#) Ibid, 11–12.

[152](#) Formerly the Washington Conversations on International Peace and Security Organization, attended by the United States, Britain, the Soviet Union and China.

[153](#) Pahuja notes that this conference took place after ‘many key elements of the shape of the new institutions had already been agreed upon by the major powers’ (Pahuja op cit 13).

[154](#) On the differences between the Covenant of the League of Nations and the UN Charter, see Klabbers op cit 17–19.

[155](#) See chapter 5 of this book.

[156](#) As Kennedy notes: ‘The transformative power of institutionalization seemed powerful after the First World War, the Second World War, and the wars of decolonization. Although each generation experienced and acknowledged the proceduralization of their dreams and the breakdown of the organizations they founded, faith in the institutionalization and fear of disorganization remained largely unshaken’ (Kennedy op cit 984).

[157](#) Formerly known as the ‘United Nations Monetary and Financial Conference’.

[158](#) Klabbers op cit 19.

[159](#) See also chapter 14 of this book.

[160](#) Pahuja op cit 13. In fact, Britain did not want to widen the conversation on the establishment of the economic institutions at all, and the US’s insistence on doing so was in pursuit of strategic advantage, not inclusiveness (*ibid*).

[161](#) See UN Charter, Chapter VIII.

[162](#) The exception being the Organization of African Unity, which contained mechanisms relating to the maintenance of peace and security and the settlement of disputes, but these were not fully operational until after the end of the Cold War. See discussion in para 1.2.5.5 below.

[163](#) The Pact of the League of Arab States, art 2. The Pact was signed on 22 March 1945 by Syria, Transjordan (now Jordan), Iraq, Saudi Arabia, Lebanon, Egypt and Yemen.

[164](#) OAS Charter, art 1.

[165](#) Which came into force in December 1951.

[166](#) See chapter 11 of this book.

[167](#) Klabbers op cit 19.

[168](#) Signed on 5 May 1949 by Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

[169](#) Statute of the Council of Europe, art 1(a).

[170](#) The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.

[171](#) Established in terms of the Treaty of Paris (1951), signed by Belgium, France, West Germany, Italy, the Netherlands and Luxembourg.

[172](#) The proposal was made by France's Foreign Minister at the time, Robert Schuman. See 'The Schuman Declaration', 9 May 1950.

[173](#) Established in terms of the Treaty of Rome (1957), signed by Belgium, France, Italy, Luxembourg, the Netherlands and West Germany.

[174](#) See the Treaty of European Union (1992) (known as 'the Maastricht Treaty') and the Treaty of Lisbon (2007). Please take note of the following sources: A Arnulf & D Chalmers (eds) *Oxford Handbook of European Union Law* (2015); R Schütze *European Union Law* (2015); C Barnard & S Peers (eds) *European Union Law* (2014); J Klabbers *The European Union in International Law* (2012).

[175](#) Formed in order to facilitate the reconstruction of Europe after World War II. In 1961, it became the Organisation for Economic Co-operation and Development, and now focuses on global economic trade.

[176](#) Formed to create a bridge between East and West Europe during the Cold War in relation to security issues.

[177](#) OAU Charter, art II, 1(d).

[178](#) The OAU Charter established a ‘Commission of Mediation, Conciliation and Arbitration’ (see art XIX) in order to ‘settle disputes among themselves by peaceful means’, as well as a Defence Commission in order to ‘defend the sovereignty, the territorial integrity and the independence’ of member states. However, neither instrument lived up to the expectations of the drafters and the former Commission was replaced by the ‘Mechanism for Conflict Prevention, Management and Resolution’ in 1993. See the OAU ‘Cairo Declaration’.

[179](#) See the African Charter on Human and Peoples’ Rights, adopted by the OAU in 1981 but entering into force in 1986. See chapter 11 of this book.

[180](#) See *Report of the UN Secretary General: ‘Agenda for Peace’* (1992) UN Doc A/47/277-S/24111, para 63.

[181](#) The OAU ‘Cairo Declaration’ (1993), para 15.

[182](#) AU Constitutive Act, art 3(f).

[183](#) The Protocol establishing the Peace and Security Council (PSC) was adopted on 9 July 2002 at the First Ordinary Session of the Assembly of the African Union. Pursuant to art 5(2) of the AU Constitutive Act, the PSC became operational in 2004.

[184](#) Article 4(j) sets out ‘the *right of Member States* to request intervention from the Union in order to restore peace and security’ [own emphasis], while art 4(h) sets out ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity’. This was motivated in large part by dissatisfaction with the current international legal regime, which had failed to prevent atrocities in Africa during the 1990s.

[185](#) From 12 member states in 1989, to 28 member states currently.

[186](#) The adoption of the Euro currency is voluntary. To date, 19 member states have adopted the currency.

[187](#) It now has 47 member states, more than half of which joined after 1989.

[188](#) Russia joined on 28 February 1996.

[189](#) See also M Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* (2005) 23–41; 218–223.

[190](#) In simple terms, imperialism denotes political and economic rule over large territories often through military force and by conquering other lands. This explains why colonialism, the taking of control over foreign territories by Western powers between the 15th and 19th centuries, is a term sometimes used interchangeably with imperialism.

[191](#) See, however, A Becker Lorca *Mestizo International Law: A Global Intellectual History 1842–1933* (2014), which considers ‘the expansion and appropriation of international law outside

the West [and] ... in which Western and non-Western international lawyers interacted and disagreed about the interpretation of international rules and doctrines' (ibid, 7) [own emphasis].

[192](#) See generally A Orford (ed) *International Law and its Others* (2009).

[193](#) See Pahuja op cit.

[194](#) Anghie op cit especially chs 4–6.

[195](#) G Simpson *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004) 5.

[196](#) See also ibid, chs 10–12.

[197](#) See also Shaw op cit 22 *et seq.*

[198](#) See, for example, the collection of essays in S Marks (ed) *International Law on the Left: Re-examining Marxist Legacies* (2008).

[199](#) Ibid, 1–13.

Chapter 2

Statehood and recognition

HENNIE STRYDOM AND CHRISTOPHER GEVERS

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2.1 Introduction to statehood

States are the central subjects of international law¹ and, through the related notion of sovereignty,² continue to play a dominant role in structuring the international legal order (as well as debates about it).³ In fact, states are central not just to international law, but to the modern legal, political and social imagination generally.⁴ As Craven has pointed out, we tend to depict the world either in terms of its ‘physical and biological geography’ (continents, rivers, seas and forests), or in terms of its ‘political geography’ (territorial states on a map). In this way, the state ‘assumes for itself the same kind of permanence and solidity in descriptions of our social and political environment that one would normally associate with geological formations in the physical world’.⁵

While this may seem a fairly unexceptional situation to many of us today, the *rise* of the state within global legal, political and social imagination was a bloody,⁶ drawn-out and (fairly) recent affair, as chapter 1 has illustrated.⁷ Moreover, despite their centrality, states (and sovereignty) have come under considerable and constant attack (Nietzsche once called the state ‘the coldest of all cold monsters’),⁸ and their supposed demise has been an abiding feature of international legal scholarship (in 1924, Brierly labelled the state ‘idolon theatri’).⁹

For its part, South Africa has historically played a significant and provocative role in the development of the law relating to statehood. South Africa was one of the first African ‘states’ to be recognised as such when, in 1931, it was granted independence by the Statute of Westminster. Prior to this, it was a British Dominion with limited self-government. Then, during the inter-war period, South Africa was ‘entrusted’ with a mandate over South West Africa (now Namibia) by the League of Nations. However, when mandates were terminated following World War II, the apartheid government refused to relinquish control over the territory. The ensuing international dispute (which ended up before the International Court of Justice on several occasions) led to the further development of the principle of self-determination of peoples, which (as we shall see) is a crucial part of the ‘international law of statehood’. Finally, under apartheid, the South African government attempted to create a number of nominally independent states – called ‘bantustans’ – to deflect international criticism of the treatment of the so-called ‘non-European’ population.¹⁰ This project failed and was repealed after the end of apartheid. However, the reasons for its failure became a point of contestation for the theories of statehood as international lawyers debated whether it had failed because the bantustans failed to meet the criteria of statehood (and, if so, which ones), or whether it failed because no other state ‘recognised’ their statehood.¹¹

2.1.1 Defining statehood

There is no generally accepted definition of statehood in international law, despite longstanding efforts by international lawyers (and episodic efforts by states) to develop one.¹² It is somewhat surprising that agreement over the definition of such a central subject in international law has eluded states and scholars. Over the years, various reasons have been advanced for the failure to define ‘the state’ – such as the politics at play, or the context within which questions of definition generally arise.¹³ Other scholars suggest the problem is structural, relating to the very *nature* of the state.¹⁴

However, it has become commonplace in contemporary literature to refer to a number of *criteria* for statehood. This has the benefit of providing some common ground for discussions about states and statehood. However, the use of criteria raises a number of difficulties.

First, there is the question of where to locate these criteria (and whether they are fixed). Here the difficulties of definition repeat themselves. However, many writers (almost as a reflex)¹⁵ begin with the four criteria contained in the 1933 Montevideo Convention on the Rights and Duties of States:

1. a permanent population;
2. a defined territory;
3. government; and
4. capacity to enter into relations with other states.¹⁶

Initially, there was some debate as to whether what was being described in article 1 of the Montevideo Convention was ‘*a sociological fact or a legal category*’. (Both interpretations are possible).¹⁷ Over time, the Montevideo Convention increasingly became associated with the *declaratory* theory of statehood, and they are the starting point for most discussions about statehood. However, the Montevideo criteria are ‘still treated with a certain degree of circumspection’.¹⁸ In this regard, Craven notes that as ‘*a legal prescription*, the terms of the Montevideo convention appear to be either too abstract or too strict’.¹⁹

Secondly, referring to criteria of statehood pre-empts the second important debate about statehood – namely, how states come into existence, or are created. This is because the use of criteria implies that states have come into being through the objective application of these criteria, by some competent authority empowered to apply them. While this is consistent with the so-called *declarative* theory of statehood (which has been dominant since the inter-war period), it is at odds with its theoretical opponent, the *constitutive* theory of statehood, in terms of which states are created solely through their *recognition* by other states.²⁰ The meaning of these theories is further explained in the section on statehood and recognition below.

Despite its limitations, the same approach is followed here: the ‘marks’ of statehood (found in the Montevideo Convention) are used to *describe* what states in broad terms look like, so that we can discuss them further – and not to *prescribe* what a state must be in order to be recognised as such (that is, not as *criteria* for statehood).

2.1.1.1 A defined territory

To begin with, states are not ‘disembodied spirits’,²¹ they are ‘territorial entities’²² or, according to the Montevideo Convention, they have a defined territory. This includes not just land itself but also the territorial sea (in the case of coastal states) and the air space above the state.²³ States’ territories come ‘in all shapes and sizes’.²⁴ They range considerably in size. The Vatican City, for example, is less than half a square kilometre in size.²⁵ Moreover, not all states are single, contiguous landmasses; different parts of a state can be separated from one another (with other states between them).²⁶ For example, Alaska and Hawaii are both part of the United States of America, even though they are separate from the other states and, in so far as Alaska is concerned, Canada stands between it and mainland America.

Although states may have *defined* territories, many states have disputed borders – that is, disputes over the precise territorial boundaries of the state. In the *North Sea Continental Shelf* case, the ICJ noted:

There is ... no rule that the land frontiers of a state must be fully delimited and defined, and often in various places and for long periods they are not, as shown by the case of the entry of Albania into the League of Nations.²⁷

In fact, states’ borders are disputed far more often than one might think, even in the case of relatively well-established states.²⁸ For example, Israel’s borders have been disputed for over 40 years.²⁹ This becomes even more complicated when we consider marine space, which is constantly shifting. An interesting question arises as to whether, once a state has established that it has a defined territory,

it loses its status as a state if the territory changes significantly. Here, the effects of climate change are particularly relevant.³⁰ Among scholars who see a ‘defined territory’ as a *criterion* for statehood, some assert that, at the very least, a state’s territory must be ‘reasonably ascertainable’ in order to qualify under this criterion.³¹

2.1.1.2 A permanent population

States are made up of people or have a ‘permanent population’, in terms of the Montevideo Convention. As is the case with territory, populations come in different sizes.³² Once again, the Vatican City is a good example of how small a state can be: as at 2006, it had only 768 inhabitants.³³ While the ‘population’ for these purposes need not necessarily be nationals of the state,³⁴ in the legal sense, a number of authors suggest they must have *some* relationship to the would-be state.³⁵ In this regard, Craven notes:

[T]he existence of a ‘population’ seems to be cast in metaphorical terms — they must exist ‘as if’ in relationship to an order of government over territory, in which their presence as objects of coercion is necessary, but their identity as participants in that political community remains indeterminate.³⁶

Some scholars insist on a stronger relationship, for these purposes, between a state and its population. Abbas, for example, argues that ‘the organic population of the state must be distinguishable, *by virtue of its identity, culture, and customs*, from other peoples who may be present in the state, such as foreigners’.³⁷

2.1.1.3 Effective government

States have governments, or more specifically *effective* governments. For some, this is the most important attribute of statehood, as ‘all the others depend upon it’.³⁸ The relationship between government and statehood is particularly controversial,³⁹ and discussions in this regard tend to blur the distinction between the state, on the one hand, and the government on the other. However, even among those scholars who see this as a requirement for statehood, there is general agreement that a government need not be a particular *form* of government (such as a democracy).⁴⁰ As the International Court of Justice in the *Western Sahara* case found:

No rule of international law, in the view of the court, requires the structure of the state to follow any particular pattern, as is evident from the diverse forms of state found in the world today.⁴¹

Rather, effective government in this regard implies ‘a system of government in general control of its territory, to the exclusion of other entities’.⁴² As Craven notes:

[W]hat is clearly meant, here, is that the government concerned must demonstrate unrivalled possession and control of public power (whatever the specificities of that might be in any particular setting), and that once that unrivalled possession is established with a degree of permanence recognition of statehood may follow.⁴³

This distinction can be illustrated by comparing the South African government during apartheid with the ‘bantustans’ it tried to establish. Both entities might be considered to have unacceptable *forms* of government (as a result of their violation of the right to self-determination), but only the bantustans’ failure to exercise control over their territory would be relevant for the purposes of the ‘effective government’ element.

2.1.1.4 Capacity to enter into relations with other states

Finally, states possess the *capacity* to enter into relations with other states.⁴⁴ This ‘capacity’ is evidenced by entering into treaties with other states, exchanging diplomats with other states and by approaching international courts to settle disputes. Authors differ on this element’s significance for statehood.⁴⁵ Abass, for example, argues that ‘the capacity to enter into foreign relations with other states is the strongest certification of state sovereignty’.⁴⁶

Certain authors consider the ‘independence’ of states to be part of this capacity requirement.⁴⁷ In this regard, the Permanent Court of Arbitration, in 1928, in the *Island of Palmas* arbitration noted:

Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.⁴⁸

There is, however, general agreement among scholars that independence – either as part of the ‘capacity to enter into foreign relations’ concept, or an independent one altogether – is an important mark of statehood.⁴⁹ Crawford, for whom independence is a separate criterion of statehood (the most important one at that), distinguishes in this regard between *formal* independence and *actual* independence.⁵⁰ He notes that ‘it is important to distinguish independence as an initial qualification for statehood and as a condition for continued existence’.⁵¹ In respect of the latter, international law formally protects states’ independence once established.⁵²

2.1.2 The ‘new’ criteria for statehood

Most authors agree, at the very least, that the Montevideo criteria (defined territory, permanent population, effective government and capacity to enter into relations with other states) must be satisfied. However, there is some debate among them as to whether these requirements are exhaustive, or whether there are additional requirements for statehood.

Over time, scholars (and more recently, international organisations such as the European Council) have augmented these requirements. Crawford, for example, supplements the original four with one of *independence*, which he argues is the most important condition for statehood. In addition to these five effectiveness-based criteria, Crawford argues that the creation of states is conditioned by legal principles such as the principle of self-determination and the prohibition on the use of force. These legal principles, in exceptional circumstances, can operate against the principle of effectiveness to disqualify a factually proper claim to statehood ‘on grounds of legality or legitimacy’.⁵³ By way of example, he argues that certain entities that met the requirements for statehood historically were nevertheless not ‘states’ under international law as their establishment would violate the right to self-determination (for example, Southern Rhodesia (Zimbabwe) in the 1960s). Similarly, other entities that did not strictly meet these requirements (in particular, that of effective government) nevertheless qualified as states as their establishment would support the right to self-determination (such as Congo in 1960). According to Crawford, this development reflects the rise of the principle of legality (and peremptory norms) in international law.⁵⁴

However, the augmentation of the criteria has been criticised, and may have the effect of working against the idealistic ambition of declarativists of subjecting statehood to legal principles.⁵⁵ This is to say nothing of some of the new criteria for statehood that have been advanced (such as ‘willingness and ability to observe international law’),⁵⁶ which stretch the idea of ‘facticity’ to vanishing point.

2.2 Statehood and recognition

The manner in which states come into existence or are created is a matter of some controversy. As a result of this issue's early influence on debates about statehood, most academic discussions regarding statehood are organised around the concept of the 'recognition of states'. In this regard, there is an ongoing debate between two theories of how states come into existence. Broadly speaking, according to the *constitutive theory*, a new state is constituted (or created) by the legal act of recognition by existing states; while according to the *declaratory theory*, a new state exists (or is somehow created by international law) when it meets the criteria of statehood, and the recognition of other states simply declares this fact (and is thus not legally relevant).

2.2.1 The 'great debate' (and its discontents)

The classic statement of the *constitutive theory* is that 'a State is, and becomes, an international person, through recognition only and exclusively'.⁵⁷ Simply put, recognition *constitutes* the state.⁵⁸ The act of recognition therefore is central to this theory of statehood: it is the 'tool of statecraft'.⁵⁹ Crucially, recognition is a 'high political act', and states are given full discretion in choosing whether or not to recognise an entity claiming statehood. States cannot claim a *right to recognition* on the part of other states. To use a practical example, under the constitutive theory, the success of the apartheid government's attempts to create independent states (bantustans) depended on whether the rest of the states of the world recognised these new entities.⁶⁰ The result is that the constitutive theory leaves very little role for international law (if any) in the creation of the key actors in international law (states).⁶¹

Modern exponents of the *declaratory theory* assert that 'the creation of States is a matter in principle governed by international law and not left to the discretion of individual states'.⁶² The act of recognition 'merely acknowledges or *declares* that a community has come to possess all the requisites of statehood'.⁶³ The theory has evolved somewhat over time. The classic statement of the 'declaratory theory' was originally rather different from its modern one – namely, that '[t]he formation of a new State is ... a matter of fact, and not of law'.⁶⁴ However, the suggestion that statehood was simply a fact, and that therefore establishing its existence was merely a factual enquiry, has come in for considerable criticism.⁶⁵ Crawford, the most prominent modern declarativist, sought to clarify this historical fact/law dichotomy by suggesting:

[a] State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices.⁶⁶

Similarly, Chen argues that 'if a State owes its existence to a system of law, then that existence is not, *or not only*, a "fact"'.⁶⁷ Others have suggested that the creation of a state is a 'mixed question of law and fact'.⁶⁸ However, what makes these diverse scholars 'declarativists' is the common assertion that statehood is a legal status that is independent of recognition.⁶⁹ As one scholar puts it, '[r]ecognition presupposes a state's existence, it does not create it'.⁷⁰ The legal effect of an 'act of recognition' by existing states, on this approach, is *evidentiary*.⁷¹ This 'great debate' between the constitutivist and declarativist theories of recognition has generated considerable literature and critique. The most commonly expressed critique of *constitutivism* is that it grants existing states too much, or in fact absolute, discretion with regard to who gets to become the newest member of the international legal order. Recognition becomes a tool of *Realpolitik* or, as Brierly puts it, 'an attorney's mantle artfully displayed on the shoulders of arbitrary power'.⁷² It is too 'political' and leaves little or no place for law in the formation of international law's central subjects. As such, a number of scholars have objected to this theory on principled grounds (and little else at times). Practical problems arise as well, including the status of an entity recognised by one state but not another. What is the status of an entity that possesses the attributes of a state, but which remains

unrecognised by other states? Is that entity bound by international law as it applies to states? All this is to say nothing of the possible interpretive difficulties associated with the act of recognition. For example, Warbrick suggests that the simple statement ‘We (State A) do not recognize X as State’ has at least five possible meanings.⁷³

A central feature of the *declaratory theory* (at least in its later form) is that it reasserts the role of international law in the creation of states, an idealist response to the ‘seemingly unprincipled aspects of constitutivism’ and its diminished role for law.⁷⁴ However, as Grant points out, despite its principled pretences, this approach ‘is more complex than a simple dichotomy between *Realpolitik* and idealism would suggest’.⁷⁵ There are formidable challenges to the claim that international law, somehow, *creates* states (and that recognition is, at best, evidentiary). Chiefly, state practice suggests that the recognition by other states continues to play a far greater role in the formation of states than declarativists care to admit.⁷⁶

Even on its own terms, the declaratory theory is open to criticism. By ‘making statehood automatic, upon the fulfilment of certain criteria by any entity aspiring to statehood’,⁷⁷ this theory raises difficult questions. First and foremost, ‘what are the criteria of statehood against which claims are measured?’ The declarative theory requires clarity on the concept of ‘state’ and, in doing so, ‘enmeshes recognition with the definition of statehood’.⁷⁸ Even if there were an agreed set of criteria, the question then becomes: ‘who or what decides when these are met?’ As Kelsen notes, ‘in the province of law there are no absolute, directly evident facts, facts “in themselves”, but only facts established by the competent authority in a procedure prescribed by the legal order’.⁷⁹ As a result, declarativists are forced to ‘rely rather heavily upon the self-executory character of formal rule’ or accept some role for states in deciding when the facts are present.⁸⁰ In the latter case, this has the effect of collapsing the distinction between the constitutive and declarative theories altogether.⁸¹

For these reasons, some scholars have tried unsuccessfully to propose a ‘third way’, somewhere between the two dominant theories. Sixty years ago, Lauterpacht proposed a theory that accepted the basic premise of constitutivism, but suggested that when the conditions of statehood are met, states are ‘under a duty to grant recognition’.⁸² Then, in 1987, Dugard argued that in light of recent practice, in particular the process of decolonisation, recognition could take place *collectively* through admission to the United Nations.⁸³ However, despite the fact that Dugard’s thesis was one of the first to take full account of the practice of decolonisation, it was not widely adopted.

Over the years, this debate has raged (or limped) on, with declarativists gaining the upper hand in the textbooks,⁸⁴ while in practice ‘most international lawyers try to bring the two approaches into some sort of alignment’.⁸⁵ Few are confident enough to deny the relevance of recognition to statehood altogether. As Simpson suggests: ‘most ... [international lawyers], most of the time, think recognition (at least some of the time) belongs with statehood’.⁸⁶ These debates continue, with little chance of resolution (not least of all because the protagonists adopt markedly different conceptions of international law).⁸⁷ Yet, they remain central to modern scholarship on statehood in international law, and are therefore the ‘logical starting point’.⁸⁸

However, these theories alone cannot explain the emergence of states in international law. Rather, it is necessary to place these theories in their historical context, and consider how they have influenced, and been influenced by, state practice over time. Moreover, arguably neither of these theories has taken sufficient cognisance of decolonisation, which, from an African perspective in particular, led to the emergence of a number of states.

2.2.2 Nineteenth century: revolution, recognition and colonialism

The state, as we know it today, emerged during the long nineteenth century, along with the question of ‘statehood’, as a discrete concern of international law. This turn in international legal scholarship was influenced by three developments in the world of states.

First was the secession of former colonies in the New World – beginning with the United States, which seceded from Britain in 1776, and followed by the secession of a number of former Spanish colonies in Central and South America. These secessions meant international lawyers had to account for the emergence of states outside Europe. The second development, from the middle of the nineteenth century, were the revolutions (and counter-revolutions) that changed the face of Europe. Among other things, the ‘historic dynastic prerogative’⁸⁹ was eroded as legitimism came to be replaced by ‘effective control’ as the basis for *internal* sovereignty.⁹⁰ The third development, in the latter half of the century, was the expansion by certain European powers of their global imperial projects (into Africa in particular).⁹¹ European imperial conquest gave way to colonialism and the formal projection of European sovereignty globally;⁹² during the final three decades of the nineteenth century, the British Empire was extended over approximately 4.5 million square miles and 66 million people; France gained 3.5 million square miles and 26 million people; Germany, 1 million square miles and 26 million people; and Belgium, 900 000 square miles and 8.5 million subjects.⁹³

It is in the context of the emergence of the modern state in Europe (and beyond), and the projection of sovereignty outside it, that the debates about statehood and international law began in earnest.⁹⁴ Among those international lawyers who explicitly addressed the question of statehood, the constitutive theory of recognition soon rose to prominence (particularly among scholars from Britain and North America).⁹⁵ In this regard, Parfitt notes that ‘one of the first to articulate a constitutive theory of recognition’ was Henry Wheaton, an American international lawyer and diplomat. In his *Elements of International Law* (1863), Wheaton argued that ‘while the “internal sovereignty of a State” did not “depend on its recognition by other States”, a state’s “external sovereignty” would “require recognition by other States in order to render it perfect and complete”’.⁹⁶

The dominance of the constitutivist theory during this period had considerable consequences for ‘would-be’ African states (and for international law more broadly).⁹⁷ The refusal of the (then-overwhelmingly European) ‘family of nations’ to recognise African political communities as states, notwithstanding their ‘state-like’ character,⁹⁸ meant that they could legally be brought under the sovereignty of European powers through colonisation. In this regard, Anghie notes: ‘[T]he colonial encounter ... was an encounter, not between two sovereign states, but between a sovereign European state and an amorphous uncivilized entity...’.⁹⁹

This legal ‘non-recognition’ of African sovereignty was formalised at the Conference of Berlin (1884–1885)¹⁰⁰ where certain European powers met to agree *inter alia* the ‘rules concerning the acquisition of new territory’.¹⁰¹ While the true impact of the Berlin Conference remains debated,¹⁰² it had the effect of ‘irreversibly excluding any pretensions to sovereignty that indigenous communities might have entertained’.¹⁰³ This paved the way for the exercise of sovereignty in Africa, not by Africans, but by imperial European states – and, in one case, a European company – with disastrous and lasting effects.¹⁰⁴

In practical terms, the colonial encounter set the borders that would (more or less) become contemporary African states. Through the process of colonisation, European states carved up Africa into about 40 colonial territories, which later formed the basis of many post-colonial African states.¹⁰⁵

2.2.3 The interwar period, the Montevideo Convention and declarativism

Despite the relative dominance of the constitutive theory of statehood at the turn of the century, the changing composition of the international legal order following World War I resulted in a shift towards the declarative theory.¹⁰⁶ The centrepiece of this new declarativist thinking was the 1933 Montevideo Convention on the Rights and Duties of States. In particular, article 1 of the Convention states:

The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.

According to Parfitt, the Convention was an attempt by (newly recognised) Latin American states to check the ‘hubris of inter-war “modernism” of the Great Powers of the time’.¹⁰⁷ Under the Montevideo Convention, the ‘declaratory theory’ was remodelled to some extent so that “external legality” followed not from “internal legality” but rather from the “fact” of statehood, *as defined by the four supposedly objective criteria*.¹⁰⁸ The Montevideo Convention – according to its proponents –‘marked the beginning of the end both for the constitutive theory *and for the so-called “standard of civilization” upon which it relied*’.¹⁰⁹ The rise of declarativism also coincided with the expansion of international law’s reach more broadly: the *constitutive theory* was a theory of, and for, the nineteenth century, whereas ‘modern’ international law demanded a stronger role in the ‘creation’ of its pre-eminent subjects.¹¹⁰

However, the emergence of the declarative theory, and the expansion of international law, did little to ameliorate African claims for statehood in the short term. While the interwar period witnessed the emergence of two African states (Egypt¹¹¹ and South Africa), statehood remained illusory for the majority of African peoples who continued under the ‘yoke of colonialism’. Nevertheless, the seeds of its destruction were planted during the interwar period. First, the post-war principles of ‘self-determination and recognition of ethnic and national rights’,¹¹² while limited in their application at the time to central and eastern Europe, would later form the basis of claims for decolonisation after World War II. Secondly, the creation of the League of Nations in 1919, and the introduction of the mandates system,¹¹³ was the first step in the ‘great project of dismantling … Empires’ and in ‘facilitating the transformation of colonial territories into sovereign, independent states’ that would take place under the United Nations after World War II.¹¹⁴ Finally, following the Great War, in which a number of African soldiers participated in expectation of fairer treatment,¹¹⁵ colonial powers faced growing anti-colonial sentiment from within their colonial territories and from abroad.

However, it would take another world war and the creation of the United Nations in order for the promise of African statehood to become a reality.

2.2.4 Decolonisation and political self-determination

The United Nations was established in 1945, 60 years after the Berlin Conference had effectively denied the claim of the majority of African political communities to statehood. Significantly, the UN Charter recognised the principle of self-determination, ‘the portal through which communities stepped in order to acquire the magic of sovereignty’.¹¹⁶ This would ultimately lead to the demise of colonialism.¹¹⁷

While the right of peoples to determine their own form of government has antecedents in domestic political thought,¹¹⁸ it emerged at the international level at the beginning of the twentieth

century. In his famous Fourteen Points Speech in 1918, US President Wilson made it clear that he believed ‘boundaries in the new Europe should be configured so far as possible by reference to “historically established” relations of nationality and allegiance’.¹¹⁹ However, as noted above, this was a limited right to self-determination, and did not inhere to either the *internal* population of the victorious powers, nor did it apply to ‘territories outside Europe which, in the terms of the time, had yet to discover their national consciousness’.¹²⁰

The principle of self-determination would take on a far greater and broader role in the United Nations, both in its Charter and more importantly in practice.¹²¹ The Charter lists ‘self-determination of peoples’ among its purposes and principles.¹²² However, it is in the practice of states (and in particular newly independent states in the United Nations General Assembly) that this principle was first expanded,¹²³ and then given effect through Chapter XI of the Charter.

Chapter XI (concerning non-self-governing territories), ‘while conservatively drafted, was subsequently given a “broad interpretation”’.¹²⁴ Under Chapters IX and XIII of the UN Charter, a trusteeship system was established for the ‘progressive development towards self-government or independence’ of the former League of Nations mandates and the territories of defeated Italy. Moves to include all colonial territories under this system were resisted by the imperial powers. As a compromise, Chapter XI was introduced to apply to ‘non-self-governing territories’. Under Chapter XI, member states who had or assumed responsibilities for these non-self-governing territories were obliged to take certain measures to ‘promote to the utmost ... the well-being of the inhabitants of these territories’, in terms of the ‘sacred trust’. These measures included:

to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.¹²⁵

However, this system was not made subject to the same level of oversight as that of the trusteeship system, and (perhaps more importantly), it was left up to the Colonial Powers to determine which of their ‘colonial’ possessions were ‘non-self-governing-territories’.

Despite these limitations, the practice of states served to interpret these provisions very broadly.¹²⁶ In 1960, the General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples (‘the Colonial Declaration’),¹²⁷ the so-called ‘Magna Carta of decolonization’.¹²⁸ This concerned not only trust and non-self-governing territories, but also ‘all other territories which have not yet attained independence’.¹²⁹ The Colonial Declaration affirmed that ‘[a]ll peoples have the *right to self-determination* [and] ... by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’.¹³⁰ Furthermore, it declared that ‘[i]mmediate steps shall be taken ... to transfer all powers to the peoples of ... [these] territories, without any conditions or reservations’.¹³¹ The development of the principle of self-determination in respect of these territories by the General Assembly was later endorsed by the ICJ in the *Western Sahara* case, where it stated that the Colonial Declaration ‘provided the basis for the process of decolonization which has resulted since 1960 in the creation of many States which are today Members of the United Nations’.¹³² The principle that emerges from this practice is summed up by Judge Dillard in his ‘Separate Opinion’ in the *Western Sahara* case: ‘It is for the people to determine the destiny of the territory and not the territory the destiny of the people’.¹³³ In this regard, as Simpson notes, ‘the pattern of meticulous preparation for independence favoured by the Charter and central to the mandate scheme was abandoned in favour of “a speedy and unconditional end to colonialism”’.¹³⁴

This was followed – the very next day in fact – by Resolution 1541, which addressed the issue of identifying territories as ‘non-self-governing’ by adopting certain principles to guide members

in determining whether certain territories under their control were non-self-governing territories,¹³⁵ and thereby rejecting claims by the administering powers that such matters were within their exclusive domestic jurisdiction.¹³⁶ These principles declared upfront that '[t]he authors of the Charter of the United Nations had in mind that Chapter XI *should be applicable to territories which were then known to be of the colonial type*'.¹³⁷ Resolution 1541 also set out the applicable 'full measure of self-government' as meaning: '(i) Emergence of a sovereign independent State, (ii) Free association with an independent State, or (iii) Integration with an independent State.'¹³⁸ In this regard, Simpson notes:

[W]ith its references to free association and, even integration, [Resolution 1541] gestured back to the 19th century but it was made very clear that full independence and statehood were the preferred results of a process of decolonisation. Effectiveness no longer mattered; what mattered were anti-colonial results.¹³⁹

It was through this process that the vast majority of African states came into existence. For this reason, Okafor notes that '[t]he decade of the 1960s was the age of African independence'.¹⁴⁰ The irony was, of course, that 'acts of self-determination' under this system took place within the existing colonial borders (for the most part). As Simpson notes, '[d]ecolonisation set the European imperial project in international legal stone'.¹⁴¹ This was based on the principle of *uti possidetis*, which originated 'in the somewhat hazy practice of boundary delimitation in South America'.¹⁴² It was later affirmed by both the Organization of African Unity¹⁴³ and the ICJ as 'a general principle ... logically connected with the phenomenon of obtaining independence, wherever it occurs'.¹⁴⁴

Given its role in 'the liberation of a billion people from imperial rule',¹⁴⁵ one would rightly suppose that the principle of self-determination – and the process of decolonisation – would have had a considerable effect on the theories of statehood. However, decolonisation did not precipitate the substantial revision of the field that one might expect. Remarkably, in its immediate aftermath, Higgins found that the criteria for statehood remained unchanged.¹⁴⁶ In the 1980s, Dugard noted that 'the debate over recognition continues largely in a manner reminiscent of the pre-decolonization period'.¹⁴⁷ In fact, to this day a number of international lawyers have 'resisted the implication that self determination is ... a process of describing how new States emerge'.¹⁴⁸

In fact, the decolonisation process posed challenges to both the declarativist and constitutivist accounts of statehood.

For declarativists (the dominant theory of statehood at the time of decolonisation), the process of decolonisation saw former colonies attain statehood, despite not meeting the requirements of statehood (namely, (a) a permanent population; (b) a defined territory; (c) effective government; and (d) capacity to enter into relations with other states).¹⁴⁹ For example, at the time of its independence in 1960, the Congo had little control over its armed forces and its territory, the government was internally divided (and bankrupt), and there were still considerable foreign military forces on its territory.¹⁵⁰ As Crawford notes, '[a]nything less like effective government it would be hard to imagine'.¹⁵¹ Nevertheless, it attained statehood (and turned to the United Nations for assistance in asserting it against foreign governments and internal secessionists). Crawford explains this in part on the basis that the right to self-determination may serve to 'relax' the application of the criteria for statehood in certain instances.¹⁵² Conversely, the denial of the right to self-determination will vitiate an otherwise 'good' claim to statehood. In this regard, a number of declarativist scholars – citing 'Rhodesia' or South Africa's bantustans – have listed 'non-violation of self-determination' as one of their criteria for statehood. This criterion may appear as part of one of the existing Montevideo Convention requirements (such as effective government), or as a 'new' requirement, or (in the case of Crawford) a *legal principle* conditioning the application of the criteria of statehood.

For constitutivists, their commitment to ‘political discretion’ in respect of ‘acts of recognition’ makes it difficult to account for the peremptory nature of self-determination (at least in a colonial context). However, the challenges that decolonisation presented to constitutivists in principle, were ameliorated in practice by the broad political support for decolonisation from across the spectrum. As Dugard notes: ‘In the age of the decolonization neither the United States nor the Soviet Union wished to appear to be hostile to this cause or risk the disapprobation of developing States by questioning the statehood of the new nations’.¹⁵³ The potential problems have re-emerged in the context of more recent self-determination cases.¹⁵⁴

Notably, Dugard has argued that the practice of decolonisation has established ‘collective recognition’ at the United Nations as a basis for statehood.¹⁵⁵ This, implicitly, incorporates self-determination into Dugard’s broadly constitutivist framework.¹⁵⁶

These attempts to incorporate self-determination into existing theories of statehood arguably do not go far enough. In particular, they do not address how self-determination – in the absence of the consent of the ‘colonial state’ – can be ‘squared with the principle of territorial integrity’.¹⁵⁷ As Craven notes:

For some colonial powers, after all, the colony was still largely regarded as part of the Metropolitan State (very much more so for Portugal and France than for Britain) the separation of which necessarily implied some diminution of the sovereign claims of the colonial powers.¹⁵⁸

Nor do these attempts explain how international law ‘recognize[d] a right accruing to an entity which, by its own admission, lacks international legal existence’.¹⁵⁹

2.2.5 Post Cold War: the revival of recognition?

As a result of broad political support for decolonisation, for some time ‘recognition largely ceased to be a contested issue in the relations of States’.¹⁶⁰ However, recent developments – emanating mainly from Eastern Europe – have revived debates about recognition and statehood.¹⁶¹ In this regard, Dugard notes that ‘[t]he calm surrounding the practice of recognition was shattered by the dissolution of the Socialist Federal Republic of Yugoslavia and, most recently, by the claims of Kosovo, Abkhazia and South Ossetia to statehood’.¹⁶²

In particular, the events in Kosovo and Crimea (which involve claims to statehood via ‘secession’ from another state) have brought contests over recognition, *self-determination* and statehood back into sharp relief.¹⁶³

On 17 February 2008, the Parliament of Kosovo declared its independence from the Republic of Serbia following a decade of ‘interim administration’ by the United Nations.¹⁶⁴ To date, just over half the states in the world have recognised Kosovo’s statehood, against the objections of Serbia.¹⁶⁵ For some, this suggests a resurgence in the constitutivist theory of statehood. However, this assertion is complicated by the fact that the United States and others, when recognising Kosovo’s statehood, insisted that their recognition was ‘*sui generis*, and therefore by necessary implication not governed by international law’.¹⁶⁶ Furthermore, others have pointed to ‘self-determination’ or ‘remedial secession’ – rather than recognition – as the basis for Kosovo’s statehood.¹⁶⁷

When the UN General Assembly asked the ICJ for an advisory opinion regarding whether the unilateral declaration of independence of Kosovo is in accordance with international law, there was some expectation that the court would provide clarity on these issues.¹⁶⁸ However, in its 2010 Advisory Opinion, the ICJ limited itself to the question of whether Kosovo’s declaration was ‘in violation of international law’, and found that it was not; it refused to address the broader issue of Kosovo’s status under international law or broader question of statehood.¹⁶⁹

These questions emerged once again in the context of the recent ‘secession’ of ‘The Republic of Crimea’ from Ukraine.¹⁷⁰ On 11 March 2014, local authorities in the Crimean Peninsula, citing Kosovo as a precedent, unilaterally declared the region’s independence from Ukraine. The resulting ‘Republic of Crimea’ swiftly signed a ‘treaty of accession’ with the Russian Federation on 18 March 2014.¹⁷¹

The Crimean crisis raises a number of legal issues,¹⁷² chief among which is the status of Crimea under international law. Simply put, if the ‘Republic of Crimea’ was an independent state at the time it ‘acceded’ to the Russian Federation, then it is legally part of Russia. However, if Crimea remained a part of Ukraine, then Russia – through signing the ‘treaty of accession’ and its subsequent actions – has ‘annexed’ the territory from Ukraine in violation of international law.¹⁷³

Arguments for the short-lived independent ‘Republic of Crimea’ have cited the right to self-determination as the basis for its statehood.¹⁷⁴ However, as noted above, just about all claims to ‘external’ self-determination outside the decolonisation context have failed – with the possible exception of Kosovo.¹⁷⁵ Furthermore, the Kosovo precedent, it has been argued, is limited as it was an exceptional case of ‘remedial secession’, which must be viewed in the light of the prolonged mistreatment of ‘ethnic Albanian’ Kosovars by the Republic of Serbia.¹⁷⁶ Accepting, for argument’s sake, a limited doctrine of ‘remedial secession’,¹⁷⁷ it is doubtful that the residents of Crimea (and in particular those of Russian ethnicity) can claim to have been ‘subjected to such severe and long-term adverse treatment as to render their condition irremediable within the context of the Ukrainian state’.¹⁷⁸

Only Russia recognised the short-lived ‘Republic of Crimea’,¹⁷⁹ and to date very few have ‘recognised’ its subsequent accession to the Russian Federation.¹⁸⁰ On the contrary, the General Assembly at the time voted to affirm the ‘unity and territorial integrity of Ukraine within its internationally recognized borders’.¹⁸¹ As such, arguments for the legality of Crimea’s accession to Russia are difficult to support on a constitutivist theory of statehood. Furthermore, given the ‘Republic of Crimea’s’ significant reliance on Russia during its short-lived stint as a state, doubts could also be raised regarding its statehood under the declarativist theory. However, despite all these difficulties with the legality of Crimea’s accession to (or annexation by) Russia, the region is presently being administered as part of the Russian Federation.

Recent practice of recognition by states is further complicated by the fact that states such as the United States, who supported the legality of Kosovo’s unilateral declaration of independence in 2008, are taking the opposite position on the legality of Crimea’s claim to statehood. The same is true of states such as Russia, who opposed Kosovo’s independence, but are now supporting Crimea’s claim to statehood.¹⁸² The hope among international lawyers that the ICJ might ‘[reassert] the role of international law in the creation of states’,¹⁸³ and address the ‘unprincipled aspects of constitutivism’,¹⁸⁴ were dashed when it chose to interpret its brief narrowly in the *Kosovo Advisory Opinion*.

2.3 Statehood and membership of the United Nations

Membership of the United Nations is divided into two groups – namely, the so-called original members of the United Nations, and those states that have joined subsequently. The original members are the states that participated in the war against the Axis powers in World War II and that signed the ‘Declaration by United Nations’. The Declaration confirmed the principles and objectives of the Atlantic Charter referred to in the previous chapter. First among those to sign the Declaration were the United States, the United Kingdom, China and the Soviet Union. Together with France, these formed the permanent members of the UN Security Council.

The signing of the Declaration took place on 1 January 1942 and was followed by further signatories from 43 other states. These states and a few others eventually made up the group of 51 states that met at the San Francisco founding conference on 26 June 1945 to establish the United Nations.¹⁸⁵ These developments are reflected in article 3 of the UN Charter, which reads as follows:

The original members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco or having previously signed the Declaration by United Nations of 1 January 1942, sign the present Charter and ratify it in accordance with Article 110.

For any organisation to come into being it must be constituted, meaning that it must be formally established. This function was performed by the founding members. As a result, unlike states that joined the United Nations subsequent to its establishment, no additional requirements for membership were placed upon the founding members.¹⁸⁶ In fact, among the group of original members were entities that were not states in the international legal sense of the word. Examples are the Soviet Republics of the Ukraine and Byelorussia, which joined in the founding process at the request of Josef Stalin and which only became sovereign states after the disintegration of the Soviet Union in the early 1990s; and India and the Philippines only gained independence after the establishment of the United Nations.¹⁸⁷

2.3.1 The special requirements of article 4

Article 4 regulates the UN membership of states that have wanted to join the organisation since its establishment. We are here concerned with states that were either not part of the founding group of states or with entities that acquired statehood after the establishment of the United Nations and which then wanted to join the organisation. In the latter category, for instance, we would include all those dependent colonial possessions that became fully fledged states through the process of decolonisation.

To gain admission, new members must comply with the requirements in article 4 of the UN Charter, which reads as follows:

- (1) **Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.**
- (2) **The admission of any such state to membership in the United Nations will be affected by a decision of the General Assembly upon the recommendation of the Security Council.**

These requirements are of a substantive and procedural nature and they aim at preventing the UN from acquiring universal membership unconditionally in the sense that every state could automatically become a member of the organisation upon fulfilling the conditions of statehood.¹⁸⁸ The sections that follow discuss the substantive and procedural requirements for UN membership.

2.3.1.1 Substantive requirements for membership

The first substantive requirement in article 4(1) above (that a state applying for membership must be ‘peace-loving’) was understood at the San Francisco conference not to refer to the political system of a state – for instance, a state did not have to demonstrate a democratic form of government to be considered for membership. According to the participating states at the time, such a criterion would have amounted to an unlawful interference in the domestic affairs of states and a violation of article 2(7) of the UN Charter.¹⁸⁹ Apart from this understanding agreed upon at San Francisco, a

democratic requirement would have excluded the majority of states from UN membership, since only a few would have complied with this threshold. Even today, it is accepted that many states currently enjoying membership of the organisation are not democratic. To avoid these difficulties, ‘peace-loving’ has come to be understood as relating to the international behaviour of a state at the time of application for membership. For example, of relevance would be whether the state concerned complied with UN resolutions, respected the rights of other states and settled disputes by peaceful means.¹⁹⁰

The second substantive requirement for membership in article 4(1) entails a formal declaration by the applicant state upon application for membership that indicates the state’s acceptance of the obligations enshrined in the Charter. By making such a declaration, the state gives its consent to be bound by the UN Charter and to carry out its obligations. This is linked to a determination by the organisation that the applicant state is able and willing to do so. In 1952, the General Assembly of the United Nations concluded that this determination must be based on facts such as:

the maintenance of friendly relations with other states, the fulfillment of international obligations and the record of a State's willingness and present disposition to submit international claims or controversies to pacific means of settlement established by international law.¹⁹¹

In an advisory opinion of 1948, the International Court of Justice interpreted article 4(1) of the Charter restrictively, meaning that admission to membership cannot be made on conditions not expressly provided for in article 4(1). This does not exclude circumstances of fact that can reasonably and in good faith be connected to the conditions laid down in article 4(1).¹⁹²

2.3.1.2 Procedural requirements for membership

Requirements of a procedural nature determine the process, or different steps, by means of which a state acquires membership of the United Nations. Two of its principal organs, namely the Security Council and the General Assembly are involved in this process. According to article 4(2) of the UN Charter, the Security Council must first recommend admission of a state as a UN member. The actual admission of the state then rests with the General Assembly.

The involvement of the Security Council makes sense in view of the fact that admission to UN membership may have implications for peace and security. Since the Security Council has the primary responsibility for peace and security, it has a specific interest in recommending for membership of the UN only those states that will contribute to the maintenance and enforcement of international peace and security.

In fulfilling its role, the Security Council is assisted by a Committee on Admission of New Members, which was established in 1946. The scope of the Security Council’s actual function in this regard is spelled out in Rule 60 of the Security Council’s Provisional Rules of Procedure, which determines as follows:

The Security Council shall decide whether in its judgement the applicant is a peace-loving State and is able and willing to carry out the obligations contained in the Charter and, accordingly, whether to recommend the applicant State for membership.

This decision involves a judgement by the Security Council on whether an applicant state has complied with the substantive requirements in article 4(1) of the UN Charter, and requires an affirmative vote of nine of the 15 members of the Security Council, which must include the concurring vote of the five permanent members.¹⁹³ This means that in voting against the admission of an applicant state, a permanent member can prevent the Security Council from making a

recommendation to the General Assembly. In such a case, or where the applicant state has failed to secure the necessary majority support in the Security Council, the General Assembly will be prevented from admitting the state in question.¹⁹⁴

If a state is recommended for UN membership by the Security Council, the General Assembly must decide on admission of that state by a two-thirds majority of the members present and voting.¹⁹⁵ In taking this decision, the General Assembly, in terms of Rule 136 of the Assembly's Rules of Procedure, must, likewise, determine whether the applicant state has complied with the substantive requirements in article 4(1) of the Charter. Apart from this function, the Assembly also has the power to refer an application back to the Security Council. This will happen when the Council has not recommended the applicant state for membership or a decision on the matter has been postponed by the Council. In such instances, the Assembly will provide the Security Council with a full record of the deliberations on the matter in the Assembly, which must then be considered by the Council for further decision.¹⁹⁶

2.3.2 Special cases

Membership of the United Nations is open to states only. Sometimes, states split up to form two or more new states, or several states merge into one, or part of a state secedes from the rest and forms a new political entity. As is illustrated in the section on statehood and on recognition of states and governments in this chapter, such instances may have implications for the recognition of states and governments. However, legal questions may also arise concerning admission to UN membership of the newly formed political entity or entities. A few examples will be used to illustrate the issues.

After World War II, the German state was subdivided into two separate states, East and West Germany (German Democratic Republic and Federal Republic of Germany). Each obtained UN membership as a separate state after the conclusion of a treaty between them clarifying that henceforth two German states would exist under international law.¹⁹⁷ In 1990, after the collapse of the communist regimes, of which East Germany formed a part, the two German states reunited to become one state again, the Federal Republic of Germany. The latter automatically retained its UN membership as the successor to the former German Democratic Republic without having to comply with any special admission requirement.

The position is different when part of a state secedes from the rest. If secession leads to the formation of a new political entity that has an existence of its own, the new political entity must go through the normal admission procedure for UN membership. For example, when Pakistan gained independence in 1947 as a result of the partitioning of British India by the United Kingdom, Pakistan had to make formal application for UN membership. Similarly, formal application was required for UN membership when Eritrea gained independence from Ethiopia in 1993 after a war of independence that started in 1962. In the case of the break-up of the Soviet Union into several independent states after 1990, the Russian Federation was considered as the successor of the former Soviet Union as far as UN membership was concerned, while the new breakaway republics had to follow the normal application procedure for membership.¹⁹⁸

A more complicated case of UN membership in the wake of a state's dismemberment is presented by the former Yugoslavia, which broke up into several independent political entities between 1991 and 1993. The Security Council took the view that the former Socialist Federal Republic of Yugoslavia had ceased to exist as a result of the break-up and that the newly formed Federal Republic of Yugoslavia, comprising only Serbia and Montenegro, 'cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations'.¹⁹⁹ Consequently, the Council recommended that the Federal Republic of Yugoslavia

formally apply for membership of the United Nations.²⁰⁰ This request was complied with and in 2000 the Federal Republic of Yugoslavia was admitted to membership in the United Nations after consideration of its application for membership.²⁰¹

An unproblematic instance was the severance of South Sudan from Sudan. The new state of South Sudan was formed when it declared its independence on 9 July 2011 following a referendum in which 98.83 per cent of the voting population voted in favour of secession.²⁰² South Sudan's path to independence was prepared by a comprehensive peace agreement between the government of Sudan and the Sudan Peoples' Liberation Movement to end a protracted civil war between the two parties. One of the protocols to the agreement made provision for the right to self-determination of the peoples of South Sudan through a referendum, which was later endorsed in a new interim constitution for Sudan providing for substantive autonomy to South Sudan.²⁰³ When independence followed, obviously with the blessing of the mother state (Sudan) and backed by the overwhelming support of the inhabitants of the area, admission of South Sudan as the 93rd UN member state²⁰⁴ was a mere formality.

While UN members enjoy full rights of participation in the affairs of the United Nations, a practice has evolved whereby non-members may be granted limited rights of participation. This is effected through the granting of observer status. Apart from non-member states, a range of other entities have enjoyed this privilege in the past, such as specialised agencies of the United Nations, intergovernmental organisations, and national liberation movements.²⁰⁵ Among the latter group, consider the position of Palestine, whose status has still not been finalised because the Israelis and Palestinians have not reached final agreement on a comprehensive permanent status for Palestine based on the two-state solution explicitly endorsed by the Security Council in 2002.²⁰⁶

In 1974, Palestine gained observer status as a national liberation movement when the General Assembly invited the Palestine Liberation Organization (PLO) to participate in the work of the Assembly in the capacity of observer.²⁰⁷ This designation changed in 1988 when the Assembly decided to use the designation 'Palestine' instead of 'PLO'.²⁰⁸ In 2011, Palestine applied for UN membership²⁰⁹ arguing that it complied with the criteria for statehood and with the substantive requirements for UN membership in article 4(1) of the UN Charter. In the Committee on the Admission of New Members, opinions were divided on the significance of a number of issues for purposes of the application, such as the absence of a final settlement on the two-state solution; uncertainty about the exact borders of the Palestinian state; the continued Israeli occupation of certain territories; the lack of effective control by the Palestinian Authority over its territory in view of the de facto exercise of control by Hamas in the Gaza Strip; and the refusal by Hamas to renounce terrorism and violence.²¹⁰ Over the years, these and several other factors have stood in the way of a final settlement of the Israel/Palestine conflict. In the end, the Committee was also unable to make a unanimous recommendation to the Security Council on the admission of Palestine to UN membership.

2.3.3 Suspension of membership rights and privileges

Article 5 of the UN Charter provides for the suspension of membership rights and privileges. This may occur when a member state poses a threat to international peace and security and the Security Council decides to take preventative or enforcement action against such a member in terms of Chapter VII of the UN Charter.²¹¹ A decision on the suspension of membership rights and privileges in these circumstances resides with the General Assembly upon the recommendation of the Security Council. This kind of sanction is a temporary measure against a member state and the suspended rights and privileges can be restored by the Security Council. Suspension of the rights and privileges

of membership does not affect a state's duty to comply with its Charter obligations since the state whose membership rights and privileges have been suspended remains a member and therefore still bound by the Charter.²¹²

Since a recommendation by the Security Council to suspend a member is a non-procedural matter in terms of article 27(3) of the Charter, a decision to support the recommendation must be taken by nine members, including the five permanent members. For the decision in the General Assembly, a two-thirds majority of the members present and voting will be required in accordance with article 18(2) of the Charter. The position is thus the same as for the admission of members.

Thus far, the United Nations has not made use of the suspension measure to deal with delinquent member states. To circumvent making a decision to suspend, it has instead on occasion rejected the credentials of certain representatives of member states as a symbolic and political act rather than as a sanction in terms of article 5. The rejection of credentials takes place in accordance with Rules 27 to 29 of the Assembly's Rules of Procedure, which provide for a Credentials Committee to be established at the beginning of each Assembly session with the mandate to examine the credentials of representatives and to report its findings to the Assembly. By rejecting the credentials of its representative, a member state is prevented from participating in the deliberations of the Assembly. This mechanism has been used in the past to express the Assembly's displeasure with the policies of South Africa, Portugal and Israel, although the legality of its use has been questioned²¹³ on the basis that, in these circumstances, the state is effectively expelled or suspended from the organisation without a recommendation of the Security Council.²¹⁴

2.3.4 Expulsion of a member

Expulsion of a member is provided for in article 6 of the UN Charter and may be used against a member that has persistently violated the principles of the organisation. The respective roles of the Security Council and General Assembly in expelling a member are the same as for admission or suspension. This is the most severe possible measure to prevent a member from participating in the affairs of the United Nations and leads to the termination of a state's UN membership. Expulsion is a 'last resort' measure and is reserved for cases where a violation has occurred repeatedly rather than as a one-off. The 'last resort' nature of the measure requires that other, less severe, measures must first have been tried to bring the state in question to its senses.²¹⁵

This measure too has not been used, presumably for practical reasons, because once a member has been expelled, the organisation loses its control over the expelled state's actions. Put differently, it may seem better to allow a delinquent member to remain within the organisation where group pressure and diplomatic efforts stand a chance of changing the state's delinquent behaviour.

Apart from terminating a state's membership in the United Nations, expulsion brings into effect two other legal consequences. The one is that the expelled state becomes a non-member and hence subject to article 2(6) of the UN Charter. This provision places an obligation on the United Nations to ensure that non-member states act in accordance with the UN principles enumerated in article 2 to the extent that it is necessary for the maintenance of international peace and security. The other is that the expelled state, although relieved of its Charter obligations upon expulsion, remains subject to the general principles of international law and especially those that have reached the status of customary international law.

SUGGESTED FURTHER READING

FL Bordin 'Continuation of membership in the United Nations revisited: Lessons from fifteen years of inconsistency in the jurisprudence of the ICJ' in 10 *The Law and Practice of International Courts and Tribunals* (2011) 315–50

FT Chen 'The meaning of "states" in the membership provisions of the United Nations Charter' 12 *Indiana International and Comparative Law Review* (2001) 25–51

R Higgins *The Development of International Law through the Political Organs of the United Nations* London: Oxford University Press (1963) 11–41

¹ Craven notes: ‘The proposition that international law is largely concerned with States … has long been one of the axiomatic features of international legal thought’ (M Craven ‘Statehood, self-determination, and recognition’ in M Evans (ed) *International Law* 3rd ed (2010) 203). See also G Simpson ‘Something to do with states’ in A Orford & F Hoffman (eds) *The Oxford Handbook of International Legal Theory* (forthcoming 2016) 5.

However, other international actors have emerged in recent times. Craven notes: ‘Non-State actors (whether non-governmental organizations or international organizations) are playing an increasingly important role in treaty making, and the figure of the “international community” is repeatedly invoked … as an entity having some, albeit still rather vague, legal status’ (Craven ‘Statehood, self-determination, and recognition’ op cit 206). On whether corporations are subjects of international law, see J Alvarez ‘Are corporations “subjects” of international law?’ 9(1) *Santa Clara Journal of International Law* (2011) 1–36.

² By way of caution, it is worth noting that within the literature on statehood, there is a tendency to use the terms ‘states’ (and ‘statehood’), ‘sovereigns’ (and ‘sovereignty’) and, to a lesser extent, ‘international legal persons’ (and ‘international legal personality’) interchangeably. Precisely what the relationship is between these terms and their uses is by no means clear, let alone universally shared. See further, J Crawford ‘Sovereignty as a legal value’ in J Crawford & M Koskeniemi (eds) *The Cambridge Companion to International Law* (2012) 117, and G Simpson ‘The guises of sovereignty’ in R Thakur, C Sampford & T Jacobsen (eds) *Re-envisioning Sovereignty: The End of Westphalia* (2008) 51–69).

³ Anghie notes: ‘[T]he traditional approach to international law … understands the discipline in terms of the fundamental question of how order is created among sovereign states. … The attempts to resolve this problem, and the critiques of these attempts have, on the whole, constituted the central theoretical debate of the discipline’ (A Anghie *Imperialism, Sovereignty, and the Making of International Law* (2007) 5).

⁴ Simpson notes that ‘we remain trapped in states: thinking through them, living in them, seeking protection from them, identifying ourselves with them’ (Simpson ‘Something to do with states’ in Orford & Hoffman op cit 5).

⁵ Craven op cit 204.

⁶ The origins of the European state are generally linked to the Peace of Westphalia in 1648, which concluded one of the most violent wars in modern European history: the Thirty Years War. Moreover, colonialism and imperialism – with their well-documented and unparalleled depredations committed against African people in particular – stands between Westphalia and the decolonisation of African states in the 1950s.

⁷ By 1913 – immediately prior to World War I – there were 48 states worldwide; by 1950, there were ‘75 states of “generally accepted status”’; and by the later 1980s (largely owing to the process of decolonisation of Africa, and the principle of self-determination), that number had reached 160 (see JC Dugard *Recognition and the United Nations* (1987) 2).

⁸ FW Nietzsche *Thus Spoke Zarathustra: A Book for All and Nobody* (translated by T Common) (2014) XI.

⁹ JL Brierly ‘The shortcomings of international law’ 5(4) *British Yearbook of International Law* (1924) 13. Simpson notes that ‘[i]t can sometimes seem, after all, as if everything *but* the state is on the rise (the rise of corporations, the rise of institutions, the rise of ethnic warfare, the rise of supranationalism)’ (Simpson ‘Something to do with states’ op cit 2). See further, M Koskeniemi ‘The wonderful, artificiality of states’ 88 *American Society of International Law Proceedings* (1994) 22.

¹⁰ See further, J Dugard (February 2011) ‘South African bantustan policy’ in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (2015).

¹¹ See *S v Banda* (1989–1990) BLR 45–53.

¹² Institutional attempts can be traced back to the League of Nations. See J Crawford *The Creation of States in International Law* 2nd ed (2006) 38–40.

¹³ Crawford (*Creation of States* op cit 45) notes: ‘[T]he criteria for statehood are of a special character, in that their application conditions the application of most other international law rules. As a result, existing States have tended to retain for themselves as much freedom of action with regard to new States as possible. This may explain the reluctance of the International Law Commission to frame comprehensive definitions of statehood when engaged on other work – albeit work that assumed that the category “States” is ascertainable.’

¹⁴ Craven (‘Statehood, self-determination and recognition’ op cit 205–6) suggests that historically ‘the figure of the sovereign State occupied such a central position within the discipline of international law that its presence or absence was not something that could be adequately conceptualized internally within that same framework’. Similarly, Grant suggests that the problem is that ‘state’ is both contextually and historically contingent – making a fixed definition impossible (T Grant ‘Defining statehood: The Montevideo Convention and its discontents’ 37(2) *Columbia Journal of Transnational Law* (1999) 403 at 408). Critical scholars cite these failings as another

(significant) example of the indeterminacy of the ‘discipline’ of international law as a whole. See M Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* (2005) 272–82.

15 Grant (‘Defining statehood’ op cit 415) notes that reference to the Convention ‘in contemporary discussions of statehood is nearly a reflex’.

16 Among the writers who follow this approach, most list these Montevideo criteria. Where they differ is on the question of whether these are the only criteria, and if not, what the others are. While many scholars complain that this list is ‘over-inclusive, under-inclusive and outdated’, almost all discussions use it as a starting point (see T Grant *The Recognition of States: Law and Practice in Debate and Evolution* (1999) 5, note 21).

17 Craven ‘Statehood, self-determination and recognition’ op cit 217.

18 Ibid, 220.

19 Ibid, 220–1.

20 Grant (*Recognition of States* op cit 84) notes that restraining states by the application of law in the area of recognition of states ‘runs against the discretionary grain’ of constitutivism.

21 P Jessup, Representative of the United States to the UN, addressing the Security Council in 1948. See United Nations, Security Council Official Records, 3rd year, 383rd meeting (2 December 1948).

22 Crawford *Creation of States* op cit 46.

23 A Abass *Complete International Law: Text, Cases and Materials* 2nd ed (2014) 120.

24 Ibid. However, as Crawford (*Creation of States* op cit 47) points out, the ‘fragmentation of the territory of Bophuthatswana within South Africa’ was one of the reasons given by the United Kingdom for not recognising that ‘state’ as independent of South Africa under apartheid.

25 For a list of the smaller state territories, see Crawford *Creation of States* op cit 47.

26 Ibid.

27 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* ICJ Reports 1969, 3 at para 33.

28 See further, Crawford *Creation of States* op cit 48–9.

29 J Dugard *The Secession of States and Their Recognition in the Wake of Kosovo* (2013) 48.

30 The case of Naura is an emerging (or submerging) case in point.

31 Abass op cit 120. Abass (ibid) suggests the following test: ‘it should be possible that if they were to be asked where the territory of the state lies, those of its citizens who desire self-determination would be able to respond: “From this pillar to this pole – although we are still uncertain about how far deep in or spread out our territory goes vis-a-vis our neighbours.”’

32 Here, as with territory, there is no minimum size requirement for those who see this as a criteria for statehood. See Abass op cit 119. However, this was not always the case. In fact, ‘in the early part of the twentieth century ... doubt continued to be expressed as to whether small States such as Luxembourg or Liechtenstein, for example, could properly be regarded as independent States’ (Craven ‘Statehood, self-determination and recognition’ op cit 221–2).

33 For a table of other states with small populations, see the table in Crawford *Creation of States* op cit 52.

34 Crawford *Creation of States* op cit 52. This, too, was a matter of some debate historically. As Craven (‘Statehood, selfdetermination and recognition’ op cit 222) notes: ‘If the criterion of population seems not to relate to the notion of a threshold, then perhaps it refers instead to the idea that there must exist a population enjoying exclusive relations of nationality with the nascent State. Whilst it is certainly true that in the early years of the twentieth century nationality did enjoy this aura of exclusivity – and hence, in some respects, represented a way of demarcating the populations of different States – this was merely an expectation rather than an obligation.’

35 As Craven (‘Statehood, self-determination, and recognition’ op cit 221) notes: ‘[O]ne of the critical ideas accompanying the development of the idea of the State was that the people were not merely the accidental objects of a sovereign’s authority, but that they also partook of that sovereignty and were the immediate object of an emergent art of government (for which Lincoln’s phrase ‘government by the people, for the people, and of the people’ was an obvious cumulative expression)’.

36 Craven ‘Statehood, self-determination, and recognition’ op cit 222.

37 Abass op cit 118 [own emphasis].

38 Crawford *Creation of States* op cit 56.

39 For those who see it as a *criterion*, its meaning is by far the most difficult to pin down of the Montevideo criteria, as ‘effectiveness’ is not a term of science and is capable of expansive interpretations, and the issues at stake are hotly debated. The ‘effectiveness’ (or otherwise) of a *particular* government is ultimately dependent

on one's construction of the purpose of government, a question that has been debated by philosophers and others for ages.

40 This is consonant with the idea that the classical requirements are based on effectiveness and facticity, as well as the drafting history (time of drafting) of the Montevideo Convention. While this is the classical position, as discussed below, a number of the ‘new’ requirements put forward concern (to varying degrees) the *form* of government, or the manner in which it was established. See Abass op cit 122.

41 *Western Sahara* (Advisory Opinion) ICJ Reports 1975, 12 at para 434.

42 Crawford *Creation of States* op cit 59. Crawford (*ibid*, 56–9) positions this as a criterion of statehood, and adds that this control must include some degree of ‘maintenance of law and order and the establishment of basic institutions’. Notably, Crawford argues that the degree to which these conditions apply will depend on the prevailing circumstances (i.e. if it is a ‘new state’ – such as one looking to secede – as opposed to one which is derivative of a ‘previous sovereign’ – such as a colonial power – the conditions will be more strictly applied). By way of example, Crawford suggests that the Belgian Congo in 1960 was ‘a State in the full sense of the term’, despite lacking an ‘effective government’ in a number of respects. Crawford attributes this to a presumption that ‘a new State granted full formal independence by a former sovereign has the international right to govern its territory – hence United Nations action in support of that right’. For a contrary view, see R Higgins *The Development of International Law Through the Political Organs of the United Nations* (1963) 21–2.

43 Craven ‘Statehood, self-determination and recognition’ op cit 224–5.

44 Notably, this is the most controversial of the Montevideo criteria. It was the least common in so far as state practice is concerned, *at the time the Convention was adopted*. Furthermore, Crawford (*Creation of States* op cit 61) argues that ‘the capacity to enter into relations with other states’ is not a *criterion* for statehood, but is rather a *consequence* of it. Nevertheless, this is consistent with the idea that this is an incident of statehood.

45 Craven (‘Statehood, self-determination and recognition’ op cit 220), for example, notes: ‘The “capacity to enter into relations with other states” seems to be a conclusion rather than a starting point … .’

46 Abass op cit 123.

47 *Ibid.*

48 *Island of Palmas Case* (1928) 2 RIAA 829 at 838. Crawford (*Creation of States* op cit 89) notes that ‘sovereignty’ is sometimes used in place of ‘independence’ as a basic criterion for statehood. However, he argues that this is an ‘incident’ of statehood rather than a ‘criterion’ for it. This distinction, for reasons discussed above, is not followed here.

49 Grant ‘Defining statehood’ op cit 438.

50 According to Crawford, the existence of a special claim of right to exercise government authority over a state and discretionary authority to intervene in the internal affairs of a state are situations *derogating* from formal independence. While substantial illegality of origin, ‘states’ formed under belligerent occupation and substantial external control of the State are ‘situations *derogating* from actual independence’. However, he adds that diminutive size and resources, political alliances and belligerent occupation (among others) will not undermine a state’s actual independence. See Crawford *Creation of States* op cit 61–89.

51 *Ibid.* 63.

52 See eg, art 2(4) of the UN Charter.

53 Crawford *Creation of States* op cit 46.

54 *Ibid.* vi, and 97–107.

55 Grant (*Recognition of States* op cit 33) notes that ‘by implying an astonishingly flexible set of criteria for statehood (and thus for recognition), declaratory doctrine tends to untie the fetters of international legal principle’.

56 Crawford op cit 91.

57 L Oppenheim *International Law* 1st ed (1858–1919) 109.

58 As Grant (*Recognition of States* op cit 2) puts it, the state’s ‘genesis’ is in recognition and, as a result, ‘nonrecognition consigns [an] entity to non-statehood’.

59 *Ibid.*

60 Which, in this instance, was none.

61 Grant (*Recognition of States* op cit 3) notes that the constitutive theory is now widely recognised as reducing the role of law in the path to recognition. Instead, constitutivism emphasises the free political character of states.

62 Crawford *Creation of States* op cit v.

63 Grant *Recognition of States* op cit xx.

64 Oppenheim op cit 264.

65 See H Lauterpacht *Recognition in International Law* (1947) 45–50.

⁶⁶ Crawford *Creation of States* op cit 5. However, Craven ('Statehood, self-determination and recognition' op cit 218) suggests: 'A closer analogy therefore might be the idea of the status of "criminality" being generated through the institutions and structures of the criminal law, or of "insanity" through the discipline of psychiatry (Foucault, 2006). Just as "a thief" is a designation appropriate only once it has been determined that the person concerned has unlawfully appropriated the property of another, so also to call something a "State" is to draw attention to the legal framework within which the powers and competences of a State may properly be acquired (Kelsen, 1942).'

⁶⁷ T Chen *The International Law of Recognition* (1951) 18–19.

⁶⁸ H Waldock 'General course on public international law' 106 *Recueil des Cours de l'Academie de Droit International* (1962) 146.

⁶⁹ Recognition of states does, however, on some versions of this theory, play a role as *one of the criteria* for statehood. See Crawford *Creation of States* op cit 4.

⁷⁰ A James *Sovereign Statehood: The Basis of International Society* (1986) 147.

⁷¹ It may serve a political purpose to 'acknowledge the fact of the state's political existence and to declare the recognising state's willingness to treat the entity as an international person' (L Henkin *International Law: Cases and Materials* 3rd ed (1993) 213).

⁷² JL Brierly *The Outlook for International Law* (1944) 13.

⁷³ C Warbrick 'Recognition of states: Recent European practice' in MD Evans (ed) *Aspects of Statehood and Institutionalism in Contemporary Europe* (1997) 9 at 10–11.

⁷⁴ Grant *Recognition of States* op cit 22.

⁷⁵ Ibid, 5.

⁷⁶ See Grant *Recognition of States* op cit 22–3.

⁷⁷ Ibid, 5.

⁷⁸ Ibid.

⁷⁹ H Kelsen 'Recognition in international law: Theoretical observations' 35(4) *American Journal of International Law* (1941) 605–17.

⁸⁰ Craven 'Statehood, self-determination and recognition' op cit 242 and 219.

⁸¹ For these reasons, Simpson ('Something to do with states' op cit 7) notes that while the 'great debate' is sometimes positioned as one between law (the declarative theory) and politics (the constitutive theory), 'it is never quite clear where the law and politics of this dispute lie'.

⁸² Lauterpacht *Recognition in International Law* op cit 6. The harsh response he received from scholars surely discouraged others from attempting the same. See Dugard *Recognition and the United Nations* op cit 4–5.

⁸³ Ibid.

⁸⁴ As Parfitt notes: 'the declaratory theory has remained predominant in mainstream theorizing on recognition throughout the post-1945 period ...' (R Parfitt 'Theorizing recognition and international personality' in Orford & Hoffman op cit 7–8).

⁸⁵ Ibid, 8.

⁸⁶ Ibid, 9.

⁸⁷ As Chen (*International Law of Recognition* op cit 3) notes: 'In the last analysis, the question of international recognition is but a reflection of the fundamental cleavage between those who regard the State as the ultimate source of international rights and duties and those who regard it as being under a system of law which determines its rights and duties under that law.'

⁸⁸ See Grant *Recognition of States* op cit 1.

⁸⁹ Ibid, 420.

⁹⁰ Ibid. Grant (*The Recognition of States* op cit 9) notes that 'effective control became, as the nineteenth century progressed, a more important indicator of statehood than historic dynastic prerogative'. While some still clung to the notion of legitimism, the disbanding of the 'four great monarchies' of Germany, Austria-Hungary, Russia and Turkey after World War I 'ended lingering attachment to the idea'.

⁹¹ Mutua notes: 'The first serious contacts between Europe and Africa involved the capture of African slaves for the newly-discovered Americas. Portugal, and later other European powers including the British and the French, captured and transported for sale millions of Africans into the New World. But European occupationist designs over the continent did not mature until the mid-1800s. The tremendous growth of western European capitalism and the need for markets and materials for industry gave urgency to imperialism' (M wa Mutua 'Why redraw the map of Africa: A moral and legal inquiry' 16(4) *Michigan Journal of International Law* (1995) 1113 at 1126).

⁹² In this regard, Koskenniemi notes: 'The end of informal empire meant that European public institutions – in particular, European sovereignty – needed to be projected into colonial territory – something that only the

assimilationist French had advocated earlier in the century' (M Koskenniemi *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002) 121).

93 Craven 'Colonialism and domination' in B Fassbender & A Peters (eds) *The Oxford Handbook of the History of International Law* (2012) 879 (citing C Hayes *A Generation of Materialism, 1871–1900* (1941) 237).

94 As Craven ('Statehood, self-determination and recognition' op cit 247) notes, 'these seemingly abstract theoretical arguments about recognition, statehood or sovereignty had a definitive context, namely that which arose as a consequence of the European engagement with the non-European world in the late nineteenth century.'

95 Parfitt (op cit 3–4) ascribes *constitutivism*'s ascendancy to a number of factors, including (i) the writings of German philosopher Hegel which 'quickly made an impact on the thinking of contemporary international lawyers', (ii) the political upheavals of the 17th and 18th centuries which 'led to the emergence of many new states in the Americas and elsewhere' and transformed 'the "international" from an inter-dynastic into an inter-state jurisdictional space', and (iii) 'the acceleration of European imperialism'.

96 Parfitt op cit 4 (citing H Wheaton *Elements of International Law* 2nd ed (1863) 36–9). The notion that statehood derives from recognition is strongly associated with positivist conceptions of international law. As a theory based on state consent, positivism appears 'to require consent either to the creation of the State or to its being subjected to international law so far as other states were concerned' (Crawford op cit 13).

97 Anghie (op cit 47, 48) argues that 'late nineteenth-century positivists' excluded non-European would-be 'states' (or 'native states') by turning to the concept of 'society'. He opines, '[t]he concepts of society ... enable the formulation and elaboration of the various cultural distinctions that were crucial to the constitution of sovereignty doctrine.' In this scheme, he says, 'it is because ... state exists in society that international law can claim to be law'. On this basis, he argues that 'society, rather than sovereignty, is the central concept used to construct the system of international law'.

98 This, despite the fact that evidence suggests 'the "quasi-states" present in [Africa] ... prior to colonization were stronger and more "state-like", at least judged by conventional European standards than is often acknowledged' (CM Warner 'The political economy of "quasi-statehood" and the demise of the 19th century African politics' 25 *Review of International Studies* (1999) 233–55, 235). In this regard, Mutua (op cit note 15) notes: 'The underlying concepts of political autonomy and territorial integrity among African political and state formations existed in the pre-colonial era. The inviolability of community territory, the exclusivity of participation in the political and social processes of the community by its members, and the integrity of the community were fiercely protected in the pre-colonial era. Trade relations with other communities took place on these basic premises. Some of the more rigidly stratified and centralised societies had extensive dealings with outsiders. These concepts, though in some respects similar to European notions, arose out of a different historical milieu and were not a result of commercialization and the expansionist ethos of the European state.' For an extended discussion of the development of an 'African' international law in the pre-colonial context, see TO Elias *Africa and the Development of International Law* (1998) 6–15.

99 Anghie op cit 64.

100 See chapter 1 of this book.

101 Koskenniemi *Gentle Civilizer of Nations* op cit 123.

102 See M Craven 'Between law and history: the Berlin Conference of 1884–1885 and the logic of free trade' 3(1) *London Review of International Law* (2015) 31–59.

103 Koskenniemi *Gentle Civilizer* op cit 126, where he adds: 'Articles 34 and 35 treated "sovereignty" as a quality that could attach only to a European possession. Moreover, sovereignty was treated first and foremost as an exclusivity, unaccompanied by clearly defined obligations.'

104 Mutua (op cit 1113) notes: 'The imposition of the nation-state through colonization balkanized Africa into ahistorical units and forcibly yanked it into the Age of Europe, permanently disfiguring it. Unlike their European counterparts, African states and borders are distinctly artificial and are not "the visible expression of the age-long efforts of [the indigenous] peoples to achieve political adjustment between themselves and the physical conditions in which they live." Colonization interrupted that historical and evolutionary process. Since then Africa has attempted, often unsuccessfully, to live up to and within these new formulations; all too frequently the consequences have been disastrous.' Okafor (op cit 510) makes a similar argument.

105 Mutua op cit 1134.

106 See Parfitt 'Theorizing recognition and international personality' op cit 7.

107 Parfitt 'Theorizing recognition and international personality' op cit 7. See further, N Berman *Passion and Ambivalence: Colonialism, Nationalism, and International Law* (2012).

108 Parfitt 'Theorizing recognition and international personality' op cit 7 [own emphasis].

109 Ibid, 7 (citing JL Brierly *The Law of Nations: An Introduction to the International Law of Peace* 5th ed (1955) at 129, 132) [own emphasis].

¹¹⁰ In this regard, Crawford (*Creation of States* op cit 37) notes: ‘If the effect of positivist doctrine in international law was to place the emphasis in matters of statehood on the question of recognition, *the effect of modern doctrine and practice has been to return this attention to issues of statehood and status independent of recognition*’ [own emphasis].

¹¹¹ In terms of Britain’s Unilateral Declaration of Egyptian Independence of 28 February 1922, the ‘British Protectorate over Egypt [was] … terminated, and Egypt [was] … declared to be an independent sovereign State’ (para 1).

¹¹² SN Grovogui *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (1996) 111–12. The principle of ‘self-determination of peoples’ would play an important role in the eventual independence of the rest of African states. See below.

¹¹³ Article 22 of the Covenant of the League of Nations. See chapter 1 of this book.

¹¹⁴ Anghie op cit 115. See however, Mutua op cit 1138–9; Grovogui op cit 113.

¹¹⁵ Grovogui (op cit 114–17) argues that the sacrifice made by African troops on the side of the Allies during the war – the *dette de sang* or ‘blood sacrifice’ – led ‘[v]eteran activists and intellectuals … to insist on racial equality for the African diaspora in Europe and national equality for colonial populations’.

¹¹⁶ Simpson ‘Something to do with states’ op cit 13.

¹¹⁷ There is some debate regarding whether the United Nations Charter recognised the legitimacy of colonialism. Mutua (op cit 1139–40) notes: ‘Two leading views on the legality of colonialism under the U.N. Charter have been articulated. The first view argues that the Charter of the United Nations “expressly recognizes the legitimacy of colonialism in Chapter XI.” Similarly, others argue less credibly that the duty to account to the United Nations on the administration of colonies is a recognition of the legitimacy of colonialism. The second view, popular in the former colonies, is that the Charter illegalizes colonialism. It is perhaps more plausible to argue that the U.N. Charter is evasive on the legality of colonialism. Although it provided for the administration and the preparation of the colonies for self-government and independence, regulation does not amount to legalization’.

¹¹⁸ See the 1789 Declaration of the Rights of Man and Citizen.

¹¹⁹ Craven ‘Statehood, self-determination and recognition’ op cit 231.

¹²⁰ E Hobsbawm *Nations and Nationalism since 1780* 2nd ed (1992) 131–41. Moreover, during the interwar period, the legal nature of the ‘principle’ (let alone right) of self-determination was doubtful. See, however, Crawford op cit 111–12.

¹²¹ Craven ('Statehood, self-determination, and recognition' op cit 231) notes: 'If national self-determination was merely the implicit premise behind the reorganization of Europe after the First World War, it became a very much more explicit part of the settlement after the Second World War, but in some ways on quite different terms.'

¹²² See art 1(2) and art 55 of the UN Charter.

¹²³ Resolution 545(VI), adopted in 1952, ensured that *both* international human rights covenants (the ICCPR and the ICESCR, eventually adopted in 1966) would contain a provision that ‘[a]ll peoples shall have the right of self-determination’. The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514 (XV)) contained a similar provision. Crawford (op cit 114) argues that these resolutions expanded the principle of self-determination from ‘the right of the people of a State to choose its own form of government without external intervention’ (internal), to a right of *peoples* ‘to choose their own form of government irrespective of the wishes of the rest of the State of which that territory is a part’. See also the 1970 Friendly Relations Declaration (annexed to Resolution 26/25 (XXV)).

¹²⁴ Crawford op cit 603. Crawford (op cit 603) notes: ‘[I]t has been largely through the medium of Chapter XI that Members have extended and elaborated the operation of the principle of self-determination.’

¹²⁵ Article 73(b), UN Charter. The other measures relate to the just treatment of the peoples concerned (art 73(a)), the furtherance of international peace and security (art 73(c)), co-operation with other member states and specialised international bodies (art 73(d)) and the obligation to transmit information to the Secretary-General of the UN regarding the economic, social, and educational conditions in the territories for which they are respectively responsible (art 73(e)).

¹²⁶ These progressive interpretations were endorsed by the ICJ on a number of subsequent occasions. See *Namibia* (Opinion) ICJ Reports 1971, 16 at 31 (para 52); *Western Sahara* (Opinion) ICJ Reports 1975, 12 at 31–3 (paras 54–9); *East Timor* ICJ Reports 1995, 90 at 103 (para 31); *Israel Wall* (Opinion) ICJ Reports 2004, 136, 171–2 (para 88).

¹²⁷ General Assembly Resolution 1514 (XV), adopted on 14 December 1960. Notably, while 89 member states supported the resolution, South Africa was one of nine states that abstained (the others were Australia, Belgium, Dominican Republic, France, Portugal, Spain, the UK and the USA).

¹²⁸ Simpson ‘Something to do with states’ op cit 15 (citing H Gros Espiell *The Right to Self-determination* (1980) 8).

¹²⁹ General Assembly Resolution 1514 (XV) para 5.

¹³⁰ Ibid, para 2. The application of the principle of self-determination to ‘non-self-governing territories’ was subsequently endorsed by the ICJ in the *Namibia* case supra at 31 and the *Western Sahara* case supra, para 55.

¹³¹ General Assembly Resolution 1514 (XV), para 5

¹³² *Western Sahara* supra 32 at para 57.

¹³³ Ibid, 122.

¹³⁴ Simpson ‘Something to do with states’ op cit 15 (citing the *Declaration on the Granting of Independence to Colonial Countries and Peoples*).

¹³⁵ Resolution 1541 (XV), adopted on 15 December 1960. Prior to this, ‘Member States were asked to list territories to which, *in their own assessment*, Chapter XI applied and no general examination was made of the completeness or appropriateness of their responses’ (Crawford op cit 117). See further at 608–9.

¹³⁶ Crawford op cit 607–8.

¹³⁷ Principle I, Annex to General Assembly Resolution 1541 (XV) [own emphasis].

¹³⁸ Principle VI, Annex to General Assembly Resolution 1541 (XV).

¹³⁹ Simpson ‘Something to do with states’ op cit 15 [own emphasis].

¹⁴⁰ Okafor op cit 511.

¹⁴¹ Simpson ‘Something to do with states’ op cit 15. Mutua (op cit 1140) notes: ‘Significantly, the Charter did not challenge the validity of the colonial state as an entity; there is no suggestion anywhere that the colonial state is a nullity or that sovereignty should be returned to pre-colonial states and peoples in the process of preparing them for independence. The Charter in fact does the exact opposite: it recognizes the right to political self-determination only for those territorial units that are “internationally determined”, of which the colonies are the classic example. The United Nations and international law have defined the “self” who possesses the right of self-determination as the peoples bounded by a territorial unit within a colonial state’.

¹⁴² Craven ‘Statehood, self-determination, and recognition’ op cit 232.

¹⁴³ See OAU Resolution 16(1) of 1964, which affirmed the borders existing at independence (with the exception of Somalia and Morocco). For a critique, see Mutua op cit 1163.

¹⁴⁴ *Frontier Dispute (Burkina Faso/Mali)* (Judgment) ICJ Reports 1986, 554 at para 20 (cited in Craven ‘Statehood, self-determination, and recognition’ op cit 232). Craven (*ibid*) notes: ‘Precisely what “logic” strictly required obeisance to the inherited parameters of colonial administration was not clear, but there did at least seem to be a need to determine who the people were before they were asked to decide upon their political future.’

¹⁴⁵ Simpson ‘Something to do with states’ op cit, note 30.

¹⁴⁶ Higgins op cit 54.

¹⁴⁷ Dugard *Recognition and the United Nations* op cit 3.

¹⁴⁸ Craven ‘Statehood, self-determination, and recognition’ op cit 236.

¹⁴⁹ This led O’Brien and Goebel to conclude, in 1966, that ‘[t]he inescapable conclusion seems to be that the basic principle in the recognition of new States has changed. Formerly nations that had demonstrated their capacity to exist as sovereign independent States were recognized unless they failed to meet some other criteria. Today demonstration of the capacity to exist independently is not usually required of new States’ (WV O’Brien & UH Goebel ‘United States recognition policy toward new nations’ in WV O’Brien (ed) *The New Nations in International Law and Diplomacy* (1965) 212).

¹⁵⁰ See Crawford op cit 56–7.

¹⁵¹ *Ibid*, 57.

¹⁵² Crawford (op cit 128) notes: ‘in situations such as that found in the Congo, that the principle of self-determination will operate to reinforce the effectiveness of territorial units created with the consent of the former sovereign. However, this only holds good where the new unit is itself created consistently with the principle of self-determination’.

¹⁵³ Dugard *Secession of States* op cit 40.

¹⁵⁴ See below. In fact, the persistence of problems of recognition was evident at the time in relation to those instances of secession that were taking place (or attempting to) outside the decolonisation process (ie Katanga, Biafra and Bangladesh). See Dugard *Secession of States* op cit 41.

¹⁵⁵ Dugard (*ibid*, 74) notes: ‘While admission to the United Nations might not have been understood as collective recognition in the first decade of the United Nations, when many States remained outside the United Nations, today, when nearly all communities with a reasonable claim to statehood are Members of the United Nations, it is difficult to resist the view that membership provides evidence of the legal personality of States. The

history of the United Nations since 1945 shows how universality of membership has been achieved – and how membership and statehood have gone hand in hand.'

156 Dugard (*ibid*, 36), however, maintains: 'There are rules of law that govern recognition despite the argument that recognition is a question of policy and not law'.

157 Craven 'Statehood, self-determination and recognition' op cit 233.

158 *Ibid*.

159 N Berman 'Sovereignty in abeyance: Self-determination and international law' 7(1) *Wisconsin International Law Journal* (1988–1989) 51 at 52. One explanation, along the same lines as was argued in respect of the sovereignty of mandate territories, was that: 'self-determination had a suspensive capacity the effect of which was to displace claims to sovereignty on the part of the parent State, and affirm, somewhat obscurely, the nascent claims to sovereignty on the part of the people whose future had yet to be determined' (Craven 'Statehood, self-determination and recognition' op cit 233–4). Craven (*ibid*) adds: 'Independence thus in no way implied a loss of sovereignty, or a violation of the principle of territorial integrity, rather the fruition of a status temporarily subordinated by the fact of colonial administration.'

160 Dugard *Secession of States* op cit 40.

161 Parfitt (op cit 4–5) notes: 'Thanks to [...] examples of recognition practice in the post-Cold War period, some mainstream theorists have begun to move towards a partial acceptance of the constitutive theory.' See C Warbrick 'Recognition of states' 41(2) *International & Comparative Law Quarterly* (1992) 473.

162 Dugard *Secession of States* op cit 41. See further CMJ Ryngaert & S Sobrie 'Recognition of states: International law or *Realpolitik*? The practice of recognition in the wake of Kosovo, South Ossetia and Abkhazia' 24 *Leiden Journal of International Law* (2011) 467–8.

163 Dugard (*Secession of States* op cit 43) notes: 'The recognition – and non-recognition – of Kosovo has, however, demonstrated a level of inconsistency and arbitrariness that understandably has given rise to questions about the role of international law in the recognition process – and indeed led some to ask whether international law has any role to play at all.'

164 See Security Council Resolution 1244 (1999). For a factual background, see M Benzing (May 2010) 'International administration of territories' in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* Vol V (2012) 316. For a critical perspective, see R Wilde *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (2008).

165 Dugard op cit 42.

166 *Ibid*.

167 See D Thürer & T Burri (Dec 2008) 'Self-determination' in Wolfrum op cit Vol IX 113, paras 41–4. The authors note: 'the application of the right to self-determination to Kosovo is far from self-evident'.

168 United Nations General Assembly Resolution 63/3 (1998).

169 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Request for Advisory Opinion) ICJ Reports 2010, 48. See C Ryngaert 'The ICJ's Advisory Opinion on Kosovo's declaration of independence: A missed opportunity?' 57(3) *Netherlands International Law Review* (2010) 481. The broader issues that this raised – according to the ICJ itself – included (i) '[w]hether, outside the context of ... [decolonisation], the international law of self-determination confers upon part of the population of an existing State a right to separate from that state'; (ii) 'whether international law provides for a right of "remedial secession" and, if so, in what circumstances'; and (iii) 'whether the circumstances which some participants maintained would give rise to a right of "remedial secession" were actually present in Kosovo'. See *Kosovo* (Advisory Opinion) op cit, para 82.

170 For a discussion of the events in Crimea leading up to its 'secession', see C Marxsen 'The Crimea crisis: An international law perspective' 74(2) *Heidelberg Journal of International Law* (2014) 367, at 367–70.

171 This process produced two separate entities, the 'autonomous Republic of Crimea', and the federal city of Sevastopol. Russia had officially recognised the Republic of Crimea the day before. See *Executive Order on Recognizing Republic of Crimea* (17 March 2013), available at <http://en.kremlin.ru/events/president/news/20596>.

172 See generally 16(3) *German Law Journal* (2015), a special edition on the 'Crisis in Ukraine'.

173 Article 2(4), territorial integrity and aggression.

174 In a referendum, 'held under less than free and fair conditions', a reported 97% of Crimean voters opted to leave Ukraine and join the Russian Federation (BR Roth 'The virtues of bright lines: Self-determination, secession, and external intervention' 16(3) *German Law Journal* (2015) 384 at 390). However, the referendum was subsequently declared 'invalid' by the General Assembly (General Assembly Resolution 68/262 (27 March 2014) para 5).

¹⁷⁵ In this regard Roth (op cit 385) notes: ‘The Charter and the U.N. General Assembly’s quasi-authoritative interpretive glosses – above all, the *Friendly Relations Declaration* adopted in 1970 – can be construed to reconcile the self-determination of peoples with the territorial inviolability of states by first rebuttably presuming sovereign states to be manifestations of the self-determination of the entirety of their territorial populations, and then interpreting this presumption through a pluralistic lens that disqualifies only the vestiges of western European colonialism’ (citing General Assembly Resolution 2625 (XXV) (1970).

¹⁷⁶ See Roth op cit 403–8, and 411–13.

¹⁷⁷ As noted above, in the *Kosovo* Advisory Opinion, the ICJ avoided deciding on the legality of ‘remedial secession’.

¹⁷⁸ Roth op cit 413. See also S Tierney ‘Sovereignty and Crimea: How referendum democracy complicates constituent power in multinational societies’ 16(3) *German Law Journal* (2015) 523 at 530.

¹⁷⁹ Russia did so on 17 March 2014.

¹⁸⁰ To date, only Afghanistan, Cuba, Nicaragua, North Korea, Syria, and Venezuela have recognised Russia’s claim to have incorporated Crimea.

¹⁸¹ General Assembly Resolution 68/262 (27 March 2014) para 1 (South Africa abstained).

¹⁸² On the hypocrisy of state practice, see M Milanovic ‘Crimea, Kosovo, hobgoblins and hypocrisy’ *European Journal of International Law Talk* (20 March 2014), <http://www.ejiltalk.org/crimea-kosovo-hobgoblins-and-hypocrisy/> (accessed 20 August 2015). Milanovic notes that even though there are legal distinctions to be made between the two situations, ‘they are still close enough’.

¹⁸³ *Grant Recognition of States* op cit 5.

¹⁸⁴ Ibid.

¹⁸⁵ See B Simma et al *Charter of the United Nations: A Commentary* Vol 1, 3rd ed (2012) 335, 336, 339 and 340 for the list of 51 states.

¹⁸⁶ See art 4 and discussion below.

¹⁸⁷ Simma op cit 337.

¹⁸⁸ On the conditions for statehood, see above under para 2.1 of this chapter.

¹⁸⁹ This article determines as follows: ‘Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII’.

¹⁹⁰ Simma op cit 348.

¹⁹¹ GA resolution 506(VI), 1 February 1952.

¹⁹² *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)* (Advisory Opinion) ICJ Reports 1948, 57 at 63.

¹⁹³ Article 27 of the UN Charter.

¹⁹⁴ *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) ICJ Reports 1950, 4 at 8, 9.

¹⁹⁵ Article 18(2) of the UN Charter.

¹⁹⁶ Rule 137 of the Assembly’s Rules of Procedure.

¹⁹⁷ See *Vertrag über die Grundlagen der Beziehungen zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik* (1972), especially arts 4 and 6. See also J Crawford *Brownlie’s Principles of Public International Law* (2012) 136–8.

¹⁹⁸ Simma op cit 338, 339.

¹⁹⁹ Security Council Resolution 777 (19 September 1992) para 1. See also GA resolution 47/1 (22 September 1992).

²⁰⁰ Security Council Resolution 777 (19 September 1992) para 1.

²⁰¹ SC resolution 1326 (2000) of 31 October 2000 and GA resolution 55/12 of 1 November 2000.

²⁰² See J Vidmar ‘South Sudan and the international legal framework governing the emergence and delimitation of new states’ 47(3) *Texas International Law Journal* (2012) 541, 552–3.

²⁰³ Ibid, 553.

²⁰⁴ GA resolution 65/308 of 14 July 2011.

²⁰⁵ Simma op cit 355–8.

²⁰⁶ SC resolution 1397 (2002) of 12 March 2002. See also Crawford op cit 138–40.

²⁰⁷ GA resolution 3237 (XXIX) of 22 November 1974.

²⁰⁸ GA resolution 43/177 of 15 December 1988.

²⁰⁹ UN Doc A/RES/66/37 of 23 September 2011. See also the collection of essays in M Qafisheh *Palestine Membership in the United Nations: Legal and Practical Implications* (2013).

²¹⁰ UN Doc S/2011/705 of 11 November 2011.

²¹¹ See on this, chapter 5 of this book.

²¹² Simma op cit 364, 368.

²¹³ See G Erasmus ‘The rejection of credentials: A proper exercise of General Assembly powers or suspension by stealth?’ 7 *South African Yearbook of International Law* (1981) 40; M Halberstam ‘Excluding Israel from the General Assembly by rejection of its credentials’ 78 *American Journal of International Law* (1984) 179.

²¹⁴ See art 6 of the UN Charter.

²¹⁵ Simma op cit 378.

Chapter 3

International law making as an attribute of state sovereignty

HENNIE STRYDOM

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3.1 Introduction to the sources of international law

Within states, binding law is created by the legislature and the judiciary and enforced by law-enforcement bodies. These powers derive from a state's legal competency to perform such functions in the domestic legal order and are an inherent part of a state's legal sovereignty.¹ To be sovereign in this sense means that the state has the *exclusive* power to perform these functions over its whole territory, with the result that other states must refrain from interfering in such matters.² At the very least, this is what article 2(7) of the UN Charter gives effect to by interdicting, subject to certain exceptions,³ intervention 'in matters which are essentially within the domestic jurisdiction of any State'.⁴

Law making at the international level is likewise a function of a state's sovereignty to act as law-maker in international relations,⁵ in addition to performing a range of other functions which can be political, economic or military in nature. Consequently, international law can only come about as a result of a state's legal competency to participate at the international level when fulfilling its law-making function. This competency is inherent in statehood⁶ and its exercise more often than not is subject to constitutional regulation,⁷ at least as far as the making of treaty law is concerned.⁸

When international law is applied in finding a solution to a legal dispute between states, or where the correct interpretation of a legal rule or principle of international law is sought, governments or international judicial bodies make use of the *sources* of international law. In this sense, the term 'sources' refers to the document or instrument where the particular international law rule or principle is to be found. The examples below provide an overview of the range of such sources one often encounters in international law and illustrate how they are referred to.

The first example is taken from article 38(1) of the Statute of the International Court of Justice (ICJ). When disputes between states are referred to the ICJ, this provision directs the court to apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) international custom, as evidence of a general practice accepted as law;

- (c) the general principles of law recognized by civilized nations;
- (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The second example comes from the Statute of the International Criminal Court (ICC) established in 1998 for the prosecution of persons accused of war crimes, crimes against humanity and genocide. Article 21(1) of the ICC Statute determines that the court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world ...;

The third example is contained in article 7 of the Protocol establishing the African Court on Human and Peoples' Rights.⁹ This court, which has jurisdiction over human rights disputes between citizens and their governments, is entitled, in accordance with article 7 of the Protocol, to 'apply the provisions of the Charter¹⁰ and any other relevant human rights instruments ratified by the states concerned'.

Before the different modes of international law making are discussed in greater detail, a few general comments about the formulations in the above examples must be made.

The first deals with terminology. Terms such as 'convention', 'statute', 'protocol', 'charter' and 'instrument' occur in the provisions referred to above. These designations all have in mind a specific source of international law more commonly known as a 'treaty' or 'international agreement' between states. What is important is not the terminology but the material conditions that must be fulfilled before something can be called a treaty or referred to by any of the other designations. These conditions are contained in the 1969 Vienna Convention on the Law of Treaties (VCLT), which is a codification of international law principles determining the conclusion of treaties and related matters. Although not all the provisions in this codification have attained the status of customary international law,¹¹ it nevertheless 'constitutes the basic framework for any discussion of the nature and characteristics of treaties'.¹² Article 2(1)(a) defines a treaty as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

It follows then that a valid and binding treaty is constituted when two or more states have come to an agreement in accordance with international law prescriptions, and when that agreement is in written form and subject to international law. Whether it is then referred to as a 'convention', 'statute', 'protocol', 'charter' or 'instrument' is immaterial.

A second issue is whether in the first two examples there is a hierarchy of sources. As far as article 38 of the ICJ Statute is concerned, the general view is that no hierarchy is intended in the sense that the sources in paragraphs (a)–(d) do not rank in an order of preference in all cases.¹³ However, in practice, and as a result of the increasing codification of international law through treaties, the latter can be considered to be of primary significance, while customary international law, mentioned in paragraph (b) of article 38(1), is often used as a secondary source in adjudicating disputes between states.¹⁴

A different constellation is found in article 21 of the ICC Statute. The wording used in this provision clearly intends to rank the sources in an order of preference when adjudicating crimes

under the Rome Statute. The Statute and its related instruments rank first, followed by the sources in paragraphs (b) and (c) respectively.¹⁵

The third and last issue to be noted here is the reference in the provisions above to ‘general principles of law’ or ‘general principles and rules of international law’. This category of sources allows international judicial bodies to make use of judicial reasoning, using existing legal principles in both domestic and international law in so far as such principles are applicable to the dispute the parties have submitted for adjudication.

The rubric ‘general principles of international law’ may alternately refer to rules of customary international law, to general principles of law as in article 38(1)(c), or to certain logical propositions underlying judicial reasoning on the basis of existing international law. This shows that a rigid categorisation of sources is inappropriate. Examples of this type of general principle of international law are the principles of consent, reciprocity, equality of states, finality of awards and settlements, the legal validity of agreements, good faith, domestic jurisdiction, and the freedom of the seas.¹⁶

In view of the variety of meanings given to the concept of general principles of (international) law, a general understanding of the concept remains elusive. Helpful though, for current purposes, is Koskenniemi’s classification¹⁷ of the four different uses of the concept. These are:

1. standards that are common to most national legal systems (this is the interpretation often given to article 38(1)(c) of the ICJ’s Statute and would include the sanctity of treaties,¹⁸ good faith, and due process principles);
2. general standards of international law derived from state practice such as freedom of the high seas and diplomatic immunity;
3. fundamental rules of international law such as the prohibition on aggression, which is a principle of customary international law and a *jus cogens* norm;¹⁹ and
4. fundamental human rights norms applicable to inter state relations.²⁰

It must also be pointed out that the reason for including article 38(1)(c) in the ICJ’s Statute was to avoid a situation of *non liquet* – that is, a declaration by the court that no judicial finding can be made in a dispute for lack of an existing applicable rule of law.²¹ Thus, this provision may be relied upon by the court if a matter cannot be adjudicated upon under a treaty or customary law rule.²²

Other concepts in judicial reasoning that may fall into the category of general principles of law include decisions *ex aequo et bono* and those based on *equity*. According to article 38(2) of the ICJ Statute, the court may decide a case *ex aequo et bono* provided that the parties to the dispute agree thereto. In such instances, the court is called upon to reach an adjustment of the settlement of the dispute that would involve elements of compromise and conciliation that may lead to a surrendering by the parties of some of their objectives or principled positions. The power of the court to decide a case on this basis has never been exercised because parties have not requested the court to do so.²³

Decisions based on *equity*, however, will involve considerations of fairness and reasonableness. This is often apposite in disputes where states assert conflicting claims to a common resource and circumstances do not permit an equal share in the resource for each of the claimant states. The classical case in this regard is the *North Sea Continental Shelf* dispute²⁴ between the Netherlands, Denmark and the former West Germany. This case dealt with the principles and rules of international law applicable to the delimitation of the continental shelf areas in the North Sea to which each one of the parties had a claim beyond a certain boundary. In deciding the matter, the ICJ rejected the proposition that a single method of delimitation should be decided upon (such as the equidistance principle that was in vogue at the time), concluding instead that one *objective* should be pursued – namely, a delimitation by agreement between the parties in accordance with equitable principles after all relevant circumstances have been taken into account.²⁵ This approach was later also adopted in article 83 of the 1982 United Nations Law of the Sea Convention.²⁶

This chapter will proceed with a discussion in sequence of the various modes of law making and sources of international law, namely:

- treaties;
- customary international law;
- general principles of law;
- judicial decisions and the teachings of publicists;
- sources falling outside the scope of article 38; and
- informal sources of international law.

3.2 Treaties

Treaties play a fundamental role in the codification and development of international law, and do so increasingly. As such, they are of ‘paramount importance to the evolution of international law’.²⁷ Based on the consent of states, they are the equivalent of contracts in private law – with the difference that they regulate the public law interests of states in international relations as opposed to the private law rights and duties of contracting parties in domestic private law.

Broadly speaking, treaties can be bilateral, multilateral and constitutive in nature. Bilateral treaties are concluded between two states to regulate a matter of common concern for the states parties – such as the use of a river forming the border between them, or for the promotion of bilateral trade. Multilateral treaties, however, involve multiple states parties and play an important law-making and codification role in international law.²⁸ Examples include the 1949 Geneva Conventions and their 1977 Additional Protocols codifying the laws of armed conflict; the 1966 International Covenant on Civil and Political Rights determining states’ duties with regard to the protection of civil and political rights; the 1982 United Nations Law of the Sea Convention specifying the rights and duties of states with regard to the delimitation and use of adjacent sea areas; the 1992 United Nations Framework Convention on Climate Change aimed at the stabilisation of greenhouse gas concentrations in the atmosphere; and the 2000 International Convention for the Suppression of the Financing of Terrorism aimed at criminalising the funding of terrorist activities.

Constitutive treaties bring into being (constitute) international law entities such as international or regional organisations and assign to such entities separate legal personality, privileges and immunities. The Charter of the United Nations (1945), the Constitutive Act of the African Union (2000), the Statute of the International Court of Justice (1945) and the Agreement establishing the World Trade Organization (1995) fall into this category. These instruments are at the same time multilateral in nature and are, like all treaties between states parties, subject to the Vienna Convention on the Law of Treaties (VCLT)²⁹ if the members of the organisation are also members of the VCLT.³⁰ They also remain subject to the general principles of international law applicable to treaties.³¹

Although the Vienna Convention is concerned with agreements between states, agreements between states and international organisations (which comprise states as members), and between international organisations, will also qualify as treaties. To accommodate certain special considerations when treaties involve international organisations as parties to the treaty, the International Law Commission drafted a separate instrument, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. This Convention was opened for signature in 1986 but is not in force since state ratifications have not yet reached the threshold of 35 as required by the Convention.

States may also conclude agreements with other, non-state, subjects of international law or may even conclude international agreements that are not in written form. The fact that the VCLT does not apply to such agreements does not affect their legal validity, which may be determined by rules and principles independent of the Convention.³²

3.2.1 Basic concepts in the law of treaties

An understanding of treaties as a source of international law requires also an understanding of the mechanics of treaties in practice. Thus, it is necessary first to master some basic concepts in the law of treaties.

3.2.1.1 The capacity to conclude treaties and the means of expressing consent

At the beginning of this chapter, it was explained that law making in international relations is a function of a state's sovereignty. This sovereign capacity is given recognition by the VCLT, which states that '[e]very state possesses capacity to conclude treaties'.³³ While this capacity is assumed in all cases where the statehood of the parties to the treaty is not in question, a state's consent to be bound by the treaty must be made known to the other party or parties by some positive act. In the law of treaties, the means of expressing consent can be effected by signature, exchange of instruments, ratification, acceptance, approval or accession, or any other means agreed upon by the parties.³⁴ Which one of these acts of giving consent will apply in a specific case may be determined by the treaty itself or can be ascertained from the intention of the parties.³⁵

'Ratification', 'acceptance', 'approval' and 'accession' have the same legal effect and are considered as international acts 'whereby a state establishes on the international plane its consent to be bound by a treaty'.³⁶ It must be pointed out that signature or the exchange of instruments as the means of expressing consent may be subject to ratification, acceptance or approval at a later date. In such instances, the treaty's entry into force for the signing state is postponed until such time as ratification, acceptance or approval can take place. Between the signing and the final act of giving consent, the state in question (if it is to be bound) is under a good faith obligation to refrain from conduct that may defeat the object and purpose of the treaty.³⁷ By making the signing of the treaty subject to a delayed ratification, a state creates an opportunity to reconsider its position under the treaty and to determine, for instance, whether changes to its national law will be needed to enable it to fulfil its obligations in terms of the treaty.³⁸

Two other rules of treaty law may further explain the need for delayed ratification. Of fundamental importance is the *pacta sunt servanda* rule, which places a good faith obligation on parties to a treaty to comply with the treaty's terms and conditions once the treaty has entered into force between them.³⁹ The second rule prohibits a state from invoking the provisions of its domestic law as justification for its failure to perform in terms of a treaty binding upon it.⁴⁰ Hence, a state mindful of the implications of these rules can be expected to act responsibly when considering its ability to perform in terms of a treaty that will eventually bear the state's consent and to avoid a situation where the consent to be bound is given for politically expedient or symbolic reasons. By acting with indifference to the realisability of a treaty's objectives, states will undermine the rule of law and the trust that is needed to make inter state relations work.⁴¹

3.2.1.2 The authority to conclude treaties

In international relations, the state acts through designated officials. For the purpose of adopting or authenticating the text of a treaty or for expressing the consent of a state to be bound by a treaty, a person acting on behalf of the state must have the necessary *authority* to perform these functions lawfully.

The authority to act on behalf of a state in these matters can derive from a *specific authorisation* by the state to perform certain functions, from *representation* based on state practice, or from the *official position* of a government representative. In the case of specific authorisation, a person will only be allowed to represent a state if that person can produce *full powers* given to him or her for the purpose of adopting or authenticating the text of a treaty or for expressing the consent of a state to be bound by a treaty.⁴² It is left to the internal law of the state to determine the person responsible for issuing full powers. In the normal course of events, a document containing full powers will emanate from the head of state or from another person delegated for that purpose.⁴³ The document containing the full powers must comply with certain minimum requirements. For instance, it must at least state the name of the representative authorised to act on behalf of the state, the title of the treaty to be signed on behalf of the state, the signature of the competent authority and the place and date of signature.⁴⁴

In the case of representation based on past state practice, there is explicit or implicit acceptance by the states parties that a certain representative is entitled to act on behalf of a state and that the presentation of full powers can be dispensed with.⁴⁵ This frequently occurs in the case of bilateral treaties, when the representatives of the respective parties – for example, the ministers of the relevant government sectors responsible for the implementation of the treaty – are known to one another and their authority to bind the states parties is not in dispute.⁴⁶

Full powers are also dispensed with in the case of representation based on official position. This involves a group of persons who, by virtue of their functions, and without special authorisation, can perform certain functions relating to the conclusion of treaties on behalf of the state. They are heads of state and government, and ministers of foreign affairs who can perform all acts relating to the conclusion of a treaty; heads of diplomatic missions for the purpose of adopting the text of a treaty between the accrediting state and the state to which they are accredited; and representatives accredited to an international conference or international organisation for the purpose of adopting the text of a treaty.⁴⁷

As far as heads of state and government are concerned, it is presumed that they are, by virtue of their official position, entitled to act on behalf of the state in international relations and to bind the state by consenting to a binding international instrument, such as a treaty. Similarly, since ministers of foreign affairs are in charge of conducting their governments' foreign relations through their diplomatic activities, their official position entitles them to conclude binding agreements on behalf of the state.⁴⁸ In the *Armed Activities (DRC v Rwanda)* case, the ICJ confirmed that this rule is a rule of customary international law, and that it finds expression in article 7(2) of the VCLT.⁴⁹ In the case of heads of diplomatic missions and especially accredited representatives, full powers are only dispensed with for purposes of the *adoption* of a treaty text. This means that for expressing consent to be bound by the treaty, full powers for that purpose will have to be produced.⁵⁰

An act relating to the conclusion of a treaty performed by a person without the necessary authority to do so is without any legal effect, unless the act is afterwards confirmed by the state.⁵¹ In cases where a representative's authority to express the consent of a state to be bound by a treaty has been made subject to restrictions, non-observance of the restrictions may not be invoked as invalidating the consent unless the other negotiating states had prior knowledge of the restrictions.⁵² A state may also not invoke the non-observance of its domestic law with regard to the competence to conclude treaties as invalidating its consent, unless the violation was manifest and concerned a domestic rule of fundamental importance. The test for a manifest violation is whether it would be

objectively evident to any state acting in accordance with normal practice and in good faith that such a violation has occurred.⁵³

Since internal procedures for ratification are usually a matter regulated in terms of domestic law, the question is whether states can be expected to keep themselves at all times informed about legislative and constitutional developments in other states that may have an effect on their *competence* to conclude treaties. This issue came before the ICJ in the 2002 land and maritime boundary dispute between Cameroon and Nigeria referred to earlier. In this case, the Nigerian government disputed the validity of an agreement with Cameroon, signed by the respective heads of state, because the agreement was never *ratified* by the Nigerian government subsequent to the *signing* thereof – as required by the Nigerian constitution. In relying on article 46 of the VCLT, Nigeria argued that non-compliance with this requirement constituted a manifest violation of a domestic rule of fundamental importance and that Cameroon either knew or ought to have known that the Nigerian head of state did not have the authority to undertake legally binding commitments on behalf of the Nigerian state. This argument raises a further issue – namely, whether Cameroon could rely on article 7(2) of the VCLT according to which heads of state are considered as having the authority to represent their states in matters of this nature without having to produce full powers.

The court dealt with these issues by stating:

[A] limitation of a Head of State's capacity in this respect is not manifest in the sense of Article 46, paragraph 2, unless at least properly publicized. This is particularly so because Heads of State belong to the group of persons who, in accordance with Article 7, paragraph 2 of the Convention '[i]n virtue of their functions and without having to produce full powers' are considered as representing their State. ... there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States.⁵⁴

From the judgment, it is clear that the party relying on article 46 in claiming the invalidity of a treaty should be able to demonstrate that sufficient communication and notification of the legal position with regard to the competence to conclude treaties was maintained with the other party.

3.2.1.3 The entry into force of treaties

The consent of negotiating parties as the basis for accepting the terms of a treaty is equally relevant for determining the date on which the treaty will enter into force for the parties. For instance, the law of treaties determines that a treaty will enter into force ‘as soon as consent to be bound by a treaty has been established for all the negotiating States’.⁵⁵ However, this rule will not apply if the treaty itself determines otherwise or if the negotiating states have reached agreement on another date.⁵⁶ Should it happen that the consent of a state to be bound by a treaty is established after the date on which the treaty has entered into force, the treaty will enter into force for that state on the date when consent was established.⁵⁷ This rule is a manifestation of the rule against the retroactive application of treaties, which prevents the application of the provisions of a treaty to acts or events that occurred before the entry into force of the treaty with respect to a state party, unless a different intention appears from the treaty or is established otherwise.⁵⁸

How these rules are applied can be illustrated with reference to the Statute of the International Criminal Court (1998). As is typical for multilateral treaties, the Statute makes use of certain events to determine its entry into force for the different states parties. First of all, article 126(1) of the Statute requires at least 60 ratifications as one of the preconditions for the Statute’s entry into force. The date of the actual entry into force will then be the first day of the month after the 60th day

following the 60th instrument of ratification, acceptance, approval or accession deposited with the Secretary-General of the United Nations.

But since several states may give their consent to be bound by the Statute at different occasions after the entry into force of the Statute, the Statute will enter into force for them at different dates. This is regulated under article 126(2), which determines that for each state ratifying, accepting, approving or acceding to the Statute after its entry into force, the Statute shall enter into force for such state on the first day of the month 60 days after the deposit of its instrument of ratification, acceptance, approval or accession.⁵⁹

3.2.1.4 Reservations to treaties

It may happen that a state is prepared to become a party to a treaty without accepting all of the treaty's provisions. To cater for such instances, treaty law permits a state to make certain *reservations* to a treaty, which simply means that the state excludes or modifies the legal consequences of the treaty with respect to certain provisions. Consequently, reservations to treaties constitute one of the most controversial issues in treaty law.⁶⁰ It is perhaps also one of the most complex issues in treaty law and the observation is apt that the law of treaty reservations 'is one of the hardest areas of law to grasp, teach or condense and simplify without loss of accuracy'.⁶¹

This matter is dealt with in article 2(1)(d) of the VCLT, which states as follows:

'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

The making of reservations is guided by the VCLT, which provides in article 19 as follows:
A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;**
- (b) the treaty provides that only specific reservations, which do not include the reservation in question, may be made; or**
- (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.**

From the above, it is clear that a treaty may altogether disallow the making of reservations or only allow reservations to certain provisions of the treaty. In the case of permissible reservations, a state may not formulate a reservation that cannot be reconciled with the object and purpose of the treaty. Of further importance is the fact that a reservation must be made at the time of signing, ratifying, accepting, approving or acceding to a treaty and not thereafter.

Reservations are mainly associated with multilateral treaties. When disagreements arise between states parties in the case of a bilateral treaty, the parties will have to renegotiate the terms and conditions of the treaty until consensus is reached between them. This is so since *mutual agreement* between the two parties is an essential element for the bilateral treaty to have binding effect between them; a reservation by one of the parties would render the obligation unenforceable.⁶²

The legal complexities brought about by reservations are most prominent in the case of multilateral treaties as a result of the fact that some states may accept a specific reservation made by a party or parties, while others do not. Consider the legal effects of the acceptance and non-acceptance respectively of the reservation with regard to the relationship between the reserving state and the accepting or non-accepting states parties.

3.2.1.4.1 The *Genocide Convention* case

Already in 1951, these issues had become the subject matter of an advisory opinion of the ICJ in the *Reservations to the Genocide Convention* case.⁶³ Since the 1948 Genocide Convention contained no provisions permitting or prohibiting reservations, many states used this opportunity to enter reservations against certain provisions of the Convention. This prompted the UN General Assembly to request an advisory opinion from the ICJ on whether a state that has made a reservation can still remain a party to the Convention and, if so, what the legal effect would be of such reservations on states that accepted or rejected the reservation.

The court held the view that a state that has made a reservation to the Convention and which has been objected to by some states parties but not by others, remains a party to the Convention if the reservation is *compatible* with the object and purpose of the Convention.⁶⁴ But what about the clause containing the reservation? Will it still be effective, or not, as between the objecting state or states and the reserving state. This question may be answered with reference to article 20(4)(b) of the VCLT. The effect of this provision is that an objection by a contracting party to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving state *unless the objecting state definitely expressed a contrary intention* (our emphasis). Tacit acceptance of a reservation is also provided for by means of article 20(5), which determines that reservations not objected to at the end of 12 months will be deemed accepted.

Article 24(4)(b) incorporates the finding of the ICJ in the *Genocide Convention* case, underscored by the idea that the object and purpose of the Convention is to maximise the participation of as many states as possible in the implementation of the Convention. The complete exclusion from the Convention of one or more states, the court argued, ‘would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis’.⁶⁵ But the question remains whether article 20(4)(b) also applies to reservations that have been objected to since the provision only mentions the entry into force of the treaty. Fitzmaurice⁶⁶ seems to apply article 20(4)(b) also to reservations, which means that in the absence of a definite expression of intent by the objecting state that the reservation between it and the reserving state shall be inoperative, the reservation shall have effect between them.

If the reservation is *not compatible* with the object and purpose of the Convention, then the reserving state cannot be regarded as being a party to the Convention. The court also added that a state objecting to a reservation that it considers to be incompatible with the object and purpose of the Convention is entitled to consider the reserving state not to be a party to the Convention. For states with the opposite view, the reserving state will then still be considered to be a party to the Convention.⁶⁷

This approach by the court (according to which each party to a treaty has a right to an autonomous assessment of the consequences of a reservation in terms of the object and purpose of the treaty) has shaped the law on reservations to treaties as it is now regulated in terms of the VCLT. In cases where a treaty expressly authorises a reservation, acceptance of the reservation by the other states parties is not required.⁶⁸ However, acceptance will be required if it appears from the limited number of negotiating states and the object and purpose of the treaty that the application of the treaty in its entirety and between all the parties was an essential condition of their consent to be bound by the treaty.⁶⁹ Reservations to the constituent instruments of international organisations will require acceptance thereof by the competent organ of the organisation.⁷⁰

The relations between states parties making reservations and other states parties are now guided by the following rules.⁷¹ Acceptance by a state party of a reservation made by another state party causes the latter to be a party to the treaty in relation to the accepting state – if or when the treaty is in force between them. In the case of a contracting state objecting to a reservation, the objection

will not preclude the entry into force of the treaty between the objecting and reserving state, unless the objecting state expressly indicated a contrary intention. An act expressing a state's consent to be bound by a treaty and containing a reservation will take effect as soon as one other contracting state has accepted the reservation. It must also be noted that reservations and objections can be withdrawn at any time, or as stipulated by the treaty itself.⁷²

3.2.1.4.2 Incompatible and impermissible reservations

Distinguishing between reservations that are incompatible with the object and purpose of a treaty, from those that are not, remains a contentious issue. Scholarly contributions to the issue are voluminous and the matter has also made up a large part of the International Law Commission's (ILC) report on reservations to treaties.⁷³ The work on treaty reservations had already commenced in 1993 and culminated in the Commission's 2011 *Guide to Practice on Reservations to Treaties*.⁷⁴ The purpose of these guidelines is to provide assistance in the resolution of disputes concerning *lacunae* in the VCLT on the making of and objecting to reservations and the legal consequences thereof. In the words of the ILC, the guidelines 'are by no means binding' and their purpose is rather to 'direct the user towards solutions that are consistent with existing rules ... or to the solutions that seem most appropriate of the progressive development of such rules'.⁷⁵ A select few aspects of the ILC Guidelines are referred to below.

Closely related to the compatibility/incompatibility issue mentioned in the previous paragraph is the contentious issue of the legal effect of an impermissible reservation – that is, a reservation that is incompatible with the object and purpose of the treaty. The debate on this issue is largely as a result of the fact that the VCLT fails to set out in clear language the consequences of the invalidity of a reservation in such instances.⁷⁶ The ILC has described this failure as 'one of the most serious lacunae in the matter of reservations in the Vienna Conventions'.⁷⁷

As the Commission pointed out, the question of reservations in respect of the compatibility issue is caught up in the doctrinal controversy between the proponents of 'permissibility', who hold that the object and purpose issue must first and foremost be solved by reference to the treaty and its interpretation, and the proponents of 'opposability', who hold that the validity of a reservation depends solely on the acceptance of the reservation by another contracting state.⁷⁸

The permissibility approach entails a two-stage assessment: first, the reservation is objectively assessed for compatibility with the treaty's object and purpose. If found to be *incompatible*, it cannot be validated through its acceptance by other states parties. If found to be *compatible*, it will be within the discretion of the other states parties to accept the reservation or to object to it for reasons they may decide upon. A state party may, for instance, decide to object to the reservation for political reasons. For the proponents of 'opposability', the compatibility test is merely a guideline for use by the parties to decide whether to accept or reject the reservation and they base the validity of the reservation entirely on whether it has been accepted, or not, by other parties.⁷⁹ In this instance, validity is therefore a matter that hinges on state consent and nothing else.

However, the question about the legal effect of an impermissible reservation remains problematic. It has been suggested that one solution is to consider the state entering an impermissible reservation as not being party to the treaty, unless the reserving state withdraws the reservation. The other is to sever the reservation from the rest of the treaty and to consider the reserving state bound by the treaty in its entirety.⁸⁰ However, thus far it is only in the case of regional human rights treaties (dealt with below) that the severability issue has found some legal support.⁸¹ A rather difficult issue in the general debate on the legal effect of impermissible reservations therefore remains – namely, how lawfully to sever a reservation that is the very basis of the reserving state's consent to be bound by the treaty.⁸²

The ILC's answer to the uncertainties regarding the legal effect of impermissible (invalid) reservations is guideline 4.5.1, which reads as follows:

A reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of any legal effect.⁸³

The reference to Parts 2 and 3 is a reference to the procedural and substantive requirements for the validity of reservations in the VCLT. By declaring reservations that do not meet these requirements null and void – that is, without legal effect⁸⁴ – the guideline makes the nullity of the reservation independent of the reactions of other states parties to the treaty.⁸⁵ In this manner, the ILC wanted to avoid a situation where permissibility issues are left to the states parties to decide; that scenario could deprive article 19 of the VCLT of any substance, if reservations were validated by state consent regardless of the requirements of article 19.⁸⁶ The Commission's further explanation is that this guideline is in keeping with the logic of the Vienna regime – that is, that the guideline accords with the common ground between the permissibility and opposability approaches and with the position of the human rights treaty bodies, and, finally, that it is grounded in state practice.⁸⁷

3.2.1.4.3 Procedural rules applicable to reservations

Reservations and objections are also subject to procedural rules.⁸⁸ For instance, a reservation, its express acceptance and an objection to it must be formulated in writing and communicated to the contracting states and other states entitled to become parties to the treaty. The same applies in the case of a withdrawal of a reservation, or of an objection to it. When expressing its consent to be bound by a treaty, a reserving state must formally confirm its reservation, in which case the reservation shall be considered as having been made on the date of confirmation.⁸⁹ The issue of the notification to third states of a reservation, and of its withdrawal, was dealt with by the ICJ in the *Armed Activities (DRC v Rwanda)* case. There the subject matter of the dispute, *inter alia*, was the adoption by Rwanda in 1995 of an executive decree to the effect that all reservations made to human rights treaties, including the Genocide Convention, will be withdrawn and that the withdrawal will take effect on the date of the decree's publication in the government's official journal. Of specific relevance in the matter were article XVII of the Genocide Convention, which authorises the UN Secretary-General to notify all UN members as well as non-members of any signature, ratification or accession to the Convention and revisions of it; and article 22(3)(a) of the VCLT, which determines that the withdrawal of a reservation becomes operative in relation to another contracting state only when notice of the withdrawal has been received by that state, unless the treaty determines otherwise, or it is otherwise agreed. Based on these provisions, the ICJ ruled that for a withdrawal to have effect in *international law*, the withdrawal must be the subject of a notification received at the international level.⁹⁰ In the case of the Genocide Convention, the court found that the UN Secretary-General is the depositary of such a notification even though the Convention does not provide for reservations at all.⁹¹ In terms of article 22(3)(a) of the VCLT, this means that, for the coming into effect of the Rwandan reservation for other contracting parties, the reservation must have been communicated to them by the Secretary-General, since no other agreement between the parties determined otherwise. But since the Rwandan authorities were in default as far as notifying the Secretary-General of the reservation was concerned, there was no notification by the Secretary-General to third parties. The court therefore concluded that the adoption and publication of the decree containing the reservation in the official journal of the Rwandan government did not as a matter of international law affect the withdrawal of the reservation.⁹²

3.2.1.4.4 Legal effect of reservations

Of specific importance are the legal effects of reservations and objections to reservations with regard to the treaty obligations of states parties.⁹³ A reservation in relation to another state party modifies the provisions of the treaty between the reserving and other state to the extent of the reservation, but does not affect the provisions of the treaty for and between the other parties to the treaty. When a state objects to a reservation, the provisions to which the reservation relates do not apply between the objecting and the reserving state if the objecting state has not opposed the entry into force of the treaty between them.

It is important to distinguish *interpretative declarations* from reservations – the former not being regulated in the VCLT. The International Law Commission (ILC) has explained the difference between reservations and interpretative declarations as follows:

[I]nterpretative declarations are distinguished from reservations principally by the objective pursued by the author State or international organization: in formulating a reservation, the State or organization purports to exclude or modify the legal effect upon itself of certain provisions of a treaty (or of the treaty as a whole with respect to certain specific aspects); in making an interpretative declaration, it intends to specify or clarify the meaning or scope that it attributes to a treaty or to certain of its provisions.⁹⁴

However, if it appears from the declaration that the state party intended to exclude or modify the legal effect of a treaty provision, it may be characterised as a reservation, which must then be dealt with under article 19 of the VCLT.⁹⁵

3.2.1.4.5 The special case of reservations to human rights treaties

The special character of human rights treaties and the obligations they impose on states parties go back to 1951 when the International Court of Justice in the *Genocide Convention* case distinguished between ordinary treaties and those of a human rights or humanitarian character. In the latter instance, states parties ‘do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention’.⁹⁶ Ten years later, the European Commission of Human Rights argued in a similar fashion in affirming that the obligations imposed on states parties by the European Convention on Human Rights are of an objective character in that they are designed to protect fundamental rights from infringement by any of the states parties as opposed to creating subjective and reciprocal rights for the parties themselves.⁹⁷ To this, one should add the following important views of the Inter-American Court of Human Rights:

[M]odern human rights treaties in general ... are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting states. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.⁹⁸

The UN Human Rights Committee, the monitoring body of the 1966 International Covenant on Civil and Political Rights (ICCPR), referred to these obligations as *erga omnes* obligations, meaning that they are obligations owed to the international community as a whole; thus each state party has a legal interest in the performance by every other state party of its obligations under the ICCPR.⁹⁹

This understanding of the nature of human rights treaties and of the obligations they impose on states parties has given rise to an ongoing controversy about the making of reservations to human rights treaties. The UN Human Rights Committee, alarmed by the high number of reservations by states to their obligations under the ICCPR and its Optional Protocol, some of which excluded the duty to provide and guarantee certain particular rights enumerated in the Covenant, addressed the issue in a General Comment in 1994, expressing the desire that states should in principle ‘accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being’.¹⁰⁰

The Covenant and its first Optional Protocol do not contain a provision on reservations, which means, as the Human Rights Committee pointed out, that article 19(c) of the VCLT takes effect. As a result, only those reservations that are compatible with the object and purpose of the Covenant will be allowed and since the object and purpose of the Covenant is to create legally binding human rights standards, reservations that offend peremptory or customary international law norms inherent in these standards will not be compatible with the object and purpose of the Covenant. A state can therefore not make a reservation allowing it to engage, for example, in slavery, torture, arbitrary detention, or the denial of freedom of thought and conscience.¹⁰¹

It is against this understanding of the object and purpose of human rights treaties that the Human Rights Committee raised the contentious point about which body has the legal authority to determine whether a specific reservation is compatible with the object and purpose of the Covenant.¹⁰² As was pointed out in the previous section, in terms of articles 20 and 21 of the VCLT, the acceptance or rejection of reservations by individual states parties alone determines the modification of the treaty provisions and the legal relationship between the reserving and objecting or accepting state. The Committee found this arrangement to be inappropriate when addressing the problem of reservations to human rights treaties because such treaties do not create a ‘web of inter-State exchanges of mutual obligations’ but concern the ‘endowment of individuals with rights’, causing the principle of inter-state exchanges to be mostly redundant and an unreliable source for determining whether a reservation is compatible or not with the object and purpose of the ICCPR.¹⁰³

Established in terms of article 28 of the ICCPR as a monitoring body for the effective implementation of the Covenant, the Human Rights Committee was of the view that the determination whether a reservation was compatible with the object and purpose of the ICCPR is a function that must be performed by the Committee itself as an integral part of its functions under the ICCPR.¹⁰⁴

It was also the Committee’s view that in the case of an unacceptable reservation to the Covenant, the consequence will not be that the Covenant has no effect for the reserving party. Instead, the reservation will generally be severable, which means that the Covenant will remain operative for the reserving party without the benefit of the reservation.¹⁰⁵ This approach was also followed by the European Court of Human Rights in cases related to contested reservations to the European Convention on Human Rights (1950).¹⁰⁶

By following the severability approach, the Human Rights Committee has declared reserving states bound by the treaty provisions, including those to which the rejected reservation relates. This met with opposition from states that considered article 19(c) of the VCLT equally valid for human rights treaties, and according to which states parties could determine whether a reservation was compatible with the object and purpose of the treaty, especially when a reservation formed an integral part of a state’s consent to be bound by the treaty.¹⁰⁷

The debate on these issues has become part of the International Law Commission’s work on reservations to treaties. Most recently, in the 2011 *Guide to Practice on Reservations to Treaties*, the Commission has again confirmed the competency of human rights monitoring bodies to assess the permissibility of a contested reservation, including whether the reservation is compatible with

the object and purpose of the treaty in question.¹⁰⁸ However, this power, according to the Commission, does not affect the power of states parties to accept or reject reservations in accordance with articles 20, 21 and 23 of the VCLT.¹⁰⁹ In countering with this argument (the Human Rights Committee's approach), the Commission defined the current situation as one that allows for several coexisting mechanisms, which are mutually non-exclusive, for assessing the permissibility of reservations.¹¹⁰ The Commission's conclusion on this reads as follows:

It could be concluded that the possibilities of cross-assessment in fact strengthen the opportunity for the reservations regime, and in particular the principle of compatibility with the object and purpose of the treaty, to play its real role. The problem is not to set up one possibility against another or to affirm the monopoly of one mechanism, but to combine them so as to strengthen their overall effectiveness, for while their modalities differ, their end purpose is the same: the aim in all cases is to reconcile the two conflicting but fundamental requirements of integrity of the treaty and universality of participation. It is only natural that the States that wished to conclude the treaty should be able to express their point of view; it is also natural that the monitoring bodies should play fully the role of guardian of treaties entrusted to them by the parties.¹¹¹

That this approach may result in conflicting positions with regard to the admissibility or not of contested reservations is a disadvantage the Commission is prepared to live with. The explanation is simply that the risk of conflicting positions is 'inherent in any assessment system ... and it is probably better to have too much assessment than no assessment at all'.¹¹²

3.2.1.5 Interpretation of treaties

The following excerpt explains the complexities surrounding the interpretation of treaties:

The interpretation of treaties is one of the most controversial issues in international law. The plainest provisions of a treaty... will often generate huge controversy when it comes to applying the treaty. Reasons for this include the fact that the implementation of a treaty can have a serious impact on, and implications for, the national interests of parties to the treaty.¹¹³

The interpretation of treaties is based first on a general rule of interpretation, and secondly on supplementary means of interpretation. The general rule takes the actual text of the treaty as it stands as a point of departure and determines that a treaty '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 its object and purpose'.¹¹⁴ This rule has acquired the status of customary international law¹¹⁵ and comprises three elements: the *text*, the *context* and the *object and purpose* of the treaty.

As far as the *text*, which includes the preamble and any annexes to the treaty, is concerned, the words and phrases used in the treaty must be given their ordinary or literal meaning in the context in which they are used and taking into account the object and purpose of the treaty. If the words and phrases make sense when following this approach, the matter ends there.¹¹⁶

The *context* can be made up of:

- (a) any agreement relating to the treaty and entered into between the parties relating to the conclusion of the treaty; and/or
- (b) any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.¹¹⁷

The difference between (a) and (b) is that while (a) deals with the conclusion of a treaty, (b) relates to an instrument affecting the interpretation of a treaty. Together with the context, one must also take into account:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent state practice in the application of the treaty that establishes the agreement between the parties regarding the treaty's interpretation; and

(c) any relevant rules of international law applicable in the relations between the parties.¹¹⁸

The *object and purpose* as an aid to interpretation is considered to be vague and ill-defined, causing it to be of little help in the interpretation process.¹¹⁹ To give it more relevance, some commentators have suggested a link with the principle of *effectiveness*, which finds expression in the maxim *magis valeat quam pereat*. This means that in the case of two possible interpretations, with the one supporting the effectiveness of the treaty and the other not, good faith and the object and purpose of the treaty will favour the former.¹²⁰

The supplementary means of interpretation¹²¹ include the preparatory work (*travaux préparatoires*) of the treaty and the circumstances surrounding its conclusion. Recourse to these means of interpretation can be used either to confirm the meaning resulting from the application of the general rule of interpretation, or to determine the meaning when the interpretation according to the general rule renders the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result.

3.2.1.6 Position of third states

The general rule in this regard is that a treaty does not create obligations and rights for a third state (a state not party to the treaty)¹²² without that state's consent.¹²³ The exception to this rule is when the parties to the treaty intended a treaty provision to create obligations for the third state and the third state accepts that obligation in writing.¹²⁴ These requirements also apply in the case of assigning rights to a third state.¹²⁵ An obligation that arises for a third state in this manner may be revoked or modified only with the consent of the parties to the treaty and of the third state, unless otherwise agreed upon.¹²⁶ If a right has been assigned, it may not be revoked or modified by the parties if the revocation or modification was intended to be subject to the consent of the third state.¹²⁷

The general rule stated above is based on the commonly accepted principle that treaties only create rights and obligations for states that are parties to it. This default rule of treaty application derives from the sovereignty and independence of states and finds expression in the Latin maxim *pacta tertiis nec nocent nec prosunt* – treaty rights and obligations have no effect on third parties.¹²⁸

The only case indicating a potential exception to the *pacta tertiis* rule is the well-known *Reparations* case.¹²⁹ This matter involved a claim against Israel by the United Nations arising from the assassination of a UN envoy in Israel and the failure by Israel to provide the necessary protection. At the time, Israel was not a member of the United Nations and was not even recognised as a state. The ICJ had to rule on whether the United Nations had the capacity to bring an international claim against Israel in these circumstances. In referring to the United Nations as an entity possessing objective international legal personality (as opposed to a personality that is merely an extension of the individual members' recognition thereof), the court held that the obligation to respect the United Nations' capacity to bring international claims against states was binding even on non-party states, such as Israel.¹³⁰

3.2.1.7 Invalidity, termination and suspension of treaties

Discussion of the practical operation of treaties would not be complete without reference to how treaties end, fail or cease to operate. Thus, the following sections discuss invalidity of treaties, and the termination and suspension of treaties.

3.2.1.7.1 Invalidity

The invalidity of a treaty, or of the consent of a state to be bound by a treaty, may only occur through the application of the VCLT.¹³¹ However, termination of a treaty, or its suspension, denunciation or withdrawal by a party may take place either as a result of the application of the treaty itself or of the VCLT.¹³² The reason for this distinction is that *validity* can only be contested by a state on grounds determined by the VCLT, while in the case of termination, suspension, denunciation or withdrawal, room is left for the contractual freedom of the parties as expressed in the treaty between them.¹³³ Despite and beyond this distinction, it should be noted that invalidity, termination, suspension, denunciation or withdrawal of or from a treaty does not affect the duty of a state to fulfil those treaty obligations to which it remains bound under general international law independent of the treaty.¹³⁴

The validity of a treaty can be contested on the basis of error, fraud, corruption or coercion of a state representative. An error will invalidate the consent to be bound by a treaty if it relates to a fact or situation that was assumed by the consenting state at the time and which formed an essential basis of that state's consent to be bound. However, this will not apply if the state contesting the validity contributed by its own conduct to the error, or, if under the circumstances, the state should have known about a potential error.¹³⁵ Consent to be bound by a treaty will also be invalidated if the consent was induced by the fraudulent conduct of another state or procured through the corruption or coercion of a state representative.¹³⁶

A treaty will be rendered void in two instances: first, if the conclusion of the treaty has been induced by the threat or use of force in violation of the principles of international law embodied in the UN Charter;¹³⁷ and secondly, if at the time of its conclusion it was in conflict with a *peremptory norm* of general international law.¹³⁸ Article 53 of the VCLT defines a peremptory norm as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

The concept of a peremptory norm (*jus cogens*) in article 53 reflects the thinking in international law since the 1960s that there could be norms of international law that have a higher ranking. Their importance for the orderly coexistence of states is seen as so fundamental that they cannot be set aside by treaty or by acquiescence but only through a subsequent rule of the same character. As such, a *jus cogens* norm limits the contractual freedom of states by determining that treaties allowing certain activities will be void. Examples are treaties that sanction the use of force in contravention of the UN Charter, genocide, slavery, crimes against humanity, torture and the like. However, it must be noted that the application of this rule is made somewhat difficult by the absence of an authoritative agreement or decision specifying all the norms that will have the status of *jus cogens*.¹³⁹ In 2006, the International Law Commission published its own list of *jus cogens* norms – namely, the prohibition of aggression, slavery and the slave trade, genocide, racial discrimination, torture, as well as the basic rules of international humanitarian law applicable in armed conflict situations, and the right to self-determination.¹⁴⁰ The issue of *jus cogens* norms is further discussed at the end of this chapter under the debate on the hierarchy of norms.

3.2.1.7.2 Termination and suspension of treaties

This part is not concerned with the termination or suspension of the operation of a treaty by agreement between the parties,¹⁴¹ but with termination or suspension as a result of a breach of the treaty by a party, or as a result of external circumstances. Thus, the focus will be on the consequences of a material breach, a supervening impossibility of performance, a fundamental change in circumstances, and the emergence of a new peremptory norm of international law.

3.2.1.7.2.1 Material breach

In the case of a material breach, the VCLT makes a distinction between bilateral and multilateral treaties. If one of the parties to a bilateral treaty is in material breach of its treaty obligations, the other party is entitled to terminate the treaty or to suspend its operation in whole or in part.¹⁴² In the case of a multilateral treaty, the situation is more complex since different parties may be affected by the breach in different ways.

In the first instance, the breach may result in the other parties (those not responsible for the breach) unanimously suspending the operation of the treaty, or terminating it in whole or in part: (a) in relations between themselves and the party responsible for the breach; or (b) as between all the parties.¹⁴³ In the case of (a), the treaty remains in effect between the other parties; in the case of (b), the treaty comes to an end as between all the parties.

Secondly, a party that is specifically affected by the breach is entitled to suspend the operation of the treaty in whole or in part between itself and the state in breach.¹⁴⁴ Thirdly, any party, other than the state in breach, may suspend the operation of the treaty with respect to itself if the breach radically changes the position of every party with respect to the further performance of its obligations under the treaty.¹⁴⁵

The above options available to the non-defaulting parties only apply in the case of a *material* breach of the treaty. In terms of the law of treaties, a material breach occurs when a treaty is repudiated in a manner not provided for in the VCLT, or when a provision essential to the accomplishment of the object and purpose of the treaty is violated.¹⁴⁶ Furthermore, the options are not available to non-defaulting parties in the case of treaties of a humanitarian character – in particular, when the breach relates to provisions prohibiting reprisals against persons protected in terms of such treaties.¹⁴⁷ The purpose of this provision is to prevent the beneficiaries of protective measures from losing their rights as a result of a dispute between the parties to the treaties in question.

The above responses to a material breach of a treaty, which are responses strictly provided for in the law of treaties, are not the only way in which a state party may react to a breach of a treaty obligation by another state party. Under general international law, a state may avail itself of countermeasures, which may include the suspension of a treaty provision by the state affected by the breach. The aim of a countermeasure is to compel the defaulting state to cease its violation of international law and to restore the situation to what it was before the violation occurred.¹⁴⁸ Countermeasures form part of the law of state responsibility and are used as an enforcement mechanism in international law. This is dealt with in chapter 5 of this book.

3.2.1.7.2.2 Supervening impossibility of performance

The performance of a treaty can become impossible through the permanent disappearance or destruction of an object that is indispensable for the execution of the treaty. In such instances, a party will be entitled to terminate the treaty or to withdraw from it. If the impossibility is only temporary, the treaty may be suspended for the duration of the impossibility.¹⁴⁹ However, the party relying on the impossibility of performance will not be entitled to make use of termination, withdrawal or suspension if the impossibility is the result of a breach by that party of a treaty obligation or another international obligation owed to any other party to the treaty.¹⁵⁰

3.2.1.7.2.3 Fundamental change of circumstances (*rebus sic stantibus*)

During the life of a treaty, the circumstances as they existed at the time of the conclusion of a treaty may change in a way not foreseen by the parties. In such an event, the parties to the treaty will not be entitled to invoke the change in circumstances as a ground for terminating or withdrawing from

a treaty. The exceptions to this rule are: (a) when the circumstances as they existed at the time were essential for the forming of the parties' consent to be bound by the treaty; and (b) when the change in circumstances radically transformed the extent of the obligations still to be performed by the parties.¹⁵¹

Treaties establishing a boundary between states are not subject to the *rebus sic stantibus* rule. A party may also not invoke the rule if the change in circumstances resulted from a breach by that party of an obligation under the treaty or under another international obligation owed to any of the other parties.¹⁵²

3.2.1.7.2.4 Emergence of a new peremptory norm

An existing treaty will be rendered void and terminated if it is in conflict with a peremptory norm that has come into existence after conclusion of the treaty.¹⁵³ This rule is a logical corollary of the rule in article 53 of the VCLT dealt with earlier on. However, it has been noted that state practice regarding this rule is virtually non-existent, and there are no reported cases where a treaty has been invalidated on the basis of this rule.¹⁵⁴

3.2.2 Treaties and the United Nations

In chapter 1, reference was made to the problems created by the conclusion of secret treaties, a practice that contributed to the outbreak of World War I, and which the US President Woodrow Wilson wanted to put an end to through open diplomacy advocated in his Fourteen-Point plan.¹⁵⁵ This led to the open publicity and registration of treaties in accordance with article 18 of the Covenant of the League of Nations, and it is now provided for in article 80 of the UN Charter.

This provision requires that treaties, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as well as for publication. A similar requirement is contained in article 102 of the UN Charter with regard to treaties entered into by UN member states.

A question that arises in this context is what the position will be if the obligations a UN member incurs in terms of the UN Charter are in conflict with the obligations incurred by virtue of another international agreement. Such instances are regulated in terms of article 103 of the UN Charter, which determines that the UN member's obligations under the Charter will prevail.

3.2.3 Treaties and domestic law

The above international law rules and processes by means of which a state gives its consent to be bound by a treaty do not constitute the only source of a state's power to participate in the treaty-making process. Domestic law plays an equally important role in determining the powers and functions of the different state organs involved in the treaty-making process and the conditions that must be fulfilled for a treaty to have the force of law in the domestic legal system. These matters are usually regulated in terms of a state's constitution and may differ from state to state, since international law leaves it to each state to determine the exercise of its treaty-making power.

In the case of South Africa, the executive and the legislature are the organs of state empowered by the Constitution to bring treaties between South Africa and other states into being. In following the practice of the VCLT, the South African Constitution distinguishes between the negotiating and signing process and the ratification process. Negotiating and signing a treaty is the responsibility of the national executive,¹⁵⁶ while Parliament is called upon to ratify the treaty by adopting a resolution of approval in both the National Assembly and the National Council of Provinces. Only if this

happens will the treaty bind the Republic in its international relations with the other party/parties to the treaty.¹⁵⁷ However, at this point, the treaty still has no legal effect in the domestic law of South Africa. For this to take place, Parliament must adopt legislation to provide for the treaty's domestic implementation and enforcement.¹⁵⁸

This relationship between treaties and South African law has also been pronounced upon by the Constitutional Court in the words of Ngcobo CJ:

An international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane. And failure to observe the provisions of this agreement may result in South Africa incurring responsibility towards other signatory states. An international agreement that has been ratified by Parliament under section 231(2), however, does not become part of our law until and unless it is incorporated into our law by national legislation. An international agreement that has not been incorporated in our law cannot be a source of rights and obligations.¹⁵⁹

Some treaties are not subject to the whole procedure set out above. For instance, treaties of a technical, administrative or executive nature, or a treaty that does not require ratification or accession and entered into by the executive, will bind the Republic without the approval of the two Houses of Parliament. However, what is required in such instances is that the treaties in question at least be tabled in Parliament.¹⁶⁰ This exception is aimed at less formal treaties responsible for regulating matters of a routine nature for which the executive signature will suffice.¹⁶¹

Another exception is the so-called self-executing treaty. Self-executing treaties automatically acquire domestic validity without parliamentary enactment in terms of section 231(4) of the Constitution, provided that they are not inconsistent with the Constitution or an Act of Parliament. The concept of self-executing treaties was taken over from US law and has been criticised by some scholars as being unsuitable in the South African context.¹⁶² Case law on the matter has also failed to bring clarity to the issue as is illustrated by a number of cases dealing with the extradition of fugitives to and from South Africa.

In the *Quagliani* case,¹⁶³ the dispute involved *inter alia* the domestic validity of an extradition agreement between South Africa and the United States in terms of which the extradition of Quagliani to the United States on drug-related charges was sought. Since the agreement was not enacted into law as required by section 231(4) of the Constitution, Quagliani sought an order declaring his arrest and detention for purposes of the extradition unlawful and unconstitutional. In response to this argument, the South African government raised the self-executing nature of the agreement by virtue of the fact that the treaty itself provided for its entry into force by the mere exchange of the parties' instruments of ratification. This was rightly rejected by the court as confusing the distinction between the international (section 231(2)) and domestic (section 231(4)) application of the treaty. Furthermore, the process of domestic application suggested by the government would be inconsistent with the Constitution and, as such, of no consequence in view of the second proviso in section 231(4) of the Constitution.¹⁶⁴

Although this was the first opportunity for bringing clarity to the concept of self-executing treaties, the court, citing a lack of time and facilities, was content with only a brief reference to the concept's problematic American meaning before concluding that the ordinary meaning of the words 'self-executing treaty' in the South African Constitution is unhelpful in determining what the authors of the Constitution had in mind.¹⁶⁵

Shortly after this ruling, the same extradition agreement was again the subject of a dispute in the *Goodwin* case¹⁶⁶ – this time involving an extradition request by the South African government to the United States for the extradition of Steven Goodwin on charges of fraud and theft. Contrary to the view in *Quagliani* regarding the self-executing nature of the extradition agreement, the court in

Goodwin, without proper reasoning and justification, was quite prepared to find in favour of the self-executing nature of the extradition agreement.¹⁶⁷ This is even stranger in view of the fact that the Extradition Act 67 of 1962 requires ratification by Parliament for any extradition agreement to have force and effect¹⁶⁸ and of which the Minister must formally give notice in the *Government Gazette*.¹⁶⁹ Since the transformation of treaties into domestic law can take place through proclamation or notice in the *Government Gazette*,¹⁷⁰ the Extradition Act obviously has in mind a procedure that will give effect to the domestic enactment requirement of section 231(4) of the Constitution.

On appeal, these conflicting judgments ended up in the Constitutional Court, where the unsatisfactory state of affairs and its potentially negative effect on extradition relations between South Africa and other countries were duly recognised. Final determination of the issues, the Constitutional Court observed, was therefore a matter of urgency and in the interest of justice.¹⁷¹ Unfortunately the ‘final determination’ not only failed to bring clarity to the issues but created even more confusion. In rejecting as unnecessary to consider the question whether the agreement was self-executing, Sachs J then made the following rather puzzling statement in which the other justices concurred:

The question then is whether the Agreement ‘becomes law’ in South Africa as contemplated by section 231(4) of the Constitution. There are two ways in which this section can be answered. The first is to say that the Agreement itself does not become binding in domestic law, but the international obligation the Agreement encapsulates is given effect to by the provisions of the Act. The second approach is that once the Agreement has been entered into as specified in sections 2 and 3 of the Act, it becomes law in South Africa as contemplated by section 231(4) of the Constitution without further legislation by Parliament.

It is not necessary for purposes of this case to decide which of these approaches is correct, for their effect in this case is the same. Either the Agreement has ‘become law’ in South Africa as a result of the prior existence of the Act which constitutes the anticipatory enactment of the Agreement for the purposes of section 231(4) of the Constitution. Or the Agreement has not ‘become law’ in the Republic as contemplated by section 231(4) but the provisions of the Act are all that is required to give domestic effect to the international obligation that the Agreement creates.

I conclude, therefore, that on either of the approaches identified above, no further enactment by Parliament is required to make extradition between South Africa and the United States permissible in South African law.¹⁷²

This dictum has been described as ‘incomprehensible’¹⁷³ and as ‘profoundly unsatisfactory’.¹⁷⁴ By concluding that no further enactment by Parliament is needed for bringing the extradition agreement into operation at the domestic level, the Constitutional Court seems to have adopted a third way for the incorporation of treaties that is not sanctioned by section 231(4) of the Constitution. In terms of this provision, there are only two options: either parliamentary enactment is necessary or the agreement must be a self-executing one. Neither the self-executing nature of the agreement, nor the question whether the existing Extradition Act suffices as parliamentary enactment for purposes of section 231(4) of the Constitution has been addressed.¹⁷⁵ Although in the latter instance it is unsatisfactory to enact a new extradition law every time the South African government concludes an extradition agreement with a foreign state, the amendment of the Extradition Act to provide for such instances remains an option. However, even this avenue, of which the court should have been aware,¹⁷⁶ has not been addressed.

A final matter in respect of treaties under the South African Constitution is the continuation of a state’s treaty obligations despite a change of government. This is regulated in section 231(5) of the Constitution, which determines that the Republic will remain bound by international agreements that were in force when the Constitution took effect. The underlying principle here is that the state

is the legal entity bound by the treaty and not the government, which may change from time to time without affecting the existence and legal position of the state.

3.3 Customary international law

International law-making by way of state practice (custom) qualifies as a source of law in terms of article 38(1)(b) of the Statute of the ICJ. The difference between international law derived from a treaty and international law derived from custom or state practice is that customary international law is binding on all states, while international treaty law binds only the parties to the treaty.

Without dismissing entirely the role of custom as a source of international law in our time, Friedmann observed some 60 years ago that custom can no longer play the predominant role as a source of law that it once did in the formative years of international law; it is too clumsy and slow-moving to accommodate the modern pace of development in international relations and has become unsuitable for the development of international co-operative law and for the specific regulation of economic, social, cultural and administrative matters.¹⁷⁷ However, its persistent relevance is still demonstrated these days in the interaction between customary law and treaty law and in the progressive development and codification of international law norms. We thus find that:

More and more nowadays, international custom is perceived as ‘*consuetudo scripta*’: ... that is, a broad correspondence between general customary norms and those written down in large international conventions of (basically) universal character. There are, in fact, growing numbers of cases where we may ... talk of ‘double value’ in the sense that the wording of many provisions in relevant international agreements ends up being seen as suitably faithfully to represent the content of customary law too. Entire chapters of contemporary international law appear to consist ... of normative statements in which the conventional and the customary dimensions live together harmoniously.¹⁷⁸

3.3.1 Requirements for the formation of custom

According to article 38(1)(b), for international law rules to emerge from custom, there must be *evidence of state practice accepted as law*. Thus, evidence is required to justify the conclusion that a general state practice exists and that the practice has been accepted by states as confirming an international law rule binding upon them.¹⁷⁹ This latter element in the formation of customary international law is known as the subjective or psychological element, or the *opinio iuris sive necessitates*. That this can be difficult to determine appears from the following passage:

The problem with this rather subjective criterion is that it is often difficult to understand how a single human mind works, let alone the mind of a state A state is an abstract entity, operated by thousands of individuals with millions of motives.¹⁸⁰

The material that makes up the evidence showing state conduct or behaviour with regard to a specific issue may come from a wide range of sources, such as diplomatic correspondence, the opinions of state law advisors, official state manuals, comments by government officials, legislation, judicial decisions, historical records, voting patterns in respect of UN resolutions, ratification patterns in respect of treaties, and the practice of international organisations. However, these sources may be equally relevant in determining the *opinio iuris* element in the formation of customary international law with the result that the two elements (evidence and *opinio*) are intertwined and, as has often been pointed out in endless debates on the matter, may even be paradoxical. In this volume, it will serve no purpose in joining in these debates. Instead, a few select cases will be referred to in order to illustrate the ICJ's application of article 38(1)(b).

In the *North Sea Continental Shelf* case, the two-element requirement for the formation of customary international law was confirmed as follows:

Not only must the acts concerned amount to a settled practice, but they must also be such or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*. The states must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.¹⁸¹

And with regard to the length or consistency of the state practice required, the court observed that:

[a]lthough the passage of only a short period of time is not necessarily, or of itself, a bar to the formulation of a new customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it may be, State practice, including that of States whose interests are specifically affected, should have been both extensive and virtually uniform.¹⁸²

In the *Asylum* case, the facts presented to the court to prove the existence of a custom involving the granting of asylum to political refugees in the embassies of Latin American countries fell short of what the court considered to be a ‘constant and uniform usage’ for a custom to come into being. In this instance:

[t]he facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some states and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.¹⁸³

This passage raises another interesting question – namely, what is the position if, through their conduct, states breach an existing customary law rule? Does this imply that the existing rule is weakened, or even worse, replaced by a new customary rule as a result of the breach? This issue arose in the well-known *Nicaragua* case,¹⁸⁴ which involved a claim by Nicaragua that the United States used force against it by training and assisting rebel groups responsible for armed attacks against Nicaragua and by laying mines in Nicaragua’s sea ports. For technical reasons, the ICJ was prevented from assessing the legality of the US involvement on the basis of the prohibition on the use of force in the UN Charter and had to determine whether there existed such a prohibition in customary international law.

This confronted the court with the problematic situation that, while states publicly denounce the use of force as unlawful in international law, there is an abundance of historical instances in which states in fact used force to settle disputes or in pursuit of strategic objectives. In response, the court concluded that for a rule to be established as customary law, it is not necessary for the corresponding state practice to ‘be in absolutely rigorous conformity with the rule’. To deduce the existence of a customary law rule, it will be sufficient if the conduct of states is *generally* consistent with the rule, and if inconsistent state conduct has ‘generally been treated as breaches of that rule, not as indication[s] of the recognition of a new rule’.¹⁸⁵

In following this approach, the ICJ has deduced the existence of a customary law rule, not, as conventionally done, from state practice, but from the *opinio iuris* of states, namely the habitual and public denunciation of the use of force by states as unlawful. Put differently, what is important is not the breaking of the rule, but its confirmation in statements about it. One may explain this further with reference to the large body of human rights guarantees contained in international

human rights treaties. Despite the fact that most of these treaties are ratified by most states in the world, their violation is of regular occurrence in many of those states. However, this does not diminish the normative validity of the guarantees.

3.3.2 The persistent objector rule

The role of state practice and *opinio iuris* in the formation of customary international law further illustrates the significance of state consent in the international law-making process. Should a state therefore want to exempt itself from the application of a new customary law rule, it will have to make known its objection against the formation of the rule. In other words, if a state clearly and persistently objects to a particular practice while the law on the issue in question is still developing, the objecting state cannot be bound by the customary law rule that may emerge from the practice.¹⁸⁶

However, the persistent objector rule may be inapplicable in the case of *jus cogens* norms and *erga omnes* obligations. As explained in the section on treaties,¹⁸⁷ *jus cogens* norms allow for no derogation with the result that a state will not be able to exempt itself from the obligations imposed by a *jus cogens* norm.¹⁸⁸ *Erga omnes* obligations, however, reflect the interests of the international community as a whole with the result that all states have an interest in their enforcement. In the well-known *Barcelona Traction* case,¹⁸⁹ the ICJ explained this matter as follows:

[A]n essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising *vis-à-vis* another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.¹⁹⁰

The obligations that derive from the *erga omnes* concept of state duties may therefore limit, in equal measure, the use of the persistent objector rule. Obligations having such an effect are usually informed by communitarian norms aimed at safeguarding a matter of common concern and may have a customary or treaty law basis. This is best illustrated by the legal responsibilities and obligations of states relating to the preservation of the environment.¹⁹¹

3.3.3 Customary international law in the domestic legal system

As with treaties, one must in the final instance take note of the application of customary international law in the domestic legal system of the state. South African common law has followed the rule that customary international law forms part of South African law.¹⁹² This position has been endorsed in section 232 of the 1996 Constitution, which proclaims that customary international law ‘is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’. This means that in the case of an irreconcilable conflict between customary international law and the Constitution or an Act of Parliament, the Constitution or the Act will prevail. In the absence of such a conflict, a South African court is obliged to follow an interpretation that is consistent with international law over any other that is inconsistent with international law.¹⁹³ The rule in section 232 now also means that customary international law ranks above the common law and judicial decisions.

It remains the function of the courts to determine which rules of customary international law will find application in a specific case and whether a specific rule has attained the status of customary international law. In performing this function, the courts will as a matter of course turn to other judicial decisions, foreign and international, as well as other sources of international law. In *S v Petane*,¹⁹⁴ for instance, the court concluded that ‘where a rule of customary international law is recognized as such by international law it will be so recognized by our law’. And as regards the test for acceptance by the international community for a rule to qualify as a customary law rule, the court in *Petane* followed conventional wisdom by stating that for custom to be incorporated into South African law, it ‘would at the very least have to be widely accepted’.¹⁹⁵

3.4 General principles of law

Article 38(1)(c) of the Statute of the ICJ allows the court to make use of general principles of law in deciding a dispute. According to this provision, the general principles in question are those found in the legal systems of the civilised nations of the world. The reference to ‘civilised nations’ must be understood in the context of the thinking of the time when the community of states was still seen as being made up of civilised and less civilised nations, a distinction that was certainly not unrelated to the divisions that existed between the colonial powers and their colonial possessions.

The use of general principles of law in deciding disputes between states was inserted in the Statute to provide for issues in dispute that were not covered by treaty or customary international law. In such an unlikely event, it ‘was thought undesirable, and possibly inappropriate in principle, that the Court should be obliged to declare what is known as *non liquet* – a finding that a particular claim could neither be upheld nor rejected, for lack of any existing applicable rule of law’.¹⁹⁶ Although, on occasion, the ICJ has invoked general principles of law such as unjust enrichment, *res judicata*, the limited liability of a corporation, estoppel and *nemo judex in re sua*,¹⁹⁷ no dispute before the court has been determined solely and expressly on the basis of some or other general principle of law.¹⁹⁸

3.5 Judicial decisions and the teachings of publicists

According to article 38(1)(d) of the ICJ Statute, judicial decisions and the teachings of the most highly qualified publicists of the various nations rank as subsidiary means for the determination of rules of law. The reason for referring to these sources as *subsidiary* means of deciding a dispute is because when a rule of international law is found in a judicial decision or a textbook, it will be one that has been derived from any of the three preceding sources of international law.¹⁹⁹ The distinction is therefore between the sources from which the rule originates and the sources where the rule has been used, applied or interpreted.

Judicial decisions in the context of article 38(1)(d) include decisions of the ICJ, other international courts and tribunals as well as national courts. In this regard, it must be noted that the law of precedent does not apply in international adjudication. This is true even of the ICJ’s own case law. For instance, article 59 of the ICJ Statute determines that a ‘decision of the Court has no binding force except between the parties and in respect of that particular case’. However, nothing prevents the court from making use of earlier judgments in deciding a case.

3.6 Sources falling outside the scope of article 38

There is a continuing debate in international law about whether article 38 contains a complete list of international law sources or whether, in the course of time, other sources have emerged, not foreseen at the time when the ICJ Statute was drafted and which cannot be overlooked in view of their impact on the development of international law. Commentators remain divided on the issue and those favouring an expansion of the list of sources also differ as to the range of sources one could include in such a list. Only a few developments will be considered below.

3.6.1 Resolutions of the political organs of the United Nations

The General Assembly of the United Nations is not authorised to take binding decisions with regard to matters that relate to the purposes and principles of the organisation. In this regard, its powers and functions are limited to the discussion and consideration of issues, the making of recommendations and the undertaking of studies.²⁰⁰ Binding decisions are only possible with regard to internal matters of the organisation – that is, the admission, suspension or expulsion of a member, and approval of the UN budget.²⁰¹

However, during its annual sessions, the General Assembly adopts a large number of resolutions. From time to time, these contain important declarations, which, although not legally binding, may play an important role in the progressive development of international law.²⁰² The question then is whether such resolutions and declarations qualify as separate sources of international law.

The accepted view is that General Assembly resolutions may provide evidence of the opinions of governments expressed in statements about them and in the voting patterns for and against such resolutions. As such, General Assembly resolutions may provide a basis for determining the existence or otherwise of a customary law rule.²⁰³ Here, one should take note of the approach followed by the ICJ in its advisory opinion in the *Nuclear Weapons* case:

The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.²⁰⁴

The court then examined the resolutions put before it. These contained declarations to the effect that the threat or use of nuclear weapons would be in direct violation of the UN Charter and should therefore be prohibited. The court concluded:

[S]everal of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the legality of the use of such weapons.²⁰⁵

The ICJ's advisory opinion confirms the more acceptable view – namely, that General Assembly resolutions do not qualify as freestanding sources of international law having an existence and role outside the ambit of article 38 of the ICJ Statute; their law-making function is part and parcel of the customary law process based on state practice and *opinio juris*. However, what may cause a difference of opinion is the evidentiary weight that must be accorded to resolutions in establishing their contribution to the formation of a customary law rule. In the first paragraph quoted above, the ICJ has provided some indicators for determining this issue. To this, one could add the intention of the sponsors of the resolution and their explanatory statements, whether the resolution has been adopted unanimously or near unanimously, the repetition of the resolution or its recitation in

subsequent resolutions, and whether states acted upon the resolution to give effect to its object and purpose.²⁰⁶

If one turns to Security Council resolutions, a more intricate picture emerges. Several factors contribute to this. In the first instance, the Security Council has the primary responsibility for the maintenance of international peace and security,²⁰⁷ and resolutions taken for this purpose under Chapter VII of the UN Charter are binding on the members of the organisation. Secondly, in terms of the UN Charter, member states agree to accept and carry out the decisions of the Security Council in accordance with the Charter.²⁰⁸ Thirdly, in the event of a conflict between the obligations member states have in terms of the Charter and their obligations under any other international agreement, their Charter obligations will prevail.²⁰⁹

Throughout its history, the Security Council has often made use of its powers under Chapter VII and although the conventional view has always been that the drafters of the UN Charter never intended the Council to act as a creator of new law, but as an interpreter and enforcer of existing law, its capacity to override treaties and general international law in terms of the powers given to it has not been disputed.²¹⁰ A clear illustration of how this could occur are the resolutions adopted by the Council in response to the 9/11 terrorist bombings in the United States. Making use of its powers to maintain international peace and security, the Council, in resolutions 1373 (2001) and 1540 (2004) laid down general (and detailed) rules, in legislation-like fashion, for states in respect of terrorist financing and the proliferation of weapons of mass destruction. To enforce these measures, the Council also established a Counter Terrorism Committee to monitor the implementation of the measures by states and to make authoritative statements on what would constitute international terrorism and what would count as adequate measures in response thereto. This enhanced role assumed by the Security Council in terms of the Council's own interpretation of its powers has given rise to a lively debate on the need for judicial review of the Council's actions to bring clarity to matters such as the potentially *ultra vires* exercise of Security Council powers or the adoption of measures that could be irreconcilable with international human rights guarantees.²¹¹

After the Cold War, the Security Council has also resorted to a broadening concept of what would constitute a threat to international peace and security. This discretion to determine the meaning and scope of the concept is inherent in article 39 of the UN Charter, which gives the Council the sole power to determine whether there exists a threat to the peace or whether an act of aggression has been committed that warrants the Council's action under Chapter VII of the Charter. In short, a threat to international peace and security is what the Security Council says it is. Thus, while a threat by one state to use force against another will certainly qualify as a threat to international peace and security, there may well be, in the view of the Council, other situations constituting such a threat.

This can be illustrated by the circumstances that led to the setting up in 1993 and 1994 of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) respectively.²¹² In both instances, the Security Council acted under Chapter VII of the UN Charter in determining that the widespread and flagrant violations of international humanitarian law (such as crimes against humanity and genocide) that occurred *within* the territories of these countries constituted a threat to international peace and security. In setting up the two ad hoc tribunals and bringing the perpetrators to justice, the Council's aim was to hold criminally accountable those responsible for the violations; the Council believed this would contribute to the restoration and maintenance of peace.

This led to a dispute in one of the early cases before the ICTY as to whether the setting up of a criminal tribunal falls within the Chapter VII powers of the Security Council. Nowhere is such an option specifically mentioned but the authority given to the Council under article 41 – namely, to decide what 'measures ... are to be employed to give effect to its decisions', was considered wide

enough by the ICTY to include the setting up of the tribunal.²¹³ Apart from the problematic issue of whether a body such as the tribunal could decide on its own constitutionality, the case illustrates how the Council may, through its own interpretation of its powers, develop the law of the UN Charter.

In a recent contribution, an enhanced legislative role for the Security Council has been proposed to deal with the global problem of climate change regulation, which is in dire need of co-ordinated international law making.²¹⁴ This law-making role, envisaged as a remedy for the current failures in bringing about an inclusive regulatory regime for the prevention of environmental harm, is justified by arguing that in some circumstances the protection of the environment may be necessary for the maintenance of international peace and security. As such, the Security Council potentially has the power to take mandatory action under Chapter VII of the Charter.²¹⁵ This understanding of the security implications of climate change consequences is strengthened by the fact that the Security Council itself debated the issue in 2007 and 2011 in response to increasing evidence of the potential for conflict arising from the link between global warming and the competition for natural resources. And at the 2011 debate, the Secretary-General of the UN, Ban Ki-moon, stated unequivocally that climate change ‘not only exacerbates threats to international peace and security, it is a threat to international peace and security’.²¹⁶

The above proposal on an enhanced law-making function for the Security Council in climate change matters takes note of the legitimacy deficit as a result of the limited membership in the Security Council and the control over decision-making resting exclusively with the five permanent members. To overcome this, the proposal envisages Security Council resolutions to be deliberated and agreed upon first in the General Assembly before they are given binding force in the Council. A process of this type, it is explained:

would reflect the needs of global governance by promoting greater accountability, openness and inclusivity in the way the Council carries out a lawmaking function – and would ensure that Security Council lawmaking rests on a broader consensus than at present by involving the General Assembly. It would give both bodies acting together the chance to impose greater coherence in a decentralized lawmaking system which currently lacks any institution capable of doing so and to make law in areas of pressing concern – such as terrorism or climate change – if necessary against the wishes of a minority of dissenting states, leaving no room for opt-outs, persistent objectors, or reservations. Such a joint lawmaking procedure could be implemented without revising the Charter – although changing membership and voting rights in the Security Council would require Charter amendment.²¹⁷

3.6.2 The International Law Commission

Article 13(1)(a) of the UN Charter authorises the General Assembly to initiate studies and make recommendations for the progressive development and codification of international law. For this purpose, the General Assembly in 1948 established an International Law Commission, comprising 34 members elected by the General Assembly on the basis of their recognised competence in international law and representing the main legal systems of the world. The Commission performs its functions in terms of its own statute.

Its main activities involve research in areas of international law and the preparation of reports and draft conventions with commentaries that may in due course evolve into binding codifications of international law in the form of multilateral conventions. Examples include the Vienna Convention on the Law of Treaties (1969), the Geneva Conventions on Diplomatic and Consular Relations (1961 and 1963 respectively) and the Convention on the Non-Navigational Use of International Watercourses (1997). Other significant contributions are the Draft Articles on the

Responsibility of States for Internationally Wrongful Acts (2001) and the Draft Articles on the Prevention of Transboundary Harm resulting from Hazardous Activities not Prohibited by International Law (2001). A full list of the ILC's activities and codification efforts is available on the UN web page.

3.6.3 Other forms of standard setting

It is common practice for international organisations such as the United Nations to develop guidelines or standards for state conduct by way of non-binding instruments. This is usually the case when a matter is not yet ripe, or is too controversial, for regulation by way of a binding treaty. The idea then is to impose flexible and voluntarily accepted obligations on states in the expectation that they will influence state conduct in the course of time. Although such instruments are not governed by the law of treaties, they may over time mature into binding norms in the form of treaty provisions or through the development of customary international law. The importance of these instruments in the progressive development of international law varies according to the number of states that have shown support for them.

It is common practice to refer to these instruments as ‘soft law’ and they can be identified by the terms used to refer to them—such as, standard minimum rules, guiding norms, model laws, declarations, recommendations, and guiding principles. Their influence is especially noteworthy in setting standards for state conduct concerning the protection of the environment and much of what we nowadays have in the form of binding environmental law norms originated from two such instruments – namely, the 1972 Stockholm Declaration on the Environment, and the 1992 Rio Declaration on the Environment and Development.

3.7 Informal international law making

For some time now, the concept of *global governance* has been a prominent subject of research in social science, economics and politics. Understandably, and as the *global* element in the concept of governance already signals, it was only a matter of time before the literature on international relations and international law would increasingly start to reflect the influence of this concept on traditional modes of thinking in these areas.

Loosely formulated, global governance refers to the role of informal (or less institutionalised) network-like forms of co-operation between public and private entities involving transnational decision-making processes that may or may not involve the state, and which may even take place below the level of the state. State borders, both real and symbolic, are permeated and rule-making and standard-setting no longer emanates solely from the state but from a plurality of transnational interagency co-operative efforts in addressing matters of common (global) concern.²¹⁸

This phenomenon has raised concern about the accountability of the actors involved in these processes and about the transparency and legitimacy of their decision making in matters that could have far-reaching consequences for individuals, communities and domestic institutions. In order to address these deficits, some emerging fields of research have sought to develop frameworks of analysis based on administrative law or public law principles for international or transnational governance activities.²¹⁹ However, one of the challenges faced by international law is that the entities at the global level that are involved in these processes and decision-making do not fit the traditional definition of subjects of international law (that is, they may not be states or international organisations). In addition, the norms, standards, guidelines and procedures they generate do not qualify as sources of international law in the traditional sense of the word. It is these new forms of

law making that have prompted the Hague Institute for the Internationalization of Law in 2008 to request further research into the phenomenon and this has resulted in a compilation of various contributions under the title *Informal International Law-Making*.²²⁰

Informal international law-making (IN-LAW) is defined as:

Cross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization ..., and/or as between actors other than traditional diplomatic actors ... and/or which does not result in a formal treaty or other traditional source of international law.²²¹

It is beyond the scope of this volume to cover this topic in more detail. But it should be noted that these informal processes have been on the increase over the last two decades as a result of international co-operation taking place through various types of governance networks that have complemented, and not replaced,²²² existing state-to-state approaches in solving matters of global concern.

3.8 The debate on the hierarchy of international law norms: *jus cogens* and obligations *erga omnes*

The concepts of *jus cogens* norms and *erga omnes* obligations were briefly referred to earlier in this chapter in connection with the issue of the validity of treaties and the persistent objector rule respectively. Their further meaning for the debate on the hierarchy of international law norms will now be explained.

In any legal order, certain legal norms may be accorded a higher or lower status, especially when necessary to decide which norm must prevail when it is conflict with another. For instance, one may recall: the Roman law distinction between *jus strictum* and *jus dispositivum*; the elevation of natural law above the will of states in natural law thinking of the seventeenth and eighteenth centuries; and the nullity of contracts that conflict with public policy or the prevailing moral convictions in society.²²³

Such a hierarchical ordering of legal norms is also known in international law.²²⁴ In the law of treaties, for instance, we encounter the rule that in the case of successive treaties, the treaty prior in time takes priority; a special treaty rule prevails over a general treaty rule (*lex specialis derogate legi generali*) and obligations under the UN Charter prevail over obligations of a UN member state under any other agreement.²²⁵ Article 53 of the VCLT, which gives expression to the concept of peremptory norms (*jus cogens*) in international law, and the subject matter of this section, is another example. Since its inception as part of the VCLT, the concept of *jus cogens* has received widespread attention in scholarly debates and in the jurisprudence of international and national tribunals. This does not mean that the concept's theoretical underpinnings, content and scope of application are uncontentious.²²⁶ In this part, only some of the most salient aspects of the concept are addressed.

The essences of article 53 is that the rule of hierarchy it encapsulates will cause a treaty in conflict with a *jus cogens* norm not only to be non-applicable, but wholly without legal consequences – that is, null and void. This has the further consequence under article 71(1) of the VCLT that the parties to such a treaty shall:

- (a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and**
- (b) bring their mutual relations into conformity with the peremptory norm of general international law.**

The higher status assigned to a *jus cogens* norm under article 53 does not have a *retrospective effect* as regards the rights and obligations of states parties to a treaty in conflict with the norm. This is clear from article 64 read with article 71(2) of the VCLT. Article 64 deals with the development of a new peremptory norm of general international law and determines that an existing treaty (meaning one that came about prior in time to the emergence of the new peremptory norm) that is in conflict with the norm, will become void and terminate. However, according to article 71(2), the termination of the treaty under article 64 releases the states parties from any obligation to further perform the treaty but leaves unaffected any right, obligation or legal situation created by the treaty prior to its termination. However, these rights, obligations and situations may only be maintained to the extent that their maintenance is not in itself in conflict with the new peremptory norm.²²⁷

Apart from treaties, a *jus cogens* norm may also conflict with a rule of general (customary) international law or with resolutions of international organisations. In such instances, the result is the same – the general rule and the resolution will be rendered invalid.²²⁸ Less certain is the outcome of a conflict between *jus cogens* norms. The example given by the ILC is the right to use force to realise the right to self-determination.²²⁹ But conflicts such as these cannot be resolved through the doctrine on *jus cogens* norms and remain problematic because there is no hierarchy between *jus cogens* norms *inter se*.²³⁰

Article 53 of the VCLT provides no further clarification of the identification of a norm having peremptory status beyond the statement that a peremptory norm ‘is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted’. This threshold does not require complete consensus among all states on the peremptory status of a norm, but consensus among at least a large majority of states must exist.²³¹ Although there is no authoritative list of peremptory norms, according to the ILC, the most frequently cited examples of norms having this status are: the prohibition of aggressive use of force; the prohibition of genocide; the prohibition of torture; crimes against humanity; the prohibition of slavery and slave trade; the prohibition of piracy; the prohibition of racial discrimination and apartheid; and the violation of the basic rules of international humanitarian law.²³²

In case law before international and national tribunals, the concept of *jus cogens* has been invoked in relation to a range of issues outside its original treaty law origin. A few examples will suffice. In the famous *Nicaragua* case, the ICJ referred to the ILC’s study on the codification of the law of treaties to confirm the *jus cogens* character of the prohibition on the use of force in article 2(4) of the UN Charter. In the 2006 *Armed Activities (DRC v Rwanda)* case, the court confirmed that the condemnation of genocide in the Genocide Convention is a peremptory norm of international law.²³³ However, as in several others,²³⁴ in neither of these cases did the court provide meaningful clarity on the content, scope and impact of *jus cogens* norms. The court’s tendency has rather been merely to reiterate that a certain rule has acquired the status of a *jus cogens* norm without further elaboration regarding its impact and significance for the judgment.²³⁵

Perhaps of special interest in this regard is the ruling by the ICJ in the 2012 jurisdictional immunities case between Italy and Germany.²³⁶ The dispute in this matter was based on civil claims allowed by the national courts of Italy against Germany for serious violations of international humanitarian law committed against Italian citizens during World War II. Germany alleged that by allowing such claims Italy had failed to respect the immunity Germany was entitled to under international law against such claims in the civil courts of another country. In response, Italy maintained that Germany was not entitled to immunity in this instance, *inter alia*, because the acts that formed the basis of the proceedings were of a most serious nature and constituted violations of international humanitarian law of a peremptory character.

For this proposition, the court could find no state practice supporting a customary international law rule to that effect.²³⁷ On the contrary, the court pointed out, a substantial body of state practice

exists supporting the view that customary international law does not make a state's entitlement to immunity dependent upon the gravity of the act or the peremptory nature of the act.²³⁸ The court then, assuming without deciding, that the violations were in conflict with the *jus cogens* norms of international human rights and international humanitarian law, found that there is no conflict between such rules and the rules on state immunity since they address different matters. Rules on immunity, the court held, are procedural in nature and are confined to the question whether a foreign domestic court may exercise jurisdiction over another state. As such, these rules have nothing to do with the lawfulness of the conduct Germany is accused of. Recognising the immunity of a foreign state in such instances does not amount to recognising as lawful a situation created by the breach of a *jus cogens* norm.²³⁹

The most well-known case at the national level on the concept of *jus cogens* is the 1999 ruling by the British House of Lords in the *Pinochet* case.²⁴⁰ In this matter, the question was whether immunity could be raised in a British court in proceedings against a former head of state (General Pinochet of Chile) for acts of torture committed while he was in office. The Law Lords, relying on domestic law, held that the United Kingdom courts were entitled to exercise universal jurisdiction over the *jus cogens* prohibition against torture regardless of where the crime of torture was committed.²⁴¹ On the issue of immunity, Lord Millet made the point:

International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.²⁴²

However, it must be noted that the *Pinochet* case was about extradition proceedings, which are in essence criminal proceedings. This raises the issue of whether a state, as a result of the conduct of one or more of its officials, may also be denied a defence based on immunity in *civil proceedings* for damages relating to breaches of a *jus cogens* norm. While courts in this regard have taken note of the growing recognition of the prohibition of torture as part of *jus cogens*, they have at the same time pointed out that there is still no firm legal basis in international law for the proposition that a state will not be entitled to immunity in respect of civil claims for damages as a result of acts of torture committed outside the forum state.²⁴³

Erga omnes obligations must be distinguished from the *jus cogens* concept.²⁴⁴ The concept of *erga omnes* obligations arose, somewhat paradoxically, in a matter before the International Court of Justice on the diplomatic protection of corporations in the *Barcelona Traction* case.²⁴⁵ This case, frequently cited in international law, has inspired much debate²⁴⁶ as a result of an *obiter dictum* by the court to the effect that:

an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.²⁴⁷

The court then further explained this by arguing that *erga omnes* obligations may derive 'in contemporary international law from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'.²⁴⁸ As a first observation, this means that the international community as a whole has an interest in the performance by all states of their obligations in these fields and that a breach of such an obligation has *erga omnes* effects. Thus, the effect of a norm that creates obligations *erga omnes* is that all states, irrespective of their individual interest in the matter, will be entitled to invoke state responsibility in case of a breach of that norm.²⁴⁹ This contrasts with the conventional position in international law according to which international law obligations are usually owed by states to each other with each one only 'individually entitled to invoke a breach as

basis for State responsibility'.²⁵⁰ State responsibility in this latter sense is predicated on bilateral relations between the individual members of the international community of states while the concept of *erga omnes* obligations has in mind an obligation that binds simultaneously each and every addressee of the obligation with respect to all the others.²⁵¹

Unlike in the case of a *jus cogens* norm, the concept of *erga omnes* obligations is not about a hierarchy of norms and obligations; it is about the scope of application of the legal obligation and the procedural remedies for a breach of that obligation in terms of the law of state responsibility,²⁵² a matter that is dealt with more extensively in chapter 4. Although, as the ICJ implied in the *Barcelona Traction* case, *jus cogens* obligations would have *erga omnes* effects, one must be careful not to assume that all *erga omnes* obligations automatically have a *jus cogens* status in international law. For instance, multilateral human rights treaties, such as the 1966 Covenant on Civil and Political Rights (ICCPR),²⁵³ may have an *erga omnes* effect in the sense that the international community as a whole has an interest in the performance by states of their obligations in terms of this treaty to the extent that these obligations have acquired international customary law status. But this does not mean that all these obligations are of a *jus cogens* nature.²⁵⁴

SUGGESTED FURTHER READING

N Arajarvi *The Changing Nature of Customary International Law* Abingdon; New York: Routledge (2014)

R Gaebler (ed) *Sources of State Practice in International Law* Leiden: Koninklijke Brill (2014)

¹ See also H Thirlway 'The sources of international law' in MD Evans (ed) *International Law* 4th ed (2014) 91, 92. (This article is referred to hereafter as Thirlway in Evans (ed) op cit.)

² See S Hobe *Einführung in das Völkerrecht* 10th ed (2014) 13–14.

³ For instance, the UN Security Council can intervene under Chapter VII of the UN Charter when the Council decides to take enforcement action. But this is an entirely different matter and is dealt with in chapter 5 of this book.

⁴ See K Doehring *Völkerrecht* (1999) 41, 52–3.

⁵ See S.S. *Wimbledon PCIJ Judgments*, 1923, Series A, No 1, 1 at 25: '[T]he right of entering into international engagements is an attribute of State sovereignty.'

⁶ See P Daillier, M Forteau & A Pellet *Droit International Public* 8th ed (2009) 513; M Craven 'Statehood, self-determination and recognition' in MD Evans (ed) *International Law* 4th ed (2014) 201 at 216, 217.

⁷ Compare the following statement by T Baty *The Canons of International Law* (1930) 16, 17: 'Sovereignty is, therefore, primarily a matter of Constitutional Law. It regards the internal organization of the state. It has been invariably represented as a matter of the distribution of power in a state.' See also MN Shaw *International Law* 7th ed (2014) 658: 'Where precisely in the domestic constitutional establishment the power to make treaties is to be found depends upon each country's municipal regulations and varies from state to state. ... International law leaves such matters to domestic law.'

⁸ See for instance, s 231 of the Constitution of the Republic of South Africa, 1996. This will be discussed later on in this chapter.

⁹ See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998). The Protocol entered into force in 2004. See also chapter 11 of this book.

¹⁰ The African Charter on Human and Peoples' Rights (effective 21 October 1986).

¹¹ See below on customary international law.

¹² Shaw op cit 655. E Cannizzaro 'The law of treaties through the interplay of its different sources' in CJ Tams, A Tzanakopoulos & A Zimmermann (eds) *Research Handbook on the Law of Treaties* (2014) 16 at 19. Cannizzaro has argued that international courts only rarely take care to demonstrate that a certain treaty rule existed in the form of custom before its incorporation into the VCLT. Rather it seems that the VCLT is referred to not so much as proof of the existence of customary law, but rather as an essential element in the process of the formation of customary law.

¹³ See J Crawford *Brownlie's Principles of Public International Law* 8th ed (2012) 22, 23.

¹⁴ See J Dugard *International Law: A South African Perspective* 4th ed (2011) 24.

¹⁵ See also K Ambos *Treatise on International Criminal Law* Vol I (2013) 73–4; J Fernandez & X Pacreau (eds) *Statut de Rome de la Cour Pénale Internationale Commentaire Article par Article* Vol 1 (2012) 765.

¹⁶ Crawford op cit 37. See also p 36 for references to domestic legal principles; and Shaw op cit 69 *et seq.*

¹⁷ M Koskenniemi ‘General principles: Reflections on constructivist thinking in international law’ 18 *Oikeustiete-Jurisprudentia* (1985) 121 at 124, 125 (reproduced in M Koskenniemi (ed) *Sources of International Law* (2000) 360). See also H Thirlway *The Sources of International Law* (2014) 95 *et seq.* (This book is referred to hereafter as Thirlway *Sources* op cit.)

¹⁸ See below.

¹⁹ On the meaning of *jus cogens* norms, see later in this chapter.

²⁰ On this, see chapter 11 of this book.

²¹ For more on this, see H Lauterpacht *The Function of Law in the International Community* (2011) 71 *et seq.*

²² Thirlway *Sources* op cit 93, 111 *et seq.*

²³ *Ibid.*, 104.

²⁴ ICJ Reports 1969, 3.

²⁵ *North Sea Continental Shelf* cases supra at paras 85, 88, 91–2, and 101. See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* ICJ Reports 1982, 18; *Continental Shelf (Libyan Arab Jamahiriya/Malta)* ICJ Reports 1985, 13; *Maritime Delimitation in the Black Sea (Romania v Ukraine)* ICJ Reports 2006, 61, para 120.

²⁶ See also LDM Nelson ‘The roles of equity in the delimitation of maritime boundaries’ 84(4) *American Journal of International Law* (1990) 837; Y Tanaka *Predictability and Flexibility in the Law of Maritime Delimitation* (2006); A Caflisch ‘Maritime delimitation disputes: What modes of settlement?’ in J Basedow, U Magnus & R Wolfrum (eds) *The Hamburg Lectures on Maritime Affairs* Vol 23 (2012) 69; *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* ITLOS Case No 16 (2012), para 235.

²⁷ Shaw op cit 654.

²⁸ See also Thirlway in Evans (ed) op cit 95.

²⁹ VCLT, art 5. See also K Schmalenbach ‘Article 5: Treaties constituting international organizations and treaties adopted within an international organization’ in O Dörr & K Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* (2012) 89 *et seq.*

³⁰ VCLT, art 4.

³¹ VCLT, art 4. See also Schmalenbach op cit 81 *et seq.*

³² See VCLT, art 3.

³³ VCLT, art 6.

³⁴ VCLT, art 11.

³⁵ See VCLT, arts 12–16. See also F Hoffmeister ‘Article 12: Consent to be Bound by a Treaty Expressed by Signature’ in Dörr & Schmalenbach op cit 163–208.

³⁶ VCLT, art 2(1)(b). See also P Gautier ‘1969 Vienna Convention: Article 2: Use of Terms’ in O Corten & P Klein (eds) *The Vienna Convention on the Law of Treaties: A Commentary* Vol I (2011) 33, 45–6.

³⁷ VCLT, art 18.

³⁸ See Dugard *International Law: SA Perspective* op cit 416.

³⁹ VCLT, art 16. See also Thirlway *Sources* op cit 31: ‘The whole point of making a binding agreement is that each of the parties should be able to rely on performance of the treaty by the other party or parties, even when such performance may have become onerous or unwelcome to such other party or parties.’

⁴⁰ VCLT, art 27. See also art 46 for the exception to this rule, which is dealt with later in this chapter.

⁴¹ See also *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* ICJ Reports 1997, 7 para 142.

⁴² VCLT, art 7(1)(a). Art 2(1)(c) defines ‘full powers’ as referring to a ‘document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty’. See also Gautier op cit 47–8.

⁴³ F Hoffmeister ‘Article 7: Full Powers’ in Dörr & Schmalenbach (eds) op cit 119 at 123.

⁴⁴ *Ibid.*, 124, 125.

⁴⁵ VCLT, art 7(1)(b).

⁴⁶ See Hoffmeister ‘Article 7’ op cit 125.

⁴⁷ VCLT, art 7(2). See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea Intervening)* ICJ Reports 2002, 303 para 265; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility), ICJ Reports 2006, 6 para 47.

⁴⁸ See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Reports 2002, 3 para 53.

⁴⁹ *Armed Activities (DRC v Rwanda)* supra, para 46.

- ⁵⁰ Hoffmeister ‘Article 7’ op cit 128, 129.
- ⁵¹ VCLT, art 8.
- ⁵² VCLT, art 47.
- ⁵³ VCLT, art 46.
- ⁵⁴ *Land and Maritime Boundary* case op cit, paras 265, 266.
- ⁵⁵ VCLT, art 24(2).
- ⁵⁶ VCLT, art 24(1).
- ⁵⁷ VCLT, art 24(3).
- ⁵⁸ VCLT, art 28.
- ⁵⁹ On the non-retroactivity rule, see also art 11 of the Rome Statute.
- ⁶⁰ M Fitzmaurice ‘The practical working of the law of treaties’ in MD Evans (ed) *International Law* 4th ed (2014) 166 at 184.
- ⁶¹ M Milanovic & L-A Sicilianos ‘Reservations to treaties: An introduction’ 24(4) *European Journal of International Law* (2013) 1055.
- ⁶² A Abass *Complete International Law: Text, Cases and Materials* 2nd ed (2014) 91. See also C Walter ‘Article 19: Formulation of Reservations’ in Dörr & Schmalenbach op cit 239 at 241.
- ⁶³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) ICJ Reports 1951, 15.
- ⁶⁴ Ibid, 29.
- ⁶⁵ Ibid, 24.
- ⁶⁶ Fitzmaurice op cit 186.
- ⁶⁷ Ibid, 29.
- ⁶⁸ VCLT, art 20(1).
- ⁶⁹ VCLT, art 20(2).
- ⁷⁰ VCLT, art 20(3).
- ⁷¹ VCLT, art 20(4). In contrast to these rules, 19th century state practice favoured the doctrine of unanimity, which meant that if the reserving state failed to attract unanimous acceptance of the reservation, it had either to withdraw the reservation, or withdraw its membership of the treaty. See Walter op cit 242 fn 62.
- ⁷² VCLT, art 22.
- ⁷³ UN Doc A/CN.4/470 (30 May 1995).
- ⁷⁴ Report of the International Law Commission, 63rd Session (2011) GAOR 66th Session, Suppl No 10, UN Doc A/66/10 (*Guide to Practice on Reservations to Treaties with Commentary*). For the history and process of this major project, see A Pellet ‘The ILC Guide to Practice on Reservations to Treaties: A general presentation by the Special Rapporteur’ 24(4) *European Journal of International Law* (2013) 1061.
- ⁷⁵ ILC *Guide to Practice* op cit Addendum 1, 34.
- ⁷⁶ Ibid, 432 para 19 and section 4.5 at 502 *et seq.*
- ⁷⁷ Ibid, 507 para 16.
- ⁷⁸ Ibid, General Commentary to Part 3 para (4) at 330.
- ⁷⁹ Fitzmaurice op cit 186.
- ⁸⁰ Ibid, 187.
- ⁸¹ See also KL McCall-Smith ‘Mind the gaps: The ILC Guide to Practice on Reservations to Human Rights Treaties’ 16(3) *International Community Law Review* (2014) 263 at 271.
- ⁸² Ibid, 187.
- ⁸³ ILC *Guide to Practice* op cit 509.
- ⁸⁴ Ibid, commentary to guideline 4.5.1 at 509.
- ⁸⁵ Ibid, commentary to guideline 4.5.1 at 509.
- ⁸⁶ Ibid, 510.
- ⁸⁷ Ibid, 510–11. For examples of state practice, see 511 *et seq.*
- ⁸⁸ VCLT, art 23.
- ⁸⁹ See also ILC *Guide to Practice* supra, section 2 (procedure) at 132.
- ⁹⁰ *Armed Activities (DRC v Rwanda)* supra, para 42.
- ⁹¹ Ibid, para 43.
- ⁹² Ibid, para 44.
- ⁹³ VCLT, art 21.
- ⁹⁴ ILC Report (2011) supra 74.

- ⁹⁵ See Gautier op cit 49 fn 36.
- ⁹⁶ *Reservations to the Genocide Convention* case supra, para 23 fn 63.
- ⁹⁷ *Austria v Italy* Application no 788/60, 4 *Yearbook of the European Convention on Human Rights* (1961) 140.
- ⁹⁸ *The Effect of Reservations on the Entry into Force of the American Convention*, IACtHR Series A No 2, 24 September 1982, paras 29–30.
- ⁹⁹ Human Rights Committee, General Comment no 31, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) para 2.
- ¹⁰⁰ Human Rights Committee, General Comment no 24, UN Doc CCPR/C/21/Rev.1/Add.6 (1994) para 4. See also U Linderfalk ‘Reservations to treaties and norms of *jus cogens*: A comment on Human Rights Committee General Comment No 24’ in I Ziemele (ed) *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (2004) 213.
- ¹⁰¹ Human Rights Committee (1994) supra, paras 7, 8. See also paras 9 and 10 for other examples raised by the committee.
- ¹⁰² Ibid, para 16.
- ¹⁰³ Ibid, para 17. The contrary view is that the existence of monitoring bodies in international human rights treaties, although a particularity of such treaties, is not a convincing argument to modify the general reservations regime of the VCLT with regard to state obligations under human rights treaties. It is also important to note that the views of the monitoring bodies have contributed to the development and refinement of the VCLT ‘object and purpose’ test, rather than undermining it. See A Pellet & D Müller ‘Reservations to human rights treaties: Not an absolute evil ...’ in U Fastenrath et al (eds) *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (2011) 521 at 537. Also Thirlway *Sources* op cit 41.
- ¹⁰⁴ Human Rights Committee (1994) supra, para 18.
- ¹⁰⁵ Ibid.
- ¹⁰⁶ *Belilos v Switzerland* [1988] 10 EHRR 466; *Loizidou v Turkey* (Preliminary Objections) [1995] 20 EHRR 99.
- ¹⁰⁷ See Fitzmaurice op cit 172, 194.
- ¹⁰⁸ ILC *Guide to Practice* op cit 395 para (6). See also Guideline 3.2 at 391 *et seq.*
- ¹⁰⁹ Ibid, 395 para 6.
- ¹¹⁰ Ibid, 397 para 9.
- ¹¹¹ Ibid, 398, 399 para 14.
- ¹¹² Ibid, 398 para 12.
- ¹¹³ Abass op cit 100.
- ¹¹⁴ VCLT, art 31(1).
- ¹¹⁵ See *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (Judgment) ICJ Reports 1994, 6 para 41; *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objections) ICJ Reports 1996, 803 para 23.
- ¹¹⁶ *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) ICJ Reports 1950, 4 at 8.
- ¹¹⁷ VCLT, art 31(2) VCLT.
- ¹¹⁸ VCLT, art 31(3) VCLT.
- ¹¹⁹ Fitzmaurice op cit 187. See also I Buffard & K Zemanek ‘The object and purpose of a treaty: An enigma?’ 3 *Austrian Review of International and European Law* (1998) 342; A Pellet ‘Article 19: Formulation of reservations’ in Corten & Klein (eds) op cit Vol I, 405 at 446 *et seq.*
- ¹²⁰ Fitzmaurice op cit 188.
- ¹²¹ VCLT, art 32. See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Jurisdiction and Admissibility) ICJ Reports 1995, 6.
- ¹²² VCLT, art 2(1)(h).
- ¹²³ VCLT, art 34.
- ¹²⁴ VCLT, art 35.
- ¹²⁵ VCLT, art 36.
- ¹²⁶ VCLT, art 37(1).
- ¹²⁷ VCLT, art 37(2).
- ¹²⁸ See E David ‘Article 34: General rule regarding third states’ in Corten & Klein op cit 887; DJ Bederman ‘Third party rights and obligations in treaties’ in DB Hollis (ed) *The Oxford Guide to Treaties* (2012) 328.
- ¹²⁹ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) ICJ Reports 1949, 174.

- ¹³⁰ Ibid, 185. See also separate opinion of Lord McNair in *International Status of South West Africa* (Advisory Opinion) ICJ Reports 1950, 128, 153, which did not meet with the approval of the other members of the court.
- ¹³¹ VCLT, art 42(1).
- ¹³² VCLT, art 42(2).
- ¹³³ MG Kohen & S Heathcote ‘Article 42: Validity and continuance in force of treaties’ in Corten & Klein op cit Vol II, 1015 at 1020.
- ¹³⁴ VCLT, art 43.
- ¹³⁵ See also *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Merits) ICJ Reports 1962, 6 at 26.
- ¹³⁶ VCLT, arts 49–51.
- ¹³⁷ VCLT, art 52.
- ¹³⁸ VCLT, art 53. See also arts 69 and 71 for consequences of voidness.
- ¹³⁹ J Klabbers ‘The validity and invalidity of treaties’ in DB Hollis (ed) *The Oxford Guide to Treaties* (2012) 551 at 570 *et seq*; E Suy ‘Article 53: Treaties conflicting with a peremptory norm of general international law (“jus cogens”)’ in Corten & Klein op cit Vol II 1224.
- ¹⁴⁰ ILC *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.702 (2006) para 33.
- ¹⁴¹ On this, see arts 54, 57 and 58 of the VCLT.
- ¹⁴² VCLT, art 60(1) VCLT. See also art 70 for the consequences of termination.
- ¹⁴³ VCLT, art 60(2)(a)(i) and (ii).
- ¹⁴⁴ VCLT, art 60(2)(b).
- ¹⁴⁵ VCLT, art 60(2)(c).
- ¹⁴⁶ VCLT, art 60(3).
- ¹⁴⁷ VCLT, art 60(5).
- ¹⁴⁸ B Simma & J Tams ‘Article 60: Termination or suspension of the operation of a treaty as a consequence of its breach’ in Corten & Klein op cit Vol II, 1351 at 1354.
- ¹⁴⁹ VCLT, art 61(1).
- ¹⁵⁰ VCLT, art 61(2). See also *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* ICJ Reports 1977, 7 para 103; P Bodeau-Livinec & J Morgan-Foster ‘Article 61: Supervening impossibility of performance’ in Corten & Klein op cit Vol II, 1382.
- ¹⁵¹ VCLT, art 62(1).
- ¹⁵² VCLT, art 62(2). See also MN Shaw & C Fournet ‘Article 62: Fundamental change of circumstances’ in Corten & Klein op cit Vol II, 1411.
- ¹⁵³ VCLT, art 64.
- ¹⁵⁴ A Lagerwall ‘Article 64: Emergence of a new peremptory norm of general international law (“jus cogens”)’ in Corten & Klein op cit Vol II, 1455 at 1458.
- ¹⁵⁵ See also P Klein ‘Article 80: Registration and publication of treaties’ in Corten & Klein op cit Vol II, 1797.
- ¹⁵⁶ Constitution of the Republic of South Africa, 1996, s 231(1).
- ¹⁵⁷ Ibid, s 231(2).
- ¹⁵⁸ Ibid, s 231(4).
- ¹⁵⁹ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) 374 para 92.
- ¹⁶⁰ Constitution supra, s 231(3).
- ¹⁶¹ See also Dugard *International Law: SA Perspective* op cit 54, 55.
- ¹⁶² Ibid, 56, 57 and sources there.
- ¹⁶³ *Nello Quagliani v President of the Republic of South Africa and Others* Case 28214/06 TPD, 18 April 2008 (unreported). Because of virtually identical legal issues, this case was heard together with the matter in *Steven Mark van Rooyen & Laura Brown v President of the Republic of South Africa and Others* Case 959/04 TPD 18 April 2008 (unreported). For a discussion of these cases, see NJ Botha ‘Extradition, self-execution and the South African Constitution: A non-event?’ 33 *South African Yearbook of International Law* (2008) 253.
- ¹⁶⁴ *Quagliani* op cit 17–18.
- ¹⁶⁵ Ibid, 16.
- ¹⁶⁶ *Steven William Goodwin v Director-General of Justice and Constitutional Development* Case 21142/08 TPD 23 June 2008 (unreported). See also Botha op cit 262.
- ¹⁶⁷ *Goodwin* op cit, para 30.
- ¹⁶⁸ Section 2(3)(a).

- ¹⁶⁹ Section 2(3) ter.
- ¹⁷⁰ Dugard *International Law: SA Perspective* op cit 55.
- ¹⁷¹ *President of the Republic of South Africa and Others v Quagliani; President of the Republic of South Africa and Others v Van Rooyen and Another; Goodwin v Director-General, Dept of Justice and Constitutional Development and Others* 2009 (4) BCLR 345 (CC) paras 9–11.
- ¹⁷² *Ibid.* paras 46–8.
- ¹⁷³ Dugard *International Law: SA Perspective* op cit 59.
- ¹⁷⁴ NJ Botha ‘Rewriting the Constitution: The “strange alchemy” of Justice Sachs, indeed!’ 34 *South African Yearbook of International Law* (2009) 253.
- ¹⁷⁵ See also *Claassen v Minister of Justice and Constitutional Development and Another* 2010 (6) SA 399 (WCC) and the critical note of M Killander ‘Judicial immunity compensation for unlawful detention and the elusive self-executing treaty provision’ 26(2) *South African Journal on Human Rights* (2010) 386.
- ¹⁷⁶ See J Dugard *International Law: A South African Perspective* 3rd ed (2011) 217.
- ¹⁷⁷ WG Friedmann *The Changing Structure of International Law* (1964) 121–3.
- ¹⁷⁸ L Condorelli ‘Customary international law: The yesterday, today, and tomorrow of general international law’ in A Cassese (ed) *Realizing Utopia: The Future of International Law* (2012) 147, 151, 152.
- ¹⁷⁹ Crawford op cit 23. See also Thirlway in Evans (ed) op cit 98, 100 *et seq.*
- ¹⁸⁰ Abass op cit 35.
- ¹⁸¹ ICJ Reports 1969, 3, para 77. See also *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (Merits) ICJ Reports 1986, 14 at 108–9.
- ¹⁸² *North Sea Continental Shelf* case *supra*, para 74.
- ¹⁸³ *Asylum case (Columbia v Peru)* ICJ Reports 1950, 266 at 277.
- ¹⁸⁴ *Military and Paramilitary Activities* *supra*.
- ¹⁸⁵ *Ibid.* para 186.
- ¹⁸⁶ Crawford op cit 28; Dugard *International Law: SA Perspective* op cit 29; J Klabbers *International Law* (2013) 30. See also *Anglo-Norwegian Fisheries case (United Kingdom v Norway)* ICJ Reports 1951, 116 at 131.
- ¹⁸⁷ See para 3.2.1.7.1 above.
- ¹⁸⁸ See also Dugard *International Law: SA Perspective* op cit 39 and his views as judge *ad hoc* in the case of *Democratic Republic of the Congo v Rwanda* ICJ Reports 2006, 89 para 10 (separate opinion of Judge Ad Hoc Dugard).
- ¹⁸⁹ *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain)* (Merits) ICJ Reports 1970, 3, 32.
- ¹⁹⁰ See also *East Timor (Portugal v Australia)* ICJ Reports 1995, 90 at 102; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Reports 2004, 136 para 155.
- ¹⁹¹ See also *Seabed Advisory Opinion*, ITLOS Case no 17 (2011) para 180.
- ¹⁹² *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C); *Nduli and Another v Minister of Justice and Others* 1978 (1) SA 893 (A); Dugard *International Law: SA Perspective* op cit 46–7.
- ¹⁹³ Constitution, s 233.
- ¹⁹⁴ 1988 (3) SA 51 (C) 57.
- ¹⁹⁵ *Ibid.* 57A–I. For other case law and comments, see Dugard *International Law: SA Perspective* op cit 51–2.
- ¹⁹⁶ Thirlway *Sources* op cit 108. Also *ibid.* 111 *et seq.*
- ¹⁹⁷ See Dugard *International Law: SA Perspective* op cit 34.
- ¹⁹⁸ See Klabbers op cit 35; Thirlway in Evans (ed) op cit 105, 109.
- ¹⁹⁹ Thirlway in Evans (ed) op cit 105.
- ²⁰⁰ See Chapter IV of the UN Charter.
- ²⁰¹ UN Charter, arts 4–6, 17.
- ²⁰² See also Crawford op cit 42.
- ²⁰³ See also Dugard *International Law: SA Perspective* op cit 30. He points to an ‘accumulation of resolutions’, or a ‘repetition of recommendations on a particular subject’ as potential evidence of the practice of states.
- ²⁰⁴ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Reports 1996, 226 para 70.
- ²⁰⁵ *Ibid.*
- ²⁰⁶ See also Thirlway *Sources* op cit 79–81.
- ²⁰⁷ UN Charter, art 24.
- ²⁰⁸ UN Charter, art 25.
- ²⁰⁹ UN Charter, art 103.
- ²¹⁰ See H Kelsen *The Law of the United Nations* (1950) 294–5.

²¹¹ See E de Wet *The Chapter VII Powers of the United Nations Security Council* (2004); D Akande ‘The International Court of Justice and the Security Council: Is there room for judicial control of decisions of the political organs of the United Nations?’ 46 *International and Comparative Law Quarterly* (1997) 309; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v US/UK)* (Provisional Measures) ICJ Reports 1992, 3; *Kadi & Al Barakaat International Foundation v Council & Commission* [2008] ECR I-06351 (C-402/05 P & C-415/05 P). See also V Gowlland-Debbas ‘The functions of the United Nations Security Council in the international legal system’ and G Nolte ‘The limits of the Security Council’s powers and its functions in the international legal system: Some reflections’ in M Byers (ed) *The Role of Law in International Politics: Essays in International Relations and International Law* (2000).

²¹² See SC resolutions 827 (1993) and 995 (1994).

²¹³ *Prosecutor v Tadić* (Appeals Chamber ICTY) Decision on Jurisdiction, Case No IT-94-1 AR (1995).

²¹⁴ A Boyle ‘International law-making: Towards a new role for the Security Council’ in A Cassese (ed) *Realizing Utopia: The Future of International Law* (2012) 172.

²¹⁵ Ibid, 178.

²¹⁶ See UN News Service ‘Remarks to the Security Council on the impact of climate change on international peace and security’ 20 July 2011. See also European Council *Climate Change and International Security Council Doc S113/08*, 14 March 2008.

²¹⁷ Boyle op cit 181–2.

²¹⁸ See K-H Ladeur ‘Theory of governance’ (September 2010) in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* Vol IV (2012) 541 *et seq.*

²¹⁹ See B Kingsbury, N Krisch & R Stewart ‘The emergence of global administrative law’ 68(3) & (4) *Law and Contemporary Problems* (2005) 15; A von Bogdandy, P Dann & M Goldmann ‘Developing the publicness of public international law: Towards a legal framework for global governance activities’ in A von Bogdandy et al (eds) *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010) 3; M Goldmann ‘Inside relative normativity: From sources to standard instruments for the exercise of international public authority’ 9 *German Law Journal* (2008) 1865.

²²⁰ J Pauwelyn, RA Wessel & J Wouters (eds) *Informal International Law-Making* (2012).

²²¹ J Pauwelyn ‘Informal international law-making: Framing the concept and research questions’ in Pauwelyn et al op cit 13 at 22.

²²² See also Thirlway *Sources* op cit 215–20.

²²³ See Report of the Study Group of the International Law Commission on Fragmentation of International Law, UN Doc A/CN.4/L.682 of 13 April 2006, para 361.

²²⁴ See also D Shelton ‘International law and “relative normativity”’ in MD Evans (ed) *International Law* 4th ed (2014) 137 *et seq.*; A Orakhelashvili *Peremptory Norms in International Law* (2006) 7.

²²⁵ VCLT, art 30. A Orakhelashvili ‘Article 30: Application of successive treaties relating to the same subject matter’ in Corten & Klein op cit Vol I, 764 *et seq.*

²²⁶ See for instance, P Weil ‘Towards relative normativity in international law’ 77 *American Journal of International Law* (1983) 413. Weil believes that any doctrine distinguishing between higher and lower norms erodes the normativity of the international legal order.

²²⁷ For an extensive analysis of these provisions, see Lagerwall op cit 1455 *et seq* and F Crépeau, R Coté & S Rehaag ‘Article 71: Consequences of the invalidity of a treaty which conflicts with a peremptory norm’ in O Corten & P Klein (eds) *The Vienna Convention on the Law of Treaties: A Commentary* Vol II (2011) 1612 *et seq.*

²²⁸ ILC Fragmentation Report supra, para 367.

²²⁹ Ibid. The right to self-determination has the status of a *jus cogens* norm in international law. But the prohibition on the use of force in article 2(4) of the UN Charter has a similar status. On this prohibition, see chapter 4 of this book.

²³⁰ ILC Fragmentation Report supra 367.

²³¹ See E de Wet ‘Jus cogens and obligations erga omnes’ in D Shelton (ed) *The Oxford Handbook of International Human Rights Law* (2013) 541 at 541.

²³² ILC Fragmentation Report op cit, para 374. See also Orakhelashvili *Peremptory Norms* op cit 50 *et seq.*

²³³ *Armed Activities (DRC v Rwanda)* case op cit, para 64.

²³⁴ See V Gowlland-Debbas ‘Judicial insights into fundamental values and interests of the international community’ in AS Muller, D Raič & JM Thuránsky (eds) *The International Court of Justice: Its Future Role after Fifty Years* (1997) 327, 332 *et seq* and especially at 364 noting that the court has been cautious in describing certain norms as peremptory and in constructing judgments on such concepts and that the court has made ‘only oblique references to the concept of *ius cogens*’.

[235](#) Cf also De Wet in Sheldon (ed) op cit 547, 548; Hernández op cit 27, 45 *et seq*; ILC Fragmentation Report op cit, paras 378, 379.

[236](#) *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) ICJ Reports 2012, 99. See also M Kaldunski ‘The law of state immunity in the case concerning Jurisdictional Immunities of The State (Germany v Italy)’ 13 *The Law and Practice of International Courts and Tribunals* (2014) 54; JC Barker ‘Jurisdictional Immunities of the State (Germany v Italy)’ 62 *International and Comparative Law Quarterly* (2013) 741; R van Alebeek ‘Jurisdictional Immunities of the State (Germany v Italy): On right outcomes and wrong terms’ 55 *German Yearbook of International Law* (2012) 281.

[237](#) *Germany v Italy* supra, paras 83, 84.

[238](#) Ibid, para 84.

[239](#) Ibid, paras 92, 93.

[240](#) *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* 119 ILR 136 (1999)–[2000].

[241](#) See also N Roht-Arriaza ‘The Pinochet precedent and universal jurisdiction’ 35 *New England Law Review* (2001) 311.

[242](#) *Pinochet* supra at 232.

[243](#) European Court of Human Rights: *Al-Adsani v United Kingdom* 34 EHRR 11 (2001); *Jones v United Kingdom*, Application nos 34356/06 and 40528/06, Judgment of 2 June 2014, paras 194–5; 196–8.

[244](#) See also chapter 4 of this book on state responsibility.

[245](#) Supra.

[246](#) See inter alia JA Frowein ‘Collective enforcement of international obligations’ 47 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (1987) 71; C Annacker ‘The legal regime of erga omnes obligations in international law’ in 46 *Austrian Journal of Public International Law* (1994) 131; B Simma ‘From bilateralism to community interests in international law’ *Recueil des Cours* Vol 250 (1994) 217; K Zemanek ‘New trends in the enforcement of erga omnes obligations’ 4 *Max Planck Yearbook of United Nations Law* (2000) 1 at 6; CJ Tams *Enforcing Obligations Erga Omnes in International Law* (2005); G Gaja ‘The protection of general interests in the international community’ *Recueil des Cours* Vol 364 (2012) 19.

[247](#) *Barcelona Traction* supra, para 33.

[248](#) Ibid, para 34.

[249](#) ILC Fragmentation Report op cit, para 380.

[250](#) Ibid, para 382.

[251](#) Ibid, para 389 fn 548.

[252](#) Ibid, para 380; Hernández op cit 41–3.

[253](#) See chapter 11 of this book.

[254](#) See also De Wet in Sheldon (ed) op cit 555.

PART TWO

Foundational principles and enforcement of international law

CHAPTER 4 The fundamental principles of the international legal order

CHAPTER 5 Maintaining international peace and security: the enforcement of international law

Chapter 4

The fundamental principles of the international legal order

HENNIE STRYDOM AND LAURENCE JUMA

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4.1 Introduction

Since the middle of the last century, when the maintenance of international peace was of central concern, the scope of international law has expanded vastly. It has responded to the need to regulate and manage a growing assortment of rights and duties that the members of the international

community have claimed and accepted in today's complex and interdependent world. It is clear that claims to equal sovereignty in a state-oriented system of international relations cannot be free from conflict and tension. However, for states to attain certain objectives and to maintain a balance between rights and obligations, there must be some form of international legal order comprising a set of principles or rules that make all of this possible. Accepting and conducting international relations in accordance with such a legal order constitutes the difference between relatively peaceful coexistence and a condition of permanent hostility in which everything is reduced to the wielding of unrestrained power.

In this chapter, the focus is on those principles that are at the core of the post-World War II international legal order, and which represent the combined developments in general international law and the codification of principles in article 2 of the UN Charter. Although the account given is not exhaustive, we are of the view that the selected principles represent the undisputed normative and binding framework for lawful conduct in international affairs. Some scholars have identified them as 'overriding legal standards', the 'constitutional principles of the international community'¹ or the 'foundational principles of international law'.² The key principles discussed here are: sovereign equality, good faith, the peaceful settlement of disputes, the prohibition on the use of force, and the responsibility of states and international organisations. The manner in which these principles are enforced in international law is dealt with in chapter 5 of this book.

4.2 Sovereign equality

Article 2(1) of the UN Charter provides: 'The Organization is based on the principle of the sovereign equality of all its Members.' The 'sovereign' part of equality in this first principle under article 2 takes us back to the history of the modern state, which has been explained in chapter 1. As a political and legal concept, state sovereignty refers to the *original* and *exclusive* power of the state to establish and maintain, by force if necessary, a political and legal order on the territory of the state. In the sixteenth century, state sovereignty (also understood as state monopoly on the use of force) played a crucial role in overcoming civil wars waged by coalitions of various groups in society, in breaking the power of feudal institutions, and in bringing about political unity in the territorial states that were emerging from medieval society.³

By 'original' is meant that the power in question is inherent in statehood and does not derive from a higher order.⁴ By 'exclusive' is meant that within a state, no other state can exercise governmental powers and functions. By the same token, it means that a state is prohibited from interfering in the internal organisation of another state; according to Cassese, this 'ensures that each State respects the fundamental prerogatives of the other members of the community'.⁵ This is also the notion that lies at the heart of article 2(7) of the UN Charter, which protects matters that are essentially within the domestic jurisdiction of a state from outside interference.⁶

From a political point of view, it is tempting to understand the sovereignty of the state as unrestrained power, a notion that enjoyed particular popularity during the time of state absolutism in the sixteenth and seventeenth centuries, and was rekindled by dictators such as Hitler and Stalin in the twentieth century. However, from the perspective of international law, sovereignty must be understood as a legal concept – one that denotes the legal capacity or power of a state to participate in international law-making and in international law enforcement, either individually or in co-operation with other states. In this sense, sovereignty in international law means a state's 'legal independence from other States'.⁷ Thus understood, sovereignty is always legally circumscribed, internally by the law of the state, and externally by the legal claims other states are entitled to as equal members of the international legal order.

This brings us to the concept of ‘sovereign equality’ in article 2(1) of the UN Charter. This concept had already assumed an extraordinary importance when in 1943 the United States, the United Kingdom, the Soviet Union and China jointly recognised at the Moscow conference the necessity of establishing an international organisation based on the principle of the sovereign equality of all its members.⁸ This fusion of the two concepts (sovereignty and equality) then, and now in article 2(1) of the UN Charter, gives expression to another historical development (the product of eighteenth century enlightenment) – namely, equal recognition of statehood regardless of the nature and form of government or differences in size and power. As such, the equal status is an equal status in law; under international law, all states, weak or powerful, rich or poor, are entitled to the same legal status and treatment.⁹ The rights that accrue from their equal membership in the international community ‘are principally rights of participation in the exercise of the functions of governance of that community, that is to say, in making and applying international law and adjudicating international legal claims’.¹⁰

These notions we also encounter in the General Assembly’s important Friendly Relations Resolution of 1970, where we find the following interpretation of the principle of sovereign equality:

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.¹¹

In particular, sovereign equality includes the following elements:

- States are judicially equal;
- Each State enjoys the rights inherent in full sovereignty;
- Each State has the duty to respect the personality of other States;
- The territorial integrity and political independence of the State are inviolable;
- Each State has the right freely to choose and develop its political, social, economic and cultural systems;
- Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

This declaration may confuse matters to a certain extent by including under sovereign equality other, self-standing principles such as good faith, territorial integrity and political independence. However, its essence adds weight to sovereign equality of states as one of the most fundamental principles of international law. It is foundational to international relations and has guided the formulation of rules of the international system as a whole. It commands the greatest of respect in the practice of international law and is rarely questioned by states regardless of their differences in population, culture, and even political ideology. Upholding this principle is essential to a stable society of independent, territorial states and for the integrity of international law.

4.3 Good faith

Article 2(2) of the UN Charter determines as follows: ‘All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.’

The idea that obligations must be performed in good faith¹² was put forward by the Latin American states at Dumbarton Oaks with the objective in mind that a formal and legalistic obedience towards international obligations in the post-war world order might obstruct the realisation of the purposes and principles of the United Nations; an element of morality, in the form of a good faith obligation, was needed to guide the actions of states. By elevating the Roman law

concept of *bona fides* to a principle of the UN Charter,¹³ an element of mutual consideration and co-operation towards the fulfilment of the *objectives* of the UN Charter has become the guiding principle for state conduct – as opposed to the mere *letter* of the undertaking.¹⁴ The appeal to states to act in good faith is therefore:

intended as a constant reminder that a set of treaties with such comprehensive objectives as those of the UN does not survive merely on the strength of the terms used and on its individual provisions, but only achieves its reality via the communal will of its members, for which there is ultimately no guarantee. Where, in a concrete case, there is no fundamental consensus among the community of nations on what is to be a legal obligation, or where the will to cooperate gives way to the overpowering weight of individual national interests, the substantial basis of the organization breaks down, even if the outward legality is preserved.¹⁵

To avoid such a consequence, the good faith obligation obliges UN member states to have recourse to a general spirit of co-operation in fulfilling their mutual undertakings and responsibility towards international community objectives.

What follows are a few select examples to illustrate how the principle of good faith has been applied in international practice subsequent to the establishment of the United Nations.¹⁶

As a first example of good faith in practice, the ICJ, in its 1948 advisory opinion on the conditions for UN membership, determined that article 4 of the UN Charter does not forbid the taking into account of any factor not explicitly mentioned in determining an applicant state's suitability for UN membership. However, this discretion is limited by the question whether the factor extraneous to article 4 can be 'reasonably and in good faith' connected to the conditions laid down by article 4.¹⁷ Such judicial guidance in respect of a certain method of interpretation is of specific relevance in a system where states only too frequently resort to and rely on their own (and often selective) interpretation of the constitutive instruments of international organisations or treaty provisions in defence of national interests.¹⁸

A second example is the obligation in article 26 of the Vienna Convention on the Law of Treaties (VCLT) according to which treaties must be performed in good faith. In its 1966 Draft Articles and Commentaries on the Law of Treaties, the International Law Commission¹⁹ referred to good faith as a 'fundamental principle of the law of treaties' and a 'legal principle' that is an integral part of the *pacta sunt servanda* rule.²⁰ Complying with a treaty in good faith also means that states have an obligation not to evade their responsibilities in terms of a treaty by resorting to a strictly literal interpretation of its terms and conditions.²¹ Likewise, in the *Israel Wall* case, the ICJ relied, inter alia, on the good faith rule of interpretation in article 31 of the VCLT, to find the Fourth Geneva Convention applicable in the occupied Palestinian territories.²² In general, the good faith rule in article 31 of the VCLT aims at the 'fulfilment of a treaty in a way that the other party to the treaty may reasonably expect on the basis of the text agreed upon, or, in other words, in such a way as is required by the sense and purpose of the treaty, as understood by the contracting parties in good faith'.²³

Arguments about good faith have also surfaced in disputes between states with regard to the exercise of sovereign rights. In the *Right of Passage Over Indian Territory* case,²⁴ a dispute arose between Portugal and India concerning access and rights of transit by agreement in respect of two enclaved territories over which Portugal had sovereign rights but which were accessible only over Indian territory. India had the power of regulation and control over access and transit, and the question was whether this power included the power to refuse access and transit. In the circumstances of the case, the ICJ found in favour of India, which gave rise to the following dissenting view of Judge Fernandes:

If the State occupying the surrounding territory recognized the sovereignty of another State over an enclave while at the same time mentally reserving the right to sever the communications with it when it chose, it would not be acting in accordance with the principle of good faith, which is the most general and the most essential of the general principles of law.²⁵

Similarly, the dissenting view of Judge Armand-Ugon was that since the right of passage was, by agreement, subject to prior authorisation in each instance, ‘India was bound to settle each request for authorisation in good faith and with due regard to the purpose of such passage, uninfluenced by considerations extraneous to that purpose.’²⁶

Even in matters involving non-binding resolutions of the UN General Assembly, there are individual opinions in favour of a good faith consideration by a state in cases where that state is the addressee of the resolution. This happened in the *South West Africa Voting Procedure* case²⁷ involving South Africa’s administration of the territory of South West Africa under the mandate system. In a separate opinion, Judge Klaestad held the view that even when a resolution of the General Assembly lacked a binding legal character, the recommendation contained in the resolution was not without real significance and importance and could not simply be disregarded by South Africa, because:

[a]s a Member of the United Nations, the Union of South Africa is in duty bound to consider in good faith a recommendation adopted by the General Assembly under Article 10 of the Charter and to inform the General Assembly with regard to the attitude which it has decided to take in respect of the matter referred to in the recommendation.²⁸

This approach found support in the separate opinion of Judge Lauterpacht. He stated that, although the right of the administering authority under the trusteeship system not to comply with a specific course of action recommended by the General Assembly or another UN organ has never been challenged, what has been challenged is the right to simply ignore the recommendation and to abstain from providing reasons for the administering authority’s position. The state in question, he then argued, while not bound to accept the recommendation, is bound to give due consideration in good faith to the recommendation and to explain the reasons for not following the recommended course of action.²⁹

The requirement of good faith has also acquired a prominent role in negotiations between states, and this is particularly true in the case of nuclear disarmament. Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) obliges the states parties to pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race. In 1995, the Security Council reminded states parties of their obligation to achieve the universal goal under the NPT of complete disarmament and to pursue negotiations in good faith on effective measures towards that goal.³⁰

In referring specifically to article 2(2) of the UN Charter, the Friendly Relations Resolution and article 26 of the VCLT, the ICJ in the *Nuclear Weapons* case³¹ gave the following interpretation of the good faith obligation in article VI of the NPT:

The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.³²

Disappointed by the lack of results over many years in this area, the Marshall Islands, on 24 April 2014, instituted separate proceedings in the ICJ against the United Kingdom, Pakistan and India citing the failure of these states to fulfil their obligations under article VI of the NPT and under

customary international law to ‘pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control’.³³

4.4 Peaceful settlement of disputes

In terms of article 2(3) of the UN Charter, member states must ‘settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered’.³⁴ This principle forms an integral part of the main purpose of the United Nations – namely, to ‘maintain international peace and security … 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’.³⁵ Further confirmation of its importance for international relations in the Charter era is to be found in two seminal instruments of the UN General Assembly – namely, the Friendly Relations Resolution³⁶ and the Manila Declaration on the Peaceful Settlement of Disputes.³⁷

The means by which states should give effect to this principle and the role of the political organs of the United Nations in this regard are spelled out in Chapter VI of the UN Charter. According to article 33, the parties to a dispute that is likely to endanger international peace and security must first ‘seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice’.³⁸ Should the parties fail to settle their dispute by any of these means, the dispute must be referred to the Security Council.³⁹ The Council may then recommend appropriate procedures or methods of adjustment or terms of settlement appropriate in the circumstances.⁴⁰ In this instance, the Council assumes the role of a mediator but it must be noted that its powers under Chapter VI do not include the power to make binding decisions, with the result that the parties to the dispute are under no obligation to heed the Council’s advice.

Another issue is whether a referral of a dispute to the Security Council under article 37 will be possible only if all parties to the dispute agree that the peaceful means under article 33 have failed. If so, a disagreeing party (acting with bad intent or abusing its rights) could obstruct the referral and the intervention by the Council. Since the provision in article 37(1) is unclear on this, referring only to ‘the parties’ and ‘they’, the answer most probably lies in following the overriding importance of the peaceful settlement principle. This seems to disallow a situation where a clearly prescribed means of peaceful settlement – namely, intervention by the Security Council – is contingent upon a joint view that the article 33 means have failed.

Unilateral referral will likewise be the acceptable approach where it is clear from the beginning that one of the parties to the dispute demonstrates an unwillingness to submit to a peaceful means of settlement. This is illustrated by the Tehran hostage crisis. On 4 November 1979, militant Iranian students took over the US embassy in Iran and held embassy staff hostage, following violent anti-American protests against the admission of the deposed Shah of Iran into the United States for medical treatment. Shortly after the incident, the Iranian government endorsed the action taken by the students, and it became clear that there was little potential for solving the crisis by mutual effort between the two governments. On 4 December 1979, the Security Council adopted a resolution⁴¹ calling on Iran to release the hostages immediately, and reminding the United States and Iran of their obligations under the UN Charter to settle their disputes by peaceful means. This resolution, as well as an almost simultaneous order by the ICJ granting provisional measures,⁴² was ignored by Iran. On 22 December 1979, the US government requested the Security Council to intervene in view of Iran’s recalcitrant attitude, and to consider measures to induce Iran to comply with its international obligations.⁴³

A referral of a dispute to the Security Council by the parties acting under article 37 must be distinguished from the referral of a dispute or situation under article 35. This latter provision allows for any UN member to bring to the attention of the Security Council or General Assembly a dispute or situation that might lead to international friction.⁴⁴ A non-UN member state may also bring to the attention of these organs a dispute to which it is a party, provided that it accepts in advance and for purposes of the dispute the Charter obligations on the peaceful settlement of disputes.⁴⁵

Once the Security Council has become seized of a matter under Chapter VI, it may investigate the dispute or situation in order to determine whether the continuation thereof is likely to endanger the maintenance of international peace and security.⁴⁶ A finding that a threat to international peace and security exists may then cause the Council to act in accordance with Chapter VII of the Charter. This is discussed in chapter 5 of this book.

If the General Assembly is informed about a dispute or situation under article 35, the measures it takes will be subject to articles 11 and 12 of the Charter.⁴⁷ Before these provisions are further explained, it must be noted that although the UN Charter confers on the Security Council *primary* responsibility for the maintenance of international peace and security,⁴⁸ the Council does not have *exclusive* powers in such matters.⁴⁹ A residual competence in this regard is given to the General Assembly. For instance, the Assembly may *consider* the general principles of co-operation in the maintenance of international peace and security;⁵⁰ *discuss* any question relating to the maintenance of international peace and security brought before it in terms of article 35 and *make recommendations* with regard to any such question to a state or states concerned or to the Security Council;⁵¹ *call* the attention of the Security Council to situations that are likely to endanger international peace and security;⁵² and *recommend* measures for the peaceful adjustment of any situation likely to impair friendly relations among nations.⁵³

A first observation to note is that the General Assembly, when exercising the functions enumerated in articles 11 and 14 of the UN Charter, is prevented from taking binding decisions. This is clear from the wording highlighted in the previous paragraph. Secondly, further limitations may apply, depending on the involvement of the Security Council. For instance, in terms of article 11(2), any question ‘on which action is necessary’ must be referred to the Security Council either before or after discussion of the matter in the Assembly. It is now settled law that ‘action’ in article 11(2) must be understood as ‘enforcement’ or ‘coercive’ action within the meaning of Chapter VII of the UN Charter, which falls under the exclusive power of the Security Council.⁵⁴ Furthermore, article 12(1) of the Charter prevents the General Assembly from making any *recommendation* with regard to any dispute or situation while the Security Council is exercising its functions with regard to that dispute or situation, unless the Council requests a recommendation from the Assembly.⁵⁵ A literal interpretation of the term ‘recommendation’ in this instance would suggest that the Assembly will not be prevented from *considering* or *discussing* such a dispute or situation. This is borne out even further by the wording in article 11(2), according to which a referral can take place ‘before or after discussion’ in the Assembly.

4.5 Prohibition on the use of force

Closely linked with the principle on the peaceful settlement of disputes, is the principle on the prohibition on the use of force. The latter is formulated in article 2(4) of the UN Charter and reads as follows: ‘All members 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 inconsistent with the Purposes of the United Nations.’

It has correctly been observed that this principle ‘constitutes one of the cornerstones of the modern international legal order’⁵⁶ and its status as customary international law is not disputed.⁵⁷ It is also often cited as a *jus cogens* norm.⁵⁸ However, at the same time, it has led to fundamental differences in opinion on its applicability in certain situations,⁵⁹ as will become clear. While this section deals with the *prohibition* on the use of force in international relations, the UN Charter regime on the lawful use of force as an enforcement mechanism is dealt with in chapter 5 of this book.

Important historical attempts at restraining states from resorting to war include the Covenant of the League of Nations (1919) and the Kellogg-Briand Pact (1928),⁶⁰ neither of which could prevent the major armed conflicts of the first half of the twentieth century. In the case of the Covenant, one weakness, and a consequence of the still-prevailing legal position at the time, was that the customary law right to go to war as a means of settling disputes was still tacitly recognised in the Covenant. Moreover, the measures contained in articles 12 to 15 – such as referring a dispute to the Council of the League, or to arbitration or to judicial settlement, and respecting a cooling-off period – were largely procedural in nature.⁶¹ But as Brownlie notes,⁶² one should not give too much emphasis to these elements in the Covenant in explaining the failures of the League system; at least in general terms, the Covenant created a presumption against the legality of war and made it a matter of international concern.⁶³ The major defects were in the effectiveness of its enforcement machinery,⁶⁴ brought about by a lack of even-near universal membership, the termination of membership by states in the early years of the League’s existence and the expulsion of certain states, such as Russia, from the League. The United States also never became a member of the League.⁶⁵

A decisive turning point in the hitherto little-questioned acceptance of war as a means of settling disputes came with the adoption in 1928 by 63 states of the General Treaty for the Renunciation of War (Briand-Kellog Pact or Treaty of Paris). For the first time, an international treaty contained a universal and general prohibition of war; the preamble states that ‘the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated’.

Two further substantive provisions read as follows:

Article I: The High Contracting Parties solemnly declare in the name of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with each other.

Article II: The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Although not specifically provided for in the treaty, it was the general assumption among the treaty members that the right to self-defence was not affected by the above provisions.⁶⁶ This was perhaps why its acceptance in state practice was uncontentious. In fact, public pronouncements and diplomatic exchanges drawing the attention of conflicting parties to its objectives⁶⁷ in a number of incidents in the years that followed illustrate the importance it started to assume in international affairs.

However, two shortcomings must be noted. The one is the absence of a sanctions mechanism in case of a breach of the treaty’s substantive provisions. The other is the fact that the prohibition merely referred to ‘war’, which, when restrictively interpreted, could exclude other forms of military action.⁶⁸ Both these shortcomings were addressed in the UN Charter. Chapter VII now provides for enforcement action against threats to the peace and acts of aggression and article 2(4) prohibits the ‘use of force’, which is a wider term than ‘war’. Moreover, the prohibition is not limited to the actual use of force, such as the invasion of another state or an attack upon its territory

by the armed forces of a state, but also covers the ‘threat of force’. In the latter instance, the ICJ in its advisory opinion in the *Nuclear Weapons* case has stated as follows:

If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of ‘threat’ and ‘use’ of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal ... the threat to use such force will likewise be illegal.⁶⁹

Whether it is an actual use of force or a threat to use force, the envisaged action must be directed against the territorial integrity and political independence of a state or be inconsistent with the purposes of the UN Charter⁷⁰ to be illegal under article 2(4).⁷¹ The phrase ‘territorial integrity and political independence’ may be understood as the totality of the rights a state possesses with regard to its territory and people,⁷² which means that any transfrontier use of armed force causing an impairment of these rights will constitute a violation of article 2(4).⁷³ For instance, this will be the case if force is used to alter or interfere with the boundaries of states. Thus, military action that results in loss of territory or in permanent occupation of territory will easily meet the threshold established by article 2(4) of the Charter and is therefore illegal. These notions also inform the following restatement of the UN Charter law in the Friendly Relations Resolution:

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from a threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.⁷⁴

The most blatant example of an impairment of territorial rights one can take from recent history is the order given by Saddam Hussein on 2 August 1990 to Iraqi military troops to invade and occupy Kuwait in response to Kuwait’s refusal to give in to his demands for cancelling the debt owed to Kuwait and for more economic aid for Iraq.⁷⁵ Another example is the secret military operation killing Osama Bin Laden in 2011. In the early hours of 2 May, a small group of US Special Forces departed by helicopter from a base in Jalalabad, Afghanistan and crossed the border into Pakistani territory, apparently undetected. After an eventful landing at a compound, the hide-out of the Bin Laden family, in the town of Abbottabad, the Special Forces succeeded in entering the compound and in the ensuing skirmish Osama Bin Laden and members of his family were assassinated. In the absence of Pakistan’s consent for the operation – which by all accounts seems to be the case – this action will constitute a clear violation of Pakistan’s sovereignty within the meaning of article 2(4) and was on that account unlawful.⁷⁶ But, the unlawfulness of the operation will fall away if the action can be justified as action in self-defence, an issue that is dealt with in chapter 5.

The prevailing view is that the notion of ‘force’ in article 2(4) of the UN Charter is confined to armed force. This consensus view emerged from the drafting history of the UN Charter, which reveals that the question of ‘economic’ force, for instance, was rejected at the San Francisco conference when some states proposed the prohibition of economic aggression as well. Moreover, the fact that article 2(4) was in response to a devastating war, further implied that the drafters of the UN Charter had in mind armed force of the kind employed in World War II.⁷⁷ However, in the UN’s Friendly Relations Resolution, the coercion of a state by other means has also been declared unacceptable:

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.⁷⁸

This may be illustrated with reference to article 98(2) of the Rome Statute of the ICC. This provision allows for the conclusion between states of bilateral agreements that prevent the surrender of one party's nationals to the jurisdiction of the court by the other party to the agreement, without the consent of the former.

Since 2002, the United States has concluded agreements with close to 100 states⁷⁹ in an attempt to prevent US military personnel from being surrendered to the ICC for violations of the Rome Statute in response to a surrender request by the ICC. It is also no secret that the United States has procured the participation of certain states in these agreements by promising or threatening the withholding of certain forms of economic or military aid.⁸⁰ Will such conduct fall foul of the above provision in the Friendly Relations Resolution?⁸¹

The broader approach of the Friendly Relations Resolution was followed much earlier in the 1948 Charter of the Organization of American States (OAS). In article 19, we find the following formulation:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.

4.6 Responsibility of states and international organisations

A further key principle of international law is that role-players on the international stage must accept responsibility for their conduct. Failure by states to meet their obligations under international law results in liability or state responsibility. The growing role of international organisations means that increasingly this principle is also applied to such organisations too. This is because both states and international organisations are subjects of international law.

4.6.1 Responsibility of states

In their relationship with one another, states are supposed to respect the rules that define their relationship. This entails that states have diligently to perform the obligations imposed upon them by international law. This duty results from the legal personality of every state as the principal bearer of international obligations.⁸² If states fail to perform their obligations, or conduct themselves contrary to their international law commitments, they commit what is called 'internationally wrongful acts', which may be breaches of either treaty law or customary international law. The state in breach (responsible state) may then incur liability vis-à-vis the state that has suffered an injury (injured state) as a result of the breach. State responsibility in this sense may be incurred *directly* or *indirectly*. Direct responsibility will occur if the state, acting through its organs or agents, breaches an international law obligation. Indirect responsibility occurs when the breach injures foreign nationals or their property. Both these forms of responsibility will be covered in this section.

Thus, the law of state responsibility refers to the body of rules that defines breaches of obligations of states in international law, as well as the consequences of such breaches. Its scope encompasses the *primary rules* that define the nature of the internationally wrongful act that may be *attributable* to a state, and the *secondary rules* that flow from the consequences of a breach of an international obligation. This body of law has gone through various stages of codification by the International Law Commission (ILC).⁸³ This section focuses on the 2001 ILC Draft Articles on the

Responsibility of States for Internationally Wrongful Acts (DASR), which contains the modern concept of state responsibility in international law.⁸⁴

4.6.1.1 The nature of the responsibility

Article 1 of the DASR provides as follows: ‘Every internationally wrongful act of a state entails the international responsibility of that state.’

This provision does not contain any precondition for responsibility such as requiring *fault* (negligence) or *intent* (the *mens rea* element) on the part of the wrongdoing state. Responsibility is therefore consequential to and correlates with the wrongful act.⁸⁵ This theory of so-called ‘objective responsibility’,⁸⁶ which rests upon a violation of a particular legal duty, has been followed in the practice of states and in the jurisprudence of arbitral tribunals⁸⁷ as well as the International Court of Justice.⁸⁸ Consequently, ‘once the breach of an obligation owed under a primary rule of international law is established, this is *prima facie* sufficient to engage the secondary consequences of responsibility’.⁸⁹

4.6.1.2 Wrongfulness

The wrongfulness of an act for purposes of state responsibility is determined by international law and is unaffected by a contrary characterisation in the internal law of a state.⁹⁰ The breach of a legal duty so as to constitute wrongfulness may arise from a positive action of the state or from an omission or failure to act.⁹¹ Wrongfulness may be precluded in certain circumstances that provide the ‘wrongdoing’ state with a defence or excuse against responsibility. The DASR provides for six types of circumstances precluding wrongfulness – namely consent (article 20); self-defence in conformity with the UN Charter (article 21); countermeasures (article 22);⁹² force majeure (article 23); distress (article 24); and necessity (article 25).⁹³

Necessity may only be invoked as a ground for precluding wrongfulness if the act complained of was the only way for the state to safeguard an essential interest against a grave and imminent peril, and if the act did not seriously impair an essential interest of the state, or of the international community as a whole, to which the legal obligation is owed.⁹⁴ A state is interdicted from invoking necessity if the international obligation in question excludes the raising of such a defence, or if the state has contributed to the situation that caused the necessity.⁹⁵

In the *Gabčíkovo-Nagymoros Project* case,⁹⁶ the ICJ recognised necessity (as a circumstance that excludes wrongfulness) to be part of customary international law and pointed out that it can only be accepted on an exceptional basis, meaning that it can only be invoked under strict conditions. Moreover, the state invoking it cannot be the sole judge of whether the conditions have been met. Consequently, in each case, a determination must be made:

[I]t (the necessity) must have been occasioned by an ‘essential interest’ of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a ‘grave and imminent peril’; the act being challenged must have been the ‘only means’ of safeguarding that interest; that act must not have ‘seriously impair[ed] an essential interest’ of the State toward which the obligation existed; and the State which is the author of the act must not have ‘contributed to the occurrence of the state of necessity’.⁹⁷

Given the formulation in article 25 and the above summary of conditions by the ICJ, it becomes debatable whether forceful humanitarian intervention (discussed in chapter 5) may constitute a lawful act based on necessity.

If a state is under an obligation to comply with a peremptory norm of international law,⁹⁸ the wrongfulness of a breach thereof cannot be precluded by invoking any of the grounds above.⁹⁹ Consequently, if an obligation arises for a state under a peremptory norm of international law, that obligation will prevail.¹⁰⁰

4.6.1.3 Attributability

For a state to be held accountable for the wrongful breach of an international obligation, the breach must be *attributed* to the state. This is an essential element of state responsibility but the formulation in article 2(a) of the DASR, where attributability is dealt with, is somewhat confusing. The heading of this provision, ‘Elements of an internationally wrongful act of a State’, seems to imply that attributability is an element of wrongfulness. The opening sentence of article 2 has the same leaning in stating ‘[t]hat there is an internationally wrongful act of a State when conduct ... (a) is attributable to the State ...; and (b) [c]onstitutes a breach of an international obligation of the State’.¹⁰¹

The concept ‘attributability’ denotes the circumstances or factors that make it legally possible to connect an act or omission with a state for purposes of determining the responsibility of the state. When this stage of an enquiry is reached, one would assume that wrongfulness has already been determined and that the convoluted formulation in article 2 could therefore have been avoided by a formulation that reads as follows:

There is an internationally wrongful act of a state when conduct consisting of an action or omission (a) constitutes a breach of an international obligation of the state; and (b) is attributable to the state under international law.

Be that as it may, attributability may arise in various circumstances that will be explained later on in this chapter.

4.6.1.4 Responsibility for the conduct of state organs

The state is an abstract legal entity and can only act through its officials and organs. It follows then that in representing and acting on behalf of the state, government officials and state organs may render the state liable in international law. This rule is formulated as follows in article 4(1) of the DASR:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State and whatever its character as an organ of the central government or of a territorial unit of the State.

The powers and functions of government officials and of organs of state are regulated by domestic law and that branch of the law should be turned to in case there is a legal dispute regarding a person’s or organ’s legal capacity to act on behalf of the state.¹⁰²

The rule that the conduct of any organ of state must be regarded as an act of that state is well established and is part of customary international law.¹⁰³ In such instances, the responsibility of the state may arise from an act or omission as the select cases below illustrate.

In the *Youmans Claim* between the US and Mexico,¹⁰⁴ a group of soldiers was instructed to disperse an angry mob threatening violence against three US nationals in a house in Mexico. Upon arriving at the scene, instead of dispersing the mob, the soldiers opened fire on the house as a result of which one US national was killed. The other two occupants were then forced to flee and in doing so they were also killed by the troops and the angry mob. The US claim against Mexico was based

on the failure of the Mexican authorities to exercise due diligence in protecting the US nationals. However, Mexico argued that since the soldiers had failed to carry out the orders given to them, they had acted *ultra vires*; the Mexican authorities should therefore not be held responsible because such acts cannot be imputed (attributed) to the state. This was rejected by the claims commission, which correctly pointed out that the wrongfulness of the act was exactly as a result of the soldiers disobeying their orders for which the Mexican government must be held directly responsible. The issue here was not that the soldiers acted outside the scope of their powers. If that were relevant, no wrongful act would ever be attributed to a state. Of relevance was the fact that they acted in an official capacity and while on duty.¹⁰⁵ The legal position taken here is now incorporated into the DASR. Article 7 states as follows:

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Distinguishing between acts done in an official capacity and acts done in a private capacity (for which a state cannot be held responsible) may sometimes be difficult. This can be illustrated by the *Mallén* case.¹⁰⁶ In this matter, an off-duty policeman who had personal grudges against Mallén, arrested him, locked him up and fined him US \$500 before he was released. Two months later, the policeman, while on duty, encountered Mallén again and this time, he hit him and threatened him with a gun. Mallén was locked up again. According to the Mexican-US General Claims Commission, the first incident of arrest was not attributable because it was an ‘unlawful act of a private individual who happened to be an official’. In respect of the second incident, the Commission found that the act of the policeman was attributable to the state. The tribunal observed that the policeman could not have taken Mallén to jail if he had not been acting as a police officer. And even though this was clearly an act of revenge, ‘the act as a whole, can only be considered as the act of an official’. It is difficult to see how the Commission could have treated the two incidents differently, or made a distinction between the acts of the policeman on the two occasions as far as attribution is concerned. The only possible explanation is that in the second incident, the policeman was in fact on duty, and according to the evidence, he had shown his badge and brandished his gun, which could have made a difference in the characterisation of the act.

In the *Corfu Channel* case,¹⁰⁷ the ICJ, having found that the Albanian government should have known about the laying of a minefield in the Corfu Channel, ruled that the obligation incumbent upon the Albanian authorities in such circumstances consisted in notifying approaching sea vessels about the danger to which they might have been exposed. However, nothing was attempted, and the failure to do so resulted in damage to a British warship. This constituted a grave *omission* on the part of Albania and, according to the court, involved the international responsibility of Albania.

The failure to act was also evident in the *Tehran Hostages* case.¹⁰⁸ As will be recalled from an earlier reference to the case, the US Embassy in Tehran was attacked by a group of militant protesters who subsequently took possession of the embassy and held embassy staff hostage for a considerable period of time. During their violent action, the militants encountered no opposition from the Iranian security forces responsible for the protection of the embassy premises. In fact, the security personnel simply disappeared from the scene. In terms of general international law, a receiving state is under an obligation to protect the premises, staff and archives of the sending state’s diplomatic and consular agencies.¹⁰⁹ Therefore, the ICJ ruled that the inaction by Iran constituted ‘clear and serious breaches’¹¹⁰ of its obligations in this regard and for that it must be held directly responsible for such breaches.

The principles on attributability espoused above are equally applicable to the conduct of the armed forces of a state in times of armed hostilities. This is illustrated by the *Armed Activities* case

between the DRC and Uganda.¹¹¹ This matter involved the alleged illegal presence of Ugandan military forces on the territory of the DRC before, during and shortly after a military coup in the DRC in 1997/1998 which brought the current leader Laurent Kabila to power. In the course of ongoing hostilities at the time, which affected and involved several of the neighbouring states in the Great Lakes region, the Ugandan forces were accused of supporting rebel forces hostile to Kabila and of widespread violations of international human rights and international humanitarian law. Apprised of credible evidence of these atrocities, the ICJ concluded that the conduct of the UPDF (Ugandan Forces) ‘as a whole is clearly attributable to Uganda, being the conduct of a State organ ...’.

[a]ccording to a well-established rule of international law, which is of customary character’.¹¹² On the basis of this general principle, the court then concluded as follows:¹¹³

The conduct of individual soldiers and officers of the UPDF is to be considered as the conduct of a State organ. In the Court’s view, by virtue of the military status and function of Ugandan soldiers in the DRC, their conduct is attributable to Uganda. The contention that the persons concerned did not act in the capacity of persons exercising governmental authority in the particular circumstances, is therefore without merit.

It is furthermore irrelevant for the attribution of their conduct to Uganda whether the UPDF personnel acted contrary to the instructions given or exceeded their authority. According to a well-established rule of a customary nature ... a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces.¹¹⁴

In practice, it may also happen that an organ of a state (the sending state) may be placed at the disposal of another state (the receiving state). In this instance, the receiving state will be responsible for the conduct of the state organ if the organ is exercising elements of governmental authority under the control and direction of the receiving state.¹¹⁵

4.6.1.5 Responsibility for the conduct of non-state entities exercising elements of governmental authority

Attributability in the case of non-state entities exercising elements of governmental authority is regulated in terms of article 5 of the DASR, which determines as follows:

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Crawford explains that the justification for assigning responsibility to the state in these circumstances derives from the fact that increasingly the exercise of governmental authority is performed by parastatal entities or former state corporations, which although privatised, retain their public or regulatory functions.¹¹⁶ For purposes of state responsibility, an exercise of governmental authority must have taken place; what must be established in each case is the nature, content and purpose of the functions assigned to the entity in question by the domestic law of the state.

4.6.1.6 Responsibility for the conduct of private persons or a group of persons

Responsibility for the conduct of private persons and entities is not normally attributed to the state, but certain circumstances may cause private action to be attributed to the state. The position is regulated under article 8 of the DASR, which determines as follows:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Attributability under this provision is linked to two key situations:

1. the private person or entity acted on the instructions of the state; or
2. the private person or entity acted under the direction or control of the state.

In the commentary to this provision it has been argued that the three terms ‘instructions’, ‘direction’ and ‘control’ are disjunctive and for responsibility to occur, ‘it is sufficient to establish any one of them’ as long as they ‘relate to the conduct which is said to have amounted to an internationally wrongful act’.¹¹⁷

The most common instance falling under the first situation is when a state decides to make use of private persons or private entities to perform functions or missions abroad under the instigation or instruction of the state. The use of private military and private security companies to perform a range of services for states operating in foreign lands experiencing internal conflict is a case in point.¹¹⁸ In such cases, the basis of the relationship between the state and the private entity is often contractual in nature¹¹⁹ and the private entity does not become part of the official structure of the state but performs its instructions (which may be part of the contract, or given subsequently) as an independent contractor.

In the *Bosnia Genocide* case, the ICJ held that for attributability on the basis of instructions to take place, it was not sufficient that the instructions were merely of a general nature relating to the overall actions taken by the persons or group of persons responsible for having committed the violations. What was needed was that the instructions were given in respect of each operation during which the alleged violations occur.¹²⁰ Presumably, this understanding does not require that the state needs to direct the private entity to perform the specific act that caused the violation for attributability to arise. Rather, attributability will ensue when the unlawful conduct is incidental to the mission (operation). However, if the private entity ignored the instructions or acted outside the scope of the mission, responsibility will not be attributed to the state.¹²¹ Thus, this position differs from when the state acts through its organs, in which case *ultra vires* conduct is nevertheless attributed to the state.

The ‘direction or control’ requirement under the second situation referred to above has been dealt with in a number of decisions with different outcomes. It is most famously linked to the ICJ’s 1986 ruling in the *Nicaragua* case. In this matter, the court had to determine whether the United States could be held responsible for the conduct of a rebel group, the *contras*. This group was involved in an internal armed conflict with the Nicaraguan government and was responsible for a number of atrocities committed in the course of the conflict. The United States involvement consisted in providing financial and logistical support for the *contras* as well as training, intelligence, arms and ammunition.¹²² Without further evidence, these facts, the court found, were insufficient ‘for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua’.¹²³ For conduct of this kind ‘to give rise to legal responsibility of the United States, it would in principle have to be proved that that state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed’,¹²⁴ which was not the case here given the nature of the United States’ involvement.

This ‘effective control test’ (which seems to require that all *contra* operations had to reflect a strategy and tactics ‘wholly devised by the United States’ or evidence that the *contras* at least was acting on behalf of the United States)¹²⁵ was rejected by the ICTY in the *Tadić* case as requiring too high a degree of control for attributability. Instead, the tribunal developed what it referred to as the ‘overall control’ test for determining whether the conduct of an organised group, such as a military unit or rebel group not forming part of the state and acting independently of any specific state instructions, may be attributed to the state.¹²⁶ If in such instances the group is under the overall control of the state, its activities must engage the responsibility of the state ‘whether or not each of them was specifically imposed, requested or directed by the State’.¹²⁷ ‘Overall control’ in this sense means that the state has participated in the ‘general direction, coordination and supervision’ of the activities of the group in question in addition to providing financial, logistical and other assistance to that group.¹²⁸

In the *Armed Activities (DRC v Uganda)* case, the ICJ was also called upon to decide whether Uganda could be held responsible for the conduct of militias operating in the DRC. In holding that the requisite level of control over paramilitaries had not been established by the facts and therefore had not given rise to an issue, the court referred to *Nicaragua* but left *Tadić* unmentioned.¹²⁹

A more detailed engagement with these latter cases occurred in the *Bosnia Genocide* case,¹³⁰ where the court had to decide on the criminal responsibility of the accused for the genocidal activities of militia groups in the course of the Bosnia/Herzegovina crisis. In following the *Nicaragua* approach, referred to at one point as ‘settled jurisprudence’,¹³¹ the court concluded as follows:¹³²

Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State’s own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the State of customary international law, as reflected in the ILC Articles on State Responsibility.

In rejecting the ‘overall control test’ applied by the ICTY in *Tadić*, the court pointed out that the tribunal was not called upon to decide on state responsibility; it had used the concept of control to determine whether military units operating in one state may be attributed to another state for purposes of deciding whether the armed conflict was internal or international according to international humanitarian law. Thus, the court held that legal positions under general international law on matters of state responsibility were not the same as those for deciding criminal cases under international humanitarian law.¹³³ The court then explained its position on the unsuitability of the ‘overall control test’ for determining state responsibility as follows:

It must next be noted that the ‘overall control’ test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State’s responsibility can be incurred for acts committed by persons or groups of persons – neither State organs nor to be equated with such organs – only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the ‘overall control’ test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility.¹³⁴

There have been some critical responses to the different rulings on this issue. Cassese is of the view that the ICJ in the *Nicaragua* case failed to clarify the grounds on which the effective control test was based, and also made no reference to state practice and other authorities in support of the test as applied to the humanitarian law violations by the *contras*.¹³⁵ Consequently, the court had wrongly applied the effective control test, which is reserved for instances where *single private individuals* act on behalf of a state and under the instructions of that state (the first option under article 8), as opposed to organised armed groups such as the *contras*, for which the overall control test should be used.¹³⁶ In the *Tadić* case, this distinction was maintained¹³⁷ and the rationale for having the two tests is explained as follows by Cassese:

When a private individual or a group of private individuals, nationals of a particular state, who are not on the payroll of the state nor act systematically at its behest, perform an act that is inconsistent with international law and injures another state, it would be easy for such individuals to shift their responsibility to their national state, by claiming that in fact they acted on behalf of that state To avoid such possible abuses, international law requires a stringent test for concluding that the state does indeed bear responsibility for the actions of those individuals: it is necessary to prove that the state issued instructions or directives or orders to the individuals concerning the specific wrongful action. Things are different when a state deals with a hierarchically organized group, in particular a military or paramilitary unit. If a state supports such a group financially, logically, organizationally and, in addition, coordinates its military actions or takes part in such coordination and planning, this means that a strong link exists between the state and the organized group. The systematic and broad support of the group by the state, on the one hand, and the hierarchically organized structure of the group, on the other, cannot but imply that the state normally has a say in, as well as an impact on, the planning or organization of the group's activities. If therefore the group or some of its members engage in prohibited acts, the state must bear responsibility, even if it did not specifically order, organize or instruct the commission of those acts.¹³⁸

The usefulness of the overall control test has also been propagated in view of some recent trends relating to the use by states and international organisations of armed groups or military units. There is, for instance, the dangerous practice by certain states of providing various kinds of support to international terrorist groups, and to armed groups involved in armed hostilities in other countries – a phenomenon that is particularly prevalent in the Middle East and in Africa. The instability this creates constitutes a serious threat to international peace and security. But there is also the question of individual and state responsibility for the atrocities these groups often systematically plan and execute with impunity. As Cassese has pointed out, there are many obstacles if one uses the effective control test to determine state responsibility in these instances. Proving that the group has acted upon instructions, under the direction or specific control of the state in each of the operations that led to the wrongful act will be impossible. Further evidentiary challenges are posed by the clandestine nature of many operations, the planning behind them and the secret contacts with government officials and organs. However, if the overall control test is relied upon, ‘it suffices to demonstrate that certain ... groups or units are not only armed or financed ... by a specific state..., but also that such state generally speaking organizes or coordinates or at any rate takes a hand in coordinating or planning [the] actions’.¹³⁹

There is also the view that holding states responsible, for instance, for acts of terrorism, on the basis of a modification of the effective control test, is neither necessary nor desirable since the preferable approach is to rely on the primary norms of international law for determining the responsibility of a state for terrorist acts. As Crawford points out, states remain bound by the customary international law duty to prevent harm to other states and not knowingly to allow

territories under their control to be used for acts that may cause harm to other states.¹⁴⁰ Whether a state failed to comply with this due diligence obligation will depend on whether the state knew or ought to have known about the threat and whether it had the capacity to counter the threat.¹⁴¹ Apart from this customary law obligation, states are also subject to a range of treaty obligations in respect of anti-terrorism measures and must also comply with Security Council prescriptions in this regard.¹⁴²

With regard to the role and responsibility of international organisations, questions arise with regard to the use by the United Nations or a regional organisation of national contingents belonging to troop-contributing countries, in for instance, peacekeeping and peace-enforcement operations. This occurs frequently, and in the case of breaches of international law by the members of such contingents, complex legal issues concerning responsibility may arise. For instance, will attributability lie with the international or regional organisation, or with the state to which the contingent belongs. This matter is dealt with further below.

4.6.1.7 Responsibility for the conduct of insurgents and insurrectional groups

In general, a state cannot be held responsible for the conduct of an insurrectional or other movement. This is premised on the assumption that the movement has its own structures and organisation, and an existence independent of the state. In such instances, it is a well-established rule of international law that the conduct of the movement cannot be attributed to the state, unless there is some other ground for doing so.¹⁴³ In the *Solis* case,¹⁴⁴ for example, the United States had made a claim for compensation against Mexico in respect of cattle allegedly taken by Mexican soldiers from a ranch belonging to Solis, an American national. Mexico denied the claim on the ground that the soldiers who took the cattle were not federal soldiers but belonged to an insurgent group, de la Huerta. The Commission rejected the United States claim, and held that Mexico could not be held responsible for conduct of an insurgent group.

However, history is replete with examples of groups that have challenged the authority of government and even ended up overthrowing it. In general terms, when an insurrectional group becomes the ‘state’ (in the sense of becoming the new government), so to speak, the new state/government will be responsible for the conduct of the insurrectional movement. This scenario is regulated in article 10(1) of the DASR, which determines: ‘The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.’

The argument in this instance is that there is continuity between the new organisation of the state and that of the insurrectional movement once the latter has taken over governmental control. Attribution of the movement’s conduct in the course of the insurrection to the state takes place automatically because the state, as a legal entity, does not cease to exist when there is a change of government.¹⁴⁵

The same principle applies when the insurrectional movement succeeds in taking control of a part of the territory of an existing state and establishes a new state on that part. This is a classic example of state formation through secession, and once again the conduct of the insurrectional movement will be attributed to the newly formed state as the new legal entity. This position is regulated in article 10(2) of the DASR, which states as follows:

The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

4.6.1.8 Attribution based on subsequent acceptance or approval of a wrongful act

Article 11 of the DASR describes a further scenario in which a wrongful act may be attributed to a state:

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

The conduct that is acknowledged or adopted in this instance will usually be that of a private person or entity.¹⁴⁶ What is required for purposes of attributability is that the acknowledgement or adoption must be something more than support or endorsement in the general sense of showing sympathy with the wrongful conduct. This can once again be illustrated by the *Tehran Hostages* case referred to earlier on. The militant group that stormed and occupied the US embassy comprised private Iranian citizens, lacking the status of agents or organs of the state. Hence, their conduct could not be attributed to the Iranian state on this basis. However, it will be recalled that the responsibility of the state was first and foremost based on the fact that Iran failed to comply with its international obligations to protect the US mission against violence of this nature. But there was also a second ground on the basis of which the ICJ held Iran responsible – namely, the seal of government approval given to the conduct of the militants. Shortly after the violent attacks and hostage-taking by the militants, the Head of State, the Ayatollah Khomeini, issued a decree declaring that the US foreign mission premises and the hostages would remain under siege until the Shah (who was in the United States at the time for medical treatment) was handed over to stand trial in Iran. According to the ICJ, this official act of approval of the situation turned the conduct of the militants into acts of the state for which the state itself was responsible.¹⁴⁷

4.6.1.9 The legal consequences of an internationally wrongful act

It stands to reason that the breach of an international obligation cannot be without legal consequences for the state responsible for the wrongful act. The legal consequences are spelled out in Part II of the DASR and they relate in general to duties that the responsible state owes first in relation to the international obligation that has been breached, and secondly, to the state or states that suffered harm as a consequence of the breach.

With regard to the first aspect, the responsible state remains under a duty to perform the obligation¹⁴⁸ because the obligation is not terminated or suspended by the breach. The rationale for this rule is that the suspension or termination of an international law obligation is determined by other (primary) rules of international law (such as the law of treaties, in case of a treaty law obligation) and not by the rules determining state responsibility. Closely linked to this duty is the duty of the wrongdoing state to cease the act or omission responsible for the breach, if it is of a continuing nature, and to offer assurances and guarantees that the breach will not be repeated.¹⁴⁹ The cessation of wrongful conduct is a first step in limiting the consequences of a breach. The importance of complying with this duty has been explained as follows:

The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interest of the international community as a whole in the preservation of, and reliance on, the rule of law.¹⁵⁰

Duties under the second aspect above relate to the issue of reparation. This is covered in article 31 of the DASR, which determines as follows:

- (1) The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.**
- (2) Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.**

The obligation to make reparation as a consequence of an internationally wrongful act is a general principle of international law and is often cited with reference to the following statement by the Permanent Court of International Justice (PCIJ) in the *Chorzow Factory* case:

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed.¹⁵¹

This form of reparation is also known as *restitution* (in Latin, *restitutio in integrum*) and is the term used in article 35 of the DASR. In this provision, re-establishing the position that existed before the wrongful act was committed is subject to two conditions – namely, the re-establishment must be materially possible, and it must not involve a burden that is out of all proportion to the benefit that the restitution will bring. The first condition relates to the notion of impossibility of performance – for instance, where, as a result of the wrongful act, irreplaceable property has been destroyed or persons have been killed. The second condition focuses on proportionality between what it will cost or take to restore the situation and the benefit that will be derived from it.

In case restitution is ruled out as a viable form of reparation, the responsible state is under an obligation to pay *compensation* for the damage caused. According to article 36(2) of the DASR, compensation under this rule shall cover ‘any financially assessable damage including loss of profits insofar as it is established’. ‘Damage’ must be understood as ‘any damage, whether material or moral, caused by the internationally wrongful act of a State’.¹⁵² In international law, non-material damage is usually associated with an injury done to the national of a state and may arise in cases such as mental suffering, humiliation, degradation, loss of position or reputation.¹⁵³ In the *Diallo* case, the ICJ held the view that non-material injury can be established even in the absence of specific evidence as to the injury. In this matter, the court relied on certain objective facts in concluding that an injury was caused to the diplomatic agent of Guinea as a result of the agent’s treatment by the DRC. The facts included Mr Diallo’s arrest without reasons and without being given the possibility to seek a remedy; the unjustifiably long period of the detention; and the wrongful expulsion of Mr Diallo from the DRC where he had resided for 32 years. On this basis, the court was of the view that it ‘is reasonable to conclude that the DRC’s wrongful conduct caused Mr Diallo significant psychological suffering and loss of reputation’.¹⁵⁴ It is an established rule that the quantification of compensation for non-material damages is based on considerations of equity, involving an objective assessment of what is just, fair and reasonable in the circumstances.¹⁵⁵

To ensure full compensation, it may in certain circumstances become necessary to order the payment of interest on compensation for damages suffered as a result of a delay in payment. A claim for interest is not a separate cause of action but forms part of the principal claim for damages. The matter is regulated in terms of article 38 of the DASR, which determines as follows:

- (1) Interest on any principal sum payable under this Chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.**
- (2) Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.¹⁵⁶**

Satisfaction is the third form of reparation for an internationally wrongful act and is used as a remedy when the injury caused cannot be made good by either restitution or compensation.¹⁵⁷ This form of acknowledging responsibility for a breach of an international obligation may take the form

of an expression of regret, a formal apology, or another appropriate modality,¹⁵⁸ provided that it remains proportional to the injury caused and is not humiliating to the responsible state.¹⁵⁹ The modes of satisfaction listed here are mere examples and, depending on the circumstances, many other options may be considered – such as the instigation of an enquiry into the causes of the incident that led to the harm, the taking of disciplinary action against a responsible individual, or the granting of declaratory relief by a court or tribunal.¹⁶⁰

When reparation, in whatever form, is considered, the injured state's wilful or negligent contribution to the injury must be taken into account. This applies equally to the conduct of a person or entity in relation to whom reparation is sought.¹⁶¹

A separate category of legal consequences, over and above the duty to make reparation, applies in the case of a serious breach by a state of an obligation that stems from a peremptory norm¹⁶² of general international law. A *serious breach* in this sense is one that involves a 'gross or systematic failure by the responsible State to fulfil the obligation'.¹⁶³ In such instances, other members of the international community of states are under an obligation to bring to an end by lawful means the serious breach by the responsible state, and to refrain from recognising a situation brought about by the breach or to render aid or assistance in maintaining the situation.¹⁶⁴

Underlying this position are developments in international law with regard to the concepts of *erga omnes* obligations and *jus cogens* norms. The debate on *erga omnes* obligations – obligations that are owed to the international community as a whole as opposed to obligations that are owed to an individual state or states – is strongly associated with a statement by the ICJ in the oft-cited *Barcelona Traction* case:¹⁶⁵

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have legal interest in their protection; they are obligations *erga omnes*.¹⁶⁶

As examples of *erga omnes* obligations, the court mentioned those that derive from the outlawing of aggression and genocide and the protection of fundamental rights and freedoms, including protection against slavery and racial discrimination.¹⁶⁷ Seemingly instrumental to this development was the codification of the *jus cogens* concept in article 53 of the 1963 Vienna Convention on the Law of Treaties.¹⁶⁸ In terms of the *jus cogens* concept, certain rules of customary international law are so important for international coexistence that they cannot be set aside by treaty or acquiescence but only through a subsequent rule of the same character. According to the International Law Commission, the most frequently cited examples of such *jus cogens* norms are the 'prohibition of aggression, slavery and the slave trade, genocide, racial discrimination, apartheid and torture, as well as basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination'.¹⁶⁹ Hence, what the court in *Barcelona Traction* listed as examples of *erga omnes* obligations is hardly distinguishable from the ILC's list of *jus cogens* norms.¹⁷⁰

The legal consequences for other states of a breach of these norms – namely, an obligation to bring to an end such breaches by lawful means and not to recognise a situation brought about by such a breach, nor to assist in its maintenance – are well established in international law. A few examples will suffice. In the ICJ's advisory opinion in the *South West Africa/Namibia* case, the court held that the:

termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all states in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law: in particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof.¹⁷¹

The General Assembly's Friendly Relations Resolution has the unequivocal statement that states shall not recognise as legal any acquisition of territory brought about by the use of force.¹⁷² In the *Nicaragua* case, the ICJ linked this principle to the UN Charter prohibition on the use of force (article 2(4)), while confirming the prohibition's status as a *jus cogens* norm.¹⁷³ This non-recognition obligation was also invoked by the Security Council in 1990 in response to Iraq's attempt at annexation of Kuwait's territory by force.¹⁷⁴ In the ICJ's advisory opinion on the *Israel Wall* case, the court confirmed the *erga omnes* character of respect for the Palestinians' right to self-determination and for humanitarian law in armed conflict situations,¹⁷⁵ and drew the following broad legal consequences from Israel's breach of these norms:

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.¹⁷⁶

In the latter paragraph, the ICJ extended the scope of the legal consequences beyond what is traditionally part of state responsibility to include certain obligations that the United Nations and its organs must comply with in bringing to an end the illegal situation that resulted from the construction of the wall.

4.6.1.10 Enforcing responsibility

When an internationally wrongful act has been committed, what are the mechanisms or processes through which those who have suffered injury or loss as a result of the breach can obtain redress? The preliminary issue that needs to be unravelled is who may invoke state responsibility. Primarily, the issue addresses the question of who can institute a claim when an international obligation is breached and responsibility is incurred. This question is dealt with in Part 3 of the DASR, which is entitled 'The implementation of the international responsibility of a state' and is covered by seven articles (42–48). It should be noted that these provisions focus on states and their rights to invoke responsibility; these provisions do not acknowledge the role of international institutions. For example, the opening provision, which is article 42, begins with the following statement: 'A State is entitled as an injured state to invoke the responsibility of another state.' This approach, where states are recognised as the primary beneficiaries of the rights and bearer of duties, is adopted throughout the document. As we shall show later in this chapter, this approach is problematic and has been challenged by scholars and commentators.¹⁷⁷

4.6.1.11 Injured and non-injured states

In circumscribing the entitlement to invoke responsibility, the DASR distinguishes between *injured* states and *non-injured* states. Article 42 deals with injured states. It provides that an injured state is entitled to ‘invoke the responsibility of another State if the obligation breached is owed to (a) that state individually; or (b) a group of states including that state, or the international community as a whole’. However, if the obligation breached is owed as intimated in (b) above, the breach must either, ‘specifically affect the state, or [be] of such a character as radically to change the position of all other states to which the obligation is owed with respect to the further performance of the obligation’.

The definition of injury under article 42 must be discerned from the source obligations themselves and their context. This is the case in particular with paragraph (a). Indeed, the Commentary affirms that that definition is ‘closely modelled on article 60 of the Vienna Convention on the Law of Treaties’, which emphasises the notion of material breach of treaties.¹⁷⁸ Thus, injury could arise from breach of an obligation created by a bilateral agreement, any commitment unilaterally adopted or imposed by general principles of international law, as well as specific obligations between two states assigned by multilateral regimes. Under paragraph (b), a state is injured when it is ‘affected by the breach in a way that distinguishes it from the generality of other states to which the obligation is owed’¹⁷⁹ or when the breach affects ‘per se every other state to which the obligation is owed’.¹⁸⁰ The scope for determining whether a state qualifies under article 42 to invoke responsibility is therefore very narrow. Its scheme is almost exclusively affirmative of the consensual element that dictates the law-making process in the international system which is based on the consent of states. In the context of article 42, this means that the invocation of responsibility is the entitlement of the injured state on the basis of an individual right to performance of an international law obligation. The relationship between the injured state and the responsible state is therefore of a bilateral nature and comparable to the relationship between the parties to a bilateral treaty in the case of a wrongful breach of a treaty provision by one of them. However, in the case of article 42, the wrongful breach that gives rise to responsibility is not limited to treaties; the entitlement to invoke responsibility may also arise from the breach of customary international law.¹⁸¹ Thus, the position under article 42 must be distinguished from the position under article 48 which is explained below.

When several states are injured by the same internationally wrongful act, each one of them may separately invoke the responsibility of the state that committed the wrongful act; and when several states are responsible for the same wrongful act, the responsibility of each of them may be invoked in relation to that act.¹⁸²

Article 48 deals with non-injured states. It provides an avenue for a state to invoke responsibility in respect of an obligation owed to a group of states¹⁸³ (including the state invoking the responsibility) or to the international community as a whole¹⁸⁴ even where the state invoking the responsibility has not suffered any injury. Examples of obligations that are envisioned in paragraph 48(1)(a) might include regional and sub-regional security arrangements, regional mechanisms for the protection of human rights, as well as mechanisms for protection of the environment.¹⁸⁵ Article 48(1)(b) gives recognition to the developments explained in the previous part with regard to *erga omnes* obligations and *jus cogens* norms. There is little doubt that the drafters of the DASR intended to acknowledge the true import of rules of international law that have a universal appeal, and which states, regardless of their individual commitments and their national interests, have undertaken to uphold for the good of the community as a whole. All states have the duty to enforce such rules, whether the breach results in direct injury to them individually or not. The implication that can be drawn from article 48(1)(b) seems to be that a breach of obligations *erga omnes* may entitle any state to invoke responsibility. Thus, it has been argued that:

[R]ather than reducing everything to the level of individually held substantive rights, Article 48 recognises that certain communitarian norms are owed either to the other states parties (sometimes referred to as obligations *erga omnes partes*) or to ‘the international community as a whole’ (obligations *erga omnes*). As a consequence, in the case of obligations *erga omnes partes* every state party to the treaty in question has a procedural right, that is, *locus standi* to invoke its application on behalf and for the benefit of all the parties; and in the case of obligations *erga omnes*, every state has standing to invoke it on behalf of the ‘international community as a whole’.¹⁸⁶

Injured, as well as non-injured, states invoking the responsibility of another state must give notice of the claim to the responsible state and, in doing so, may specify what conduct is expected of the responsible state to bring an end to the wrongful act, and what form the reparation for the injury should take.¹⁸⁷ The right to invoke the responsibility of a state will be lost when the injured state has waived its claim or when, through its conduct, it has acquiesced in the lapse of the claim.¹⁸⁸

4.6.1.12 Standing

A matter related to the issue of injured and non-injured states is the idea that a state should have standing to raise a claim against another. The question of which state has *locus standi* to seek such redress is important in determining not just the legitimacy of the process but its legality as well. In international contexts, standing is often linked to *interests* and *injury* resulting from the culpable act, as is clear from the previous section. Thus, a state seeking to litigate in an international tribunal should demonstrate that it has sufficient legal interest in the dispute in the same way that may be required of a litigant in a domestic court.

What does *legal interest* mean, or when can it be said that a state has such an interest? There are no definite answers to this question. What can be said is that *interests* and *injury* are somewhat intertwined. Indeed, one major factor that underpins the determination of *legal interest* in a claim made by the state is the nature of obligations breached and the *injury* suffered as a result. As we have already shown, states are sovereign entities and therefore they have the right to protect themselves or their citizens against wrongs that affect their interest. As a general rule, states that are not beneficiaries of international obligations cannot claim the rights to enforce them.¹⁸⁹ This may be illustrated with reference to the 1962 and 1966 *South West Africa* ICJ cases involving legal proceedings aimed at obtaining an order from the ICJ to the effect that South Africa had failed to administer South West Africa/ Namibia in accordance with the obligations imposed upon it by the mandate system under article 22 of the Covenant of the League of Nations.

In 1962, two African states, Ethiopia and Liberia, both former members of the League of Nations, submitted a joint application to the ICJ, requesting the court to declare that South Africa had failed to administer the South West Africa mandate in the interest of the territory’s inhabitants – *inter alia*, by practising the policy of apartheid in the mandate territory.¹⁹⁰ In its responding memorial, South Africa objected, *inter alia*, to the applicant states’ *locus standi* in the matter, arguing that no material interest of the two governments or of their nationals were involved in the matter or affected by it. In its judgment, the court, by a very narrow margin – eight votes to seven – held that the relevant provisions of the mandate indicated that the member states of the League had a *legal right or interest* in the observance by the mandatory of its obligations, both towards the inhabitants of the territory and towards the members of the League of Nations.

On the basis of this ruling, the ICJ, in 1966, had to decide on the merits of the claims against South Africa.¹⁹¹ The result was one of the most controversial decisions by the court; the 1962 ruling was overturned by the casting vote of the President of the Court, since the votes were equally divided.¹⁹² The applicant states were calling for the due execution of the mandates. They appeared

before the court in their capacity as former members of the League, claiming rights they believed they were invested with as League members. The central issue in the merits case was whether the various mandate holders had any direct obligation towards the other members of the League individually as regards the carrying out of their mandates.¹⁹³ In rejecting this proposition, the ICJ ruled that neither the League Covenant, nor the instruments of mandate reserved any role for the individual members of the League, as a result of which ‘no security taking the form of a right for every member of the League separately and individually to require from the mandatories the due performance of their mandates, or creating a liability for each mandatory to be answerable to them individually ... was provided by the Covenant’.¹⁹⁴ The supervision of the mandate system was the sole responsibility of the Council of the League, to which the mandatories were answerable and in which the individual League members shared through their participation in the activities of the League organs; beyond this, no rights of supervision, independent of their participation in the League’s institutional activities, accrued to the individual League members which they could claim in their own name ‘to set themselves up as separate custodians of the various mandates’.¹⁹⁵

The ICJ has dealt with the issue of *interest* very conservatively. It has insisted that it is for the state seeking to intervene to identify the interest of a legal nature and which *may* be affected (as opposed to will or must be affected) by a decision in the matter before the court. Moreover, it is for the court to decide on the request to intervene and to determine the limits and scope of the intervention.¹⁹⁶ Where it is not merely a case of a third state having a legal interest in the matter, but of the legal interest being a necessary element in the subject matter to be decided, the third state will have to be joined as a full party to the proceedings for the case to be admissible.¹⁹⁷

However, there are indications that the narrow approach on standing outlined above may be ripe for reconsideration, especially in view of the notion of community interests (raised in the previous section on injured and non-injured states). A case in point is the application before the ICJ¹⁹⁸ brought by Belgium against Senegal in respect of a dispute concerning Senegal’s failure to prosecute Hissène Habré, the former president of the Republic of Chad, for crimes against humanity committed during his presidency, or to extradite him to Belgium to stand trial there. At the time, Hissène Habré enjoyed political asylum in Senegal. Belgium based its application on the 1984 Torture Convention and on international customary law, which provide for a state’s duty to punish or extradite perpetrators of gross human rights violations, such as torture.

The issue of standing in respect of Belgium was raised in the proceedings on the admissibility of the case as a result of the fact that Belgium had no direct interest in the case since it was common cause that there were no Belgian nationals among the victims of the alleged crimes. Belgium’s involvement came about as a result of a complaint by a Belgian national of Chadian origin in a Belgian court against Hissène Habré for the crimes of torture, genocide and other serious violations of international humanitarian law and covered by Belgian law. This led to various steps taken by the Belgian authorities to have Hissène Habré extradited to Belgium. In the proceedings before the ICJ, which turned on the ‘extradite or punish’ obligation of states parties under the Torture Convention,¹⁹⁹ Belgium argued, *inter alia*, that under the Torture Convention ‘every State party, irrespective of the nationality of the victims, is entitled to claim performance of the obligation concerned, and, therefore, can invoke the responsibility resulting from the failure [by Senegal] to perform’.²⁰⁰

As the court pointed out, this raised the issue of Belgium’s standing to bring the application.²⁰¹ In confirming that Belgium had standing in the matter, the court relied on the object and purpose of the Torture Convention – namely, to make more effective the struggle against torture across the world – and concluded that states parties ‘have a common interest to ensure, in view of their shared values, that acts of torture are prevented, and, that, if they occur, their authors do not enjoy impunity’.²⁰² This means further that a state party’s duty to conduct a preliminary enquiry into the

facts of the case against the alleged perpetrator, and to submit it to its competent authorities for the purpose of prosecution, arises when the perpetrator is present on the territory of the state, ‘regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred’.²⁰³ The ‘common interest’ all states parties have in compliance with these obligations implies, according to the court, ‘that the obligations in question are owed by any State party to all the other parties to the Convention’.²⁰⁴ These, the court argued, are obligations *erga omnes* which entitle each state party to ‘make a claim concerning the cessation of an alleged breach by another State party’.²⁰⁵

In commenting on this case, De Wet points out that the essence of the ruling leans towards an acceptance by the ICJ that community-oriented interests of the kind that underpin peremptory human rights obligations may constitute a ‘sufficient legal interest’ for determining standing in proceedings before the ICJ. However, since the court has based its arguments solely on the common interests of the parties as embodied in the Convention, it raises the question whether standing may also be allowed exclusively on the customary law prohibition and criminalisation of torture.²⁰⁶ Moreover, by treating the *erga omnes* obligations strictly within the narrow confines of the parties’ treaty obligations, the court has not settled the question whether claims based on breaches of *erga omnes* obligations may also derive from the broader (non-treaty-based) notion of international community interests as a source of legal obligation that governs the relationship between states independent of the consent (or will) and interests of the individual members of that community.²⁰⁷

What makes the finding of an answer to this question problematic is that the concept of community interests (or ‘international community interests’) has acquired a plethora of meanings in the voluminous literature on the subject.²⁰⁸ Invoked *ad nauseam* in a variety of contexts, it has also attracted negative responses that point to the concept’s nebulous meaning, lack of clarity regarding the values and norms it represents and especially its lack of substantive legal effect.²⁰⁹ As to the latter, one particular point of interest is the accommodation of the so-called international community interests by the ICJ, given its current judicial function based on the consent of states. Such interests have usually surfaced in cases before the court in arguments based on the notions of *jus cogens* and *erga omnes* obligations,²¹⁰ as the above and other cases²¹¹ have illustrated.²¹² But in none of these instances do we find an articulation of an international community of states in the sense of an autonomous international community that has an existence above and independent of the sovereign states that make up that community. The use of the term ‘international community’ in the case law of the court, it has been pointed out, is ‘purely ornamental’;²¹³ and even if one subscribes to the consensus view that certain norms have a *jus cogens* status prohibiting any derogation from them, and that there are obligations a state may owe to the international community as a whole (*erga omnes* obligations), ‘[s]tates remain at the heart of the elaboration of those norms; obligations devolve primarily upon them, as do the rights to enforce them’.²¹⁴

Finally, it must be noted that the issues of *erga omnes* obligations and community interests have relevance too for states taking countermeasures to enforce international law obligations. This is dealt with in chapter 5.

4.6.1.13 Claims on behalf of nationals and legal entities

At the beginning of the section on state responsibility, the distinction between direct and indirect responsibility was explained briefly. This part will deal with indirect responsibility, which occurs when states bring claims on behalf of natural and legal persons when their rights have been violated by another state. The basis of the claim in such instances is the failure of the territorial state to treat the foreign national according to the international minimum standard of treatment required for aliens.²¹⁵ By intervening on behalf of the injured national,²¹⁶ the claimant state (the state of nationality)

acts for the injured individual rather than for the state.²¹⁷ This form of intervention by a state is also referred to as diplomatic protection and the ILC has played an important role in developing the codification thereof in the form of a set of Draft Articles on Diplomatic Protection (DADP) that was published in 2006.²¹⁸ According to article 2 of the DADP, a state has a *right* (as opposed to a duty) to exercise diplomatic protection. In article 1, this form of protection is defined as follows:

[D]iplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

The established rule is that the right of diplomatic protection belongs to the state of nationality as was stated in the *Mavrommatis Palestine Concessions* case:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.²¹⁹

Equally well established is the rule that domestic remedies must first be exhausted before a state can intervene on behalf of a national and seek redress at the international level.²²⁰ This is confirmed in the last part of the above quotation. Whether remedies have been exhausted as required by this rule will depend on whether a final decision has been rendered by a competent authority or organ in the host state without providing an effective remedy.²²¹

Both the above rules have been incorporated in the DADP.²²² Article 3(1) determines that the state that is entitled to exercise diplomatic protection is the state of nationality;²²³ and according to article 14(1), a state may not pursue an international claim on behalf of a national before that person has exhausted all local remedies. Compliance with the latter requirement is excepted when: the available local remedies cannot provide effective redress or offer no reasonable possibility of such redress; there is an undue delay in the remedial process which is attributable to the state responsible for the injury; there is no relevant connection between the injured person and the state responsible for the injury at the date of injury; the injured person is manifestly precluded from pursuing local remedies; or the state responsible for the injury has waived the local remedies requirement.²²⁴

In the *Diallo* case, it was made clear that in:

matters of diplomatic protection, it is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person whom the applicant seeks to protect of the obligation to exhaust available local remedies. It is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted.²²⁵

In addition to these basic rules applicable to diplomatic protection, some additional issues must be clarified – namely, the *effective nationality* requirement; whether states are obliged to exercise diplomatic protection; and the position in respect of legal entities.

4.6.1.13.1 Nationality requirement

In view of the nationality requirement in article 4 of the DADP, it becomes debatable whether the ‘genuine or effective link’ requirement espoused in the famous *Nottebohm* case²²⁶ must still be followed – especially given the peculiar circumstances in which it came about. In that case, Nottebohm, a German national by birth, applied for and obtained the nationality of Liechtenstein through naturalisation in 1939. At the time, his main business headquarters and interests were in Guatemala, where he had his fixed abode. In 1940, after having obtained his Liechtenstein passport, he returned to Guatemala. By then, World War II had broken out and Guatemala, for all intents and purposes at war with Germany, adopted war measures as a result of which Nottebohm (being a

German citizen) was expelled and his attempted return some time later, refused. In 1951, Liechtenstein instituted proceedings in the ICJ, claiming on behalf of Nottebohm reparations from Guatemala for the latter's treatment of Nottebohm.

The case before the court was then whether the nationality conferred on Nottebohm by Liechtenstein could be relied upon against Guatemala in justification for Liechtenstein's attempt at diplomatic protection. It may be noted at this point that Nottebohm retained his connection with Germany throughout, by visiting members of his family there as well as attending to his business interests in the land of his birth. By contrast, there was no real bond between him and Liechtenstein – he only paid fleeting visits to his brother in Liechtenstein and at no time showed any intention of settling there.

For the purpose of diplomatic protection by means of international proceedings, the court approached the matter from the *quality* of the connection between the injured national and the claimant state and held that what must be ascertained regarding the nationality conferred by Liechtenstein was whether the link of nationality was *real and effective* in the sense of an exact juridical expression of an existing social fact illustrating the connection with the state in question.²²⁷ Since on the facts there was no real bond of attachment between Nottebohm and Liechtenstein,²²⁸ the court concluded that Guatemala was under no obligation to recognise the nationality granted by Liechtenstein and the latter was not entitled to claim protection for Nottebohm on that basis.²²⁹

Article 4 of the DADP makes no reference to a 'genuine link' requirement as an additional factor for the exercise of diplomatic protection. It merely requires a link of nationality acquired in one of the ways specified in the provision and in accordance with domestic law. In its commentary on this provision, the ILC took the view that the Nottebohm requirement was limited to the peculiar facts of the case, especially the difference in the closeness of the ties between Nottebohm and Guatemala stretching over a period of 34 years, compared with his tenuous links with Liechtenstein. This, the ILC interpreted as suggesting that the court did not intend the genuine link requirement to apply to all cases but only to assert it as a rule for permitting a state in Liechtenstein's position to claim on behalf of an injured person against a state with which that person had very strong links. The ILC also cautioned that if the genuine link requirement is strictly applied in today's world:

it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalisation and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection.²³⁰

Today, perhaps more than ever, dual or multiple nationality is not an extraordinary phenomenon.²³¹ This state of affairs is recognised in article 6 of the DADP, which allows one or all of the states of which the injured person is a national to exercise diplomatic protection on behalf of that person against a state of which that person is not a national. Here too, no genuine or effective link is required for diplomatic protection, which makes sense because there is no contest of nationality with the respondent state. In case of such a contest – that is, where the injured person has the nationality of both the applicant and the respondent states – article 7 allows the applicant state to exercise diplomatic protection only if the nationality of the applicant state is predominant. The predominant link must exist both at the date of injury and at the date of the proceedings for diplomatic protection to be exercised. In this instance, a genuine or effective nationality link is required, and the onus is on the applicant state to prove it. The article 7 scenario finds support in a number of arbitral awards and is a well-established rule in international law.²³²

In what certainly is a progressive development in the law on diplomatic protection, the DADP makes provision for the exercise of such protection on grounds other than nationality. This may

occur in the case of *stateless persons* and *refugees*²³³ and represents a development that recognises the growing international concern with the protection of such vulnerable groups. In these cases, according to article 8 of the DADP, *lawful and habitual residence* in the state at the date of injury and at the date of the official presentation of the claim provides a ground for the state of residence to exercise diplomatic protection on behalf of the stateless person or refugee. In the case of refugees, diplomatic protection cannot be exercised by the state of residence if the wrongful act that caused the injury to the refugee was committed by the refugee's state of nationality.²³⁴ The need for this rule is based on the fact that article 8 contains an exception to the nationality rule for the exercise of diplomatic protection and can therefore not override it.

4.6.1.13.2 Is there a duty to exercise diplomatic protection?

The second issue singled out above for further explanation is whether states are *obliged* to exercise diplomatic protection when circumstances require it. Article 2 of the DADP is unequivocal that a state has a *right* to exercise diplomatic protection, but there is no indication that a state is under a duty to do so. Although this is the position in international law, domestic law may impose such a duty on a state,²³⁵ a matter that is dealt with below. As far as the DADP are concerned, the discretionary right of a state under article 2 may be subject to a duty-type interpretation when read with article 19. This provision determines as follows:

A State entitled to exercise diplomatic protection according to the present draft articles, should:

- (a) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;**
- (b) Take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and**
- (c) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.**

With reference to this provision, Dugard, who served as a Special Rapporteur to the ILC on the matter of diplomatic protection, indicates that there is growing support for the proposition that, in certain cases involving serious human rights violations, a state may have a duty to exercise diplomatic protection.²³⁶ The recommendatory spirit of article 19 is clear from the use of the word 'should' and implies that diplomatic protection may be desirable under certain circumstances,²³⁷ such as when a 'significant injury has occurred'. Hence, when faced with a potentially serious injury to a national, the failure of a state to respond in an appropriate and effective manner may be reviewable, despite the discretionary nature of an exercise of diplomatic protection in international law. Support for this proposition is present in national case law.

In *Abbasi and Another v Secretary of State for Foreign and Commonwealth Affairs*,²³⁸ the applicant, a British national, was captured by US forces in Afghanistan and taken to a US detention facility in Guantanamo Bay, Cuba, where he was held captive without access to a court, other tribunal or even a lawyer. The proceedings in the British court were founded on the contention that Abbasi's right not to be arbitrarily detained was infringed by the United States, and were aimed at securing a court order compelling the British Foreign Office to intervene on his behalf or to give an explanation for why this had not been done. In essence, the case turned on the reviewability by a court of the conduct of the executive in foreign relations issues. In this matter, the court could not find justification on the facts for such a review.²³⁹ Nevertheless, it made it clear that in extreme cases, where the authorities, contrary to established practice²⁴⁰ refuse even to consider a request for diplomatic protection, the court may find it appropriate to make a mandatory order instructing the authorities to give due consideration to an applicant's case.²⁴¹ This clearly implies that, in certain circumstances, a state may have a duty to intervene and exercise diplomatic protection.

The South African constitutional court followed the same approach in *Kaunda and Others v President of the Republic of South Africa*.²⁴² A group of private military operatives with South African nationality, allegedly en route to assist in a coup to overthrow the government of Equatorial Guinea, was arrested and detained in Zimbabwe. In detention, they were subjected to inhumane and degrading treatment and further faced a transfer to Equatorial Guinea, where their fair trial rights were under threat and the imposition of the death penalty a grim prospect. Although the majority accepted the discretionary nature of the right to exercise diplomatic protection, it was concluded that:

There may thus be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to government for assistance in such circumstances where the evidence is clear would be difficult and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justifiable and a court would order the government to take appropriate action.²⁴³

This was further elaborated on by concluding that:

If government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly. Rationality and bad faith are illustrations of grounds on which a court may be persuaded to review a decision.²⁴⁴

While broadly in agreement with the majority decision, Ncgobo J went somewhat further, relying in particular on South Africa's international human rights treaty obligations and a joint reading of sections 3(2) and 7(2) of the South African Constitution.²⁴⁵ These provisions, respectively, entitle South African citizens to the rights, privileges and benefits of citizenship and bind the state to respect, protect, promote and fulfil the rights in the Bill of Rights. Their combined meaning, according to Ncgobo J, means that government has a constitutional duty to ensure that all South African nationals abroad enjoy the benefits of diplomatic protection against violations of their fundamental human rights, and this duty 'entails an obligation to consider properly the request for diplomatic protection with due regard to the provisions of the Constitution'.²⁴⁶ In her dissenting judgment, O'Regan J, citing the constitutional imperatives of a normative commitment to human rights and international law, democratic governance and the duty to promote, rather than to hinder the achievement of the protection of human rights,²⁴⁷ concluded that section 3 of the Constitution contains an 'entitlement to diplomatic protection'²⁴⁸ and proposed a declaratory order to the effect that the government is 'under a constitutional obligation to take appropriate steps to provide diplomatic protection to the applicants to seek to prevent the egregious violation of international human rights norms'.²⁴⁹

In *Von Abo v Government of the RSA*,²⁵⁰ the applicant, a South African national and owner of agricultural land and related enterprises in Zimbabwe suffered considerable financial losses as a result of the expropriation without compensation of his farmland by the Zimbabwean government. When all his attempts to obtain redress in the Zimbabwean courts failed, he turned to the South African government for assistance. An intransigent attitude by the government finally persuaded him to apply for a court order to the effect that he had a right to diplomatic protection and that the South African government had failed to consider his requests rationally and in good faith. In finding that the South African government had 'done absolutely nothing to assist the applicant, despite diligent and continued requests for diplomatic protection',²⁵¹ Prinsloo J, relying on *Kaunda*, ruled that the applicant had a 'right to apply for diplomatic protection' and that the respondents (the South African government) 'were under a constitutional duty at the very least to properly (that is rationally) apply their minds to the request for diplomatic protection'.²⁵² The government, having

failed to comply with its constitutional duty in this regard, was then ordered to forthwith take all necessary steps to have the violation of the applicant's rights by the Zimbabwean government remedied and to report to the court within 60 days on the steps it has taken in this regard.²⁵³

A claim for damages against the government, subject to compliance with the court's order, was postponed, and in the follow-up hearing on this matter,²⁵⁴ the court found that there was once again 'abject failure ... to demonstrate any visible sign of even taking notice of these orders'²⁵⁵ and that the respondents showed 'no interest whatsoever in attempting to comply with the orders of this court ...'.²⁵⁶ In the circumstances, the court decided on the payment of damages as appropriate relief arising from the violation of the applicant's rights by the Zimbabwean government.²⁵⁷ In effect, this meant that the damages suffered by the applicant as a result of the expropriation of his property by the Zimbabwean government became the responsibility of the South African government as a result of the latter's failure to afford the applicant appropriate and effective relief in response to his request for diplomatic protection. On appeal by the South African government, this order was set aside by the Supreme Court of Appeal.²⁵⁸ The latter reasoned that the order against the South African government to pay damages to the applicant for a breach committed by another government is akin to vicarious liability and a foreign concept in this instance; a state cannot attract liability in terms of its domestic law (the constitutional law basis of the alleged duty to provide diplomatic protection) vis-à-vis its own national for wrongs committed by another state against that same individual.²⁵⁹

The only breach that could have occurred, according to the Supreme Court of Appeal, was that the South African government had failed to comply with its duty to consider the applicant's request for diplomatic protection appropriately.²⁶⁰ But, the court pointed out, even if there was a constitutional breach in the sense of a failure to respond appropriately to the request, the result of such a breach is not causally linked to the loss suffered, which was a result of the expropriation by the Zimbabwean government.²⁶¹ Apart from declaring the order made in the High Court legally untenable for the above reasons, the Supreme Court of Appeal was also of the view that it was unrealistic and impractical to expect the respondents (appellants before the SCA) to remedy the situation within 60 days; the respondents were set an impossible task, given the complexities of diplomatic negotiations, which are dependent on the responses and co-operation of the foreign government and the known uncompromising attitude of the Zimbabwean government in matters of this nature.²⁶² By prescribing in this manner the result the government's efforts should achieve and the time frame within which it was supposed to do so, the High Court had violated the rule on the separation of powers and encroached on the functions of the executive.²⁶³

The Supreme Court of Appeal was also critical of Prinsloo J's reading of the *Kaunda* case on the issue of the *right* to diplomatic protection. Instead of following the majority judgment, Prinsloo J, according to the Supreme Court of Appeal, seemed to have been influenced by the 'broader ... and less precise views' expressed by Ngcobo J in his concurring minority judgment, resulting in an incorrect approach.²⁶⁴ In support of the discretionary nature of the exercise of diplomatic protection followed by the majority in *Kaunda*, the Supreme Court of Appeal in this instance also invoked the judgment of Harms DP in the *Van Zyl* case.²⁶⁵ There it was stated:²⁶⁶

The appellants' request was premised on a 'right' to diplomatic protection and not on a right to have a request considered. It was further based on the duty of government to provide a particular type of diplomatic protection. These demands were, in the light of the constitutional court's judgment, ill-founded.²⁶⁷

The approach followed by the Supreme Court of Appeal in *Von Abo* does not correspond well with the court's own concessions in regard to the nature of the violation suffered by the applicant in the initial proceedings, and the conduct of the South African government in response to the request for diplomatic protection. With regard to the former, the court, in setting out the facts of the case, stated that '[i]t is common cause' that the loss suffered by the applicant as a result of the expropriation

‘was suffered as a result of a gross violation of international human rights standards’.²⁶⁸ And in noting the frustration of the court a quo in trying to establish the reasonableness or appropriateness of the government’s conduct, the Supreme Court of Appeal made the following telling conclusion:

This case is an example of how a government, founded on a constitutional dispensation and a culture of human rights, is not supposed to treat its citizens and its courts.²⁶⁹

Given these circumstances, one should be reminded of the majority judgment in *Kaunda* where Chaskalson CJ pointed out that there:

may be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to the government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable, and a court could order the government to take appropriate action.²⁷⁰

But intervention by a court in such circumstances is by no means limited to a *refusal* by government to respond to a request for diplomatic protection. Irrational or inappropriate responses are equally subject to judicial review, as will be a failure to properly consider a request and to act upon it.²⁷¹ Even so, it remains within the discretion of the executive to decide upon the manner and form of the diplomatic intervention; it is for intervening in this sphere of decision making that the *Von Abo* judgment in the High Court has specifically been criticised. Thus, it has been suggested that the correct approach would have been an order directing the South African government to properly reconsider the request for diplomatic protection and to reapply its mind as to what would be an appropriate form of intervention in the circumstances.²⁷²

In international law, diplomatic intervention is an obligation of conduct and not of result. Since the co-operation of the foreign state is essential in remedying the wrong done to the national of the intervening state, the latter cannot guarantee that the intervention will have a positive outcome. But this does not place the intervening state’s considered options for intervention beyond judicial scrutiny. The intervening state must be able to show why the measures chosen are best suited to obtain a remedy in the circumstances of each case, and that those measures, compared to others, have the greatest potential for success.

4.6.1.13.3 Legal entities

A final issue to be addressed under this section is the position of legal entities. Like human beings, these entities can be injured by states in whose territories they conduct business and they too can be given diplomatic protection by their state of nationality. The question then is how to determine the nationality of a corporate entity. Although the general rule is that a company is considered to be a national of the state in which it is registered or incorporated, the situation becomes more complicated when the place of registration and the place of doing business are in different countries, or when the injury is done to shareholders having different nationalities.

The leading authority in this regard remains the *Barcelona Traction* case.²⁷³ In this matter, Barcelona Traction Ltd was incorporated in Canada, while it supplied electricity to Spain and had Belgian nationals as a majority of its shareholders. In 1948, Spain declared the company bankrupt and Belgium, acting on behalf of its nationals brought an action against Spain on the basis that Spain’s action adversely affected the Belgian shareholders. Spain’s argument was that the injury was to the company alone, and not to the shareholders and that, as such, Belgium lacked standing to exercise diplomatic protection on behalf of the shareholders.

The ICJ rejected the position put forward by Belgium and held that a ‘close and permanent connection’ with Canada existed by virtue of the company’s incorporation under the laws of Canada, the board meetings held there, the accounts and registers kept there and the listing of the

company in the records of the Canadian tax authorities, a position that had been maintained for more than 50 years and which entitled Canada, as opposed to Belgium, to exercise diplomatic protection on behalf of the company.²⁷⁴ In arriving at this conclusion, the court distinguished between a direct injury to the company and an indirect injury to the shareholders as a result of the company's bankruptcy. This indirect injury, the court pointed out, does not entitle the shareholders to diplomatic protection because the company did not cease to exist as a result of its financial situation and could still act on behalf of its shareholders in the Spanish courts, and it did so in fact. According to the court, the exception to this rule is when the company ceased to exist in the legal sense of the word and the shareholders are deprived of a potential remedy available through the company. In such instances, an independent right of action for them and their government could arise.²⁷⁵ Likewise, where the injury directly infringes the rights of the shareholders, as distinct from the rights of the company, the shareholders' state of nationality will be entitled to exercise diplomatic protection.²⁷⁶

Article 9 of the DADP, referred to earlier on, confirms the above rule in *Barcelona Traction* on the nationality of companies. However, this provision also seems to develop further the rule of incorporation where a close connection between a company and the state of incorporation is lacking, by providing as follows:

However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.

In this scenario, and as a result of a mere formal connection between a company and the state of incorporation, the more substantial elements of the seat of management and financial control become decisive in determining the nationality of the company.

The position in *Barcelona Traction* on the protection of shareholders has also been incorporated in the DADP. For instance, article 12 determines that if an internationally wrongful act of a state causes a direct injury to the rights of shareholders, as distinct from those of the corporation, the shareholders' state of nationality is entitled to exercise diplomatic protection on their behalf. In the case of an injury to the corporation, article 11 determines that the state of nationality of the shareholders in the corporation will not be entitled to exercise diplomatic protection on behalf of the shareholders – unless the corporation has legally ceased to exist for a reason unrelated to the injury, or the corporation, at the date of injury, had the nationality of the state responsible for the injury, and incorporation in that state was a requirement for doing business there.

4.6.2 Responsibility of international organisations

As noted in chapter 1, international organisations have become important players in the international arena. But their relationship with international law has not been entirely clear, even though they have influenced the development of law in a variety of fields. When states get together to establish an international organisation, their intention is to enable the organisation to perform certain functions on their behalf. Therefore, they invest it with the power to do just that. This means that international organisations have limited competence and that their powers are dictated by their constituent instruments. As observed by the ICJ in the *Nuclear Weapons* case, these organisations are new subjects of international law that enjoy only limited autonomy and mandate as entrusted to them by states. The court stated as follows:

International organisations are subjects of international law which do not, unlike states, possess a general competence. International organisations are governed by the ‘principle of speciality’, that is to say, they are invested by the states which create them with powers, the

limits of which are a function of the common interests whose promotion those states entrust to them.²⁷⁷

As far back as 1956, the ILC released a report in which it noted the importance of changing and adapting international law to ‘reflect the profound transformation that had occurred in international law … and to bring the principles governing state responsibility into line with international law at its present stage of development’.²⁷⁸ This was indeed a realisation that the international system had changed and that the traditional approach that deemed states to be the only players in international law had been overtaken by the increasing number of institutions with a growing influence on international affairs and even on the development of international law. In 2001, the UN General Assembly requested the ILC to consider the issue of the responsibility of international organisations. The principles governing such responsibility are now contained in the 2011 ILC Draft Articles on the Responsibility of International Organisations (DARIO).²⁷⁹

The DASR was taken as the basis for DARIO, and the latter follows the former in general outline. In many instances, the provisions are the same in substance and the ILC’s underlying assumption seems to be that states and international organisations should in principle be subject to the same rules on responsibility, since they are both subjects of international law.²⁸⁰ The positive element in this approach is that by equating states and international organisations for purposes of responsibility for internationally wrongful acts, the ILC has prevented the development of different legal regimes for responsibility being applicable to states and international organisations respectively, which could have caused unnecessary fragmentation in this area of international law.

4.6.2.1 Legal personality

Legal personality is a crucial element in the operation of an international organisation and determination of its responsibility. It includes not only the capacity of an entity to operate in the international arena, but also the ability to enter into legal agreements and to enjoy certain rights and privileges, such as immunity from national jurisdiction, liability for wrongful acts committed and the right to bring claims for wrongful acts for which they have suffered harm.²⁸¹ The element of legal personality is now also included in the definition of ‘international organization’ in article 2(a) of the DARIO, which defines an international organisation as an ‘organization established by treaty or other instrument governed by international law and possessing its own international legal personality’.

Legal personality may be acquired through constituent documents or through the application of the doctrine of implied powers. The latter arises when the power not implicitly specified in the constituent document is implied through interpretation of the same document. In the *Reparations* case, the ICJ considered the functions of the United Nations and observed that certain powers could be implied – the powers necessary for it to fulfil its obligations. In this case, the ICJ was requested to provide an opinion as to whether the United Nations had legal capacity to bring reparation claims against states. In essence, the court had to advise on whether the United Nations had legal personality in these circumstances. The court held:

It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with competence required to enable those functions to be effectively discharged. The Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality.²⁸²

The court observed that the United Nations had acquired such a stature in the international realm that it needed to have such a personality to discharge its mandate. Moreover, the court considered the nature of its functions, some of which made it vulnerable to injury when certain wrongs are committed. It was thus reasonable to expect that the United Nations should have a right to bring claims against the states whose wrongful conduct cause injury to it. Thus it can bring claims as well as be liable for harm inflicted on third parties.

Some organisations such as the United Nations are said to have ‘objective’ legal personality. The UN’s objective legal personality was confirmed in the 1949 advisory opinion in the *Reparations* case referred to above. Objective legal personality refers to the ability of an organisation to assert its rights independently without the control of its members.

In the case of the United Nations, such personality is apparent in the manner it executes its mandate without the subjective control of member states. This legal personality is often justified on the ground that it is underwritten by rules of customary international law. Objective legal personality is claimed where an organisation has legal powers that it can exercise at the international level and where it maintains the kind of relationship with its members that respects the distinctions existing between them.

By virtue of having legal personality and being able to perform functions in the international realm, such organisations are deemed to possess certain rights and duties. Generally, these rights and duties are contained in the constituent instruments but they may also flow from customary international law. According to the ICJ in the *Reparations* case, ‘the rights and duties of an entity such as the organization must depend upon its purpose and functions specified or implied in its constituent documents and developed in practice’.²⁸³

Cassese²⁸⁴ enumerates these rights as follows: the right to enter into international agreements with states; privileges and immunity from jurisdiction of state courts; the protection of all its agents; and the right to bring an international claim. The availability of these rights to international organisations indicates the importance of legal personality. But these rights also coincide with the international organisation’s capacity to exercise the powers necessary for it to fulfil its mandate. Take, for example, the privileges and immunities that international organisations enjoy so as to shield them from interference by states. These immunities and privileges come from the constituent instruments, general rules of customary international law, and sometimes through bilateral arrangements between organisations and states. They may take the form of immunity from prosecution, inviolability of premises, and even freedom of communication, to mention a few.

4.6.2.2 The principle of attribution

The principle of attribution is contained in article 4 of the DARIO which determines as follows:

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission (a) is attributable to the international organization under international law.

We have previously discussed how acts of government officials and state agents and even of non-state entities may be imputed to a state. The question therefore is what kinds of conduct could be imputed to international organisations? The general rules on attribution of conduct are contained in Chapter 2 of the DARIO. They relate to the conduct of agents of the organisation (article 6); conduct of agents of a state or organs or agents of the organisation placed at the disposal of another organisation (article 7); conduct in excess of authority or in contravention of instructions (article 8); and conduct acknowledged and adopted by the organisation as its own (article 9). The general position is that the conduct of an organ or agent of the organisation imputes responsibility to the organisation irrespective of what position the agent or organ holds in the organisation. This may be

so even where the agent or organ has exceeded its authority or contravenes instructions – that is, has performed an *ultra vires* action. In the *Certain Expenses* case, the same issue arose in relation to actions performed by the wrong organs of the United Nations. The ICJ held that such actions were still attributable to the United Nations. According to the court, an internal irregularity should not affect the rights of third parties.²⁸⁵

Apart from *ultra vires* action, conduct that was not initially attributable to the organisation may nonetheless be considered an act of the organisation under international law if the organisation acknowledges and adopts it as its own. In *Prosecutor v Dragan Nikolic*, the Trial Chamber II of the ICTY found that the action of the persons who had arrested Nikolic was attributable to SFOR because the force had acted in a way that showed its acknowledgement and adoption of the act.²⁸⁶

However, if the organ or agent is placed at the disposal of another organisation, or an agent or organ of state is so placed, the conduct of such organ or agent will impute responsibility to the organisation only where there is ‘effective control’ over that agent or organ. The ‘effective control’ test has been dealt with above under the section on state responsibility. Here it must be noted that article 7 of the DARIO also relies on this test for attributing the conduct of an organ of state or of the organs or agents of an international organisation to an international organisation at whose disposal the organs or agents were placed.

Sometimes questions do arise as to who may be considered an agent or organ of the organisation. For example, although there is no doubt, and indeed the United Nations has made it amply clear, that it will accept responsibility for peacekeeping operations, can the conduct of the individual peacekeepers be attributed to it? In other words, are peacekeepers agents or organs of the United Nations?

Several factors may be considered here. First, the operations are often authorised by the UN Security Council and can therefore flow from Chapter VII of the Charter. Therefore, technically, their actions may be imputable to the United Nations under articles 6 and 7 of the ILC Draft Articles. Secondly, although peacekeepers act under the direction of the United Nations, the forces come from member states who also exercise a certain level of control over them. One could therefore argue that they are placed at the disposal of the United Nations and therefore meet the requirement of article 7 of the ILC Draft Articles. However, can one assume that once such forces are at the disposal of the United Nations, the latter exercises ‘effective control’ over them?

The complexities that occur in reality with regard to these issues can be illustrated by the following cases. In *Behrami v France; Saramati v France, Germany and Norway*,²⁸⁷ the Grand Chamber of the European Court of Human Rights was called upon to rule on a tripartite relationship between the United Nations, NATO and troop-contributing countries in relation to the international community’s intervention in Kosovo pursuant to Security Council Resolution 1244 of 1999. This resulted in the establishment by the Security Council of an international civilian presence (UNMIK)²⁸⁸ and a multilateral military force (KFOR)²⁸⁹ under the unified *command and control* of NATO.

In the *Behrami* case, a young boy was killed by an unexploded cluster bomb dropped during the NATO bombardment of Kosovo in 1999. This incident, which also caused serious injury to the boy’s brother, occurred in a sector controlled by French forces whose responsibility it was to clear unexploded ordnance from the area. Hence, proceedings were brought against France by the injured boy and his father, alleging a violation of the right to life in article 2 of the European Convention on Human Rights. In *Saramati*, a resident of Kosovo was arrested by UNMIK police on charges of attempted murder and other offences in 2001. His release was later ordered by the Supreme Court of Kosovo, but he was then rearrested on orders of a KFOR commander (a Norwegian general). He was subsequently detained by KFOR as a security threat and then transferred to the custody of

UNMIK, then under French command. Saramati's action was based on a violation of article 5 of the European Convention, which guarantees the right to liberty of the person.

In Behrami's case, the Grand Chamber concluded that the supervision of the ordnance-clearing activities fell within the mandate of UNMIK, while the powers of detention were within the jurisdiction of KFOR. With regard to UNMIK, the Grand Chamber found that since UNMIK was created by a Chapter VII Security Council resolution, it was a wholly subsidiary organ of the United Nations and its actions were therefore attributable to the United Nations.²⁹⁰ In *Saramati*, despite accepting the effectiveness of NATO command and control in operational matters concerning KFOR, the Chamber determined that since KFOR was present in Kosovo under Security Council authorisation, it was exercising lawfully delegated Chapter VII powers of the Security Council, which meant that the KFOR action was attributable to the United Nations.²⁹¹ In this matter, the Grand Chamber treated the matter in accordance with the internal law of the organisation (in terms of which ultimate authority and control over operational matters in such circumstances usually remain with the Security Council) instead of applying the law of responsibility – in particular, the principle of attributability according to the effective control test.²⁹²

At about the same time as these cases were dealt with in the European Court of Human Rights, the United Kingdom House of Lords (now the UK Supreme Court) handed down its judgment in *Al-Jedda v Secretary of State for Defence*.²⁹³ In this matter, a dual British-Iraqi national had been detained by British forces in Iraq on suspicion that he was a member of a terrorist group, invoking the preventive detention powers granted to the multinational coalition forces under Security Council Resolution 1546 (2004). The claimant sought judicial review of his detention on the ground that his detention violated his personal liberty rights under article 5 of the European Convention on Human Rights, but he was unsuccessful in the Divisional Court of the Queen's Bench Division,²⁹⁴ where it was held that his article 5 rights were trumped by the combined effect of the Security Council resolution and article 103 of the UN Charter.²⁹⁵ This position was confirmed by the Court of Appeal.²⁹⁶ At the time that the House of Lords became seized of the matter, the *Behrami* and *Saramati* judgments were handed down and the British government used this windfall to plead responsibility of the United Nations as a result of the terms of the Security Council resolution that established a multinational force to operate under 'unified command'²⁹⁷ (UN-speak for Security Council command and control) in Iraq.

The late Lord Bingham, joined by the other law lords, except for Lord Rodger, approached the matter by distinguishing the *Behrami* and *Saramati* case from the situation in Iraq, arguing that the multinational force in Iraq, unlike UNMIK and KFOR in Kosovo, was not established at the behest of the United Nations, was not mandated to operate under UN auspices and was not a subsidiary organ of the United Nations. By virtue of this (unpersuasive) distinction,²⁹⁸ the House of Lords then paved the way for a ruling to the effect that the conduct of the British forces was attributable to the United Kingdom and not the United Nations,²⁹⁹ thus confirming that effective control (which the United Kingdom obviously exercised over its troops in Iraq) was the measure for determining attributability.

In the European Court of Human Rights, the House of Lords' approach and ruling were endorsed.³⁰⁰ Important in this instance is the European Court's views on the attributability issue in terms of article 5 of the DARIO (now article 7 of the 2011 ILC Draft Articles). The court stated as follows:

It would appear from the opinion of Lord Bingham ... that it was common ground between the parties before the House of Lords that the test to be applied in order to establish attribution was set out by the International Law Commission, in Article 5 of its draft Articles on the Responsibility of International Organisations and its commentary thereon, namely that the conduct of an organ of a State placed at the disposal of an international organisation

should be attributable under international law to that organisation if the organisation exercises effective control over that conduct For the reasons set out above, the Court considers that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi- National Force and that the applicant's detention was not, therefore, attributable to the United Nations.³⁰¹

The court, in its last sentence, failed to bring clarity as to which of the two tests would apply – effective control or ultimate authority and control. In fact, it avoided a clear decision in this regard by merely stating that as far as the Security Council was concerned, neither test had been satisfied.

More encouraging developments on this front have taken place in the national courts of the Netherlands. The cases referred to below stem from events between 1993 and 1995 relating to atrocities committed by the Bosnian Serb army after the fall of Srebrenica in 1995. Prior to this, on 16 April 1993, the UN Security Council, acting under Chapter VII of the UN Charter, declared the town of Srebrenica and surrounding areas in the former Yugoslavia a safe area that was supposed to remain free from any armed attack or any other hostile act.³⁰² To provide more effective protection for civilians in the area, the mandate of the United Nations Protection Force (UNPROFOR) was extended to enable it to deter attacks against the safe areas, to monitor the ceasefire, to promote the withdrawal of military and paramilitary units and to occupy some key points on the ground.³⁰³ Despite these initiatives, the Bosnian Serb army commenced a military offensive against the safe areas between 6 and 11 July 1995 and this ended in the fall of Srebrenica and a subsequent genocide of the Muslim population.³⁰⁴ At the time of the offensive, Srebrenica and its outskirts were under the protection of a Dutch battalion (Dutchbat) that formed part of UNPROFOR. When Srebrenica fell to the Bosnian Serb forces, the Dutchbat units in Srebrenica, on hearing that NATO air support was refused, withdrew from their observation posts into a nearby compound in Potocari where more than 5 000 refugees were also given sanctuary by Dutchbat. Many of these refugees were later killed by Bosnian Serb forces, together with others, when they were handed over by Dutchbat under circumstances that Dutchbat knew would pose a threat to their well-being.

In 2007, civil action was brought by the Mothers of Srebrenica, a Dutch NGO, on behalf of 10 women whose family members died in the genocide on the basis that both the United Nations and the Netherlands were responsible for the failure to prevent the genocide at Srebrenica. The District Court of the Hague held that the United Nations enjoyed absolute immunity³⁰⁵ and that the court therefore had no jurisdiction to hear the matter.³⁰⁶ This was upheld by the Court of Appeal³⁰⁷ as well as the Supreme Court,³⁰⁸ which held that the immunity rule is absolute and applies even in extreme cases such as the duty to prevent genocide.

This outcome left the issue of the responsibility of the Netherlands still to be decided. Consequently, the matter returned to the District Court of The Hague for a decision on the liability of the Netherlands for the loss suffered by the applicants as a result of the killing of their relatives who were under the protection of Dutchbat before they were handed over to the Bosnian Serb Army.³⁰⁹

In determining which acts performed by Dutchbat could be attributable to the state, the court made use of the *effective control* test in article 7 of the DARIO and held that effective control means *factual control* ('feitelijke zeggenschap') of the state over concrete acts of Dutchbat.³¹⁰ Whether such control was exercised must be determined by the circumstances of each case, which may also indicate the existence of *dual attribution* in the sense that the same conduct may in principle be attributable to the state as well as the United Nations.³¹¹ In support of this conclusion, the court referred to article 48 of the DARIO, which determines that where an international organisation and one or more states or other international organisations are responsible for the same internationally wrongful act, the responsibility of each state or organisation may be invoked in relation to the act.

In view of the possibility of dual attribution, the court found it unnecessary to investigate whether the United Nations also exercised effective control over the impugned conduct of Dutchbat.³¹² This made it possible for the court to avoid the immunity issue with regard to the responsibility of the United Nations.

For effective control to be established, the court declined to rely solely on the requirement that the state must have pierced the operational command and control function of the United Nations (which existed at least until the fall of Srebrenica)³¹³ by directly giving instructions to Dutchbat, or that it must independently have performed operational command responsibilities. It would suffice that factual control was exercised over specific actions, given the factual circumstances and the specific context of the incident. This would mean that conduct may be attributed to the state even where the state was in a position (was able or had the power) to *prevent* an event from occurring, but failed to act.³¹⁴

In taking this position, the District Court relied on earlier judgments by The Hague Court of Appeal in the *Nuhanović* and *Mustafić* cases. These cases were based on similar facts and concerned an application by relatives of refugees protected by Dutchbat at Potocari. After the fall of Srebrenica, the refugees in question, like so many others, were compelled to leave the compound and were subsequently killed by the Bosnian Serb Army.³¹⁵ The disputed conduct in these matters was limited to the actual removal of the refugees from the compound and the alleged failure of Dutchbat to intervene. Dealing only with the removal issue, the Court of Appeal formulated the attribution principle on the basis of the ability or power to prevent, in the context of the effective control principle in international law. In holding the state responsible for the conduct of Dutchbat, the Court of Appeal took into account that Dutchbat knew about the risks refugees could face when leaving the safety of the compound; and that at the time of the incident, The Netherlands and Dutchbat, apart from the United Nations, had actual control over the evacuation of Dutchbat and the refugees in the compound and was therefore in a position to prevent the incidents complained of. In 2013, the Supreme Court of The Netherlands confirmed the rulings of the Court of Appeal in the *Nuhanović* and *Mustafić* cases.³¹⁶

The ruling of the District Court in the *Mothers of Srebrenica* case is closely aligned with the Court of Appeals ruling in the *Nuhanović* and *Mustafić* cases. Hence, the District Court distinguished between the situation prior to the fall of Srebrenica and the situation thereafter for purposes of establishing effective control. In the period prior to the fall of Srebrenica, *operational control* over the execution of the mandate in respect of the safe areas fell within the United Nations' command and control powers and over which the state had no effective control and for which it could not be held responsible.³¹⁷ However, when Srebrenica fell into the hands of the Bosnian Serb Army and the mission to protect the safe areas became impossible, the normal situation in which a state placed at the disposal of the United Nations a contingent of troops for a peace operation under United Nations command and control changed dramatically. Henceforth, the court pointed out, a transitional period commenced during which the state assumed co-responsibility (*medezeggenschap*) for the conduct of Dutchbat in respect of the provision of humanitarian aid to the refugees and in respect of the preparation of their evacuation from Potocari.³¹⁸ For this assessment, the court relied on high level discussions between UN and government representatives shortly after the fall of Srebrenica, during which agreement was reached that Dutchbat would henceforth focus on the humanitarian task and on the preparations for the evacuation of Dutchbat itself and the refugees in the compound.³¹⁹ As a result, the state assumed *effective control* during the transition period for these actions and the conduct of Dutchbat can therefore be attributable to the state.³²⁰

Given these circumstances, it becomes debatable whether it was at all necessary to work with the effective control test for establishing attributability. The circumstances during the transitional period seem to suggest that Dutchbat acted in no capacity other than organ of the state, in which

case the responsibility of the state arises from article 4 of the DASR dealt with earlier on in this chapter, and not from article 7 of the DARIO, which was central to the court's reasoning all along. In fact, in the *Nuhanović* and *Mustafić* cases, the Supreme Court made reference to article 4 of the DASR (and article 8). However, it then refocused attention on articles 6, 7 and 48 of the DARIO, which the parties to the case have accepted as the correct approach to deciding the attributability issue in view of the fact that Dutchbat was placed at the disposal of the United Nations as part of an international peacekeeping operation – a situation for which the DARIO provisions were developed in the first place. This may be correct with regard to the situation prior to the fall of Srebrenica. As the courts in all these cases pointed out, the situation after the fall of Srebrenica changed dramatically from the ‘normal’ position when a state places troops at the disposal of an international organisation, to one where, after the fall of Srebrenica, the government of the Netherlands and Dutchbat took effective control over the evacuation of Dutchbat and the refugees. Whether at this point, Dutchbat was still placed at the disposal of the United Nations (for purposes of article 7 of the DARIO) will require closer scrutiny of the actual relationships that existed and their legal bases.

Two final matters in the *Mothers of Srebrenica* case should be pointed out. The first is the issue of wrongfulness. According to the District Court, wrongfulness in this instance consisted of a violation of the right to life guaranteed under article 6 of the 1966 International Covenant on Civil and Political Rights and article 2 of the 1950 European Convention on Human Rights as well as the international law obligation to prevent genocide.³²¹ Here, one should recall that the extraterritorial application of international human rights treaties is by no means uncontroversial. The question then is on what basis was Dutchbat under an obligation to give effect to the provisions of these instruments in Potocari. In following the *Al-Skeini* judgment³²² by the European Court of Human Rights, the District Court in *Mothers of Srebrenica* ruled that after the fall of Srebrenica, the state, acting through Dutchbat, had *effective control* over the compound, and that Dutchbat exercised authority within the compound to the almost total exclusion of control by the United Nations. Furthermore, the compound was respected and left alone by the Bosnian Serbs.³²³ Under these circumstances, the state was in a position to ensure compliance with the human rights guarantees of the above instruments in respect of the refugees who found themselves in the compound after the fall of Srebrenica.³²⁴ For this conclusion, the District Court found support in the rulings of the Supreme Court in the *Nuhanović* and *Mustafić* cases, where it was held that in exercising effective control over the compound, the state had the legal power (*rechtsmacht*) within the meaning of article 1 of the European Convention on Human Rights and article 2 of the International Covenant on Civil and Political Rights.³²⁵ Both these provisions place an obligation on states parties *inter alia* to secure to anyone *within their jurisdiction* the rights provided for in these instruments.

The second matter is causality. For the state in these circumstances to incur responsibility, there must be a causal link between the conduct of Dutchbat and the death of the refugees in question. The District Court in *Mothers of Srebrenica* held the view that there was a sufficient measure of certainty that the lives of the deceased would have been saved had Dutchbat not participated in their deportation from the compound. In this regard, the court pointed out that by remaining in the compound, the deceased would have enjoyed the protection of Dutchbat and would have been evacuated together with Dutchbat. Also taken into account was the fact that up to that point, the Bosnian Serb Army had left the compound alone and had given no indication that force would be used against Dutchbat or the refugees inside the compound.³²⁶

SUGGESTED FURTHER READING

S Chesterman, TM Franck & DM Malone *Law and Practice of the United Nations* Oxford: Oxford University Press (2008)
E de Wet ‘The international constitutional order’ 55 *International and Comparative Law Quarterly* (2006) 76

P D'Argent & N Susani 'United Nations, purposes and principles' in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* Vol X Oxford: Oxford University Press (2012) 418

J Dunoff & JP Trachtman (eds) *Ruling the World? Constitutionalism, International Law and Global Governance* Cambridge: Cambridge University Press (2009)

B Fassbender *The UN Charter as Constitution of the International Community* Leiden: Koninklijke Brill NV (2009)

W Friedmann *The Changing Structure of International Law* New York: Columbia University Press (1964)

R Kolb *An Introduction to the Law of the United Nations* Oxford: Hart Publishing (2010)

V Lowe & C Warbrick (eds) *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* London: Routledge (1994)

A Peters, G Ulfstein & J Klabbers *The Constitutionalization of International Law* Oxford: Oxford University Press (2009)

1 A Cassese *International Law* 2nd ed (2005) 48.

2 A Paulus 'Article 2' in B Simma et al (eds) *The Charter of the United Nations: A Commentary* Vol I (2012) 125. See also MN Shaw *International Law* 7th ed (2014) 876.

3 C Möllers 'Souveränität' in W Heun, M Honecker, M Morlok & J Wieland (eds) *Evangelisches Staatslexikon* (2006) 2174; H Quaritsch *Staat und Souveränität* Bd 1 (1970) 36–43; B Fassbender 'Article 2(1)' in Simma et al op cit 136. See also in general MR Fowler & JM Bunck *Law, Power and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (1995); J Dennert *Ursprung und Begriff der Souveränität* (1964).

4 See also B Fassbender 'Die Souveränität des Staates als Autonomic Rahmen der völkerrechtlichen Verfassung' in H-P Mansel et al (eds) *Festschrift für Erik Jayme* (2004) 1089 at 1090. As a corollary of statehood, even non-member states will be entitled to treatment according to their sovereign equality.

5 Cassese *International Law* op cit 53, also 51. See also Fassbender in Simma et al op cit 136; P Daillier, M Forteau & A Pellet *Droit International Public* 8th ed (2009) 472, para 278; Max Huber *Island of Palmas Arbitral Award*, reprinted in 22(4) *American Journal of International Law* (1928) 867 at 875.

6 It has correctly been noted by Daillier et al op cit 483, 484 that this provision gives recognition to a juridical concept as opposed to a political one and derives its meaning from the sovereign competencies of the state.

7 H Kelsen 'The principle of sovereign equality of states as a basis for international organization' 53(2) *Yale Law Journal* (1944) 207 at 208. See also the following statement by Judge Fernandes in the *Right of Passage over Indian Territory* ICJ Reports 1960, 6 at para 38: 'The Sovereignty of a State over any part of its territory cannot be made subordinate to the will of another State. The very essence of sovereignty is independence of an exterior will.'

8 Kelsen op cit 207; Fassbender in Simma et al op cit 144.

9 Fassbender in Simma et al op cit 140, 141; Fassbender in Mansel et al op cit 1096.

10 Fassbender in Simma et al op cit 158.

11 General Assembly Resolution 2625 (XXV) *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (24 October 1970).

12 See also JF O'Conner *Good Faith in International Law* (1991) 17 *et seq.*

13 See also M Kotzur 'Good faith (bona fides)' in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* Vol IV (2012) 508.

14 R Kolb 'Article 2(2)' in Simma et al op cit 167–73.

15 Ibid, 172.

16 For earlier, historical examples see O'Conner op cit 45 *et seq.*

17 *Conditions of Admission of a State for Membership in the United Nations (Article 4 of the Charter)* (Advisory Opinion) ICJ Reports 1948, 57 at 63.

18 See Kolb in Simma et al op cit 173.

19 ILC Draft Articles on the Law of Treaties and Commentaries (1966) *Yearbook of the International Law Commission* Vol II (1966) 211.

20 Ibid. See also chapter 3 of this book on the law of treaties.

21 Ibid, 211.

22 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) ICJ Reports 2004, 136 para 94 *et seq.*

23 Kolb in Simma et al op cit 178. See also G White 'The principle of good faith' in V Lowe & C Warbrick (eds) *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (1994) 230 at 235, 236 and 239–41; O'Conner op cit, Ch 7.

24 ICJ Reports 1960, 6 at 139 para 43.

25 Ibid, 139 para 43.

26 Ibid, 85.

- ²⁷ *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa* (Advisory Opinion) ICJ Reports 1955, 67.
- ²⁸ Ibid, 88.
- ²⁹ Ibid, 118, 119.
- ³⁰ Security Council Resolution 984 (1995) para 8.
- ³¹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Reports 1996, 226 at 264 para 102.
- ³² Ibid 263, 264 para 99. See also *North Sea Continental Shelf cases (Germany v Denmark/The Netherlands)* ICJ Reports 1969, 3.
- ³³ Applications available at www.icj-cij.org.
- ³⁴ For an earlier codification of this principle, see art 1 of the Hague Convention for the Pacific Settlement of International Disputes (1899).
- ³⁵ UN Charter, art 1(1).
- ³⁶ General Assembly Resolution 2625 (XXV) (24 October 1970), principle 2.
- ³⁷ General Assembly Resolution 37/10 (15 November 1982).
- ³⁸ For a discussion of these different means of dispute settlement, see C Tomuschat ‘Chapter VI Pacific Settlement of Disputes’ in Simma et al op cit 1076 *et seq*.
- ³⁹ UN Charter, art 37(1).
- ⁴⁰ UN Charter, art 37(2) read with art 36.
- ⁴¹ Security Council Resolution 457 (4 December 1979).
- ⁴² *Case Concerning United States Diplomatic and Consular Staff in Tehran* (Provisional Measures), ICJ General List no 64 (1979).
- ⁴³ UN Doc S/13705.
- ⁴⁴ UN Charter, art 35(1).
- ⁴⁵ UN Charter, art 35(2).
- ⁴⁶ UN Charter, art 34.
- ⁴⁷ UN Charter, art 35(3).
- ⁴⁸ UN Charter, art 24(1).
- ⁴⁹ *Certain Expenses of the United Nations* (Advisory Opinion) ICJ Reports 1962, 151 at 163.
- ⁵⁰ UN Charter, art 11(1).
- ⁵¹ UN Charter, art 11(2).
- ⁵² UN Charter, art 11(3).
- ⁵³ UN Charter, art 14.
- ⁵⁴ *Certain Expenses* case supra 164, 165.
- ⁵⁵ See also UN Charter, arts 10 and 14.
- ⁵⁶ A Randelzhofer & O Dörr ‘Article 2(4)’ in Simma et al op cit 203. See also *Armed Activities on the Territory of the Congo (DRC v Uganda)* (Merits) ICJ Reports 2005, 168 para 148; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (Merits) ICJ Reports 1986, 14 at 98, 99 paras 187, 188.
- ⁵⁷ See *Military Activities in Nicaragua* case supra, paras 187, 188; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Reports 2004, 136 at 171 para 87.
- ⁵⁸ J Crawford Brownlie’s *Principles of Public International Law* (2012) 595; Cassese *International Law* op cit 202, 203.
- ⁵⁹ C Gray *International Law and the Use of Force* 3rd ed (2008) 7.
- ⁶⁰ For more historical data, see I Brownlie *International Law and the Use of Force by States* (1963) chs 1, 2.
- ⁶¹ See also Randelzhofer & Dörr in Simma et al op cit 205; G Wilson *The United Nations and Collective Security* (2014) 20, 21.
- ⁶² Ibid, 54–7.
- ⁶³ See also Covenant of the League of Nations, arts 10 and 16.
- ⁶⁴ See also chapter 1 of this book.
- ⁶⁵ For a more comprehensive account of the membership issues in the League, see MO Hudson ‘The members of the League of Nations’ XVI *British Yearbook of International Law* (1935) 130.
- ⁶⁶ Randelzhofer & Dörr in Simma et al op cit 206; Y Dinstein *War, Aggression and Self-Defence* 4th ed (2005) 83, 84.
- ⁶⁷ For examples, see Brownlie op cit 75 *et seq*.
- ⁶⁸ See Randelzhofer & Dörr in Simma et al op cit 207.

- ⁶⁹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Reports 1996, 226 at 246 para 47.
- ⁷⁰ This requirement is closely linked to the Charter principles on the maintenance of international peace and security, which are dealt with in chapter 5 of this book.
- ⁷¹ See also *Nuclear Weapons* opinion supra at 246, 247 para 48.
- ⁷² Also Brownlie op cit 268.
- ⁷³ Randelzhofer & Dörr in Simma et al op cit 216.
- ⁷⁴ General Assembly Resolution 2625 *Friendly Relations* supra, principle 1.
- ⁷⁵ On this classic unlawful invasion, see inter alia AM Weisburd *Use of Force: The Practice of States Since World War II* (1997) 55.
- ⁷⁶ See also B van Schaack ‘The killing of Osama Bin Laden and Anwar Al-Aulaqi: Uncharted legal territory’ 14 *Yearbook of International Humanitarian Law* (2011) 255 at 268.
- ⁷⁷ See also A Abass *Complete International Law: Text, Cases and Materials* 2nd ed (2014) 337–8; O Corten *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2010) 50–52.
- ⁷⁸ General Assembly Resolution 2625 *Friendly Relations* supra.
- ⁷⁹ List of states available at https://www.law.georgetown.edu/library/research/guides/article_98.cfm, accessed on 19 June 2015.
- ⁸⁰ J Fernandez & X Pacreau (eds) *Statut de Rome de La Cour Pénale Internationale* Vol II (2012) 1920, 1921.
- ⁸¹ Note that in terms of art 52 of the VCLT, a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the UN Charter. Here, there is no mention of other forms of coercion.
- ⁸² JR Crawford ‘State responsibility’ in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* Vol IX (2012) 517.
- ⁸³ For this and earlier history, see J Crawford *State Responsibility: The General Part* (2013) 3–44.
- ⁸⁴ For text, see General Assembly Resolution 56/83 (28 January 2002) Annex.
- ⁸⁵ Crawford *State Responsibility: The General Part* op cit 49.
- ⁸⁶ Ibid, 61 n 55 for criticism of the term ‘objective’ responsibility. Crawford points out that there is no such thing as ‘objective’ or ‘subjective’ responsibility, ‘only responsibility properly so called’, and the term should be avoided.
- ⁸⁷ See for instance *Caire Claim (France v Mexico)* 5 RIAA 516 (1929).
- ⁸⁸ See *Corfu Channel (UK v Albania)* (Merits) ICJ Reports 1949, 4. Also Crawford *Brownlie’s Principles* op cit 556–9.
- ⁸⁹ Crawford *State Responsibility: The General Part* op cit 61.
- ⁹⁰ DASR, art 3.
- ⁹¹ Ibid, art 2.
- ⁹² On countermeasures, see chapter 5 of this book.
- ⁹³ For an extensive discussion of these grounds, see Crawford *State Responsibility: The General Part* op cit ch 9.
- ⁹⁴ DASR, art 25(1).
- ⁹⁵ Ibid, art 25(2).
- ⁹⁶ *Gabčíkovo-Nagymoros Project (Hungary v Slovakia)* ICJ Reports 1997, 40–1 paras 51–2. See also *Israel Wall* case supra 194–5.
- ⁹⁷ See also the arbitral case of *Libyan Arab Foreign Investment Company (LAFICO) v Burundi* Vol 96 ILR 282 at 318–19 para 56.
- ⁹⁸ See chapter 3 of this book.
- ⁹⁹ DASR, art 26. See also Crawford *State Responsibility: The General Part* op cit 317.
- ¹⁰⁰ See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Counter-claims) ICJ Reports 1997, 243 at 258, para 35.
- ¹⁰¹ See also the following sentence in the commentary on the article in J Crawford *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002) 82: ‘For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State’.
- ¹⁰² See also DASR, art 4(2): ‘An organ includes any person or entity that has that status in accordance with the internal law of the State’. See also s 239 of the South African Constitution, 1996.
- ¹⁰³ See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) ICJ Reports 1999, 62 at 87.
- ¹⁰⁴ *US v Mexico* 4 RIAA 110 (1926).
- ¹⁰⁵ See also *Caire Claim (France v Mexico)* 5 RIAA 516 (1929).

- ¹⁰⁶ *United Mexican States v USA* 4 RIAA 173 (1927).
- ¹⁰⁷ *Corfu Channel (United Kingdom v Albania)* (Merits) ICJ Reports 1949, 4.
- ¹⁰⁸ *US Diplomatic and Consular Staff in Tehran (US v Iran)* ICJ Reports 1980, 3 ('Tehran Hostages' case).
- ¹⁰⁹ See Vienna Convention on Diplomatic Relations (1961) arts 22, 24–27, 29; Vienna Convention on Consular Relations (1963) arts 5, 36.
- ¹¹⁰ *Tehran Hostages* supra at para 67.
- ¹¹¹ *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* ICJ Reports 2005, 168.
- ¹¹² *Ibid.*, 242 para 213.
- ¹¹³ *Ibid.*, paras 213, 214.
- ¹¹⁴ In this latter instance, the court relied on art 3 of the 1907 Fourth Hague Convention Respecting the Laws and Customs of War on Land and on art 91 of Additional Protocol I to the 1949 Geneva Conventions.
- ¹¹⁵ DASR, art 6. For commentary, see Crawford *ILC's Articles* op cit 103.
- ¹¹⁶ Crawford *ILC's Articles* op cit 100.
- ¹¹⁷ *Ibid.*, 113.
- ¹¹⁸ See C Lehnardt 'Private military companies and state responsibility' in S Chesterman & C Lehnardt *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (2007) 139.
- ¹¹⁹ See also LA Dickinson 'Contract as a tool for regulating private military companies' in Chesterman & Lehnardt op cit 217.
- ¹²⁰ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports 2007, 43 at 208 para 400.
- ¹²¹ See also Crawford *ILC's Articles* op cit 113 para 8.
- ¹²² *Military Activities in Nicaragua* case supra at 58–9, 61–2 para 108.
- ¹²³ *Ibid.*, 64 para 115.
- ¹²⁴ *Ibid.*
- ¹²⁵ *Ibid.*, 61, 62 paras 108, 109.
- ¹²⁶ *Prosecutor v Tadić*, Appeals Chamber Case IT-94-1-A (15 July 1999) para 120.
- ¹²⁷ *Ibid.*, para 122.
- ¹²⁸ *Ibid.*, para 156.
- ¹²⁹ *Armed Activities (DRC v Uganda)* case supra at 226 para 160.
- ¹³⁰ *Bosnia Genocide* case supra 43.
- ¹³¹ *Ibid.*, 210 para 407.
- ¹³² *Ibid.*, 209 para 401.
- ¹³³ *Ibid.*, para 403. See also the separate opinion of Judge Shahabuddeen in *Tadić* supra, paras 17–18.
- ¹³⁴ *Bosnia Genocide* supra, para 406.
- ¹³⁵ A Cassese 'The Nicaragua and Tadić tests revisited in light of the ICJ judgment on genocide in Bosnia' 18(4) *European Journal of International Law* (2007) 649 at 653.
- ¹³⁶ *Ibid.*, 654.
- ¹³⁷ *Tadić* case supra, paras 117–20; 131 and 137.
- ¹³⁸ Cassese 'The Nicaragua and Tadić Tests Revisited' op cit 660–1.
- ¹³⁹ *Ibid.*, 666.
- ¹⁴⁰ Crawford *State Responsibility: The General Part* op cit 158.
- ¹⁴¹ KN Trapp *State Responsibility for International Terrorism* (2011) 66–75.
- ¹⁴² Crawford *State Responsibility: The General Part* op cit 159–61.
- ¹⁴³ Crawford *ILC's Articles* op cit 116, 117.
- ¹⁴⁴ *United States v Mexico* 4 RIAA 358 (1928).
- ¹⁴⁵ Crawford *ILC's Articles* op cit 117 para 5.
- ¹⁴⁶ However, since article 11 speaks of 'conduct' in an unqualified sense, attributability may also follow on the acceptance or adoption of the conduct of states or former states or territories. See also *Lighthouses Arbitration between France and Greece* 23 ILR 81 (1956).
- ¹⁴⁷ *Tehran Hostages* case supra 35 para 74.
- ¹⁴⁸ DASR, art 29.
- ¹⁴⁹ DASR, art 30. See also *LaGrand (Germany v United States)* ICJ Reports 2001, 466.
- ¹⁵⁰ Crawford *ILC's Articles* op cit 197 para 5.
- ¹⁵¹ *Factory at Chorzów* (Merits) PCIJ Series A No 17, 47 (1928).
- ¹⁵² DASR, art 31(2). For a more extensive account of the kinds of damage that may be considered, see Crawford *ILC's Articles* op cit 220 para 7 *et seq.*

¹⁵³ See inter alia *Lusitania Claims (United States v Germany)* RIAA Vol VII, 40 (1923); *Gutiérrez-Soler v Colombia* IACtHR Series C No 132 para 82 (2005); *Cyprus v Turkey*, Application No 25781/94, Grand Chamber, European Court of Human Rights (12 May 2014).

¹⁵⁴ *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation Owed by the DRC to Guinea) ICJ Reports 2012, 324 at 334 para 21.

¹⁵⁵ Ibid, 335 para 24; *Al-Jedda v United Kingdom*, Application No 27021/08 (7 July 2011) para 114; *Varnava and Others v Turkey* Applications Nos 16064/90 – 160666/90, 16068/90, 16069/90 – 16073/90 (18 September 2009) para 224.

¹⁵⁶ For a more extensive account, see Crawford *ILC's Articles* op cit 235–9.

¹⁵⁷ DASR, art 37(1).

¹⁵⁸ Ibid, art 37(2).

¹⁵⁹ Ibid, art 37(3).

¹⁶⁰ See also *González et al v Mexico* IACtHR (Series C) No 205 (2009) paras 468 *et seq.*

¹⁶¹ DASR, art 39.

¹⁶² See chapter 3 of this book.

¹⁶³ DASR, art 40(2).

¹⁶⁴ Ibid, art 41.

¹⁶⁵ *Barcelona Traction, Light and Power Company, Ltd* (2nd Phase: Merits) ICJ Reports 1970, 3 at 32 para 33.

¹⁶⁶ See also *East Timor (Portugal v Australia)* ICJ Reports 1995, 90, 102 para 29; *Israel Wall* case *supra*.

¹⁶⁷ *Barcelona Traction* *supra*, paras 32–3.

¹⁶⁸ See also chapter 3 of this book.

¹⁶⁹ ILC *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.702 (18 July 2006) para 33.

¹⁷⁰ See also Crawford *Brownlie's Principles* op cit 595.

¹⁷¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) ICJ Reports 1971, 16 at 56 para 126.

¹⁷² General Assembly Resolution 2625 (XXV) 1st principle para 10.

¹⁷³ *Military Activities in Nicaragua* case *supra*, paras 188–90.

¹⁷⁴ Security Council Resolution 662 (1990).

¹⁷⁵ *Israel Wall* *supra* at 199–200 paras 154–8.

¹⁷⁶ Ibid, paras 159, 160.

¹⁷⁷ See for instance, Crawford *ILC's Articles* op cit 254–5.

¹⁷⁸ Ibid, 256 para 4.

¹⁷⁹ Ibid, para 12.

¹⁸⁰ Ibid, para 13.

¹⁸¹ See International Law Commission *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001) UN Doc A/56/10 art 42 and commentary.

¹⁸² DASR, arts 46, 47.

¹⁸³ Ibid, art 48(1)(a).

¹⁸⁴ Ibid, art 48(1)(b).

¹⁸⁵ Crawford *ILC's Articles* op cit 277 para 7.

¹⁸⁶ Crawford *State Responsibility: The General Part* op cit 367. For an extensive account of developments in support of this view and relevant case law, see also J Crawford 'Responsibility for breaches of communitarian norms: An appraisal of article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts' in U Fastenrath et al (eds) *From Bilateralism to Community Interests: Essays in Honour of Judge Bruno Simma* (2011) 224.

¹⁸⁷ DASR, art 43.

¹⁸⁸ Ibid, art 45.

¹⁸⁹ *Barcelona Traction* *supra* 32.

¹⁹⁰ *South West Africa Cases (Ethiopia and Liberia v South Africa)* (Preliminary Objections) ICJ Reports 1962, 318.

¹⁹¹ *South West Africa Cases (Ethiopia and Liberia v South Africa)* (2nd Phase: Merits) ICJ Reports 1966, 6.

¹⁹² For a commendable study on the protracted dispute between South Africa and the United Nations on the issue of SWA/ Namibia, see J Dugard *The South West Africa/Namibia Dispute* (1973).

¹⁹³ *South West Africa Cases* (Merits) *supra*, paras 14, 16.

- ¹⁹⁴ Ibid, paras 23, 24.
- ¹⁹⁵ Ibid, para 33.
- ¹⁹⁶ *Jurisdictional Immunities of the State (Germany v Italy)* (Application by the Hellenic Republic to Intervene) Order of 4 July 2011, ICJ Reports 2011, 494 at 501 paras 21, 22. See also *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria)* (Application by Equatorial Guinea to Intervene) Order of 21 October 1999, ICJ Reports 1999, 1029; *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)* (Application by Nicaragua to Intervene) Judgment of 13 September 1990, ICJ Reports 1990, 92.
- ¹⁹⁷ *Monetary Gold Removed from Rome in 1943 (Italy v France, UK and US)* ICJ Reports 1954, 19, 32–3; *Case Concerning East Timor (Portugal v Australia)* ICJ Reports 1995, 90 at 102, 104 paras 28, 33; *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) ICJ Reports 1992, 240 at 259–62 paras 50–5.
- ¹⁹⁸ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* ICJ Reports 2012, 422.
- ¹⁹⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), art 7.
- ²⁰⁰ Ibid, 448–9 para 65.
- ²⁰¹ Ibid, para 66.
- ²⁰² Ibid, para 68.
- ²⁰³ Ibid.
- ²⁰⁴ Ibid.
- ²⁰⁵ Ibid, paras 68, 69.
- ²⁰⁶ E de Wet ‘*Jus cogens* and obligations *erga omnes*’ in D Shelton (ed) *The Oxford Handbook of International Human Rights Law* (2013) 541 at 557, 558.
- ²⁰⁷ See GI Hernández ‘A reluctant guardian: The International Court of Justice and the concept of “international community”’ in *British Yearbook of International Law* (2013) 13 at 49.
- ²⁰⁸ See for instance contributions in C Warbrick & S Tierney (eds) *Towards an ‘International Legal Community’? The Sovereignty of States and the Sovereignty of International Law* (2006); D Kritsiotis ‘Imagining the international community’ 13(4) *European Journal of International Law* (2002) 961; G Abi-Saab ‘Wither the international community’ 9 *European Journal of International Law* (1998) 248; AL Paulus *Die internationale Gemeinschaft im Völkerrecht* (2001); H Mosler *The International Society as a Legal Community* (1980); E de Wet ‘The international constitutional order’ 55(1) *International and Comparative Law Quarterly* (2006) 51; P-M Dupuy et al (eds) *Common Values in International Law: Essays in Honour of Christian Tomuschat* (2006); B Simma ‘From bilateralism to community interests in international law’ 250 *Recueil des Cours* (1994) 217.
- ²⁰⁹ See Hernández op cit 13 *et seq* and references there. See also J Crawford ‘Responsibility for breaches of communitarian norms: An appraisal of article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts’ in U Fastenrath et al (eds) *From Bilateralism to Community Interests: Essays in Honour of Judge Bruno Simma* (2011) 224 at 226.
- ²¹⁰ On these notions, see chapter 3 of this book.
- ²¹¹ See *Armed Activities (DRC v Uganda)* op cit para 64.
- ²¹² See also Hernández op cit 29 *et seq*; Crawford in Fastenrath et al (eds) op cit 228 *et seq*.
- ²¹³ Gleider I. Hernández. A Reluctant Guardian: The International Court of Justice and the Concept of ‘International Community’. *British Yearbook of International Law* (2013) doi: 10.1093/bybil/brt003 © Oxford University Press. Reprinted by permission of Oxford University Press and the author.
- ²¹⁴ Ibid, 26.
- ²¹⁵ On the treatment of aliens, see chapter 7 of this book.
- ²¹⁶ Nationality or citizenship is determined by national law and is usually determined by birth, descent, or naturalisation. For South African law, see the South African Citizenship Act 88 of 1995.
- ²¹⁷ J Dugard *International Law: A South African Perspective* (2011) 281. Note that the classical notion that the state, in taking up the case of one of its nationals, is asserting its own right (since an injury to the national is an injury to the state) is based on a fiction and cannot be maintained. The fact that the injured national must first exhaust all local remedies is but one factor militating against this notion. See also ibid, 281, 282.
- ²¹⁸ See GAOR 61st session, Suppl No 10 (A/61/10) 2006.
- ²¹⁹ 1924 PCIJ Series A No 2, 12.
- ²²⁰ *Interhandel Case (Switzerland v United States of America)* (Preliminary Objections) ICJ Reports 1959, 6 at 27. See also CF Amerasinghe *Local Remedies in International Law* 2nd ed (2004); Dugard *International Law* op cit 295–8; JR Crawford & TD Grant ‘Exhaustion of local remedies’ in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* Vol VI (2012) 895.
- ²²¹ See also Crawford *State Responsibility: The General Part* op cit 582, 583.

²²² See also DASR, art 44.

²²³ See DADP, art 4: ‘For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law’.

²²⁴ Ibid, art 15.

²²⁵ *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Preliminary Objections) ICJ Reports 2007, 582 at 600 para 44.

²²⁶ *Nottebohm case (Liechtenstein v Guatemala)* ICJ Reports 1955, 4.

²²⁷ Ibid, 24.

²²⁸ See ibid, 25.

²²⁹ Ibid, 26.

²³⁰ ILC Report of the Fifty-Eighth Session (2006) A/61/10, Chapter IV 33.

²³¹ See also Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930), art 3.

²³² See for instance *Flegenheimer* claim, Italian–United States Conciliation Commission 15 ILR 91 (1958); *Canevaro Case: Judicial Decisions Involving Questions of International Law (Italy v Peru)* 6(3) *American Journal of International Law* (1912) 746; Mergé Claim Italian–United States Conciliation Commission 22 ILR 443 (1955); *Eshphahanian v Bank Tejarat* 2 Iran-US CTR 157 (1983); Iran–US Claims Tribunal Case no 32-A/18-FT, 5 Iran-US CTR 251 (1984). See also commentary to art 7 of the DADP supra at 44, 45.

²³³ In the case of refugees, this form of protection is particularly relevant because a refugee is usually a person who cannot count on the protection of the state of nationality. Refugees and refugee status are dealt with in chapter 9 of this book.

²³⁴ DADP, art 8(3).

²³⁵ *Barcelona Traction* supra, paras 78–9.

²³⁶ Dugard *International Law* op cit 291.

²³⁷ See also commentary to art 19 of the DADP supra 95.

²³⁸ [2002] EWCA Civ 1598.

²³⁹ It was, for instance, not in dispute that the British authorities had various communications with their US counterparts on the detention of British citizens in Guantanamo Bay and also succeeded in obtaining access to the detainees including the applicant in the case.

²⁴⁰ An established practice would create a legitimate expectation that diplomatic protection will be provided and a deviation from the practice, without good reason, would be reviewable by the courts.

²⁴¹ *Abbasi* supra, para 104.

²⁴² 2005 (4) SA 235 (CC).

²⁴³ Ibid, para 69.

²⁴⁴ Ibid, para 80.

²⁴⁵ Ibid, paras 146 *et seq.*

²⁴⁶ Ibid, para 210. See also para 188.

²⁴⁷ Ibid, para 237.

²⁴⁸ Ibid, para 238.

²⁴⁹ Ibid, para 271. For further analyses and views on the *Kaunda* case, see ME Olivier ‘Diplomatic protection – right or privilege?’ 30 *South African Yearbook of International Law* (2005) 238; S Pete & M du Plessis ‘South African nationals abroad and their right to diplomatic protection: Lessons from the *Mercenaries Case*’ 22(3) *South African Journal on Human Rights* (2006) 439; D Tladi & P Dlagnekova ‘The Act of State Doctrine in South Africa: Has Kaunda settled a vexing question?’ 22 *SA Public Law* (2007) 444. See also the judgment in *Van Zyl and Others v Government of the RSA and Others* 2005 (11) BCLR 1106 (T), where a claim to diplomatic protection was rejected on the basis that the intervention sought was not for the protection of an international human right, but against expropriation of property. Dismissing an appeal, the Supreme Court of Appeal found that there was no obligation to exercise diplomatic protection because no international wrong was committed and the applicants had failed first to exhaust local remedies. The *Kaunda* judgment was nevertheless followed in finding that, under South African law, citizens have no right to diplomatic protection but merely a right to request government to consider diplomatic protection and that government has a duty to do so rationally (*Van Zyl v Government of the RSA* 2008 (3) SA 295 (SCA) paras 76, 81; 87–92).

²⁵⁰ 2009 (2) SA 526 (T).

²⁵¹ Ibid, para 91.

²⁵² Ibid, para 141. See also paras 137–40.

- 253 Ibid, para 161.
- 254 *Von Abo v Government of the Republic of South Africa and Others* 2010 (3) SA 269 (GNP).
- 255 Ibid, para 27. See also para 28.
- 256 Ibid, para 56.
- 257 Ibid, para 68.
- 258 *Government of the Republic of South Africa and Others v Von Abo* 2011 (5) SA 262 (SCA).
- 259 Ibid, para 31.
- 260 Ibid.
- 261 Ibid, para 33.
- 262 Ibid, paras 26, 27.
- 263 Ibid, para 29.
- 264 Ibid, para 23. See also D Tladi ‘The right to diplomatic protection, The *Von Abo* decision, and one big can of worms: Eroding the clarity of *Kaunda*’ 20(1) *Stellenbosch Law Review* (2009) 14 at 22.
- 265 *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA).
- 266 Ibid, para 52.
- 267 See also *Kaunda* supra, para 144.
- 268 *Von Abo* SCA supra, para 1.
- 269 Ibid, para 39.
- 270 *Kaunda* supra, para 69.
- 271 Ibid, paras 78–80.
- 272 Tladi ‘The right to diplomatic protection’ op cit 25.
- 273 *Barcelona Traction*, supra.
- 274 Ibid, para 71.
- 275 Ibid, para 66.
- 276 See *Crawford State Responsibility: The General Part* op cit 578.
- 277 *Legality of the Use by State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) ICJ Reports 1996, 66 at 78 para 25.
- 278 See *Yearbook of the International Law Commission* (1956) Vol II, 176, citing FV Garcia-Amador ‘State responsibility in the light of the new trends in international law’ 49 *American Journal of International Law* (1955) 339–46.
- 279 UN Doc A/66/10 (2011); *Yearbook of the International Law Commission* (2011) Vol II Part II. See also J D’Aspremont ‘The articles on the responsibility of international organisations: Magnifying the fissures in the law of international responsibility’ 9(1) *International Organizations Law Review* (2012) 15; CF Amerasinghe ‘Comments on the ILC’s draft articles on the responsibility of international organisations’ 9 *International Organizations Law Review* (2012) 29.
- 280 M Möldner ‘Responsibility of international organisations’ in 16 *Max Planck Yearbook of United Nations Law* (2012) 281 at 288.
- 281 See also *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) ICJ Reports 1949, 174.
- 282 Ibid, 179.
- 283 Ibid, 180.
- 284 Cassese *International Law* op cit 138–40.
- 285 *Certain Expenses of the United Nations* (Advisory Opinion) ICJ Reports 1962, 151 at 168. See also DARIO, art 8.
- 286 See *Prosecutor v Dragan Nikolic*, ICTY Trial Chamber II, Judgment (18 December 2003) Case No IT-94-2-S.
- 287 [2007] ECtHR, applications 71412/01 & 78166/01.
- 288 United Nations Interim Administration Mission in Kosovo.
- 289 Kosovo Force.
- 290 *Behrami; Saramati* supra, paras 142–3.
- 291 Ibid, paras 139–41.
- 292 See also A Sari ‘Jurisdiction and international responsibility in peace support operations; The *Behrami* and *Saramati* cases’ 8(1) *Human Rights Law Review* (2008) 151; KM Larsen ‘Attribution of conduct in peace operations: The ultimate authority and control test’ 19(3) *European Journal of International Law* (2008) 509; M Milanović & T Papić ‘As bad as it gets: The European Court of Human Rights’ *Behrami* and *Saramati* decisions and general international law’ 58(2) *International and Comparative Law Quarterly* (2009) 267.

- ²⁹³ [2008] 1 AC 332.
- ²⁹⁴ [2005] EWHC 1809 (Admin) para 112.
- ²⁹⁵ This provision determines that in the event of a conflict between the obligations of member states under the UN Charter and their obligations under any other international agreement, the obligations under the Charter will prevail.
- ²⁹⁶ [2007] QB 621, 650.
- ²⁹⁷ See Security Council Resolution 1511 (2003) para 13 and Security Council Resolution 1546 (2004) para 9.
- ²⁹⁸ Lord Rodger correctly pointed out that there was little difference between the establishment by the UN of KFOR in Kosovo and the establishment of the multinational force in Iraq, and held, on the basis of *Behrami* and *Saramati* that the conduct of the British forces is attributable to the UN. However, the fact of the matter is that KFOR was under no more UN control than the multinational force in Iraq. If the effective control test is to be applied, as it should, NATO contingents were in control of operational matters in Kosovo, and in Iraq, US and British command structures. See also M Milanović ‘*Al-Skeini* and *Al-Jedda* in Strasbourg: Critical review of international jursprudence’ 23(1) *European Journal of International Law* (2012) 121 at 135.
- ²⁹⁹ *Al-Jedda v Secretary of State for Defence* [2008] *supra*, para 39.
- ³⁰⁰ *Al-Jedda v United Kingdom*, Appl No 27021/08, 7 July 2011.
- ³⁰¹ *Ibid*, para 84.
- ³⁰² Security Council Resolution 819 (1993) para 1.
- ³⁰³ Security Council Resolution 836 (1993) para 5.
- ³⁰⁴ See also *Prosecutor v Radovan Karadic and Ratko Mladic* IT-95 ‘Srebrenica’ (16 November 1995) and the UN enquiry into the matter, UN Doc A/54/549 (15 November 1999).
- ³⁰⁵ See UN Charter, art 105; Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations (1947).
- ³⁰⁶ Case no 295247/HA ZA 07-2973 (10 July 2008).
- ³⁰⁷ Case no 200.022.151/01 (30 March 2010).
- ³⁰⁸ Case no 10/04437 (13 April 2012).
- ³⁰⁹ Case no C/09/295247/HA 07-2973 (16 July 2014).
- ³¹⁰ *Ibid*, paras 4.32 and 4.34. Unless otherwise indicated, references are to the Dutch text of the judgment, which is the only official text. The judgment is accessible at www.rechtspraak.nl (visited on 1 October 2014) under *Moeders van Srebrenica tegen de Staat* [*Mothers of Srebrenica*] or under the following reference number: ECLI: NL: RBDHA: 2014: 8562.
- ³¹¹ *Ibid*, para 4.34.
- ³¹² *Ibid*, para 4.45.
- ³¹³ See *ibid*, paras 4.36–4.43.
- ³¹⁴ *Ibid*, para 4.46. See also KT Dannenbaum ‘Translating the standard of effective control into a system of effective accountability: How liability should be apportioned for violations of human rights by member state troop contingents serving as United Nations’ peacekeepers’ 51(1) *Harvard International Law Journal* (2010) 113.
- ³¹⁵ *Hasan Nuhanović v The Netherlands* LJN: BR 5388 (5 July 2011); *Mustafić v The Netherlands* LJN: BR 5386 (5 July 2011). See also A Nollkaemper ‘Dual attribution: Liability of the Netherlands for conduct of Dutchbat in Srebrenica’ 9(5) *Journal of International Criminal Justice* (2011) 1143.
- ³¹⁶ Case nos ECLI: NL: HR: 2013: BZ 9225 and ECLI: NL: HR: 2013: BZ 9228 (6 September 2013).
- ³¹⁷ *Mothers of Srebrenica* *supra*, paras 4.36–4.79.
- ³¹⁸ *Ibid*, para 4.80.
- ³¹⁹ *Ibid*, paras 4.83–4.85.
- ³²⁰ *Ibid* para 4.87.
- ³²¹ *Ibid* para 4.329.
- ³²² *Al-Skeini v United Kingdom*, Appl No 55721/07 (7 July 2011).
- ³²³ *Mothers of Srebrenica* *supra*, para 4.160.
- ³²⁴ *Ibid*, para 4.161.
- ³²⁵ *Nuhanović* case *supra*, paras 3.15.2–3.17.3; *Mustafić* case *supra*, paras 3.17.1 – 3.17.3.
- ³²⁶ *Mothers of Srebrenica* *supra*, paras 4.330–4.331.

Chapter 5

Maintaining international peace and security: the enforcement of international law

HENNIE STRYDOM AND LAURENCE JUMA

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5.1 Introduction

It remains a peculiar feature of the international legal order that the same entities responsible for the making of international law – namely, states – are also responsible for its enforcement. This feature derives from the fact that states co-exist as sovereign equals in an international legal order and accept the legal obligations of that order by consenting to it either by treaty or by the formation of customary international law. Thus, there is no higher authority with the power to make and enforce international law. For states to co-exist in an orderly manner, disputes between them as well as breaches of international law must be either settled or remedied, or anarchy will prevail.

This chapter explains the different means available to states to enforce international law and to ensure compliance by states with their international legal obligations. The measures that states are allowed to take in this regard, individually or collectively, are restricted by the prescriptions of the UN Charter, which favour peaceful measures over the use of armed force. The latter is permitted only under strict conditions. However, divided opinions over the interpretation of the relevant Charter provisions means that enforcement action involving the use of force, in particular, remains one of the most controversial areas in international law, and all the more so as a result of international events after the end of the Cold War.

The range of dispute settlement and enforcement measures covered in this chapter follows conventional wisdom. First are the peaceful options, which, broadly speaking, fall into two categories – namely, diplomatic means of settlement (negotiation, mediation, conciliation and inquiry) and judicial means of settlement (arbitration (to a certain extent) and legal settlement through the International Court of Justice). Then non-forcible measures (countermeasures and sanctions) are discussed and, lastly, the use of force is considered.

5.2 Peaceful settlement of disputes

The idea that disputes between states should be settled by peaceful means rather than by the use of force has occupied a special place in international law developments since World War I, and is currently an integral part of the UN Charter's prohibition on the use of force.¹ Article 2(3) places an obligation on UN member states to 'settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. The prohibition on the use of force in article 2(4) of the UN Charter² finds its rationale in the notion that if states use alternative dispute resolution, they will be less inclined to resort to war. This is further enhanced by the article 33 obligation to seek first a solution to a dispute by peaceful means. Although article 33 of the UN Charter refers to disputes that are 'likely to endanger the maintenance of international peace and security', the 1982 Manila Declaration on the Peaceful Settlement of Disputes³ reaffirmed the 'need to exert utmost efforts in order to settle any conflicts and disputes between States exclusively by peaceful means and to avoid any military action and hostilities ...'.⁴ These sentiments are reiterated in operative paragraph 2 of the Declaration and constitute a further realisation of the principles espoused in the 1970 Friendly Relations Resolution of the UN General Assembly.⁵

According to the Manila Declaration, states 'shall seek in good faith and in a spirit of cooperation' an early and equitable settlement of their disputes by the peaceful means of their

choice,⁶ which shall be agreed upon in accordance with the circumstances and the nature of the dispute between them.⁷ It is clear from this provision and from article 33 of the UN Charter that the means of dispute settlement is left to the discretion of the disputing parties and that the options are not exhaustive. Moreover, the options are not presented in any hierarchical form and states are free to use more than one method of peaceful settlement. This neither removes the power of the Security Council to direct parties to use any particular method to resolve disputes, nor absolves treaty parties from complying with the terms of a treaty to solve a dispute relating to the interpretation or application of the treaty.

Before considering the methodologies of dispute settlement, it must be determined whether a dispute exists, since not every disagreement between states will automatically constitute a dispute. Instructive in this regard is the ruling in the *Mavrommatis Palestine Concessions* case, in which the Permanent Court of International Justice held the view that a dispute is ‘a disagreement on a point of law, a conflict of legal views or interests between two persons’.⁸ Thus, when a disagreement becomes a dispute between states in this sense, its resolution must be attempted in a manner that respects the purposes and principles of the UN Charter.

Some of the methods used are now considered.

5.2.1 Negotiation

This form of dispute settlement is the most widely used and is often the only means employed, ‘not just because it is normally the first to be tried and is often successful, but also because its advantages may appear so great as to rule out other methods, even where the chances of a negotiated settlement are slight’.⁹ Negotiation as a form of dispute settlement is especially attractive because the settlement remains within the control of the parties and they can approach the matter without being constrained by any predetermined or uniform procedural rules within which the dispute must be settled. The parties control the pace, the methods and the nature of their interaction.

However, it is important to note that when parties enter into negotiations they must do so with the objective of ‘arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement’.¹⁰ This observation by the ICJ implies two things: that the negotiations must be entered into and performed in good faith and that parties must meaningfully engage with the process. The good faith principle is considered basic to the creation and performance of all international obligations and has been discussed more extensively in chapter 4 of this book. As for meaningful engagement, the ICJ in the *Georgia* case indicated that negotiations must mean much more than ‘protests and disputations’, and that there must be ‘a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute’.¹¹ This does not mean that the negotiations must necessarily lead to a settlement. In the *Railway Traffic* advisory opinion, the PCIJ made it clear that although international law may require parties to negotiate with the aim of reaching an agreement, ‘an obligation to negotiate does not imply an obligation to reach an agreement’.¹²

It is perfectly permissible for negotiations to take place alongside other forms of dispute settlement. For instance, in the *Aegean Sea Continental Shelf* case,¹³ the ICJ indicated that the fact that negotiations were taking place did not prevent the court from exercising its jurisdiction over the matter, and vice versa. A similar position was taken by the ICJ in the *Israel Wall* case.¹⁴

5.2.2 Mediation

Sometimes direct negotiations between parties may not be possible or helpful, such as when disputes are deep-seated or protracted, and the parties have adopted negative attitudes towards one another. In such situations, mediation provides an alternative method of dispute resolution through the intervention, with the consent of the disputing parties, of a third party (the mediator). The

mediator takes an active role in solving the dispute and is expected to introduce fresh ideas and to interpret and convey each party's proposals to the other. In the end, the success of mediation will depend on whether the mediator can devise or promote a solution that both parties are prepared to accept.¹⁵

The term 'mediation' is often used interchangeably with 'good offices', which simply means that the services of some entity or person are placed at the disposal of the disputing parties with a view to solving the dispute. For instance, the good offices of the UN Secretary-General may be called upon to solve a dispute between states and this may coincide with a request for mediation. For example, in 1982, Argentina and the UK were prepared to accept good offices from the Secretary-General and mediation from the United States in a hostile dispute over the Falkland Islands.¹⁶

In article 2 of the 1899 Convention for the Pacific Settlement of Disputes, mediation and good offices were also lumped together. It states:

In case of serious disagreement or conflict, before an appeal to arms, the Signatory Powers agree to have recourse ... to good offices or mediation of one or more friendly Powers.

Article 3 determines further that, independently of the recourse in article 2, the signatories should on their own initiative recommend that one or more powers, not linked to the conflict, offer their good offices or mediation to the states at variance. The role and function of the mediator is then spelled out in article 4 as 'reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the parties ...'. This provision makes it clear that the mediator plays the role of facilitator and cannot impose results on the parties.

5.2.3 Conciliation

Although similar in many respects to inquiry and mediation, conciliation relies on an institution (a commission) to undertake the task of assisting parties to resolve their dispute. Conciliators do more than just open avenues of communication or present parties with options for resolving their dispute. They also investigate the causes of the dispute. Conciliation may be viewed as a formalised form of mediation, which is why conciliation is often undertaken by commissions set up for the purpose. Article 1 of the Regulations on the Procedure of International Conciliation¹⁷ defines it as:

[a] method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either in a permanent or ad hoc basis to deal with a dispute proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the Parties with a view to its settlement, such aid as they may have requested.

The Conciliation Commission so envisaged may be an institution comprising many members or simply one individual appointed by the parties. When the East African Community broke up in 1977, the three member states (Kenya, Uganda and Tanzania) appointed a Swiss national, Dr Victor Umbricht, to assist in the distribution of the assets.¹⁸ His work involved investigating the whereabouts of the assets as well as mediating the differences.

Conciliation may be decided upon by states through a bilateral arrangement that is encoded in a treaty. The first recorded treaty to institutionalise conciliation was the 1920 bilateral arrangement between Sweden and Chile. It was also institutionalised in the Covenant of the League of Nations in 1922.¹⁹ The General Act of Arbitration (Pacific Settlement of International Disputes)²⁰ of 1928 was to make conciliation compulsory unless the parties had elected to go before the PCIJ. Since then, a number of treaties have embraced it. One account suggests that by 1940 well over 200 conciliation agreements had been concluded.²¹ Since World War II, a number of key treaties have provided for the establishment of conciliation commissions.²²

The treaties that establish conciliation commissions usually state what the precise role of the commission is going to be. For example, article 5 of the 1925 treaty of conciliation between Italy and Switzerland states that the task of the commission was to ‘further the settlement of disputes by an impartial and conscientious examination of the facts and by formulating proposals with a view to settling the case’. Secondly, conciliation commissions do not have to apply the rule of law but nothing prevents them from doing so. In *Conciliation Commission on the Continental Shelf between Iceland and Norway in the Area between Greenland and Jan Mayen*,²³ the Conciliation Commission observed that its work was not similar to that of a court of law and that its function was merely to ‘make recommendations to the two governments which in the unanimous opinion of the Commission will lead to acceptable and equitable solution of the problems involved’. Thirdly, the outcome of the conciliation is not binding on parties. This makes conciliation much more similar to mediation than it is to arbitration. The Commission merely presents terms and findings that are ‘susceptible’ of being accepted by the parties.

5.2.4 Inquiry

Disputes that involve differences in opinion on points of facts may be resolved by way of an inquiry. In these types of dispute, states may opt for an investigation of the disputed facts. This method may also assist in determining the nature of violations of a treaty or other international commitments, and may even go as far as suggesting appropriate remedies. In the practice of the United Nations and regional entities, inquiry has developed into a very useful method of resolving problems between states. It often takes the form of an impartial fact-finding procedure and helps to illuminate issues of international concern, especially those that are important to international peace and security.

Inquiry involves third-party intervention. Usually, the third party assists disputing parties in understanding the dispute by delineating the issues (including legal issues) at the core of the dispute, thereby making it easier for parties to resolve the dispute. It is based on the rationale that exposing the truth about a situation may lead to settlement. Inquiry can constitute an independent procedure or be used in conjunction with other procedures. In this regard, it may be used in addition to other methods such as arbitration, conciliation and others. It will be most appropriate where parties agree that further information is required in order to determine the dispute between them.

This method of dispute settlement was first codified in the 1899 and 1907 Hague Conventions for the Pacific Settlement of Disputes. Article 9 of the 1907 Convention provided as follows:

In disputes of an international nature involving neither honour nor essential interests, and arising from a difference of opinion on points of fact, the Contracting Powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy should, as far as circumstances allow, institute an *international commission of inquiry*, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation. [own emphasis]

Subsequently, the method was adopted by Western nations as part of the procedures for arbitration. For example, the establishment through treaties by the United States, France and Britain of the Joint High Commission of Inquiry (mandated to conduct an inquiry on all matters submitted for arbitration) grounded the method in the realm of international law. The method is provided for in a number of multilateral as well as bilateral treaties and even in constituent instruments of some UN organs and regional bodies. But, it is in the Charter that it finds its most emphatic affirmation. Article 34 of the Charter enables the UN Security Council to investigate any dispute that is ‘likely to endanger the maintenance of international peace and security’.

The use of inquiry by international organisations to resolve disputes has become common and thus warrants attention. International organisations use inquiry to resolve disputes among states,

disputes within states (such as problems between rebel organisations and government), and in investigating international organisations themselves. Typically, inquiry is launched by way of a commission of inquiry or as a fact-finding mission. The commission of inquiry has its origins in the Hague Conventions of 1899 and 1907. Its role is merely provisional and exploratory and is mainly used to uncover facts of a dispute and thus make settlement possible. Rarely does it involve the application of rules of law. Fact-finding is firmly grounded in UN practice. For example, the UN General Assembly in its resolution on the ‘Question of methods of fact-finding’ stated ‘that an important contribution to the peaceful settlement of disputes and to the prevention of such disputes could be made by providing for impartial fact-finding within the framework of international organizations and in bilateral and multilateral conventions’.²⁴

There are a number of examples. The four Geneva Conventions of 1949 make provision for an inquiry concerning alleged violations of the Conventions.²⁵ In 2009, the UN Human Rights Council established a fact-finding mission to investigate the violations of human rights and international humanitarian law that occurred following the confrontation between Israel and Hamas in Palestine. In 2005, the UN Security Council set up a commission of inquiry to investigate the allegations of human rights violations in Darfur.²⁶ This inquiry was largely successful because its findings formed the basis for the criminal charges that were later instituted by the ICC against the Sudanese leaders. A more recent example is the commission of inquiry set up by the International Labor Organization in 2008 to investigate complaints against Zimbabwe for its failure to comply with the 1948 Convention on Freedom of Association and Protection of the Right to Organize and the 1949 Convention on the Right to Organize and Collective Bargaining.

5.2.5 Arbitration

Arbitration is a legal method of deciding disputes between states; and arbitral awards are binding on the parties.²⁷ This form of dispute settlement is usually associated with boundary and territorial disputes and has a long history in international law. The earliest known treaty providing for arbitration is the Jay Treaty of 1794 between the United States and Great Britain and is named after its negotiator, Chief Justice John Jay of the US Supreme Court.²⁸ The purpose of the treaty was to settle tensions between the two countries that arose in the aftermath of the Revolutionary War over British military posts that were still located in the north-western territories and over British interference with American trade and shipping.

Among the issues the treaty aimed at solving was uncertainty about a boundary formed by the St Croix River; it was referred to arbitration by virtue of article 5, which requested a ‘final decision’ on the matter by Commissioners to be appointed in the following manner:

One Commissioner shall be named by His Majesty, and one by the President of the United States ... and the said two Commissioners shall agree on the choice of a third And the three Commissioners so appointed shall be sworn impartially to examine and decide the said question according to such evidence as shall ... be laid before them And both parties agree to consider such decision as final and conclusive.²⁹

A noteworthy nineteenth-century example of successful arbitration is the case of the *Alabama Claims* by the United States against Great Britain in respect of a diplomatic dispute on the rights and duties of neutrality during an armed conflict, in this instance the US Civil War.³⁰ The Arbitral Tribunal was established by the 1871 Treaty of Washington between the United States and Great Britain, and resulted in a peaceful resolution of the claims seven years after the end of the Civil War, which greatly improved relations between the two countries.

An important development concerning the institutionalisation of arbitration as a permanent means of dispute settlement occurred in 1899 and 1907 with the adoption of the Hague Conventions. In the 1899 Convention (I) for the Pacific Settlement of International Disputes, the states parties acknowledged that in questions of a legal nature ‘arbitration is recognized ... as the

most effective and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle'.³¹ For this purpose it was decided to establish a Permanent Court of Arbitration (PCA) at The Hague that would facilitate immediate recourse to arbitration for international differences and that would be accessible at all times.³² At the 1907 Hague Peace Conference, the establishment and maintenance of the PCA was confirmed in Convention (I) for the Pacific Settlement of International Disputes, which also set out the PCA's rules of procedure.³³

Central to the arbitration proceedings is the *compromis* the disputing parties must sign and by means of which they determine the subject of the dispute, the time allowed for appointing the arbitrators, the form, order and time of the different communications to and before the PCA, and the amount each party must deposit in advance to cover expenses.³⁴ As a general rule, proceedings comprise written pleadings and oral discussions and development of the arguments. The latter takes place under the control of the arbitrators and may be public if so decided by them and with the consent of the parties to the dispute.³⁵

Although arbitral awards by or through the machinery of the PCA have over the years generated influential case law,³⁶ since 1921 the PCA has had to compete with the Permanent Court of International Justice (PCIJ), which was the forerunner of the current International Court of Justice (ICJ). More fora for dispute settlement provide states with more options and depending on the circumstances, judicial settlement proper may be preferable to arbitration for disputing parties. In 1962, in an attempt to reinvigorate interest in the PCA, arbitration rules were adopted for arbitrating disputes between two parties, one of which is not a state.³⁷ In 1993, a further set of optional rules for this purpose was adopted and in 2012, provision was made for arbitration of any disputes involving at least one state, state-controlled entity or intergovernmental organisation. This latter initiative aims at accommodating public international law elements that may arise in disputes involving a state, state-controlled entity and/or international organisation.

5.2.6 Judicial settlement by the International Court of Justice (ICJ)

To distinguish between judicial settlement of disputes and arbitration, it is apt to recall the criticism levelled at the time against naming the arbitral tribunal established by the 1899 and 1907 Hague Peace Conferences the 'Permanent Court of Arbitration'. As one commentator puts it:

The Permanent Court is not permanent because it is not composed of permanent judges; it is not accessible because it has to be constituted for each case; it is not a court because it is not composed of judges.³⁸

Unlike an arbitral tribunal, the notion of an international court refers to a body that performs an adjudicating function *continuously*, as opposed to exceptionally, and comprises permanent judges as opposed to ad hoc appointed arbitrators. This became a reality under the League of Nations with the establishment in 1921 of the Permanent Court of International Justice (PCIJ), pursuant to article 14 of the Covenant of the League of Nations.³⁹ The PCIJ was dissolved on 18 April 1946 to make way for a new judicial body, the International Court of Justice (ICJ), which was inaugurated on the same day, almost six months after the taking effect of the UN Charter on 24 October 1945.

5.2.6.1 The UN Charter and the ICJ

The relationship between the United Nations and the ICJ is regulated in terms of Chapter XIV of the UN Charter. Article 92 stipulates that the ICJ 'shall be the principle judicial organ of the United Nations' and that it shall function in accordance with the court's own statute, which is based on the statute of the PCIJ and annexed to the UN Charter.⁴⁰ In this manner, the Charter ensures some continuity between the PCIJ and the ICJ and makes the Statute of the ICJ an integral part of the UN

Charter. The further effect of article 92 is that the powers and functions of the ICJ derive from both the UN Charter and the Statute of the ICJ.

Because the Charter and the Statute are interlinked, member states of the United Nations are automatically members of the ICJ's Statute.⁴¹ However, a non-member of the United Nations may become a party to the Statute on conditions determined by the General Assembly upon recommendation by the Security Council.⁴² The issue of membership in these instances arose in the case of the Federal Republic of Yugoslavia (Serbia and Montenegro), which was the successor state to the former Socialist Federal Republic of Yugoslavia. In cases brought before the ICJ by and against the Federal Republic of Yugoslavia in 1993 and thereafter,⁴³ it was a matter of dispute whether the Federal Republic of Yugoslavia automatically continued in the position of the former Socialist Federal Republic with regard to UN membership and hence, membership of the Statute. Prior to these proceedings, both the Security Council and the General Assembly had determined that the Federal Republic of Yugoslavia could not continue automatically the UN membership of the former Socialist Federal Republic of Yugoslavia, and that it should therefore apply for membership in the United Nations.⁴⁴ In the cases mentioned, the ICJ did not take a position on these matters but either declined to exercise jurisdiction because of a lack of membership, or decided to exercise jurisdiction on the basis of article IX⁴⁵ of the 1948 Genocide Convention, which was an integral part of the dispute in some of the proceedings.⁴⁶ In any event, Yugoslavia's legal status as a member of the United Nations was resolved by its admission as a new member of the United Nations on 1 November 2000.

By becoming a member of the United Nations, a state undertakes to comply with the decisions of the ICJ in any case to which it is a party.⁴⁷ This provision must be read together with article 59 of the Court's Statute which states that a 'decision of the Court has no binding force except between the parties and in respect of that particular case'. These provisions reflect the universal notion as far as international adjudication is concerned – namely, that a decision by an international tribunal, such as the ICJ, has no binding effect on third parties and does not constitute a precedent binding on the Court in future disputes. *Stare decisis*, therefore, does not apply. However, these provisions are also indicative of the fact that the execution of the judgment is the responsibility of the parties and not of the ICJ – hence the undertaking to comply with the decisions of the ICJ, which clearly constitutes a UN Charter obligation for member states.

A question often asked is what recourse a party to a dispute has if the other party fails to comply with its obligations under a judgment of the ICJ. In such instances, the injured party may refer the matter to the UN Security Council, which may make recommendations or decide upon measures to be taken to ensure compliance with the judgment.⁴⁸ This raises a further question – namely, whether recommendations or decisions of the Security Council in such instances would be subject to the veto right in article 27 of the UN Charter. This provision distinguishes between decisions of the Council on *procedural matters* and decisions on *all other matters*. The latter are subject to the veto in the sense that an affirmative vote of nine members, including the concurring votes of the five permanent members, is needed for a decision to be adopted.⁴⁹

The question then is whether action taken by the Council under article 94(2) to give effect to a judgment of the ICJ will be considered a procedural or substantive matter within the meaning of article 27(2) and (3) of the UN Charter. To further complicate the matter, in terms of article 27(3), a party to a dispute shall abstain from voting in the Security Council in decisions relating to the peaceful settlement of that dispute under Chapter VI of the UN Charter. Thus, if it is assumed that action by the Council under article 94(2) is a substantive matter,⁵⁰ a permanent member will be barred from voting if that member was a party to a dispute before the ICJ and failed to comply with its obligations in terms of the judgment. However, such an interpretation will only make sense if an article 94(2) action by the Security Council (which falls outside Chapter VI) is considered part and

parcel of the Council's powers and functions under Chapter VI, as opposed to an interpretation that sees article 94(2) as bestowing an additional competence on the Council.

Chapter VI, as mentioned earlier, places an obligation on UN member states to settle their disputes by peaceful means and also empowers the Security Council to call on parties to a dispute to comply with these provisions. However, article 33 in this Chapter has a particular dispute in mind – namely one, which, if it continues, is likely to endanger international peace and security. So, if the assistance of the Security Council is sought under this provision for ensuring compliance with an ICJ judgment, the non-complying Council member must abstain from voting under article 27(3). By contrast, in a less serious case where non-compliance does not constitute a potential threat to international peace and security and the Security Council's assistance is sought under article 94(2), the non-complying (permanent) member may veto the Council's action. To avoid such an inconsistency, it has been suggested that article 94(2) should not be interpreted as conferring on the Council an additional competence, but rather as merely providing for another possibility of enlisting the services of the Council in solving disputes between states.⁵¹ Thus, the argument is that the Council, when acting under article 94(2), is not performing outside the scope of the other UN provisions governing the powers and functions of the Council, with the result that the Chapter VI caveat in article 27(3) still applies.

Finally, two further Charter provisions must be mentioned. The one is article 36 which in paragraph 1 empowers the Security Council at any stage of an article 33 dispute to recommend appropriate procedures or methods of adjustment. In making recommendations under this provision, the Council is called upon to take into consideration that legal disputes 'should as a general rule' be referred to the ICJ by the parties.⁵² This provision only gives the power of recommendation to the Council, while the actual referral is a matter for the parties to decide upon. The other is article 95, which allows parties to a dispute, including a legal dispute, to entrust the solution of their differences to tribunals other than the ICJ. This may take place in accordance with agreements already in existence or still to be concluded for that purpose. Both articles 36 and 95 leave the method of dispute settlement to the discretion of the parties to the dispute, provided that they seek a solution by peaceful means.

5.2.6.2 Composition of the ICJ and the election of judges

The ICJ, which has its seat in The Hague,⁵³ is composed of 15 judges, no two of whom may be nationals of the same state.⁵⁴ To be eligible, the candidates must be independent, of high moral character and with qualifications required in their respective countries for appointment to the highest judicial office.⁵⁵ The election of judges is somewhat complicated and not entirely free from political influence.

The *nomination* of suitable candidates is the responsibility of the national groups represented on the list of potential arbitrators in the PCA.⁵⁶ A national group comprises up to four persons nominated by each PCA member state to serve as members of the PCA on the list of potential arbitrators.⁵⁷ Little is known about the working method of the national groups and how they go about choosing suitable candidates. Arguably, this is as a result of the absence of provisions in the 1899 and 1907 Hague Conventions, or the Statute of the ICJ for that matter, prescribing how the national groups should exercise their functions in this regard.⁵⁸ Article 6 of the ICJ's Statute merely recommends that each national group consults with its highest court of justice, its law faculties and academies devoted to the study of law.

Since the establishment of the ICJ, the system of indirect nominations by national groups has given rise to diverse opinions. Those who wanted to retain this system argued that it worked well in the days of the PCIJ, that it provided a broader base for consultations and that it diminished direct

political influence by governments. Those opposing the system argued that direct nomination by governments is less complicated and more practical, and that it would encourage decisions based on the qualifications of the nominees.⁵⁹

The validity of the arguments of both groups is reduced by the fact that the *election* of the candidates involves the direct participation of the states represented in the General Assembly and the Security Council in a process that is by no means free of political influence and horse trading.⁶⁰ According to article 4(1) of the ICJ's Statute, the members of the court are elected by the General Assembly and the Security Council acting independently of one another;⁶¹ those candidates who have obtained an absolute majority of votes in both the Assembly and the Council are considered elected.⁶² Judges serve on the court in their personal capacity and not as representatives of their states of nationality and must, when taking up their duties, make a solemn declaration in open court that they will exercise their powers impartially and conscientiously.⁶³ They are also prohibited from exercising any political or administrative function or engaging in any other occupation of a professional nature;⁶⁴ and they are not entitled to act as agent, counsel or advocate in any case, or decide in any case in which they have previously taken part as agent, counsel or advocate for one of the parties or as a member of a national or international court, or of a commission of enquiry.⁶⁵

To ensure continuity, but also to provide for the regular renewal of judges, elections are staggered so that five judges complete their terms of office every three years.⁶⁶ The judges whose terms were to expire in accordance with this formula were determined by lot, drawn by the UN Secretary-General immediately after the first election had been completed.⁶⁷

The Statute also makes provision for the appointment of ad hoc judges. This occurs when, in a dispute before the court, the bench does not include a judge of the nationality of one or both of the parties. In such instances, the party or parties concerned may select an ad hoc judge for that specific case.⁶⁸

5.2.6.3 Competence of the ICJ

The ICJ has competence to decide *contentious cases* or disputes between states where there is disagreement on a point of law or fact, and a judgment on the merits of the case may be necessary. In the *South West Africa Cases*, the ICJ held that a dispute submitted for adjudication must amount to a 'disagreement on a point of law or fact, a conflict of legal views or of interests' and that it 'must be shown that the claim of one party is positively opposed by the other'.⁶⁹ The ultimate authority to decide whether a legal dispute exists between the parties in proceedings before the court lies with the court itself. Thus, whether there exists a legal dispute must be objectively determined since '[i]t is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of a dispute proves its non-existence'.⁷⁰ Disputes submitted to the court and which qualify for adjudication by the court must be decided 'in accordance with international law'.⁷¹

Apart from adjudicating in contentious cases, the ICJ is also competent to give *advisory opinions* on any legal question.⁷² In international relations, legal questions are often intertwined with political questions or have political dimensions (and vice versa), which means that the term 'legal question' in this context cannot have a restrictive meaning. As long as the subject matter placed before the court is by its very nature capable of legal analysis, it is immaterial whether it has arisen in a political context, has been informed by political motivations or has political ramifications. In this regard, the following statement by the ICJ in the *Certain Expenses* case should be noted:

It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or

small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision.⁷³

A request for an advisory opinion must be submitted in writing, contain an exact statement of the question upon which an opinion is required, and be accompanied by all documents that could throw light upon the question.⁷⁴ According to the UN Charter, the General Assembly and the Security Council are entitled to request advisory opinions from the ICJ on any legal question. Other UN organs or specialised agencies may do so only with the authorisation of the General Assembly and in relation to issues that fall within the scope of their activities.⁷⁵ States entitled to appear before the ICJ, or organisations that are likely to provide information on the question, may submit written and oral statements to and before the court in respect of the question placed before the court.⁷⁶

Being of an advisory nature, an opinion is not determinative or binding. It merely: **expresses the view of the Court as to the relevant international legal principles and rules, but does not oblige, any State, nor even the body that asked for the opinion, to take or refrain from any action. The distinction, clear in theory, is less so in practice: if the Court advises, for example, that a certain obligation exists, the State upon which it is said to rest has not bound itself to accept the Court's findings, but it will be in a weak position if it seeks to argue that the considered opinion of the Court does not represent a correct view of the law.**⁷⁷

Sometimes the problems created by a dispute between a state and an international organisation can be circumvented by means of a request for an advisory opinion. Since international organisations have no *locus standi* before the ICJ in contentious proceedings (see below), a dispute between a state and an international organisation cannot be solved in this manner. But nothing prevents the submission of such a dispute in the form of a request for an advisory opinion by agreement between the parties. This is illustrated by article VIII, section 30 of the 1946 Convention on the Privileges and Immunities of the United Nations, which determines as follows:

If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

The third and last competence of the ICJ is one that relates to the granting or ordering of *provisional measures*.⁷⁸ Tribunals of all kinds, national as well as international, are familiar with the issuing of interim injunctions or directives prohibiting or requiring certain action from a party or parties in proceedings pending a final decision on a matter before the tribunal. This competency has also been recognised in the case of the ICJ, albeit in somewhat confusing language. For instance, article 41 determines that the court 'shall have the power to indicate ... any provisional measures which ought to be taken to preserve the respective rights of either party'.

The use of terminology such as 'indicate' and 'ought to be taken' as opposed to a straightforward formulation assigning to the court the power to adopt provisional measures binding upon the parties has raised many questions, *inter alia*, whether the parties to the dispute will be under an obligation to respect a ruling of the court made in terms of article 41. This long-unsettled issue was clarified only in 2001 in the *LaGrand* case.⁷⁹ There the court ruled as follows:

The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to

indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity ... to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.⁸⁰

For provisional measures to be considered, there must be at least a *prima facie* basis for the court to have jurisdiction over the substantive issues underlying the dispute as well as some prospect of success regarding the merits of the case; otherwise the necessity for provisional measures may be absent.⁸¹

A question remains over the status of provisional measures in cases where the jurisdiction of the ICJ is contested in a matter before it. For instance, what will be the position if the court has granted provisional measures, which are binding upon the parties, only to rule subsequently that the court has no jurisdiction to entertain the dispute brought before it by the parties?

In pursuit of the answer to this question, it may be instructive to consider the comparable powers and functions of the International Tribunal of the Law of the Sea (ITLOS). Article 292 of the 1982 UN Convention on the Law of the Sea (UNCLOS) deals with applications for the release of detained vessels and their crews. Paragraph 3 of this provision determines that a tribunal, such as ITLOS, when apprised of an application for the prompt release of a foreign vessel detained by a state party, *shall deal with the application without delay* and the tribunal ‘shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew’. Acting under this provision, the tribunal is in fact complying with a request for a provisional or interim measure, and once the article 292 conditions have been fulfilled and the request has been granted, the authorities of the detaining state are obliged to comply with the order of the tribunal in terms of article 292(4). However, article 290 of UNCLOS also provides for provisional measures, actually so called, and determines that a court or tribunal which considers that *prima facie* it has jurisdiction in a dispute submitted to it, ‘may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision’. According to article 290(6), provisional measures granted in terms of this provision are also binding on the parties to the dispute.

The difference between the article 292 and article 290 measures has been dealt with by ITLOS in the *M/V Saiga* case.⁸² There it was held that the proceedings under article 292 are separate from and independent vis-à-vis other international proceedings and therefore different from the article 290 provisional measures which are *incidental* to the proceedings in respect of the merits of a dispute.⁸³ Article 290 of UNCLOS is therefore the equivalent of article 41 of the Statute of the ICJ. In the *M/V Saiga* case, the jurisdiction of the ITLOS was also contested and it did not prevent it from indicating provisional measures (the release of the vessel) with binding effect.

5.2.6.4 Preliminary requirements

A number of technical hurdles may need to be surmounted in order for parties to use the ICJ’s services in international dispute resolution. These include questions of who may have *access* to the court, the *admissibility* of the particular case and whether the court has *jurisdiction* in a particular set of circumstances.

5.2.6.4.1 Access

According to article 34(1) of the ICJ Statute, only states have access to the court. Cases can therefore not be brought against non-state entities, such as individuals, NGOs, or an

intergovernmental organisation, even if the other party is a state. Consequently, even the United Nations is prevented from bringing a contentious case before the court, but it may request an advisory opinion from the court as indicated earlier. Intergovernmental organisations are also entitled, if so requested by the court, to put before it information relevant to its cases.⁸⁴

The Statute provides for two categories of states with access to the ICJ. These are: (1) states parties to the ICJ's Statute, which automatically includes all UN members;⁸⁵ and (2) 'other states' on conditions determined by the Security Council but subject to special provisions contained in treaties in force and provided that the conditions imposed shall not place the parties in a position of inequality before the court.⁸⁶ The conditions mentioned here were determined by the Security Council in 1946,⁸⁷ and provide that the state in question must have previously deposited with the Registrar of the Court a declaration indicating the state's acceptance of the court's jurisdiction (see below) with the undertaking to comply in good faith with the decisions of the court and to accept the obligations under article 94 of the Charter.⁸⁸ A declaration of this nature may be particular in that it only accepts the jurisdiction of the court in respect of a particular dispute or disputes that have already arisen between the parties; or it may be general in the sense that jurisdiction is accepted in respect of all disputes or a class of disputes that have already arisen or which may arise in the future.⁸⁹

The right of access under the above provisions and conditions should be distinguished from the right to *intervene* in proceedings before the court, which may occur in two instances. The first is when a state that is not a party to the dispute before the court is of the view that it has a legal interest that may be affected by the court's decision in the matter before it. In such instances, the state is entitled to request the court for permission to intervene and it is for the court to decide upon the request.⁹⁰ In the *Territorial and Maritime Dispute* case between Nicaragua and Colombia,⁹¹ the ICJ has explained the position as follows:

The State seeking to intervene as a non-party ... does not have to establish that one of its rights may be affected; it is sufficient for that State to establish that its interest of a legal nature may be affected. Article 62 requires the interest relied upon by the State seeking to intervene to be of a legal nature, in the sense that this interest has to be the object of a real and concrete claim of that State, based on law, as opposed to a claim of a purely political, economic or strategic nature. But this is not just any kind of interest of a legal nature; it must in addition be possible for it to be affected, in its content and scope, by the Court's future decision in the main proceedings.⁹²

The second instance of the right to intervene is when the court is to pronounce on the construction of a convention's provisions in a dispute before it. A state not party to the dispute but party to the convention has a right to intervene in the proceedings; if it chooses to exercise this right, the construction given by the court will be equally binding upon it.⁹³ Under this option, the intervening state is given the opportunity to put forward its interpretation of the convention's provision, and the question of which construction is to be followed must have a direct bearing on the outcome of the case. Mere referral to the convention in the matter before the court will not suffice. This also explains why the intervening state is required by article 82 of the court's Rules of Procedure to stipulate *inter alia* in its application to intervene: the particular provisions of the convention the construction of which are in question; as well as a statement of the construction the intervening state submits for the court's consideration.

5.2.6.4.2 Admissibility

The admissibility of a case before the ICJ relates to the question whether certain requirements have been satisfied for bringing a matter to court. This is an issue that will usually arise when a state

intends to bring a matter to court on behalf of an individual who has suffered injury or loss as a result of the conduct of a foreign state. In chapter 4 of this book, such incidents are discussed under the topic of diplomatic protection. Of importance here is that in those instances, the state claiming to represent the individual must show that (a) the injured person was a national of the claiming state continuously from the date of the injury to the date of the submission of the claims; (b) that the injury was the result of the wrongful conduct of the respondent state; and (c) that the domestic remedies in the respondent state were exhausted.⁹⁴ Non-compliance with these requirements may render the case inadmissible before the court. However, it must be noted that as far as the local remedies rule is concerned, the rule will not apply if available remedies are ineffective, or the outcome would be a foregone conclusion, or the legal system of the respondent state is known for its lack of due process guarantees.⁹⁵ In this instance, one should also recall the following statement by the ICJ in the *Diallo* case:

[I]n matters of diplomatic protection, it is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person whom the applicant seeks to protect of the obligation to exhaust available local remedies. It is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted.⁹⁶

Inadmissibility may also occur as a result of the absence of a legal interest in the matter.⁹⁷ This is a well-established rule in international litigation. As was pointed out in the section on access above, the legal interest that the applicant state seeks to protect must be the object of a real and concrete claim, based on law and one possible of being affected by the court's decision. In the *Northern Cameroons* case, Judge Fitzmaurice, in his separate opinion, points out that a plea by one of the parties in legal proceedings before the court that the application submitted to the court failed to disclose the existence of an actual legal dispute between the parties, is a preliminary issue that relates to the admissibility of the case and must be dealt with prior to any issue concerning the competence (jurisdiction) of the court.⁹⁸ A similar stance was taken by Judge Morelli in his separate opinion in stating as follows:

For according to the Statute and Rules of Court the Court can perform its function in contentious proceedings by giving a decision on the merits only on condition that there really is a dispute between the parties. This is a question connected not with the Court's jurisdiction but rather with the admissibility of the claim; it is a question which comes before any question of jurisdiction.⁹⁹

5.2.6.4.3 Jurisdiction

As with an objection to the admissibility of a case, an objection to the jurisdiction of the ICJ is a preliminary objection that may stand in the way of a decision on the merits. This means that the issues raised during such preliminary proceedings must first be dealt with before the court can proceed to the merits. If the court finds that the case is inadmissible, or that it has no jurisdiction to hear the matter, then a decision on the merits becomes moot.

An objection to the jurisdiction of the court places in dispute the *competence* of the court itself to hear the matter. It is therefore important to be familiar with the grounds on which the court is legally entitled to exercise jurisdiction. This is a rather complicated affair because the basis of the court's jurisdiction – state consent – may be given in a number of ways and in some instances the consent may even be conditional or subject to reservations.

Note that two equally numbered provisions, in the UN Charter and in the ICJ's Statute respectively, should be distinguished: article 36 of the UN Charter from the other article 36 of the Statute of the ICJ. Paragraph 3 of article 36 of the UN Charter entitles the Security Council to recommend to states to refer their legal disputes, as a general rule, to the ICJ for settlement. This

provision does not bestow jurisdiction on the ICJ in such disputes but merely makes the Council mindful of the fact that states should be encouraged to make use of the ICJ when they are involved in disputes that are susceptible to judicial settlement. A Security Council recommendation to this effect has no binding force and the states involved may or may not decide to act upon it. If they do, it is their mutual consent to refer the matter to the ICJ that will form the basis of the court's jurisdiction. To reflect further upon the essence and scope of the court's jurisdiction, it is necessary to turn to article 36 of the ICJ's Statute, which constitutes the essential framework according to which states may consent to the jurisdiction of the court.

5.2.6.4.3.1 Consent based on article 36(1)

Article 36(1) of the ICJ's Statute determines as follows:

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

The referral of a matter to the ICJ in terms of the above provision ordinarily takes place by way of a special agreement between the parties, commonly known as a *compromis*. The *compromis* confers jurisdiction on the ICJ by mutual consent and specifies the nature and scope of the dispute between the parties, the legal issues that are subject to adjudication, the law and procedure to be applied, and the relief sought by the parties.

However, article 36(1) also provides for jurisdiction to be bestowed on the court by other means – namely, by the UN Charter or treaties and conventions. The reference to the UN Charter was inserted in the expectation that the Charter would provide for matters over which the court would exercise compulsory jurisdiction. This failed to materialise with the result that this option has lost its relevance. In the preliminary phase of the *Corfu Channel* case,¹⁰⁰ the United Kingdom, with reference to article 36(3) of the UN Charter, argued that the Security Council was entitled to refer certain matters to the ICJ and that a recommendation of this nature constituted a binding decision by the Security Council under article 25 of the UN Charter according to which UN members agree to accept and carry out decisions of the Security Council. Thus, the argument seemed to suggest that by means of an article 36(3) recommendation, read with article 25, the UN Charter made provision for compulsory jurisdiction by the ICJ. Although the court did not decide the point,¹⁰¹ seven judges rejected the UK argument in their joint separate opinion by stating that 'it appears impossible to us to accept an interpretation according to which this article, without explicitly saying so, has introduced more or less surreptitiously, a new case of compulsory jurisdiction'.¹⁰²

Consenting to jurisdiction in advance by means of treaties or conventions occurs regularly. This option, provided for in article 36(1) of the Statute must also be read in conjunction with article 37 of the Statute, which reads as follows:

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.¹⁰³

Since treaties and conventions come about by voluntary agreement between the parties, there is nothing to prevent them from also agreeing on the mode of dispute settlement should a dispute arise regarding the interpretation and application of the treaty or convention. This practice occurs in bilateral as well as multilateral conventions, and states parties are usually entitled to choose between arbitration, mediation, judicial settlement or some other peaceful method. Judicial settlement may also be the only option available to the parties. This is the case in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which, in article 9, obliges the parties to refer disputes between them with regard to the interpretation and application of the convention to the International Court of Justice.¹⁰⁴ Provisions such as these are referred to as *compromissory*

clauses in that they make it possible for any party to the treaty or convention unilaterally to refer a dispute relating to the interpretation and application of the treaty or convention to the court.

Although article 36(1) mentions certain processes by means of which states can confer jurisdiction on the ICJ, neither the Statute nor the Rules of the Court contain formalities as to how and when a party to a dispute must submit to the jurisdiction of the court. Thus, it may happen that one of the parties files an application with the court, and then, before mutual consent to submit the matter to the court has been established, the other party consents to the proceedings. Such instances are covered in Rule 38(5), which determines as follows:

When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case.

In the *Djibouti* case,¹⁰⁵ the ICJ explained that the purpose of this provision:

was to allow a State which proposes to found the jurisdiction of the Court to entertain a case upon a consent thereto yet to be given or manifested by another State to file an application setting out its claims and inviting the latter to consent to the Court dealing with them, without prejudice to the rules governing the sound administration of justice.¹⁰⁶

The consent still to be given in these instances can be given explicitly or can be derived from the conduct of the party in question – that is, acceptance of jurisdiction by implication. Jurisdiction thus established is referred to as *prorogated jurisdiction* and is based on the doctrine of *forum prorogatum* involving a process through which the determination of jurisdiction is postponed or delayed until the consent of the other party has been established. In such instances, the court must be satisfied that the respondent state's acceptance of the court's jurisdiction was 'unequivocal' and given in a 'voluntary and indisputable manner'.¹⁰⁷ For instance, it is insufficient to infer acceptance of the court's jurisdiction from the mere fact that the respondent state has entered the proceedings to challenge the claims of the applicant state, especially if in doing so the respondent state has also challenged the court's jurisdiction.¹⁰⁸

Few cases in the history of the ICJ have dealt with the subject matter of *forum prorogatum*. In the *Corfu Channel* case between the United Kingdom and Albania, the United Kingdom, in response to a Security Council recommendation to both parties to submit the matter to the court, unilaterally filed an application submitting the dispute to the court. Albania, arguing that proceedings should have been instituted jointly by means of a special agreement, objected to this course of action, but stated in the same letter of protest that it was prepared nonetheless to 'appear before the Court'.¹⁰⁹ Taking into account that Albania had accepted the recommendation by the Security Council, the court interpreted this phrase in Albania's letter of protest as constituting a 'voluntary and indisputable acceptance of the Court's jurisdiction'.¹¹⁰

In the *Djibouti* case referred to above, the ICJ for the first time had to decide on the merits of a dispute brought before it by an application based on article 38(5) of the Rules. In this matter, Djibouti brought a unilateral application against France for the breach of certain international obligations relating to mutual assistance in criminal matters, 'indicating that it sought to found the jurisdiction of the court on article 38(5) of the Rules of Court and that it was "confident that the French Republic will agree to submit to the jurisdiction of the Court to settle the present dispute"'.¹¹¹ In response, France 'informed the court that it "consents to the Court's jurisdiction to entertain the Application pursuant to, and solely on the basis of ... Article 38 paragraph 5", of the Rules of Court',¹¹² which the court accepted as an *express agreement* by France to submit to the court's jurisdiction.¹¹³

However, at the start of the contentious proceedings, France argued that its letter of acceptance in respect of the court's jurisdiction only related to certain and not all the claims put forward by Djibouti. Therefore, the court also had to entertain the question about the scope of the court's jurisdiction, which was also a question about the extent of the parties' mutual consent. The court indicated that this was a matter that could only be determined by reading France's consent together with Djibouti's application to establish what was common in their respective expressions of consent.¹¹⁴ France's attempt at excluding certain issues from being decided by the court was unsuccessful for two reasons. First, it failed to specify in its letter of acceptance, as it was entitled to do, the precise nature of the claims France was prepared to submit to the jurisdiction of the court;¹¹⁵ and secondly, in its letter of acceptance, France consented to the court's jurisdiction, as indicated above, 'to entertain the Application' of Djibouti. Hence, the court ruled that there was nothing in France's letter of acceptance suggesting an intention to limit the scope of consent to only certain aspects of Djibouti's application.¹¹⁶

5.2.6.4.3.2 Consent based on article 36(2)

Article 36(2) of the ICJ's Statute makes it possible for states to submit to the jurisdiction of the court by means of a unilateral¹¹⁷ declaration of acceptance of the court's jurisdiction. Article 36(2) also enunciates the subject matters in connection with which states may refer legal disputes to the court by way of a declaration of acceptance. The subject matters are formulated in extremely wide language with the result that almost anything with an international law relevance could be brought within their scope for purposes of the provision. The full text of article 36(2) reads as follows:

The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- (a) the interpretation of a treaty;**
- (b) any question of international law;**
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;**
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.**

Traditionally known as the 'optional clause', this provision creates a mechanism for a state to join other states that have made declarations pursuant to article 36(2) in establishing jurisdictional links in respect of disputes relating to the subject matters listed in (a) to (d). At the same time, article 36(2) functions as an open invitation to states which, although party to the Statute, have not yet deposited declarations of acceptance.¹¹⁸ By 2015, only 71 states (out of 193) had submitted declarations of acceptance (excluding those who submitted at some stage but subsequently terminated their declarations).¹¹⁹ Among the permanent members of the UN Security Council, only the United Kingdom is currently bound by an article 36 declaration.

The phrase in article 36(2) 'in relation to any other state accepting the same obligation' reflects the principle of reciprocity that underlies the *mutuality* of jurisdiction *ratione personae* and *ratione materiae* and forms an integral part of article 36(2).¹²⁰

That states may modify their declarations of acceptance is recognised in article 36(3) of the Statute, which provides that declarations under article 36(2) 'may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time'. Modifying their treaty obligations by way of reservations is part of the sovereign freedom of states. This has been confirmed in the *Nicaragua* case (Jurisdiction and Admissibility) in the following words:

In making the declaration a State is ... free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations. In particular, it may limit its effect to disputes arising after a certain date; or it may specify how long the

declaration itself shall remain in force, or what notice (if any) will be required to terminate it.¹²¹

This and other rulings by the court¹²² make redundant a restrictive interpretation of article 36(3) that would allow only conditions relating to reciprocity or time. State practice also defies such a narrow approach. Even a superficial glance at the nature and scope of reservations that states have made in modifying declarations of acceptance provides evidence of a very liberal approach to the choice of conditions that states append to their declarations.¹²³

A fairly common practice among states is to exclude from the jurisdiction of the court matters that are essentially within the domestic jurisdiction of the state. Botswana's declaration, referred to above, is one of many examples. South Africa did the same in its 1940–1955 declaration. In any event, such exceptions cannot prevent the court from deciding the dispute on the basis of international law under article 36(6) of the Statute. This provision assigns the final authority to the court to settle a dispute as to whether the court has jurisdiction. Moreover, since the scope of domestic jurisdiction in today's world has shrunk considerably, the defence potential of these exceptions has been weakened considerably.

Following the example of the United States in 1946 with the so-called *Connally* reservation,¹²⁴ some states (including South Africa)¹²⁵ have submitted declarations to the effect that it is the reserving state's own evaluation that will determine the scope of the concept of domestic jurisdiction. Such formulations undermine the authority of the court under article 36(6) and have been emphatically rejected as invalid in several individual opinions by judges in the *Norwegian Loans*¹²⁶ and *Interhandel*¹²⁷ cases, without the court making a ruling on the matter. As these cases show, such self-interpretation clauses in declarations of acceptance may work against both parties to a dispute. In the *Norwegian Loans* case, for instance, the French reservation (of the US kind) to the court's jurisdiction was invoked by Norway (which had not made such a reservation) on the basis of reciprocity. Since the reservation then (whose validity was not challenged) precluded the court from deciding the matter, the French claim against Norway could not be entertained. But as was pointed out in several individual opinions by judges in both cases, the lack of jurisdiction was incorrectly based on the French (or US in *Interhandel*) reservation; the true ground was the invalidity of the reservation because of its incompatibility with the ICJ's Statute. Being invalid, there was no acceptance of the court's jurisdiction at all by France (or the United States).¹²⁸

Declarations made in terms of article 36(2) as well as all modifications or amendments thereto must be deposited with the Secretary-General of the United Nations.¹²⁹ The act of depositing the relevant instrument brings about its legal effect as from that moment, meaning that from the date of depositing, 'a State has the right to bring an application against another State; conversely, it is from that very date that it can be made the target of an application'.¹³⁰

5.2.6.5 Non-appearance

Should one of the parties to a dispute fail to appear before the court, or if it fails to defend its case, the other party may request the court to decide in its favour. However, before complying with this request, the court must be satisfied, not only that it has jurisdiction in the matter in accordance with articles 36 and 37, but also that the claim is well founded in fact and law.¹³¹

A state that has decided not to appear in a matter must accept the consequences of its decision. For instance, the case will proceed in its absence; it remains a party to the dispute; and it remains bound by the decision of the court.¹³² However, the appearing party has no automatic claim to a decision in its favour since, as indicated above, the court must first be satisfied about certain aspects relevant to the dispute and the claim itself.

Although the text of article 53(2) of the Statute, which deals with the obligations of the court in the case of non-appearance, only mentions jurisdiction, the court may also have to satisfy itself about questions of access and admissibility. This does not follow from article 53 but from the provisions in the Statute on access and admissibility dealt with earlier, and which the court must apply in any event, even if both parties appear before it.¹³³

With regard to the second obligation – namely, that the court must satisfy itself first that the claim of the appearing party is well founded in fact and law – the *Nicaragua* case has laid down the extent of the court's obligation:

The use of the term ‘satisfy itself’ ... implies that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, in so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence. For the purpose of deciding whether the claim is well-founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it in respect to the applicable law ... so that the absence of one party has less impact. ... As to the facts of the case, in principle the Court is not bound to confine its consideration to the material formally submitted to it by the parties Nevertheless, the Court cannot by its own enquiries entirely make up for the absence of one of the Parties; that absence ... must necessarily limit the extent to which the Court is informed of the facts. ... The absent party also forfeits the opportunity to counter the factual allegations of its opponent.¹³⁴

The above assessment of the situation makes it clear that the court's position differs when having to satisfy itself about the respective legal and factual foundations of the appearing state's claim. Since the court knows the law (*juria novit curia*), it is less dependent on the analyses of the parties in this regard and can rely on its own legal assessment. The court is in a weaker position when it has to satisfy itself about the factual basis of the claim since the facts underlying the dispute are inherently part of the official business of the respective governments. It cannot be expected of the court to embark on an investigation that will fully restore the gaps in the factual picture left by the defaulting party.

5.2.6.6 Hearing and judgment

Proceedings consist of two parts: written and oral. The former comprise all the written communications to the court and consist mainly of the parties' memorials, counter-memorials, replies, and documentary evidence.¹³⁵ This phase of the proceedings takes place without the knowledge of the public, ‘behind the scenes’ so to speak. The actual hearing (the oral phase) commences with the parties' oral presentation in court and is open to the public unless the court decides otherwise or the parties demand an *in camera* hearing.¹³⁶

After conclusion of the oral phase, the deliberations of the judges start – a process that takes place in private and which remains secret.¹³⁷ However, the judgment itself, which must state the reasons on which it is based,¹³⁸ is read in open court.¹³⁹ All questions pertaining to the claims put forward by the parties must be decided by a majority of the judges present and in the case of the court being equally divided, the President has a casting vote.¹⁴⁰ This, for instance, occurred in the famous *Nuclear Weapons* case.¹⁴¹ Judges who do not agree with the majority view are entitled to deliver separate or dissenting opinions.¹⁴²

Although a judgment of the court is final and not subject to appeal,¹⁴³ a party may request a revision of the judgment but only when the request is based upon the discovery of a fact of a decisive nature, and which was unknown to the court and the party requesting the revision at the time of the initial proceedings. An application for revision must be made within six months of the discovery of

the new fact. Before admitting revision proceedings, the court may require previous compliance with the terms of the judgment.¹⁴⁴

5.3 Non-forcible measures

The adoption of the UN Charter in 1945 restricted the options open to individual states to resort to unilateral measures, often referred to as self-help, to enforce compliance with international law obligations by states in breach of such obligations. Not only has the prohibition on the use of force¹⁴⁵ in article 2(4) of the UN Charter put an end to the nineteenth-century entitlement of states to use force to punish a breach by another state, but the machinery created by the UN Charter for promoting and restoring international peace and security has shifted the initiative for enforcement mechanisms away from individual states to collective action circumscribed by the principles and purposes of the United Nations. However, certain forms of unilateral action have survived, meaning that injured states remain entitled to take certain non-forcible action in a bilateral context against a state responsible for the breach of an international obligation. In the present era, we refer to such measures as ‘countermeasures’.

Co-extensive with such unilateral responses to breaches of international law, states may collectively resort to non-forcible enforcement measures under the auspices of an international or regional organisation. Such measures usually take the form of sanctions against a state in breach of an international obligation. Both these forms of enforcement are further explained below.

5.3.1 Countermeasures

In the arbitral award in the *Air Services Agreement* case, the tribunal confirmed the use of countermeasures by a state to enforce its rights against another state in the following words:

If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through ‘counter-measures’.¹⁴⁶

To be lawful, a countermeasure must respect certain requirements. The first is that the countermeasure may not involve the use of force. A state's right to use force unilaterally is limited only to incidents of self-defence when that state is the target of an armed attack, an issue that is covered below under the use of force. Secondly, it is trite law that a countermeasure must be proportional to the injury suffered and must be terminated once the responsible state has rectified the matter.¹⁴⁷ Thirdly, in addition to these well-established limitations on the use of countermeasures, the rules of state responsibility have placed further limitations on the use of countermeasures, which now form part of the International Law Commission (ILC)'s Draft Articles on the Responsibility of States for Internationally Wrongful Acts and which are dealt with in chapter 4 of this book.

Under the Draft Articles, the injured state may only take countermeasures against the state responsible for the wrongful act and for the purpose of inducing the responsible state to comply with its international obligations.¹⁴⁸ A countermeasure that also affects third states, or is aimed at a purpose other than the one specified here, will in itself be unlawful. Furthermore, the Draft Articles only allow for one form of countermeasure – namely, the non-performance by the injured state of the international obligations it owes to the responsible state, which non-performance must be temporary and taken in such a way that it will permit the resumption of the performance of the obligations in question.¹⁴⁹

Apart from these substantive limitations on the taking of countermeasures, certain international obligations must remain shielded from the effects of the countermeasure and must still be performed

by the injured state. Thus, article 50(1) of the Draft Articles obliges the injured state to keep performing its obligations in respect of the prohibition on the use of force in the UN Charter; the protection of human rights; humanitarian law prohibiting reprisals; and peremptory norms¹⁵⁰ of general international law.

A state resorting to countermeasures also remains bound by a dispute settlement procedure applicable between itself and the responsible state.¹⁵¹ This raises the question whether an injured state, bound by a dispute settlement procedure in terms of a treaty, for instance, may use both options – that is, countermeasures and dispute settlement – to induce the responsible state to remedy the situation.

In the *Air Services Agreement* case, the award tribunal made a distinction between the period in which the case is not yet the subject matter of a dispute settlement procedure, and the period in which the procedure has been set in motion and the dispute settlement body is in a position to act. During the former period, and since states do not as a rule relinquish their right to resort to countermeasures even if they agree to a dispute settlement mechanism, the injured state will still be entitled to suspend its obligations towards the responsible state – that is, resort to countermeasures. The situation changes in the latter period. From the moment the dispute settlement body is active, the right of an injured party to initiate countermeasures disappears.¹⁵² This now also seems to be the rule adopted in the Draft Articles. Article 52(3)(b) prohibits the taking of countermeasures, and requires their suspension without delay in case they have already commenced, if the dispute between the parties is pending before a court or tribunal that has the authority to make binding decisions in the matter. However, the injured state may again resort to countermeasures if the responsible state fails to implement in good faith the outcome of the dispute settlement process.¹⁵³

Finally, a state resorting to countermeasures is still bound by the obligation to respect international law obligations with regard to the inviolability of diplomatic or consular agents, premises, archives and documents.¹⁵⁴

Apart from the substantive obligations that must be observed, a state considering countermeasures must also comply with certain procedural requirements. Thus, the injured state must first call upon the responsible state to fulfil its obligations towards the injured state, and if there is no response or the response is inadequate, the injured state must give notice to the responsible state of any decision to initiate countermeasures.¹⁵⁵ The latter does not affect the right of the injured state to take urgent countermeasures necessary for preserving its rights.¹⁵⁶

International law on countermeasures, presented in the manner set out in the ILC Draft Articles on state responsibility above, confirms the classical bilateral nature of state responsibility and the consequences thereof; it is only the *injured* state that is entitled to act in the prescribed manner against the *responsible* state. However, in chapter 4 of this book in the section on state responsibility, the position of *non-injured* states under article 48 of the ILC Draft Articles has been explained. Briefly restated, article 48 makes it possible for a *non-injured* state to invoke the responsibility of another state if the obligation breached (by that other state) is owed to a group of states collectively (which includes the state invoking the responsibility) or to the international community as a whole. As indicated in chapter 4, this provision is very much indicative of international law developments with regard to *erga omnes* obligations or the concept of international community interests. Thus, the essence of article 48 is that a state or several states, acting individually or collectively, will be entitled to invoke responsibility in the case of a breach of an international obligation even if the state or states invoking the responsibility has/have not suffered an injury. All that is required is that the obligation breached must be owed to a group to which the state invoking the responsibility belongs or to the international community as a whole. Thus, in a sense, the state invoking the responsibility decides to act on behalf of the collective

interests of the group of states to which it belongs, or on behalf of the international community as a whole.

Article 54 of the ILC Draft Articles entitles a state acting under article 48 to take ‘lawful measures’ against the responsible state ‘to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached’. What the state invoking the responsibility can claim from the responsible state is spelled out in article 48(2) – namely, the cessation of the internationally wrongful act and assurances of non-repetition; and reparations in the interest of the injured state or of the beneficiaries of the obligation breached.

A controversial question that arises in the context of articles 48 and 54 is whether non-injured states are prevented from taking *countermeasures* that are foreseen in articles 49 and 52 of the ILC Draft Articles on State Responsibility. The two latter provisions, which form part of the countermeasures section (Part II) of the Draft Articles, are clearly limited to injured states, which justifies a conclusion that states acting under articles 48 and 54 cannot take the kind of countermeasures that will be allowed under articles 49 and 52. This distinction, coupled with the lack of clarity in the Draft Articles on what responsibility under article 48 entails, what measures could be taken and how they should be implemented, has raised contentious issues regarding the lawfulness of countermeasures to enforce *erga omnes* obligations by non-injured states.¹⁵⁷ Finding support for an interpretation one way or the other in the case law of the ICJ is further obstructed by the fact that announcements by the ICJ on *erga omnes* obligations are inconclusive with regard to the measures states may resort to for the enforcement of such obligations.¹⁵⁸

In its analysis of state practice, the ILC has conceded that in a number of instances states have reacted against breaches by a state of obligations mentioned in article 48 by imposing sanctions or other measures without their having claimed to be individually injured by the breach.¹⁵⁹ However, it has described the instances of state practice as ‘limited’, ‘embryonic’ and ‘sparse’ to conclude as follows:

As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. ... At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interests.¹⁶⁰

Others have taken an opposite stance, arguing that in a ‘surprisingly large number of cases’ states have rejected the restrictive approach that only injured states may take countermeasures by resorting to countermeasures without claiming that they have been individually injured by the breach of what can be described as *erga omnes* obligations.¹⁶¹ During its 2005 Krakow session, the Institute of International Law¹⁶² adopted a resolution acknowledging the entitlement of non-injured states to adopt countermeasures against a grave breach of an *erga omnes* obligation. Article 5 of the resolution reads as follows:

Should a widely acknowledged grave breach of an *erga omnes* obligation occur, all the States to which the obligation is owed ... (c) are entitled to take non-forceable counter-measures under conditions analogous to those applying to a State specifically affected by the breach.

5.3.2 Sanctions

The term ‘sanctions’ is usually associated with economic measures taken against a state that has acted wrongfully and hence has breached an international obligation. This is a restrictive use of the term since sanctions may also include the use of a range of other measures to convince a state to bring to an end its wrongful conduct. This is clear from article 41 of the UN Charter, which reads as follows:

The Security Council may decide what measures not involving the use of force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of

economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.

While the interruption of economic relations may occur more frequently than other measures (as the practice of the Security Council demonstrates), it is within the discretion of the Security Council to avail itself of the other options in article 41; and since the range of measures mentioned is not a *numerus clausus*, the Security Council may also decide to implement any other appropriate measure as long as it does not involve the use of force. As a chapter VII measure, decisions taken by the Security Council under article 41 are binding on the member states of the United Nations (unless the wording of the particular resolution indicates otherwise) and hence will override other obligations member states may have in terms of international agreements.¹⁶³ Moreover, as the title of Chapter VII indicates, the measures that are available to the Security Council under this part of the UN Charter must be reserved for situations that constitute a threat to the peace, breaches of the peace or acts of aggression. Action taken by the Security Council to deal with such situations, including the imposition of sanctions, falls within the exclusive power of the Council. Before the Security Council can act in terms of Chapter VII, it must first determine, according to article 39 of the Charter, that there is a threat to the peace, a breach of the peace or an act of aggression, which is a determination that only the Council can make.

Although intended as a cornerstone of the new post-World War II system of collective security, article 41 lay dormant until 1966 when it was used to enforce a mandatory embargo against Rhodesia (now Zimbabwe),¹⁶⁴ followed in 1977 by a mandatory arms embargo against South Africa.¹⁶⁵ It has only been since the Cold War that article 41 has become a ‘common instrument of peace maintenance’ and has come to be frequently used in a variety of ways to force governments into compliance with their international obligations.¹⁶⁶ However, sanctions in whatever form are not without complications and it has been noted that the Security Council’s increased use of article 41 sanctions ‘has brought to light a number of difficulties, relating especially to the objective of sanctions, the monitoring of their application and impact, and their unintended effects’.¹⁶⁷

5.3.2.1 The case for targeted sanctions and better enforcement

The issue of ‘unintended effects’ has arisen in the context of comprehensive economic sanctions that often had devastating consequences for the civilian population in the target state beyond the primary aim of the sanctions regime – namely, the changing of political behaviour among the governing elite. This has caused a former UN Secretary-General, Bhoutros-Bhoutros Gali, to remark:

Sanctions, as is generally recognized, are a blunt instrument. They raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behavior is unlikely to be affected by the plight of their subjects.¹⁶⁸

A case in point was the comprehensive sanctions regime imposed on Iraq in the 1990s after the first Gulf War. It is estimated that half a million Iraqi children died as a result of malnutrition and the blocking of shipments carrying vaccines against yellow fever and diphtheria.¹⁶⁹ This and other cases of hardship visited upon the innocent civilian population in targeted countries have caused a rethink of sanctions as an enforcement measure and have led to the introduction of so-called ‘smart sanctions’ designed to target members of the political elite in the form of embargoes limited to certain select goods such as military equipment; asset freezes and international travel bans; and the blocking of financial transactions by members of the political elite.

However, the problematic element in any sanctions regime is effective enforcement. This can be compromised by a number of factors, such as lack of political will, lack of capacity and economic consequences for the enforcing state. In the latter instance, article 50 of the UN Charter creates a mechanism for states that find themselves confronted with special economic problems arising from their duty to enforce the sanctions regime against a target state. In such instances, the state experiencing economic problems has a right to consult with the Security Council with a view to alleviating the economic burden with which that state is faced.

Article 50 was invoked by Zambia, Mozambique and Botswana during the sanctions regime against the erstwhile Rhodesia, which led to a call by the Security Council to all member states and specialised UN agencies to assist the countries experiencing economic hardship as a result of the measures adopted by the Security Council against Rhodesia.¹⁷⁰ It was also invoked during the 1990 Kuwait crisis, which led to the first Gulf War and the subsequent imposition of sanctions against Iraq. In this instance, some 20 states requested assistance under article 50, which prompted the Security Council to request the sanctions committee, established in terms of Resolution 661 of 1990, to examine the requests for assistance. In the case of the sanctions regime against the former Yugoslavia in the early 1990s, eight countries sought assistance under article 50 and there, too, their applications were examined by the sanctions committee established in terms of Security Council Resolution 843 of 1993, which then made recommendations to the Security Council.

The general question of how to make the enforcement of sanctions more effective was considered by the Security Council in 2000, when an informal working group was established to investigate the matter further.¹⁷¹ By this time, the Security Council had already made use of monitoring committees to oversee and monitor the implementation of sanctions in consultation with UN member states and to provide guidelines for the effective implementation of sanction regimes. This practice was further encouraged by the working group in its final report¹⁷² in which there is a plea for constant and continuous monitoring of sanctions enforcement by member states and the early identification of problem areas and harmful practices, in addition to an emphasis on the importance of designing sanctions resolutions with clear and unambiguous language, carefully targeted sanctions, clear objectives and clear distinctions between embargoed and non-embargoed goods.

Problems of a different kind have emerged following the 9/11 terrorist attacks in the United States. To ensure better enforcement of counter-terrorism measures, the Security Council has established a Counter-Terrorism Committee (CTC)¹⁷³ to oversee and monitor the implementation by UN member states of these measures. The committee undertakes country visits, compiles expert assessments of each member state's implementation of counter-terrorism measures and provides technical assistance to member states. Since 2005, it has been assisted by an executive directorate, known as the Counter-Terrorism Executive Directorate (CTED).¹⁷⁴

5.3.2.2 Counter-terrorism measures and human rights considerations

The potential for human rights abuses by states in taking counter-terrorism measures has led the Security Council to remind states of their duty to comply with their human rights obligations when adopting and enforcing counter-terrorism measures.¹⁷⁵ In particular, states must follow due process principles in asset-freezing cases and criminal proceedings, and must respect refugee laws and international principles in extradition and deportation matters. In the 2005 World Summit Outcome Document, the 170 states that gathered for the Summit also called on the Security Council 'to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions'.¹⁷⁶

The issue of the listing of persons for suspected involvement in terrorist activities, and of the freezing of their assets, has come under scrutiny in judicial proceedings as well. In the first *Kadi* case (*Kadi I*) before the European Court of Justice (ECJ),¹⁷⁷ the applicant was suspected of being associated with the Al Qaeda terrorist network and was singled out by the Security Council and placed on its list of persons subject to counter-terrorism measures – in particular the freezing of financial assets. Regulations to this effect were adopted by the European Union for implementation by all EU member states. The applicant challenged these regulations in the European Court of Justice, arguing that they infringed upon his fundamental rights and claiming that he was not informed of the grounds for his inclusion on the Security Council list of suspected persons and that henceforth his right to be heard, to judicial review and to property had been infringed.

The Court of First Instance held that Security Council resolutions adopted under Chapter VII of the UN Charter are binding on UN member states and therefore also on the members of the European Community, which must take all measures to ensure that those resolutions are put into effect.¹⁷⁸ This view was further justified by the Court of First Instance in reiterating the UN Charter position – namely, that only the Security Council has the power to determine what will constitute a threat to international peace and security, and what measures are required to deal with the threat, and therefore that such matters fall outside the jurisdiction of national courts and of European Community authorities.¹⁷⁹ However, the Court of First Instance was prepared to undertake, what it called, *indirect review* of the validity of the relevant Security Council's resolutions. This was done with reference to the *jus cogens* status of fundamental human rights, which, according to the court, must be obeyed even by the Security Council since the protection of such rights has been proclaimed by the UN Charter and is therefore binding on all member states as well as on all UN organs.¹⁸⁰ However, on the facts of the case the Court of First Instance found that there was no transgression of this threshold by the Security Council since the measures were temporary, did not constitute an arbitrary, inappropriate or disproportionate interference with the applicant's rights and did not prevent the applicant from seeking a review of his listing via his country of nationality.¹⁸¹

When this ruling went on appeal to the Grand Chamber, the latter took the view that the contested EC regulation (purporting to give effect to the Security Council resolution about which the applicant complained) cannot be considered as an act directly attributable to the UN or any of its organs. Rather, it should be seen as part of the EC's internal and autonomous legal order, established by the EC Treaty, and subject to the review jurisdiction of the European Court of Justice, which may rule on any EC measure in light of the fundamental rights guarantees that form an integral part of that autonomous legal order.¹⁸² The Grand Chamber also rejected the proposition that the existence in the UN system of a re-examination procedure before the Sanctions Committee in respect of a contested listing prevents the judicial organs of the EC from exercising jurisdiction over the matter. In justifying its position in this regard, the Grand Chamber pointed out that the re-examination procedure does not offer the same guarantees of judicial protection that are available under EC law; that the procedure before the Sanctions Committee is in essence diplomatic and intergovernmental (which excludes the personal appearance of the affected individual); that decisions are taken by consensus, that there is a right of veto; and that the Sanctions Committee is not required to provide reasons to the affected individual for his or her being put on the list.¹⁸³ For the above reasons, the Grand Chamber concluded as follows:

It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community Law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.¹⁸⁴

In ruling in favour of the action brought by the applicant, the Grand Chamber emphasised that the effectiveness of judicial review requires that the relevant EU authority is bound to inform the applicant of the grounds for the listing and to provide him with the opportunity to contest the listing, both of which did not occur. As regards the timing of the disclosure of the relevant information, the Grand Chamber accepted that a too-early disclosure might jeopardise the effectiveness of the counter-terrorism measure. Hence, it was the Chamber's view that disclosure in such instances should not occur prior to the adoption of the initial decision to list a person, but as swiftly as possible thereafter.¹⁸⁵

Subsequent to this ruling, the issue of what would constitute 'full review' – the standard required by the Grand Chamber in the excerpt above – became yet again the subject of proceedings in the *Kadi II* case, which also ended up before the Grand Chamber.¹⁸⁶ The proceedings in *Kadi II* originated from the making available to him of the Sanctions Committee's 'narrative summary of reasons' justifying his listing, in response to the 2008 ruling by the Grand Chamber. In *Kadi II*, the applicant contended that the 'effective judicial review' required in the 2008 judgment was not possible since the 'narrative summary of reasons', on the basis of which the European Commission decided to retain his name on the list, merely comprised an enumeration of his past activities and incidents of alleged involvement with terrorist activities. The evidence on which this was based was not disclosed in the document; this was known only to the members of the Committee and until it was also disclosed, he would not be in a position to rebut effectively the case against him.

In *Kadi II*, the Court of First Instance had the benefit of the 2008 ruling by the Grand Chamber in *Kadi I* where the 'full review' standard was set. Using that, the Court of First Instance in *Kadi II* annulled the contested EU regulation, which retained the applicant's name on the list, arguing that since the European Council had neither communicated the evidence relied upon for the applicant's listing, nor given him the opportunity to exercise his right to be informed about the evidence, the Council had infringed his right to effective judicial review.

The European Commission, the Council of the European Union and the United Kingdom (supported by several European states) appealed against this ruling to the Grand Chamber of the European Court of Justice. Dismissing the appeal, the Grand Chamber applied a stringent test for effective judicial review, arguing that in the circumstances of the case:

[R]espect for the rights of the defence and the right to effective judicial protection requires that the competent Union authority disclose to the individual concerned the evidence against that person *available to that authority* [our emphasis] and relied on as the basis of its decision, that is to say, *at the very least*, [our emphasis] the summary of reasons provided by the Sanctions Committee ... so that that individual is in a position to defend his rights in the best possible conditions and to decide, *with full knowledge of the relevant facts*, [our emphasis] whether there is any point in bringing an action before the Courts of the European Union.¹⁸⁷

It was not disputed that in the present case the European Commission had complied with this obligation. All the Commission had was the Sanctions Committee's 'summary of reasons' and that was communicated to the applicant. However, the Grand Chamber went further by stating that, in the case of the listed individual contesting the summary of reasons, the competent authority 'is under an obligation to examine, carefully and impartially, whether the alleged reasons are well-founded'.¹⁸⁸ In such an instance:

[I]t is for that authority to assess ... whether it is necessary to seek the assistance of the Sanctions Committee and, through that committee, the Member of the UN which proposed the listing of the individual concerned ... in order to obtain ... the disclosure of information or evidence, confidential or not, to enable it to discharge its duty of careful and impartial examination.¹⁸⁹

This is a procedural safeguard, the Grand Chamber argued, and it is within the judicial review powers of the court to ascertain whether the competent European authority had indeed taken the necessary steps to obtain the information, as opposed to merely relying on it without further investigation for purposes of retaining the listing.¹⁹⁰ But effective judicial review, according to the Grand Chamber, also requires that the courts of the European Union ensure that the listing decision of the European authorities ‘is taken on a sufficiently solid factual basis’.¹⁹¹ That will require:

a verification of the factual allegations in the summary of reasons underpinning that decision ... with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated.

For instance, with regard to the verification requirement, the Grand Chamber argued that it is the task of the competent European authority, when the reasons for the listing are challenged, to establish that the reasons relied upon for the listing are well founded, since it is not the task of the listed person to adduce evidence to the contrary – that is, that the reasons are not well founded.¹⁹² Then, in a similar tone, the Grand Chamber stated that if the competent authority is unable to provide the necessary evidence and information underlying the reasons for the listing, then it will be the duty of the courts ‘to base their decision solely on the material which has been disclosed to them, namely ... the indications contained in the narrative summary ... provided by the Sanctions Committee ...’, the observations and exculpatory evidence that may have been produced by the person concerned and the response of the competent European Union Authority’.¹⁹³ And, concluded the Court:

[i]f that material is insufficient to allow a finding that a reason is well-founded, the Courts of the European Union shall disregard that reason as a possible basis for the contested decision to list or maintain a listing.¹⁹⁴

The stringent test applied by the Grand Chamber in this matter, which is reminiscent of the standard of proof for at least a *prima facie* case in criminal proceedings, ignores the arguments of the Security Council that the counter-terrorism measures complained of in this case ‘are preventative in nature and are not reliant upon criminal standards set out under national law’.¹⁹⁵ However, even if one accepts that prevention is the underlying motivation for these measures, their impact and duration may mean they are not much different from a criminal sanction. In fact, the Court of First Instance in *Kadi II* specifically referred to the effect of the measures, which were in place for almost ten years, on the rights of the applicant in confirming the need for a ‘full and rigorous judicial review’.¹⁹⁶ Apparently of equal mind, the Grand Chamber argued that despite their preventive nature:

the restrictive measures at issue have ... a substantial negative impact related, first, to the serious disruption of the working and family life of the person concerned ... as in this case, with the actual duration of their application, and, on the other, the public opprobrium and suspicion of that person which those measures provoke.¹⁹⁷

The sentiments on the review of counter-terrorism measures that we find in the *Kadi* judgments have also informed judgments of national courts¹⁹⁸ and of the European Court of Human Rights.¹⁹⁹ While the outcome of these developments is restricted to counter-terrorism measures, it leaves open the question about their potential influence on other sanctions imposed by the Security Council. It may therefore not be long before the jurisprudence currently being developed in the area of counter-terrorism measures finds fertile ground on a broader plane of Security Council enforcement measures under article 41 of the UN Charter.

5.4 Use of force

As was pointed out in chapter 4 of this book, one of the fundamental principles of the international legal order is the prohibition on the use of force in article 2(4) of the UN Charter. This has acquired the status of a *jus cogens* norm. However, for as long as we live in a world where individual states – some governed by misguided political regimes – have exclusive control over military forces and armaments, there will be a need for military enforcement action in circumstances where there is no other option for maintaining international peace and security. The UN Charter is not oblivious to this reality and provides for the use of force as an exception to the prohibition in article 2(4) in only two circumstances:

- 1. where there is a threat to international peace and security and the Security Council decides to authorise the use of collective force under Chapter VII of the UN Charter to counter the threat, or allows a regional agency to perform this function under Chapter VIII of the UN Charter; and**
- 2. when a state is the victim of an armed attack and is entitled to act in self-defence against the aggressor under article 51 of the UN Charter.**

These instances are further explained below.

5.4.1 The collective security option

The UN Charter assigns primary responsibility for the maintenance of international peace and security to the Security Council. In carrying out this duty, the Security Council acts on behalf of the UN member states,²⁰⁰ who as members of the UN agree to accept and carry out the decisions of the Security Council taken in accordance with the Charter.²⁰¹ Collective security action will ensue when the Security Council, in exercising its primary responsibility for the maintenance of international peace and security, decides to make use of its powers under article 42 of the UN Charter. This provision determines as follows:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations.

As a Chapter VII measure, the authorisation of the use of force under article 42 is part of the Security Council's exclusive powers. However, there are some preconditions that must be fulfilled before the Council may decide to make use of its powers in this provision. First, it must determine in terms of article 39 that a threat to the peace, breach of the peace or an act of aggression has taken place. In practice, the Security Council observes this requirement and tends to state in its resolutions authorising the use of force that it is acting under Chapter VII of the UN Charter, which then characterises the action as enforcement action against the kind of threats for which Chapter VII is intended. Secondly, the Council must be of the view, borne out by factual circumstances, that non-military measures taken under article 41 (see previous section) were, or according to the prognosis would be, inadequate to deal with the situation. Thus, in the latter instance, the Council may opt immediately for article 42 measures if justified by the circumstances – that is, without first resorting to article 41 measures.

Some brief remarks are needed in regard to the different threats in article 39 of the Charter against which the Council may decide to use force. What constitutes a 'threat to the peace' is a question that invites diverse opinions. In the *Tadić* case, the International Criminal Tribunal for Yugoslavia (ICTY) noted that a threat to the peace is more of a political than a legal concept.²⁰² Certainly, the most obvious example of a threat to peace and security is the imminent outbreak of armed hostilities between two or more states. However, it is also widely accepted, and confirmed

by the practice of the Security Council, that the Council has a wide discretion in determining what will constitute a threat to international peace and security. Thus, the Council has on occasion designated internal armed conflicts,²⁰³ gross violations of human rights and humanitarian law,²⁰⁴ terrorism,²⁰⁵ and even the outbreak of the Ebola virus in parts of Africa as threats to international peace and security.²⁰⁶ However, the wide discretion that the Security Council is allowed in terms of the UN Charter is not an unfettered one. As a minimum requirement, the Council, in discharging its duties, must act in accordance with the purposes and principles of the organisation as spelled out in articles 1 and 2 of the Charter.²⁰⁷ It has also been observed that an ‘uncurbed flexibility in determining whether Article 39 has been triggered could lead to an over-extension of the Security Council that would undermine its own efficiency and ultimately that of the organization as a whole’.²⁰⁸ Even if the Council determines that an occurrence constitutes a threat to international peace and security, it is not obliged to act in terms of article 42 of the Charter; it remains within the sole discretion of the Council to decide which measures must be employed to deal with the matter.

The second occurrence in article 39 – namely, ‘breach of the peace’ – is easier to determine. This occurs when hostilities have broken out between two or more states, or when one state’s military forces have invaded another state and occupied its territory or parts thereof. In the latter instance, the classic example in modern times remains Iraq’s military invasion of Kuwait in 1990.²⁰⁹

Such incidents may also constitute ‘an act of aggression’ – the third type of threat that may trigger a Security Council decision to use force. This is clear from the well-known definition of aggression adopted by the UN General Assembly in 1974.²¹⁰ Article 1 of the Assembly’s resolution defines aggression as ‘the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State’.

And in article 2, it is determined that the ‘first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression’.

However, the Security Council may in such instances determine that the use of force as defined here, does not constitute an act of aggression in the light of other relevant circumstances – such as that the ‘acts concerned or their consequences are not of sufficient gravity’.²¹¹ This suggests that the term ‘aggression’ ought to be distinguished from other forms of armed hostilities in contravention of the Charter as a particularly serious, indefensible and aggravated form of the use of force against another state.

Of further relevance with regard to the application of article 1 of the General Assembly resolution is the clear statement that the term ‘state’ is used here ‘without prejudice to questions of recognition²¹² or to whether a State is a member of the United Nations’. A state, once *de facto* established, is therefore entitled to the protection of its territorial integrity and political independence, irrespective of whether other states have recognised it or not.

The substance of the definition of aggression is further explained in article 3 of the resolution, where certain acts considered as instances of aggression are enumerated. It is clear from this provision that aggression may take the form not only of *direct* use of force, such as an invasion of, or an attack by, the armed forces of a state against another state, but may also be *indirect*. Especially noteworthy in the latter instance is the provision in article 3(g), which considers the following also as an act of aggression:

[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein.

In the 1970 Friendly Relations Resolution, the General Assembly formulated a *duty* of states to ‘refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion in to the territory of another State’.²¹³ As was pointed out in the well-known *Nicaragua* case, not every act of assistance will qualify as an indirect use of force. In

this matter, the supply of funds, for instance, to the rebel movement in Nicaragua by the United States was considered not to constitute an indirect form of the use of force.²¹⁴ Such a narrow interpretation is in conformity with the gravity threshold in article 3(g) of the Definition of Aggression Resolution.

Somewhat disregarded for many years, the non-binding General Assembly definition of aggression gained new relevance with the adoption of the crime of aggression in article 5(1)(d) of the 1998 Rome Statute of the International Criminal Court.²¹⁵ Left undefined until 2010, the crime of aggression was given substance in a new article 8bis(1), which assigns individual criminal liability to a person effectively ‘exercising control over or directing the political or military action of a state’ for the ‘planning, preparation, initiation or execution … of an act of aggression’. Here too, the act in question must be of a certain gravity – that is, by its ‘character and scale’ it must amount to a ‘manifest violation’ of the UN Charter.

Finally, two rather problematic issues affecting the use of force as a measure for maintaining international peace and security must be highlighted. The one is that a decision by the Security Council under Chapter VII is subject to the veto power of the five permanent members.²¹⁶ If the Council is prevented from acting as a result of the exercise of the veto, individual UN members will not be entitled to take the enforcement action that the Security Council intended to authorise; it is prevented from doing so as a result of the exercise of the veto by one or more of the permanent members. A veto simply means that there is no Security Council authority for the enforcement action. Problems may also occur if enforcement action is authorised in broad and imprecise terms. An example is Security Council Resolution 678 (1990) taken at the time of the first Gulf War (1990–1991) and which authorised the use of force ‘to restore peace and security in the area’. Such open-ended mandates provide no guidance to states in respect of the scope of their mandate and can easily be misused for ulterior purposes. This is underscored by the fact that certain states continued to use force against Iraq long after the adoption of the resolution and long after the initial conflict had ended.²¹⁷

The other problematic area has to do with the core obligation of UN member states pursuant to article 43(1) of the UN Charter to make available to the Security Council, in accordance with special agreements, armed forces, assistance and facilities for the maintenance of international peace and security. Pending the coming into force of these agreements, the Charter envisaged that joint action by the United Nations under article 42 would rest on consultation between the five permanent members of the Security Council.²¹⁸ The problem was that the agreements envisaged in article 43 were never concluded and that the consultative process remained subject to the veto of the five permanent members.

The non-realisation of the agreements signalled the unwillingness of UN member states to make binding commitments regarding their obligation under article 45 of the UN Charter – namely, to hold immediately available national air force contingents, of the strength and degree of readiness specified in the agreements under article 43, so as to enable the United Nations to take urgent military measures.²¹⁹ This has prevented the United Nations from having at its disposal a permanent standby force with the result that each operation has to rely on ad hoc arrangements with troop-contributing countries based on voluntary co-operation to dispatch armed forces where needed.²²⁰

5.4.2 The role of regional arrangements and agencies

A role for regional arrangements or agencies is provided for in Chapter VIII of the UN Charter. Article 52 determines as follows:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security

as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations.

While this provision allows for the establishment of regional intergovernmental organisations in any part of the world for the purpose of maintaining international peace and security in a particular region, article 53 spells out the relationship between such regional organisations and the Security Council. It determines in part as follows:

The Security Council shall where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.

Apart from having to obtain Security Council authorisation for enforcement action at the regional level, a regional organisation is also required to keep the Security Council fully informed at all times of activities undertaken or contemplated for the maintenance of international peace and security.²²¹

Over time, commentators on Chapter VIII have attempted various interpretations of how the terms ‘regional’ should be understood.²²² An acceptable explanation is that what is required is not strictly the geographical proximity of the members of the regional arrangement or agency, ‘but close and reliable ties between the members of the organization’ and that the ties ‘must lead to the expectation that the organization can provide specific contributions to the maintenance of international peace and security which go beyond what would be achievable at the universal level by the UN’.²²³ Furthermore, the distinction between ‘arrangement’ and ‘agency’ is of little importance and other terms are often used such as ‘regional and subregional organisations’, terms one often encounters in Security Council resolutions. One requirement (to qualify as a Chapter VIII arrangement or agency) seems to be that the arrangement or agency must have some permanency or durability as opposed to being an ad hoc arrangement between a group of states for the purpose of dealing with a specific conflict. For instance, in the *Nicaragua* case (Jurisdiction and Admissibility) the ICJ, without providing reasons, denied that the ‘Contadora Group’ had the status of a regional arrangement under Chapter VIII.²²⁴ The group was formed by Columbia, Mexico, Panama and Venezuela to deal with military conflicts at the time in El Salvador, Nicaragua and Guatemala.

Organisations that enjoy Chapter VIII status include the Organization of American States (OAS), the League of Arab States (LAS), the African Union (AU), the Organization of Security and Cooperation in Europe (OSCE), the European Union (EU), the North Atlantic Treaty Organization (NATO), the Economic Community of West African States (ECOWAS) and the Association of South East Asian Nations (ASEAN).

At this point, it is necessary to return to article 53 referred to above. This provision requires Security Council authorisation for enforcement action by a regional organisation to be lawful. A question that has caused much debate is whether the authorisation needed must be acquired prior to the taking of enforcement action or whether *ex post facto* authorisation will suffice. Given the UN Charter’s legal regime on the use of force, the Security Council’s primary responsibility for international peace and security and its exclusive powers under Chapter VII of the Charter, the only logical interpretation seems to be that article 53 requires prior authorisation. Commentators have also pointed out that ‘[t]o hold otherwise bears the risk that regional arrangements could be tempted to initiate enforcement actions in the hope that the SC would give its authorization afterwards’.²²⁵ Moreover, in the case of authorisation after the fact, the Security Council has no control over the scope and purpose of the action and can play no role in keeping it within the confines of the

Charter's legal regime on the use of force. However, a few select events will illustrate the practical difficulties that may arise with the implementation of article 53.

In 1990, ECOWAS dispatched a multinational force (ECOMOG)²²⁶ into Liberia to help end the civil war that erupted there in 1989 and which lasted until 2003.²²⁷ This intervention took place without prior Security Council authorisation but subsequent statements that emanated from the Council suggested *ex post facto* authorisation. For instance, on 22 January 1991 and then again on 7 May 1992, the President of the Security Council 'recognised' the ECOMOG action.²²⁸ This was followed by a Security Council resolution that determined that the situation in Liberia constituted a threat to peace and security in West Africa as a whole and 'commended' ECOWAS for its efforts to restore peace and security in Liberia.²²⁹ Some scholars have argued that the vague language in these and other documents makes it unlikely that an *ex post facto* Security Council authorisation can be inferred from it, and have argued that the vague language, in any event, leaves the question open whether and to what extent the ECOMOG initiative was approved *ex post facto*.²³⁰ A clear response by the Security Council rejecting the lawfulness of the ECOMOG intervention for lack of prior authorisation would have settled the matter. In its absence, the contrary intention becomes a reasonable inference.

In 1997, the Security Council authorised ECOWAS to use enforcement action to enforce an arms and petroleum embargo against Sierra Leone following a military coup during which the democratically elected government was ousted.²³¹ This authorisation was done with specific reference to Chapter VIII of the UN Charter and allowed ECOWAS also to halt inward maritime shipping, for the purpose of inspecting and verifying cargoes and their destinations.²³² Although the authorisation was not restricted to a specific time period, the resolution made it clear that the embargo would end once the military junta had relinquished power and had made way for the restoration of a democratically elected government.²³³ On 10 March 1998, the democratically elected president returned to power and the Security Council terminated, with immediate effect, the embargo on petroleum and petroleum products,²³⁴ and soon thereafter also the arms embargo.²³⁵

The termination of the embargo (the functional limitation) also terminated, by implication, Security Council authorisation for ECOMOG's enforcement action. Despite these developments, ECOMOG continued with its action until early 2000. On several occasions, the Security Council, using commendatory language, ostensibly approved of the ECOMOG initiatives, but without referring to Chapter VIII of the UN Charter. Hence, the Council 'commended' ECOMOG for its important role in the restoration of peace and security in Sierra Leone;²³⁶ 'noted' the role of ECOMOG in assisting with the disarmament and demobilisation of the rebels and with the collection and destruction of arms;²³⁷ 'welcomed' the commitment of ECOMOG to secure the safety of UN personnel;²³⁸ and 'commended' ECOMOG on its 'outstanding contribution' with regard to the restoration of security and stability in Sierra Leone, the protection of civilians and the promotion of a peaceful settlement of the conflict.²³⁹

If the vague language used by the Security Council in these examples, coupled with the absence of a reference to Chapter VIII of the UN Charter, justifies claims that the resolutions referred to do not provide sufficient evidence of an *ex post facto* authorisation of enforcement action by regional organisations, then what meaning should be attached to them, if any? This dilemma seems to rest on two approaches to authorisation. The one is that article 53, although not specifically mentioning it, requires explicit authorisation by the Security Council. This view sees implicit authorisation as a source of legal uncertainty, as well as an obstacle to the Security Council's ability to exercise command and control over regional action, and as creating an opportunity for abuse by regional organisations.²⁴⁰ The counter-approach is that a rigid reliance on explicit authorisation fails to give due consideration to Security Council practice in this regard, which, as the examples above have illustrated, is often characterised by tacit approval of the actions undertaken by regional

organisations. This may be necessary for political or diplomatic reasons when Council members, especially the permanent members, find themselves in a situation that makes explicit authorisation too costly in view of the different, and often conflicting, interests that must be accommodated.²⁴¹

If this approach is allowed for, then the question is what kind of Security Council conduct should be considered as sufficient for an inference of implicit authorisation? A plausible argument is that mere silence is inadequate and that what is needed is that the resolution must contain language that points towards implied authorisation and is supported by the concurring vote of the five permanent members. A further explanation states that:

In passing such a resolution, the members of the SC will be aware that their action can be taken as an implicit authorization. The SC thus remains in control of regional actions, and at the same time it retains more options in dealing with such situations than would be the case if only express authorizations were permitted.²⁴²

One of the most controversial incidents in this area was the 1999 NATO air campaign in the former Yugoslavia. In that year, the escalating crisis in Kosovo between the Kosovo, Albanian and Serbian forces had reached such a critical point that air strikes against the Federal Republic of Yugoslavia had been openly discussed and threatened.²⁴³ In response, two permanent Security Council members, China and Russia, made no secret of the fact that they would veto a Security Council resolution authorising the use of force in Kosovo if a request for air strikes was placed before the Council. Under these circumstances, there was no realistic prospect for Security Council authorisation. In March 1999, NATO, without seeking and obtaining prior Security Council authorisation, launched a bombing campaign that lasted until May of that year. Some states have sought to justify the NATO offensive on humanitarian grounds.²⁴⁴ However, there was agreement that the bombing campaign – lacking prior Security Council authorisation – was illegal and constituted a violation of international law.²⁴⁵ The seriousness of the incident was also underscored by the fact that an independent commission of enquiry was subsequently established to investigate the NATO intervention and other aspects of the Kosovo conflict. On the NATO air campaign, the Commission concluded that:

[T]he NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.²⁴⁶

In concluding this section, reference must be made to the express authorisation given to the African Union (AU) to intervene in member states, with military force if necessary, to deal with a humanitarian crisis. Article 4(h) of the AU's Constitutive Act (2000) proclaims that the AU has a right to 'intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances namely war crimes, genocide and crimes against humanity'. This right is reiterated in article 4(k) of the 2002 Protocol relating to the Establishment of the Peace and Security Council of the African Union and in article 8 of the 2009 AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). Neither of these provisions, nor any other, makes specific reference to the requirement in article 53 of the UN Charter – namely, that regional enforcement action will require prior Security Council authorisation. This leaves the basis for regional action in terms of article 4(h) unclear.

If the intervention takes place by invitation – that is, consent, of the member state – the need to seek prior Security Council authorisation falls away, since the invitation itself will constitute sufficient justification for the intervention. However, in such circumstances, the invitation must come from a government whose status and legal authority to seek assistance are not in dispute and the consent itself is clear and unambiguous.²⁴⁷ Note also that consent as a justification for

intervention cannot be relied upon if the action taken is directed against the government itself. For instance, this will be the case where the actions of the government of the territorial state are the cause of the humanitarian crisis and the AU is forced to act against that government under article 4(h) of the AU's Constitutive Act.

A related issue is whether member states of the AU's Constitutive Act, by virtue of their membership, have given advance consent for the kind of action contemplated in article 4(h). There are two possible responses to such an interpretation. The one is that the lawfulness and validity of an invitation (consent) (to which the AU has a right to respond) can only be determined at the time and in the circumstances of the crisis; advance consent to intervene in article 4(h) crises sometime in the future makes such an assessment impossible and disregards the sovereign right of the territorial state to determine for itself the cause of action in the actual circumstances of the situation. The other is that the AU may then rely on advance consent to exempt itself from seeking and obtaining prior Security Council authorisation for enforcement action under article 4(h). This is certainly not commensurate with the overall purpose of the UN Charter's legal regime on the use of force – in particular, that of article 53.

In general, the powers and functions of the AU, especially those under article 4(h) of the AU's Constitutive Act, cannot be interpreted with disregard for article 103 of the UN Charter. This provision states:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Moreover, in terms of article 3(e) of the AU's Constitutive Act, the AU has committed itself to international co-operation, while taking due account of the Charter of the United Nations.

If this settles the issue – namely, that article 53 of the UN Charter must be complied with when the AU decides to use enforcement action (except when in response to a lawful and valid invitation by a member state) – then what about an emergency situation that leaves no time for the internal Security Council decision-making deliberation process to run its course in response to a request for authorisation under article 53 of the UN Charter? Must a regional organisation (assuming that it can and will act) simply stand by and watch mass atrocities being committed pending the outcome of a Security Council decision? And what is the situation when the veto is exercised and the Council is prevented from acting? These dilemmas have confronted the international community in the past, and will do so in the future. They have been thoroughly considered in the UN Secretary-General's famous report on threats, challenges and change.²⁴⁸ Part answers to these dilemmas are found in the legality/legitimacy issue dealt with earlier on, and in the controversial 'responsibility to protect' doctrine dealt with further below.

5.4.3 Self-defence

The right that each state has to defend itself has been described as the 'most prominent exception to the prohibition on the use of force'.²⁴⁹ This right is provided for in article 51 of the UN Charter, which reads as follows:

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 the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The reference to an *inherent* right of self-defence has been interpreted as a reference to the pre-Charter customary law position on self-defence,²⁵⁰ which is famously linked to the *Caroline* incident

(explained below). Ever since this incident, the customary law requirements of *necessity* and *proportionality* have been confirmed in a number of cases and therefore determine the need for and scope of an act of self-defence under article 51 of the UN Charter.²⁵¹ Besides these customary law limitations, article 51 restricts the exercise of the right to self-defence to incidents of an *armed attack* against a state. A mere threat to peace and security will therefore not suffice. In the famous *Nicaragua* case, the ICJ confirmed this position as follows:

In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. ... The Court has recalled above ... that for one State to use force against another state... . is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. Thus the lawfulness of the use of force by a State in response to a wrongful act ... is not admitted when this wrongful act is not an armed attack.²⁵²

Thus, we are dealing here with a situation that is tantamount to an act of aggression in the sense of the actual use of armed force against the sovereignty, territorial integrity and political independence of a state and can include the ‘sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries’ if their operation meets the threshold of an armed attack. This description, which follows the formulation in article 3(g) of the Definition of Aggression Resolution of 1974 and is referred to earlier on, reflects customary international law according to the ICJ in the *Nicaragua* case.²⁵³

The right to self-defence may be exercised individually or collectively – that is, by a group of states acting in the interest of the victim of an armed attack. In the case of collective self-defence, three conditions must be fulfilled – namely, (1) there must be an armed attack; (2) the victim state must form and declare the view that it has been attacked; and (3) the collective action must be based on a request for assistance by the victim state.²⁵⁴ In either case (individual or collective self-defence), the act of self-defence must cease the moment the Security Council has taken the necessary measures. This also explains why a state or states acting in self-defence must immediately report their action to the Security Council, which retains, even under article 51, primary responsibility for the maintenance of international peace and security.

There is a long-standing controversy over the use of anticipatory or pre-emptive self-defence to avert an *imminent* armed attack.²⁵⁵ The proponents of this type of self-defence argue that since article 51 incorporates the customary law position on self-defence (the ‘inherent right’), which allows for anticipatory action, it must also be possible under article 51. Anticipatory action under customary international law is usually invoked with reference to the *Caroline* incident, which arose out of the Canadian rebellion of 1837. In this matter, a Canadian rebel force, partly made up of US nationals and assisted by an American ship, the *Caroline*, was involved in attacks on British ships that passed near Canadian shores. In retaliation, the British seized the *Caroline*, set fire to it and pushed it over the Niagara Falls. In a diplomatic note criticising the legality of the British action, the American government wrote the following: ‘It will be for ... [Her Majesty’s] Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation’.²⁵⁶ These requirements for self-defence are commonly accepted as constituting the pre-Charter, customary law of self-defence. But, what was also not in dispute in the *Caroline* incident, was that the British government was entitled to anticipate further attacks and therefore to take preventive action.

Various arguments have been put forward as to why preventive or anticipatory self-defence based on pre-Charter law is indefensible. A particularly forceful argument is that an interpretation allowing for preventive or anticipatory action is incompatible with the wording of article 51,²⁵⁷ which restricts self-defence to ‘if an armed attack occurs’ and, to quote from the *Caroline* incident, to an attack that is ‘instant, overwhelming, leaving no choice of means, and no moment for deliberation’.

A restrictive interpretation of article 51 is also in keeping with the purposes and principles of the UN Charter, which tend to reduce to a minimum the situations that would allow for the unilateral use of force. Another perspective in support of disallowing a broader interpretation based on the customary law position, is that in nineteenth-century doctrine (also applied in the *Caroline* incident), self-defence was used either synonymously with or as an instance of self-preservation, and also interchangeably with self-preservation, necessity, and necessity of self-defence. This blurring of meanings makes the use of the customary law notion of self-defence in support of a more flexible interpretation of article 51 ‘anachronistic and indefensible’.²⁵⁸

In the *Nicaragua* case, since the parties relied on the right of self-defence ‘in the case of an armed attack which has already occurred’,²⁵⁹ the court refrained from deciding whether or not self-defence is lawful in response to an *imminent* attack. This may point to state practice in support of a strict interpretation of article 51 of the UN Charter. In the *Armed Activities (DRC v Uganda)* case, the ICJ was also not prepared to speculate on matters of self-defence outside the ‘strict confines’ of article 51. The court made it emphatically clear:

Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular recourse to the Security Council.²⁶⁰

The restrictive approach to the interpretation of article 51 was also confirmed in the 2004 High Level Panel Report on Threats, Challenges and Change in stating that a threatened state can take military action under article 51 ‘as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate’.²⁶¹

However, those in favour of a more flexible interpretation of article 51 argue that the restrictive approach is not realistic in view of the destructive potential of modern weapons and the speed with which they can be launched.²⁶² This opens the debate on the *timing* of an act of self-defence in relation to its lawfulness, and of a potential broadening of the definition of an armed attack based on technological developments in the means of modern warfare. When formulating a response to these issues, a distinction must first be made between *pre-emptive action* against an imminent or proximate threat, as opposed to one that is occurring ('if an armed attack occurs' – article 51); and *anticipatory self-defence*, which entails *preventive action* against a non-imminent or non-proximate threat.

The High Level Panel Report seems less concerned with *pre-emptive* action in the case of an imminent or proximate threat when circumstances would justify a pre-emptive response.²⁶³ After all, this involves the issue of the timing of the response, which cannot be determined without taking into consideration the destructive capabilities of the weapons employed in an armed attack and the effectiveness with which the victim state will be able to defend itself when (a) waiting for the armed attack to actually occur, or (b) opting for a pre-emptive strike.

In focusing on the issue of *anticipatory* self-defence (preventive action), the consensus in the High Level Panel Report was that when good arguments, supported by credible evidence, point to a need for preventive military action, the case must be put before the Security Council, which can then authorise such action if it so decides. And if a decision on this fails to materialise, ‘there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment – and to visit again the military option’.²⁶⁴

5.4.4 Sources of controversy

The use of force, understood to be a measure of last resort, is bound to invite controversy in many circumstances. Six particular sets of circumstances have repeatedly tested international legal thinking on the acceptability and legality of the use of force. These are discussed below.

5.4.4.1 Rescue of own nationals

The post-Charter era is replete with incidents where states have resorted to the use of invasive force to rescue nationals abroad. It is doubtful that such action could be justified as an incident of the customary law right of self-defence,²⁶⁵ but it is outright impossible under article 51 of the UN Charter. However, such action will remain uncontroversial as long as it takes place with the acquiescence or consent of the host state. Hostile reaction to forceful rescue operations in other countries usually occurs when consent, implicit or explicit, is absent.

A well-known illustration of a forceful rescue operation is the 1976 *Entebbe* incident.²⁶⁶ On 27 June 1976, German and Arab hijackers took control of an Air France airliner bound for Paris from Tel Aviv and diverted it to Entebbe airport in Uganda. There the Jewish passengers were separated from the others and held hostage to facilitate the hijackers' demand for the release of 50 Palestinian terrorists detained in various countries. Evidence at the time suggested that the Ugandan authorities not only failed to take the necessary steps against the hijackers, but even assisted them. This was denied by Uganda. On 3 July 1976, Israeli soldiers were secretly flown to Uganda to rescue the hostages by force. In the operation the hijackers were killed as were some Israeli and Ugandan soldiers. Extensive damage was also done to the airport and to Ugandan aircraft.

In the Security Council debates following the incident, Uganda called the action barbaric and an unprovoked act of aggression and demanded full compensation from Israel; Israel invoked the right of a state in international law to use force to protect its nationals in mortal danger, the right to self-defence and the failure of Uganda to protect foreign nationals on its territory as justification for the rescue operation; Cameroon called the action a violation of the Charter principles prohibiting the use of force against the territorial integrity and political independence of another state; and the United States, supporting the Israeli action, relied on the 'well-established right' to use limited force for the protection of one's own nationals in a state that is unwilling or unable to protect them, which the United States considered to be a right 'flowing from the right of self-defence' which is limited 'to such use of force as is necessary and appropriate to protect threatened nationals from injury'.²⁶⁷

This right was invoked in several other incidents such as by the United States in the Dominican Republic (1965), Grenada (1983) and Panama (1989) and by the United Kingdom in Suez (1956).²⁶⁸ A more recent incident is the use of force by Russia against Georgia in 2008 in response to Georgia's decision to use force to assert control over separatists in the region of South Ossetia, where many South Ossetians held Russian passports. Russia justified its action by invoking its right to protect its nationals in South Ossetia. The conflict also spread to Abkhazia, another separatist stronghold, prompting Russia to extend its military action over much of Georgia, forcing Georgia to withdraw from South Ossetia and Abkhazia. Both areas subsequently proclaimed their independence.²⁶⁹ Arguing that Russia's true intention was the dismemberment of Georgia and not the protection of its own nationals, Western states objected to Russia's intervention as an unlawful use of force.²⁷⁰ But this is not extraordinary; the protection of nationals is often a pretext for more grandiose schemes, as illustrated by the other incidents referred to above (although not the Israeli action in Entebbe).

5.4.4.2 Humanitarian intervention

Forceful humanitarian intervention usually takes place to avoid a humanitarian catastrophe in another country or to come to the assistance of a people suffering serious human rights violations at the hands of an oppressive regime. Intervening, using force in such circumstances, constitutes one of the most controversial so-called exceptions to the general prohibition on the use of force

against the territorial integrity and political independence of another state and has been the source of volumes of divided opinions in scholarly, political and diplomatic debates.²⁷¹

Examples of forceful international intervention that have been made in the name of humanitarian interests include events in Kosovo and Libya.

In 1999, NATO commenced a bombing campaign in Kosovo, without Security Council approval, and lasting several weeks, allegedly to protect ethnic Albanians in Kosovo from being massacred by Yugoslav forces in the last moments of the Yugoslav conflict. Supporting this action, the United Kingdom permanent representative to the United Nations made the following statement:

The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. Under present circumstances in Kosovo there is convincing evidence that such a catastrophe is imminent. ... In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable.²⁷²

In 2011, an internal conflict erupted in Libya when a large section of the population started a popular uprising against the oppressive regime of Muammar Gadhafi. In response to the deteriorating situation and escalation of violence, the UN Security Council adopted a resolution condemning the gross and systematic violation of human rights, acts of violence and intimidation and the widespread and systematic attacks against the civilian population by government forces.²⁷³ Acting under Chapter VII of the UN Charter, the Security Council then authorised UN member states ‘to take all necessary measures’ to protect civilians and civilian-populated areas under attack and to enforce a no-fly zone in the Libyan airspace.²⁷⁴ The resolution also invoked the emerging notion of the responsibility to protect²⁷⁵ by reminding the Libyan authorities of their responsibility to protect the Libyan population and to comply with their obligations under international law to protect civilians and to meet their basic needs.²⁷⁶

Over the years, differing positions on the validity or not of humanitarian interventions of the kind that surfaced in the above and other cases, have dimmed the hope for a consensus view on whether the UN Charter (or general international law for that matter) provides legal justification for such unilateral action. It is therefore necessary to note the arguments that have come to characterise the doctrinal debate on the validity of humanitarian intervention. A few illustrations will suffice.

In the case of the removal of tyrannical forms of government suppressing the citizens of a country, it is sometimes argued that ‘intervention from outside is not only legally justified but morally required’.²⁷⁷ Such arguments may seek justification in other values espoused in the UN Charter, such as respect for human rights and fundamental freedoms,²⁷⁸ coupled with the rising importance of human rights concerns in international relations since the adoption of the UN Charter. On this point, one should recall the ICJ’s ruling in the *Nicaragua* case where the following was said:

In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence.²⁷⁹

What it means for the interpretation of a provision such as article 2(4) of the UN Charter, is precisely what causes the division in opinion on the use of force for purposes other than those explicitly provided for in the UN Charter – namely, individual and collective self-defence. Those following a broader interpretation based on human rights, morality or the maintenance of an international public or community order²⁸⁰ argue that a strict and mechanical interpretation of article 2(4) relying on its prohibitions could mean that claims worthy of international protection were ignored. This would leave communities deprived of their rights and freedoms, and at the mercy of oppressive regimes. In time, it could be equally destructive of the political independence of the state with potential implications for international peace and security. The suggestion in these instances is not that the right to humanitarian intervention is justified in every instance of human rights violation, but that a valid argument for military intervention on humanitarian grounds can be made out in extreme cases involving an immediate threat of a large-scale loss of life. Thus, in humanitarian catastrophes of this nature, ‘international law does not require that respect for the sovereignty and integrity of a State must in all cases be given priority over the protection of human rights and human life, no matter how serious the violations of those rights perpetrated by that State’.²⁸¹

The counter-argument is that considerations like these, bordering on moral canon, cannot be allowed to determine the legal scope of article 2(4). There is a real danger that states will abuse an opportunity to invent a range of so-called higher or equally relevant norms or values to justify the use of force, hoping that they will not be censored by the international community. In the long run, this might render meaningless the whole intent and purpose of article 2(4). Authors who have expressed concern about humanitarian intervention becoming an instrument wide open to abuse have also pointed to: the ineffectiveness of interventions in solving human rights issues in many instances; the opportunities it creates for hegemonic intervention; and the danger that intervention will be used to protect, for instance, commercial interests, or to maintain or impose client governments.²⁸²

Two main issues emerge from the above views opposing military interventions for humanitarian reasons. First, a strict reliance on the Charter prohibition on the use of force can hardly escape becoming unworkable and unacceptable in certain circumstances. Secondly, it must be asked whether the number of instances of unilateral humanitarian intervention since 1945 constitute state practice for the purpose of the formation of customary international law.

5.4.4.2.1 Charter prohibition may be unworkable and unacceptable

With regard to the first issue, the Charter prohibition is unlikely to act effectively as a restriction on last-resort unilateral action that is in response to a widespread and systematic violation of human rights threatening the lives and existence of a population or significant parts thereof – especially in the face of the *de facto* inability and political unwillingness of the United Nations or a regional organisation to stop the human rights violations. Their failure may be as a result of the exercise of the veto or some other self-imposed restriction or inaction.²⁸³ The following incidents may be used to illustrate this dilemma.

In the Kosovo incident²⁸⁴ referred to above, continued international efforts to bring about a political solution to the deteriorating situation in Kosovo and within the region were largely unsuccessful. Amid large-scale violence that flared up in late 1997 and the beginning of 1998, and subsequent reports of grave human rights violations and displacement of thousands of people, the UN Secretary-General in 1998 classified the situation as a ‘humanitarian crisis’ that could develop into a ‘humanitarian catastrophe’.²⁸⁵ Following this, the Security Council, acting under Chapter VII of the UN Charter, adopted a resolution expressing concern about the deteriorating humanitarian situation and the increasing violation of human rights and international humanitarian law, and

demanding that the ‘authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership take immediate steps to improve the humanitarian situation and to avert the impending humanitarian catastrophe’.²⁸⁶ In addition, the resolution spelled out a number of measures for immediate implementation by the responsible authorities, including an end to all action by the security forces affecting the civilian population and the withdrawal of security units used for civilian repression.²⁸⁷ This response to the crisis was endorsed by the Council a month later in a resolution that classified the situation as a continuing threat to peace and security in the region and re-affirmed the Charter position that the maintenance of international peace and security is the primary responsibility of the Security Council.²⁸⁸

Not only were these calls by the international community represented in the Security Council ignored, but the Yugoslav authorities persisted in their rejection of the proposals, aimed at securing a ceasefire and a peace settlement in Kosovo, by an international contact group (France, Germany, Italy, Russia, the United Kingdom and the United States). In the face of ongoing atrocities and a deteriorating humanitarian situation, NATO commenced a 78-day bombing campaign on 24 March 1999. On the one hand, the campaign was widely supported²⁸⁹ as a justifiable action in halting crimes against humanity, war crimes and the massive expulsion of civilians. On the other, it was criticised for being a use of force not provided for in the UN Charter.²⁹⁰ The latter is based on the absence of Security Council authorisation for the NATO response, which, arguably, was a requirement under article 53 of the UN Charter in this instance.²⁹¹ However, the dilemma NATO faced was that it was known in advance that Russia and China, permanent members of the Security Council, were against the use of force and would use their veto right in the Council.²⁹² The fear of a veto being used to disable the Security Council was not unfounded as, shortly after the start of the bombing campaign, Russia proposed a resolution in the Council declaring the NATO action unlawful and asking for it to be terminated. This attempt failed because the resolution only secured the support of China and one other non-permanent member.²⁹³

The controversy over the legality or illegality of the NATO bombings is further complicated by the fact that NATO failed to achieve what its action set out to do – namely, to protect the Kosovo Albanians from Serbian war crimes and to drive the Serbian troops from Kosovo. The damage caused by the bombing campaign was also disproportional to the objective.²⁹⁴ Referring to these failures, critics, even if they accepted the need for intervention, questioned the strategy decided upon by NATO and implied that better alternatives, more suitable to the humanitarian objective, should have been considered. What is the correct approach out of this dilemma?

Richard Falk argues that a legalistic approach to the Charter provisions on the non-use of force in circumstances such as those that confronted the international community in the Kosovo conflict, stands on untenable ground; it raises textual barriers to humanitarian intervention in the face of genocidal behaviour that is politically and morally unacceptable ‘especially in view of the qualifications imposed on unconditional claims of sovereignty by the expanded conception of international human rights’.²⁹⁵ Moreover, a legalistic approach is unhelpful in deciding whether the means chosen were legally acceptable in the light of the objectives pursued. He therefore argues for a more ‘nuanced attention to context … so that the debate can be reformulated in a manner corresponding with the broad injunction to seek a global security system that contributes to the achievement of “humane governance” on a global scale’.²⁹⁶ If not, the ‘self-marginalization of international law and international lawyers’ will be assured in the contemporary world when claims to use force are involved.²⁹⁷ In his scheme, the role of international lawyers is to clarify the contexts in which decisions must be taken and to recommend preferred options – also taking into account jurisprudential considerations, but then as ‘tools of illumination’ and not as ‘expressions of ontological truth’.²⁹⁸

Coincidentally, in the same year as the controversial Kosovo incident, the report of the independent inquiry into the actions (read: ‘inaction’) of the United Nations during the 1994 genocide in Rwanda was submitted to the UN Secretary-General.³⁰⁹ Rwanda must surely count as one of the most abhorrent events of the twentieth century. Between April and July 1994, 800 000 people, mostly Tutsis, were systematically and brutally decimated, while the United Nations, the OAU and the vast majority of African states showed a persistent lack of political will to prevent and then to stop the genocide.³¹⁰ If ever there was a humanitarian catastrophe, this was it; and it was made worse by the crossing into neighbouring Zaïre (now the Democratic Republic of the Congo) of more than a million refugees whose camps became infiltrated by the very forces involved in the killings.³⁰¹

Both these incidents – the controversial humanitarian intervention by NATO without Security Council authorisation, and the tragic dysfunctionality of the United Nations and the larger international community in the case of Rwanda – confront the states of the world and international law with many challenges for which answers need to be found if the legitimacy of the United Nations and the legality of unilateral humanitarian interventions are to be upheld. To preserve the legality of an intervention, commentators have sought to develop criteria for the appraisal of unilateral humanitarian intervention in circumstances when neither the United Nations nor a competent regional organisation has assumed its responsibilities.³⁰² However, interventions with Security Council authorisation that lack clear specifications can be equally problematic.

A case in point is the Libyan example referred to earlier on. Protests against the authoritarian and oppressive regime of Moammar Gadhafi started during the first months of 2011 and were met from the beginning with violent resistance by the regime using tanks, machine guns and even military aircraft flying bombing raids against protesters and civilian areas. As news of the use of excessive force, arbitrary killings, torture and enforced disappearances escalated in the course of 2011, the international community, regional organisations and NGOs became united in condemnation of the Gadhafi regime.³⁰³ In taking note of the widespread condemnation and reports of massive human rights violations, the Security Council, acting under Chapter VII of the UN Charter, adopted resolution 1970 on 26 February 2011. The resolution stated that the systematic and widespread attacks against the civilian population may amount to crimes against humanity and demanded an immediate end to the violence and the taking of steps ‘to fulfil the legitimate demands of the population’.³⁰⁴ In addition, the Security Council referred the situation to the International Criminal Court and imposed an arms embargo on the country and a travel ban and asset freeze on members of the Gadhafi regime. Despite this intervention by the Security Council, the situation deteriorated even further and within a few weeks the Council adopted resolution 1973, again under Chapter VII of the Charter, authorising, firstly, UN member states, acting nationally or through regional organisations or arrangements, ‘to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack ... while excluding a foreign occupation force of any form on any part of the Libyan territory ...’; and secondly, the imposition of a flight ban in the Libyan airspace³⁰⁵ in an attempt to protect civilians against airstrikes by the Gadhafi regime.

Acting under this authorisation, a coalition of Western states commenced with the launching of missile attacks against the Libyan air defence systems and military units. These attacks destroyed the air defence and attack capability of the regime. In April 2011, this offensive was taken over by NATO and through sustained military attacks, NATO forces gradually paved the way for the opposition forces to liberate the country from the Gadhafi regime in October 2011, when Sirte (Gadhafi’s home town) fell under the control of the opposition and Gadhafi himself was killed.

It is common cause that the weakening of the Gadhafi regime by the NATO military offensive played a major role in the success of the opposition forces in gaining the upper hand and eventually

overthrowing the regime. In this sense, outside forces contributed to ‘regime change’ in another country and it is this aspect that has caused a number of critical voices to question whether the intervening states were allowed actively to seek the overthrow of the Gadhafi regime and its replacement by the opposition.³⁰⁶ This intention became clear shortly after the commencement of the intervention by coalition forces when the leaders of the United States, France and the United Kingdom emphasised that although their duty and mandate under resolution 1973 was not to remove Gadhafi by force, it was unimaginable that Gadhafi, who was responsible for the massacre of his own people, could still play a part in Libya’s future government. Even more forthright was a G8 Summit communiqué, issued in May 2011, in stating that Gadhafi and the Libyan government had failed to protect the Libyan population, that both had lost all legitimacy and that Gadhafi must go since he had no future in a free and democratic Libya.³⁰⁷

More importantly though, is the question whether the Security Council itself excluded regime change. That regime change was not categorically ruled out by the terms of the mandate may be inferred from the fact that resolution 1970 called for steps to ‘fulfil the legitimate demands of the population’, which arguably could not have happened with Gadhafi still in control of the levers of power, and that it specifically targeted the Gadhafi regime by imposing a travel ban and an asset freeze on members of the regime. In addition, resolution 1973 specified the objective of the mandate – the protection of civilians and civilian-populated areas – but left the *means* for realising the objective largely within the discretion of the intervening powers. By authorising intervening states to ‘take all necessary measures’ (which in Security Council terminology includes the use of force), the intervening states were entitled to act, with force if necessary, against any threat that could have compromised the safety of the civilians or civilian-populated areas, and to remove that threat. Consequently, if the Gadhafi regime posed a threat to civilians and civilian-populated areas, its removal by the intervening states was still within the scope of the mandate and therefore lawful. Entirely different would be the scenario where there was no rational link between the conduct of the regime and the threat to the safety of civilians. Forceful regime change in such circumstances would certainly infringe upon the core principles of sovereignty, non-intervention in domestic affairs, and political self-determination. Noteworthy in this regard is the following assessment of the situation:

The legality of forceful regime change should not be easily presumed, and the authorisations of the Security Council to use force should not be interpreted extensively. On the other hand, the Security Council deliberately authorised military measures knowing that this action would be aimed primarily against the Gadhafi regime and would contribute to the opposition movement. Measures necessary for the protection of civilians and civilian-populated areas might at the same time have promoted regime change in Libya. In light of the Libyan air strikes against civilians, the destruction of the Libyan air force and air defence systems was necessary to protect human rights, but at the same time it significantly weakened the Gadhafi regime. Accordingly, measures were encompassed by Resolution 1973 as long as they were necessary, even though they might have promoted regime change in Libya.³⁰⁸

5.4.4.2.2 Do instances of unilateral humanitarian intervention constitute state practice?

The remaining question referred to above is whether the number of instances since 1945 in which states have asserted a unilateral right to intervene in another state to put an end to a humanitarian crisis³⁰⁹ may constitute state practice for the purpose of the formation of customary international law. For state practice to play this role, it must at least provide evidence of claims by states that they consider their actions as lawful – based on a new customary law exception to the Charter prohibitions. However, in none of the instances did the intervening states claim a customary-law

basis for humanitarian intervention; even where intervention was justified on humanitarian grounds, it was never the sole reason, but co-mingled with various other grounds or motivations.³¹⁰ These developments have led to the conclusion that it has:

become evident through the responses to the instances of alleged humanitarian intervention that have occurred since the establishment of the UN, ... that States are not willing to discard the prohibition of the use of force and the collective machinery of the UN in favour of a right of unilateral humanitarian intervention. In the rare event where there is a humanitarian emergency, and where most States agree that intervention is needed but the UN is unable to act ... States may be willing to accept humanitarian considerations in mitigation of the occasional violation of the prohibition of the use of force and limit their response accordingly.³¹¹

5.4.4.3 The responsibility to protect

The responsibility to protect ‘has succeeded humanitarian intervention as the primary conceptual framework within which to consider international intervention to prevent the commission of mass atrocity crimes’.³¹² As such, the concept is not so much indicative of a new doctrine ‘than a refocusing of humanitarian intervention’.³¹³ As a result of the tragic failures of the international community to avert large-scale humanitarian catastrophes in Rwanda (1994), Srebrenica (1995) and the NATO intervention in Serbia (1999), there was a need to rethink the role of states and the international community as a whole in preventing mass atrocity crimes.³¹⁴

These events led to the publication in 2001 of the Canadian-sponsored study by the International Commission on Intervention and State Sovereignty (ICISS). The Commission’s Responsibility to Protect Report³¹⁵ reconceptualised state sovereignty to mean that it is the *primary responsibility* of sovereign states to protect their populations from atrocities, and that when states fail to do this, the international community has the residual obligation to take over that responsibility. According to the Report, the foundations of this responsibility, as a guiding principle for the international community of states, lie in obligations that are *inherent* in: the concept of sovereignty; the primary responsibility of the Security Council for the maintenance of international peace and security; specific human rights obligations; and the developing practice of states.³¹⁶ The responsibility itself is made up of three elements – namely, the responsibility to prevent humanitarian crises, which is seen as the single most important dimension of the responsibility; the responsibility to react to situations of compelling human need; and the responsibility to rebuild societies after a military intervention.³¹⁷

This reformulation of the concept of sovereignty in the ICISS Report was taken up in the 2004 UN General-Secretary High Level Panel Report on Threats, Challenges and Change. In referring to a series of humanitarian disasters where national states or the international community had failed to live up to their responsibilities to protect civilian populations from mass atrocities, the High Level Panel Report noted that there is ‘a growing recognition that the issue is not the “right to intervene” of any State, but the “responsibility to protect” of *every* State when it comes to people suffering from avoidable catastrophe ...’³¹⁸ The report then endorsed the concept of the responsibility to protect as an ‘emerging norm’ that provides for a:

collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.³¹⁹

In this context, the High Level Panel Report also addressed the question of the *legitimacy* of a resort to the use of force and provided five guidelines (based on the ICISS Report) that the Security Council should take into consideration as a minimum requirement for maximising the possibility

of achieving widespread consensus for coercive action. Briefly stated, the guidelines require an assessment of:

1. the seriousness of the threat (that is, whether it is serious enough *prima facie* to justify the use of force);
2. the *proper purpose* of the military action (that is, whether it is to stop or avert the threat);
3. whether the military option is a *last resort* (that is, whether every other non-military option has been exhausted);
4. the *proportionality* of the military action (that is, whether the scale, duration and intensity of the action are in relation to the threat); and
5. the *balance of consequences* (that is, whether there is a possibility that the consequences of the military action will be worse than the consequences of inaction).³²⁰

In 2005, in the World Summit Outcome Document,³²¹ the UN member states agreed to commit themselves to the following:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.³²²

Since the World Summit, the Security Council has endorsed these developments in one way or another. In 2006, the Council reaffirmed the above paragraphs of the World Summit Outcome Document in a resolution on the protection of civilians in armed conflict³²³ and in the same year adopted another resolution on the deployment of the United Nations Mission in Sudan (UNMIS), while recalling the previously mentioned resolution in its preamble.³²⁴ The third example is resolution 1973 of 2011, which was dealt with above in the section on humanitarian intervention, and which reiterated the responsibility of the Libyan government to protect the Libyan population against armed hostilities in the preamble and authorised UN member states acting in co-operation with the Secretary-General ‘to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack ...’.³²⁵

Further elaboration of the concept occurred in 2009 with the publication of the UN Secretary-General’s report on the implementation of the responsibility to protect.³²⁶ The report makes it clear that ‘the provisions of paragraphs 138 and 139 of the Summit Outcome define the authoritative

framework within which Member States, regional arrangements and the United Nations system and its partners can seek to give a doctrinal, policy and institutional life to the responsibility to protect ...’³²⁷ For this purpose, a three-pillar approach is proposed – namely, timely prevention of a humanitarian catastrophe by the state on whose territory it is about to occur; international assistance and capacity building to ensure that states can comply with their core obligations in this regard; and timely and decisive response by the Security Council in authorising military intervention when peaceful measures have proven inadequate and the territorial state is unwilling or unable to protect its own population.³²⁸ The action required under any or all of these pillars remains restricted to the four core crimes – namely, genocide, war crimes, crimes against humanity and ethnic cleansing³²⁹ and when enforcement action from outside is needed, it may only be taken with Security Council authorisation.³³⁰

In subsequent years, three further reports were presented by the UN Secretary-General. The first dealt with a crucial issue for any effective preventive action and which was already raised in the 2005 World Summit Outcome Document – namely, early warning of an impending crisis.³³¹ The United Nations has never succeeded in developing early warning capacity for acting timeously to humanitarian and other crises. Hence, this report aims to put in place and strengthen institutional innovations that will facilitate early detection and prevention. Key to this process was the establishment of a joint office for the UN Special Advisor on Genocide and the Special Advisor on Responsibility to Protect. The second report focused on the fostering of global-regional collaboration and the role that regional and subregional organisations can play in early-warning and capacity-building activities.³³² The third and most important report dealt with another crucial element – namely, timely and decisive response.³³³ In essence, the report is about the need for greater collaboration between the principal organs of the United Nations in their employment of the full range of peaceful and non-peaceful measures in responding to humanitarian crises. At one point, the report noted as follows:

There is room for Member States to think and act more strategically. Measures, especially those under Chapters VI and VIII of the Charter, should be applied as early as possible. While military enforcement must remain part of the toolbox, our primary aim should be to respond early and effectively in non-coercive ways and thereby reduce the need for force. It has become clear that the success of coercive and non-coercive measures requires political unity in the design and consistency and operational coordination in the application. Strengthening modes of collaboration between the national, the regional and the international levels in this regard continues to be necessary.³³⁴

While the responsibility to protect has by now gained widespread support and its framework has been consolidated and institutionalised in the United Nations’ peace and security mandate, its practical observation leaves much to be desired. Although the concept has been invoked in several instances,³³⁵ there is very little state practice in support of actual implementation of the concept. Two case studies, namely Libya and Syria, illustrate the pitfalls and problems associated with the concept’s implementation.

In the case of Libya, despite the military and humanitarian successes achieved in the name of the responsibility to protect in 2011, the failure of the international community to actively pursue post-conflict peace-building has left the country at the mercy of a multitude of competing, heavily armed militia groups, a growing terrorist threat, rampant criminality and violence, and widespread human rights abuses, all of which the failing state institutions are incapable of dealing with.³³⁶

The Syrian conflict, which started in 2011 and which is ongoing, has created a humanitarian crisis of staggering proportions. Twelve million people are in need of humanitarian aid and almost four million have fled to neighbouring countries. But despite the magnitude of the crisis and the

widespread human rights abuses, the Security Council has repeatedly been prevented from acting by the exercise of the veto by China and Russia, who fear that a Security Council-endorsed enforcement action would be used, as was the case with Libya, to bring about regime change. Commentators have also pointed out that the Security Council would not have authorised military action in any event because the protective objective would be unlikely to materialise in view of the substantial military resources and support the Assad regime enjoys, coupled with the divisions in the opposing rebel forces, factors that were absent in the case of Libya.³³⁷ This illustrates the balance of consequences element referred to earlier; if the consequences of a military intervention are likely to be worse than the consequences of inaction, the international community will be reluctant to act.

Since there is no widely supported multilateral treaty that embodies the responsibility to protect concept, it can only become a binding norm of international law through the formation of customary law.³³⁸ For this to occur, there must be recurring state practice and the state practice must be widely observed. Thus, in applying these conditions to the responsibility to protect:

[I]t is evident immediately, first, that State practice in conformity with the doctrine is nascent and that, secondly, following the Security Council disagreements concerning the Libyan and Syrian cases such practice as there is, is neither recurrent nor widely observed.³³⁹

5.4.4.4 The war on terror

The 9/11 Al Qaida terrorist attacks in the United States in 2001 reopened the debate on anticipatory and pre-emptive self-defence and posed even more challenges to the interpretation of article 51 of the UN Charter. This came about as a result of the US response to the terrorist attacks – first, by Operation Enduring Freedom, a military offensive to disrupt the use of Afghanistan as a terrorist haven, and secondly, by adopting a new National Security Strategy in 2002 with the aim of stopping so-called rogue states (Iran, Iraq and North Korea) and global terrorists from acquiring and using weapons of mass destruction against the United States.

In explaining Operation Enduring Freedom, the United States relied on the right of individual self-defence in article 51 of the UN Charter, which raised the question whether this right can be used against non-state actors. Put differently, can the conduct of non-state actors constitute an ‘armed attack’ within the meaning of article 51? Article 51 is itself silent on the matter. However, at the time, the US response received widespread support as a justifiable act of self-defence; and in Resolution 1373 (2001), the Security Council, in condemning the terrorist attacks, reaffirmed in its preamble the right to individual and collective self-defence. Security Council Resolution 1368 (2001) also considered the acts of terrorism to be a threat to international peace and security under article 39 of the UN Charter.³⁴⁰ This international reaction was markedly different from the reluctance shown by the international community in the 1970s and 1980s to support the broad construction of self-defence that had been relied upon by the United States, Israel and South Africa to justify their use of force against so-called terrorist organisations.³⁴¹

Despite the post 9/11 reaction, the picture can sometimes become mixed. For instance, in the *Israel Wall* case,³⁴² the ICJ recognised the article 51 right to self-defence in the case of an armed attack by ‘one State against another State’, apparently excluding non-state actors,³⁴³ and in the *Armed Activities* case,³⁴⁴ the majority declined to decide the matter. However, state practice post 9/11 confirms the view that a broader right to self-defence is increasingly asserted by states seeking to justify the use of force against non-state actors under article 51 of the UN Charter. In assessing these developments, the view has been expressed that ‘the international community today is much less likely to deny, as a matter of principle, that states can invoke self-defence against terrorist attacks not imputable to another state. Instead, debate has shifted towards issues of necessity and proportionality’.³⁴⁵ But there is also the contrary view that neither the Security Council nor state

practice can bring about a Charter amendment that makes self-defence against non-state actors permissible under article 51 of the UN Charter.³⁴⁶

Although the issue of individual self-defence against non-state actors is likely to keep attracting diverse views, difficulties may also emerge in cases where a state makes available its territory to non-state actors for the purpose of assisting them in carrying out attacks against other states. In such instances, and depending on the level of territorial state involvement, the act in self-defence may be directed against the territorial state in terms of the international law rules on attribution. These were dealt with under state responsibility in chapter 4 of this book. Self-defence in these circumstances will depend on ‘complex, and typically fact dependent, questions of attribution, and [will require] responding states to show a substantial involvement of the territorial state in the very attacks of a terrorist organization against which the response was directed’.³⁴⁷ This is further illustrated by the ruling in the *Nicaragua* case³⁴⁸ that the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries may likewise constitute an act of aggression, provided that the act in question meets the gravity of an armed attack – which makes it clear that not every act of assistance will qualify as an armed attack within the meaning of article 51 of the UN Charter.

From this perspective the US attack on the Taliban regime (as opposed to its action against Al Qaeda operatives) is not unproblematic. For instance, there is no convincing public record that the Taliban was responsible for sending Al Qaeda operatives on a mission to the United States, or that it controlled or directed the 9/11 attacks, or directly participated in the attacks or knowingly financed it. With this in mind, and mindful of the ruling in the *Nicaragua* case, Paust argues:

The Taliban’s provision of safe haven to bin Laden and toleration of his terrorist training camps in areas generally controlled by the Taliban, the receipt of monies and military support from bin Laden for the Taliban’s war against the Northern Alliance, and even knowledge of past and continuing al Qaeda terroristic attacks would not constitute Taliban control of, or direct participation in, future al Qaeda attacks like the September 11th attack on the United States, so as to justify the use of military force against the Taliban.³⁴⁹

Seemingly, there is also no authority in the Security Council resolutions after 9/11 for the use of force against the Taliban regime. Key to this is Resolution 1373 already referred to. After affirming that any act of international terrorism constitutes ‘a threat to international peace and security’ and the ‘inherent right of individual and collective self-defence as recognized by the Charter of the United Nations’, the preamble also reaffirmed ‘the need to combat by all means, in accordance with the Charter ... threats to international peace and security caused by terrorist acts’. This was supplemented in the resolution’s operative part by a call on states to co-operate ‘to prevent and suppress terrorist attacks and take action against perpetrators of such acts’.³⁵⁰

It is clear from the above formulations that the action contemplated in this resolution is directed at the perpetrators of the acts and not at states that harbour, tolerate or support those engaged in the terrorist attacks. In a later resolution, the Security Council explicitly condemned the Taliban regime for allowing the territory of Afghanistan to be used as a basis for the export of terrorism and for the protection of Al Qaeda and expressed its support for the replacement of the Taliban regime by a broad-based, multi-ethnic and fully representative government.³⁵¹ Absent though is any authorisation for the use of force against the Taliban regime in these circumstances. Events of this nature illustrate the difficulties with the attribution rule in cases where a state is neither directly participating or engaging in terrorist attacks, nor meeting the *Nicaragua* threshold for effective control over the perpetrators of such acts, but is merely allowing its territory to be used as a basis for terrorist activities.

But if this state of affairs provides further justification for a broadening of self-defence in article 51 of the UN Charter to include forceful measures against non-state actors, it still does not explain

why states acting against terrorist organisations are entitled to violate the territorial sovereignty of the state where the targeted groups are based. The invasion of other states' territories for this purpose is after all not limited to the 9/11 response and various instances have been recorded where states have crossed borders to launch attacks against terrorist groups in a foreign country.³⁵² One of the latest incidents is the bombing by Egypt of the terrorist group known as the Islamic State in Syria and the Levant (ISIS or IS) on 16 February 2015 in response to the beheading of 21 Egyptian Christians held hostage by ISIS in Libya. News reports at the time implied that the strikes took place with the knowledge and assistance of the internationally recognised government in Libya, thus suggesting that there was implied consent for the strike.³⁵³ However, this government, which lost its seat in Tripoli to a rival government (forcing it to move to Tobruk), was not in control of the whole country, and neither was the rival government; at the time of the bombing, large parts of the country were under the control of various militia and radical Islamist groups. Moreover, a few days after the air campaign, the Egyptian president stated in a television interview that Egypt was simply defending itself – this despite the fact that there was no armed attack against Egypt itself. Although some commentators may argue that an attack on nationals of a state could justify an act in self-defence, there is no state practice in support of this.³⁵⁴ Moreover, a beheading does not constitute an 'armed attack' within the meaning of article 51.

To accommodate this 'new practice', it has been suggested that the traditional understanding of self-defence, as justification for the use of force between states, should be retained while opting for a more moderate rereading of the rules of attribution; states invoking self-defence in these circumstances usually make an effort to identify links between the territorial state and the terrorist organisation, but not with the effective control test of the *Nicaragua* case in mind. Based on this, the argument is that:³⁵⁵

contemporary practice suggests that a territorial state has to accept anti-terrorist measures of self-defence directed against its territory where it is responsible for complicity in the activities of terrorists based on its territory – either because of its support below the level of direction and control or because it has provided a safe haven for terrorists. In short, pursuant to this moderate re-reading, modern practice points towards a special standard of imputability in relations between terrorist groups and host states, arguably most closely resembling international rules against 'aiding and abetting' illegal conduct.³⁵⁶

Views like these are informed by a growing number of actual incidents in international relations and state practice, and by parallel developments in legal literature. Recent practice by states acting in 'self-defence' (in another state's territory) suggests the application of a test less strict than the one set in the *Nicaragua* case.

Failed states present a problem of a special kind. In such instances, it is not the unwillingness of the territorial state to prevent non-state actors from launching attacks against other states; the state is simply incapable of doing so. This happens when government institutions implode, become too weak to exercise control over the territory of the state, or lose the capacity to uphold law and order. Such events usually pave the way for anarchy, rampant violence and banditry – a situation in which terrorism, extremism and organised crime flourish.

Failed or failing states do not seem to lose their claims to territorial integrity and sovereignty. For instance, in the case of Somalia, which was without a proper government and under the control of various warlords for more than 20 years, the Security Council has repeatedly confirmed the sovereignty and territorial integrity of the country. Seemingly, it is simply a case of 'once a state, always a state'. Failed or failing states are therefore still protected by the principle of non-intervention and the prohibition on the use of force.³⁵⁷ Thus, the question arises whether the right of self-defence can be used in instances where a failed state is incapable of controlling non-state actors

operating from its territory and in circumstances where the conduct of such actors cannot be attributed to the state.

The answer to this may be introduced with reference to the separate opinion of judge Kooijmans in the *Armed Activities (DRC v Uganda)* case where he referred to the ‘phenomenon which in present-day international relations has unfortunately become as familiar as terrorism, viz. the almost complete absence of government authority in the whole or part of the territory of a State’. If, in such circumstances, he goes on to argue, ‘armed attacks are carried out by irregular bands from such territory against a neighbouring State, they are still armed attacks even if they cannot be attributed to the territorial State’. Consequently, ‘[i]t would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require’.³⁵⁸ This view is premised on a construction of article 51 of the UN Charter that will allow self-defence against non-state actors as long as the operation undertaken by them can be classified as an *armed attack* within the meaning of article 51. Hence, the act in self-defence will in such circumstances be directed against the non-state actors.

However, a question of a different kind is whether the failed state, because of its failure to prevent the action taken by the non-state actors, can be the target of a self-defence action. If the answer to this is positive, it would mean that the omission (the failure to act) is tantamount to an action that will justify a response in self-defence.³⁵⁹ In international law, the duty to prevent harm to another state is well established and forms part of customary international law.³⁶⁰ However, the duty in question is a duty of due diligence and as such does not involve an obligation to guarantee that the harm will not occur. Put differently, it is an obligation of means (and the question will be whether the state has exhausted all reasonable efforts to prevent the harm) and not an obligation of result. Failure to comply with the due diligence requirement will therefore only invite an act in self-defence if the failure equals the required level of involvement in the activities of the non-state actors.³⁶¹

Some recent developments with regard to the above issues should be noted. In 2004/2005 a study was undertaken by Chatham House³⁶² on the criteria for the use of force in self-defence. The information solicited from international law academics and international relations scholars subsequently formed the basis of a set of principles that became known as the Chatham House Principles of International Law on the Use of Force in Self-Defence.³⁶³ Principle F makes it clear that the right to self-defence in article 51 of the UN Charter is not confined to self-defence responses to attacks by states, and can be applied to attacks by non-state actors. However, certain conditions apply. First, the attack must be large-scale; secondly, the self-defence action can only be exercised on the territory of another state against the non-state actor if it is evident that the territorial state is unable or unwilling to deal with the non-state actors itself and that it is *necessary* to deal with the threat from outside in circumstances where the consent of the territorial state cannot be obtained; thirdly, the use of force in self-defence against the territorial state itself will only be justified to the extent that it is *necessary* to avert or end the attack.³⁶⁴

In 2010, the Leiden Policy Recommendations on Counter-terrorism and International Law were adopted following a consultative process involving some 30 experts in the field.³⁶⁵ The recommendations confirm the above position of the Chatham House principles in all salient respects.³⁶⁶ The debate on the *scope* of a state’s right to self-defence against non-state actors was given fresh impetus in 2012 with the publication of 16 proposed principles by Daniel Bethlehem on the scope of a state’s right to self-defence against an imminent or actual armed attack by non-state actors.³⁶⁷

The principles are based on discussions that Bethlehem had with government representatives and are presented as elements of potential state practice in the development of customary international law on the subject matter and the interpretation of treaties. Of particular note here is

the requirement in principle 10 that action in self-defence against a non-state actor in the territory of another state must take place with the consent of that state. This requirement falls away, according to Bethlehem, when (a) there is Security Council authorisation for the use of force under Chapter VII of the UN Charter; (b) there is a reasonable and objective basis for believing that the territorial state is colluding with the non-state actors, or (c) the territorial state is unwilling or unable effectively to restrain the activities of the non-state actors.³⁶⁸ While these propositions, which the Chatham House principles and the Leiden recommendations also embrace, remain controversial,³⁶⁹ they seem to be increasingly relied upon in state practice and in the statements of governments and international organisations.³⁷⁰

However, the use of force in self-defence in these circumstances remains subject to the basic requirements for lawful self-defence. This means that the threat must meet the threshold of an *armed attack*, it must be *imminent*, and the armed response must be *necessary* to repel the attack and must be *proportional* – that is, the defending state must use no more force than is necessary to defend itself. Much of the controversy that exists with regard to the use of force against non-state actors is created by the interpretation and application of these concepts and the controversy is often about finding adequately precise standards of conduct that could meaningfully restrain the actions of states in this area.³⁷¹ Given the state of the world, this is bound to remain contentious.

Finally, attention must be drawn to another scenario. It may be that a non-state actor exercises elements of governmental authority in the absence or default of official authorities. Such situations are covered by article 9 of the ILC Draft Articles on the Responsibility of States (2001),³⁷² which deals with cases where irregular forces are taking control of regular government institutions as a result of a total or partial collapse of the latter. The conduct of the non-state actors in these circumstances will be considered an act of state. They will therefore be exposed to self-defence action by another state that is the victim of an armed attack by the non-state actor.

In the context of the above exposition, the option of a pre-emptive or anticipatory response to terrorist activities after 9/11 has been the cause of an intense debate in international law on the limits of self-defence action under article 51 of the UN Charter. Immediately relevant in this regard is the 2002 US National Security Strategy (the so-called ‘Bush Doctrine’), which is based on a notion of pre-emptive or anticipatory self-defence. According to this thinking, the dangers posed by modern forms of terrorism and by the proliferation of weapons of mass destruction require an approach to self-defence that would allow for the exercise of the right to self-defence by acting pre-emptively – that is, to prevent future attacks from occurring. One could apply the same logic to the US military operations in Afghanistan in response to the 9/11 terrorist attacks and to the US-led military invasion of Iraq in 2003, which was at least in part based on a self-defence argument.³⁷³

The reaction of states and commentators to this doctrine has been largely one of rejection.³⁷⁴ This view has also found its way into the High Level Panel Report where, as indicated earlier, article 51 of the UN Charter has been restrictively interpreted to apply only to *imminent* threats that cannot be deflected other than by the use of force.³⁷⁵ With specific reference to the argument claiming a right to strike preventively in self-defence, in response to a threat that is not imminent,³⁷⁶ the Panel Report concluded as follows:

The short answer is that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment – and to visit again the military option. For those impatient with such a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the

legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.³⁷⁷

5.4.4.5 Cyber warfare

In the twenty-first century, societies the world over have become increasingly dependent on the use of networked digital activities that take place in what is commonly referred to as cyberspace. This increasing dependence on computers and computer networks has coincided with an increasing vulnerability as a result of the ease and speed with which facilities and installations can be attacked and incapacitated from anywhere in the world by hackers, criminals, terrorists and ideologically unhinged individuals. Since the tools and methodologies for such attacks are becoming more sophisticated and easy to acquire, it is realistic to predict that the misuse of cyberspace, also by government institutions, is likely to increase and with that the range of threats that societies and individuals could be exposed to.³⁷⁸

It therefore comes as no surprise that the international community has on many occasions expressed concern at these developments. In 2003, the Security Council, meeting at the level of ministers of foreign affairs, warned that it had become easier for terrorists in a globalised world to exploit sophisticated technology and communication systems for their criminal objectives³⁷⁹ – a theme that the General Assembly has addressed in broader terms by expressing concern at the criminal misuse of information technologies and its grave impact on all states,³⁸⁰ and at the danger that it could be used for purposes inconsistent with the objectives of maintaining international stability and security.³⁸¹ Perhaps the most comprehensive initiative is the World Summit on the Information Society, endorsed by the UN General Assembly. Since 2003, it has reported with regular intervals on major trends and developments. Included among the themes is the issue of developing capacity for the prevention and prompt response to cyber threats and the improvement of cyber security.³⁸²

From an international law perspective, the topic of cyber threats has attracted wide interest.³⁸³ The discussion here is limited to a brief assessment of cyber attacks in the context of article 51 of the UN Charter. Thus, the question is whether a computer network attack in peacetime may qualify as an ‘armed attack’ (within the meaning of article 51) that might justify an armed response in self-defence. As a starting point, it must be noted that the determination whether an armed attack has occurred does not depend on the choice of weapon used. Since article 51 contains no reference to specific weapons, any weapon for that matter will do.³⁸⁴ The crucial element though is whether a computer-network attack is capable of producing physical consequences of such gravity that it could be compared to an *armed attack* in the classical (kinetic) sense of the word. Consequently, the emphasis is on the immediate destructive consequences of the attack and not on the means of the attack. This would mean that if the consequences of a computer-generated, or -manipulated attack reached the gravity threshold of an armed attack, a self-defence response under article 51 would be legitimate and could even take the form of an armed response – provided that it were defensive and aimed against repelling an attack that was occurring.³⁸⁵

If the computer network attack originates from a private source, the same attributability issues will arise as with kinetic armed attacks by private entities dealt with earlier on. However, in the case of computer-network attacks, identifying the attacker for purposes of attributability is often a case of trying to find a needle in the proverbial haystack and this may undermine the victim state’s ability to respond.³⁸⁶ Such obstacles may be removed if future technological developments make it easier to identify the attacker or attackers.³⁸⁷

5.4.4.6 The blurring of peacekeeping and enforcement action

Peacekeeping is described as a:

type of military action, used as a tool in the UN system of collective security, which is consent based and tries to maintain or preserve peace with no or only a minimal use of force. It was designed as an alternative to enforcement action or enforcement measures which imply the use of military force for the purpose of imposing the will of the enforcer on the addressee of the action.³⁸⁸

Peacekeeping is not specifically provided for in the UN Charter³⁸⁹ but has been inferred from the general powers and functions assigned to the General Assembly and the Security Council by the UN Charter.³⁹⁰ As a UN practice, it evolved from the Cold War stand-off, which diminished the UN Security Council's ability to make effective use of pacific measures to resolve conflict and/or enforce peace, and threatened to make the entire UN system irrelevant to world security, and its peace functions moribund. But keen to preserve the image of the organisation, UN leaders created a role for the United Nations in conflict resolution by devising a system using impartial and non-combative forces to maintain ceasefires. The idea was based on the assumption that the interposition of 'neutral' soldiers between two warring groups may reduce the chances of renewed combat, calm heated passions and ultimately deliver peace.

The earliest examples using peacekeeping forces to maintain or restore peace under the United Nations system include the UN observer mission during the Balkan conflict (1946–1951); the United Nations Truce Supervision Organization (UNTSO) in Palestine (1949); the United Nations Observer Group in Lebanon (UNOGIL) (1958); the United Nations Emergency Force (UNEF) (established in 1956 after Israel's attack on Egypt); and the United Nations multinational force in the Congo (ONUC) to stem the post-independence violence that erupted in 1960. Currently there are 16 peacekeeping operations led by the United Nations Department of Peacekeeping Operations (DPKO),³⁹¹ the majority of them in Africa.

Over time, some basic principles have become accepted as essential for a sound implementation of any peacekeeping operation and these are briefly mentioned here. Any peacekeeping operation can only be carried out with the *consent* of the host state. This requirement distinguishes peacekeeping from enforcement action. A further essential requirement is that of *neutrality*, in terms of which peacekeeping forces and personnel are interdicted from any direct involvement in the conflict. Apart from these basic elements, the relationship between the United Nations (under whose command the peacekeeping takes place) and the host state is further determined by the UN resolution containing the *mandate* for the operation, and the *status of forces agreement* (SOFA).³⁹² The latter has the purpose of setting forth the rights and responsibilities of the UN Peacekeeping Forces and the host state respectively. The relationship between the United Nations and troop-contributing countries is likewise regulated by international agreements,³⁹³ in terms of which contingents are placed at the disposal of the United Nations and the control and command structure is determined. Certain immunities will also apply and they usually derive from two multilateral conventions – namely, the 1946 Convention on Privileges and Immunities of the United Nations, and the 1994 Convention on the Safety of United Nations and Associated Personnel, supplemented by an additional protocol, the 2010 Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel.

UN peacekeeping became enveloped in greater controversy with the end of the Cold War and the emergence in certain regions of the world of a new breed of intra-state conflict that erupted between the armed forces of states and an assortment of armed militias with a predilection for guerilla tactics and little respect for the laws of armed conflict. In these conflicts, civilians made up most of the casualties and were often the main targets. In many instances, the situation was made worse and more dangerous by the collapse of state institutions, followed by a breakdown of law

and order, banditry, random violence and destruction of state and private property. When peacekeepers were dispatched to such areas, their work began to involve many more things than the observance and monitoring of ceasefires and control over buffer zones between hostile states parties. The peacekeeping mission became a much more complex undertaking and was now used in a much broader sense. As a result, the mandates of peacekeeping operations had to be reconsidered and in 1992, the Security Council met for the first time at the level of heads of state or government with the purpose of requesting the then-Secretary-General, Bhoutros-Bhoutros Gali, to prepare a report on how to improve the UN capacity to maintain peace and security under these changing circumstances.³⁹⁴

Three activities were singled out by the Security Council for purposes of the investigation: preventive diplomacy, peacemaking (or peace enforcement) and peacekeeping. In his subsequent report, entitled ‘An Agenda for Peace’,³⁹⁵ the Secretary-General added the further concept of ‘post-conflict peace-building’. This concept was explained as follows in the report:

Peacemaking and peace-keeping operations, to be truly successful, must come to include comprehensive efforts to identify and support structures which will tend to consolidate peace and advance a sense of confidence and well-being among people. Through agreements ending civil strife, these may include disarming the previously warring parties and the restoration of order, the custody and possible destruction of weapons, repatriating refugees, advisory and training support for security personnel, monitoring elections, advancing efforts to protect human rights, reforming or strengthening governmental institutions and promoting formal and informal processes of political participation.³⁹⁶

This proposal, the result of the emerging experience with collapsing state institutions in conflict situations, was the most far-reaching; it aimed at assigning a function to UN peacekeepers that involved fulfilling all the functions of the government of a state and which was far removed from the original tasks peacekeepers were intended to perform.³⁹⁷ Equally challenging for the UN were the implications of the concept of peace enforcement propagated in the Agenda for Peace report, and explained as follows:

This task can on occasion exceed the mission of peace-keeping forces and the expectations of peace-keeping force contributors. I recommend that the Council consider the utilization of peace-enforcement units in clearly defined circumstances and with their terms of reference specified in advance. Such units from Member States would be available on call and would consist of troops that have volunteered for such service. They would have to be more heavily armed than peace-keeping forces and would need to undergo extensive preparatory training within their national forces. Deployment and operation of such forces would be under the authorization of the Security Council and would, as in the case of peace-keeping forces, be under the command of the Secretary-General. I consider such peace-enforcement units to be warranted as a provisional measure under Article 40 of the Charter. Such peace-enforcement units should not be confused with the forces that may eventually be constituted under Article 43 to deal with acts of aggression or with the military personnel which Governments may agree to keep on stand-by for possible contribution to peace-keeping operations.³⁹⁸

This proposal goes to the heart of the nature and scope of the mandate to be considered in a peace-enforcement operation. It raises the spectre of the actual use of force and the blurring of the distinction between peacekeeping and enforcement action and poses a challenge to the principles of consent and neutrality that formed the foundation of peacekeeping in the classical sense of the word.³⁹⁹ However, the need for a different approach to the challenges raised in the Agenda for Peace Report was informed by the failures of past attempts to bring under control situations that were

vastly different from the interstate conflicts of the past, and for which traditional peacekeeping mandates were ill suited.

A good illustration of the challenges that complex or multi-dimensional operations could face is provided by the mandate of the United Nations Protection Force (UNPROFOR), established in 1992 at the time of the Yugoslav conflict. UNPROFOR's initial ambitious and unrealistic mandate – namely, to 'create the conditions of peace and security required for negotiations for an overall settlement of the Yugoslav crisis',⁴⁰⁰ was incrementally expanded by later resolutions.⁴⁰¹ Eventually it covered all of the five republics of the former Yugoslavia, each with its own challenges and crises UNPROFOR had to respond to in accordance with mandates that varied in nature and scope while the conflict was unfolding with increasing intensity. Over-extended and under-resourced, it was inevitable that UNPROFOR would be drawn into situations that exposed its inability to carry out its wide mandate. Its plight was made worse by the unwillingness of member states to contribute more troops to enable it to secure the delivery of humanitarian aid, enforce no-fly zones and protect safe areas (all of which fell within its mandate) and the fact that the use of enforcement action was not authorised. This left UNPROFOR with only the traditional authorisation to use force in self-defence and against attempts preventing it from carrying out its mandate.⁴⁰²

SUGGESTED FURTHER READING

- D Bentolila *Arbitrators as Lawmakers* (2015) PhD thesis, University of Geneva
- P-E du Pont 'Countermeasures and collective security: The case of EU sanctions against Iran' 17 *Journal of Conflict and Security Law* (2012) 301 at 336
- JA Frowein 'United Nations' in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* Vol X Oxford: Oxford University Press (2012) 195
- R Hatto 'From peacekeeping to peacebuilding: The evolution of the role of the United Nations in peace operations' 95 *International Review of the Red Cross* (2013) 495–515
- C Majinge 'Emergence of new states in Africa and territorial dispute resolution: The role of the International Court of Justice' 13 *Melbourne Journal of International Law* (2012) 462–504
- EK Proukaki *The Problem of Enforcement in International Law: Countermeasures, the Non-injured State and the Idea of International Community* London: Routledge (2010)
- WM Reisman 'The diversity of contemporary international dispute resolution' 4 *Journal of International Dispute Resolution* (2013) 47–63
- NK Tsagourias 'The Tallin Manual on the international law applicable to cyber warfare' 15 *Yearbook of International Humanitarian Law* (2012) 19–43
- M Weller (ed) *The Oxford Handbook of the Use of Force in International Law* Oxford: Oxford University Press (2015)

PART THREE

Jurisdiction and control over territory and persons

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Chapter 6

Jurisdiction of states

CHRISTOPHER GEVERS AND PATRICK VRANCKEN

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6.1 State jurisdiction: an introduction

The term ‘jurisdiction’ is used often in international law, yet it is seldom defined.¹ Almost half a century ago, Malanczuk cautioned that jurisdiction is ‘a word which must be used with extreme caution’, adding that ‘there is ... a temptation to use the word without stopping to ask what it means’.² Since then, the term has been put to even greater use in international law, yet still little attention has been paid to the question of its definition.

In one sense, jurisdiction refers to ‘the extent of each *state*’s right to regulate conduct or the consequences of events’.³ In another, it describes the competence of international institutions (such as international courts and quasi-judicial mechanisms) to exercise power over states (as in the case of the International Court of Justice) and over individuals (as in the case of the International Criminal Court).⁴ In recent times, the term has also been employed, in a different sense altogether, to describe the *obligations* that states have under human rights instruments. States are said to have obligations in respect of individuals ‘within their jurisdiction’.⁵ Finally, jurisdiction is used colloquially to refer to ‘national space’⁶ (as in, ‘the accused has fled South Africa’s jurisdiction’).

This chapter is concerned with the use of the term in the first sense, what is termed ‘state jurisdiction’. According to Shaw, state jurisdiction is:

the power of the state under international law to regulate or otherwise impact upon people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs.⁷

Or more succinctly, Liivoja calls state jurisdiction ‘the normative authority or regulatory competence of a State’.⁸ In addition to delimiting the focus of this chapter to *state jurisdiction*, three further introductory remarks are necessary.

First, state jurisdiction is not a ‘unitary concept’.⁹ Rather, it is made up of three, distinct powers or competences exercised by states, namely *prescriptive*, *enforcement* and *adjudicative* jurisdiction.¹⁰ In *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* (the SALC case),¹¹ the Supreme Court of Appeal set out the distinction between these powers as follows:

[A] a distinction is generally drawn between *three forms of jurisdiction*. *Prescriptive jurisdiction* empowers states to proscribe certain conduct through either their common law or national legislation; *enforcement jurisdiction* enables states to enforce those prescriptions, including through investigations and prosecutions; and *adjudicative jurisdiction* is the state’s capacity to determine the outcome of a matter pursued through the exercise of enforcement jurisdiction by way of, *inter alia*, adjudicating what has been prescribed.¹²

Notably, there is some confusion as to which activities belong in which sub-category, particularly whether ‘investigation’ and related activities fall under enforcement jurisdiction or adjudicative jurisdiction.¹³ Recently, this confusion has been compounded by the fact that the Supreme Court of Appeal and the Constitutional Court reached different conclusions in this regard.¹⁴

Nevertheless, a proper understanding of ‘state jurisdiction’ requires the disaggregation of the concept into its constituent powers. This chapter is mainly concerned with *prescriptive jurisdiction*, or ‘the geographical reach of a State’s laws’.¹⁵ For this reason ‘jurisdiction’ in this chapter, unless otherwise indicated, refers to prescriptive jurisdiction. Only exceptionally is reference made to the enforcement and adjudicative forms of jurisdiction, and this is done explicitly. This is so because, for the most part, international law on states’ capacity to exercise adjudicative and enforcement jurisdiction is settled: states are free to do so *within their territory*. However, there is still much debate in respect of when a state can extend its laws to conduct that takes place abroad – that is, exercise *extraterritorial* prescriptive jurisdiction.

Secondly, this chapter is mainly concerned with criminal and not civil jurisdiction, the prevailing view being that the latter is an area governed by private international law or ‘conflict of laws’ and therefore beyond the scope of this book.¹⁶ Therefore, unless expressly stated, the term ‘jurisdiction’ in this chapter refers to *criminal* jurisdiction.

Thirdly, in many cases states have concurrent jurisdiction over conduct or persons under international law, and there is no general legal hierarchy among jurisdictional claims. As Crawford notes, ‘[t]here is no assumption (even in criminal cases) that individuals or corporations will be regulated only once, and situations of multiple jurisdictional competence occur frequently.’¹⁷ All claims being equal, no state can claim a greater right to exercise jurisdiction over a matter under international law than another. However, in practice, states may defer to the territorial state for reasons of policy or practicality (such as the availability of evidence).

6.2 Difficulties in identifying jurisdictional rules

An inquiry into the legality of state action begins with the identification of the relevant international legal norms. However, when it comes to state jurisdiction, this presents some difficulty.

The principal reason is that the exercise of jurisdiction by states is governed primarily by customary international law, as there is no dedicated treaty on the subject.¹⁸ While the field of international criminal law has produced common ‘jurisdiction’ provisions in certain treaties, these provisions ‘are often vague and in need of clarification by State practice’.¹⁹ As a result, the laws governing jurisdiction must be determined with reference to the two co-determinants of customary international law, namely (i) relevant *state practice*²⁰ and (ii) *opinio juris*.²¹

This results in a number of difficulties in the identification of relevant legal norms governing the exercise of jurisdiction. The general difficulties with the identification of the rules of customary international law, which are discussed in chapter 3, repeat here. In addition to these, there are numerous difficulties specifically associated with identifying the relevant jurisdictional rules under international law.

6.2.1 The challenge of the *Lotus* case

First, and foremost, most discussions of jurisdiction in international law begin with the decision of the Permanent Court of International Justice (PCIJ) in the 1927 *Lotus* case.²² This *Lotus* case, and its legacy, is the source of much of the uncertainty regarding the exercise of jurisdiction by states under international law. In short, the PCIJ in *Lotus*, while accepting the territorial limits placed on a state’s *enforcement jurisdiction*,²³ went on to afford a state a wide measure of discretion or licence in respect of ‘exercising jurisdiction in its own territory, *in respect of any case which relates to acts which have taken place abroad*’.²⁴ In this regard, it noted:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, ... [international law] leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.²⁵

In this passage, which has sparked considerable controversy and commentary, the PCIJ in *Lotus* appears to suggest that states possess ‘very wide powers of jurisdiction, which ... [can] only be restricted by proof of a rule of international law prohibiting the action concerned’.²⁶ Simply put, ‘in the absence of a rule in international law to the contrary, a state may do whatever it pleases’.²⁷ For ease of reference, this is referred to as the *permissive approach* to jurisdiction.

However, many scholars assert that, *contra Lotus*, ‘the emphasis lies the other way around’²⁸ – namely, that states can only exercise jurisdiction extraterritorially when they can rely on a rule allowing them to do so.²⁹ These scholars argue that either (i) the *Lotus* ‘jurisdiction unbound’³⁰ judgment was incorrect when it was handed down, or (ii) the position has been subsequently modified by state practice, ‘which is to assert a positive ground for the exercise of jurisdiction, rather than to rely on the absence of a prohibition’.³¹ This is termed the *restrictive approach* to jurisdiction. Notably, among adherents to this approach, there is a further division between those who consider positive grounds of extraterritorial jurisdiction to be *allowed* by international law through consensual state practice (a horizontal conception of the international order), and those who consider such grounds to be *granted* by international law (a vertical conception of the international order).

A third group of scholars, perhaps out of exhaustion, take a conciliatory approach and argue that the difference is one of emphasis, or irrelevant in practice.³²

These competing theoretical frameworks are the unstated basis of many jurisdictional disputes. The debate rages on. As Reydams notes, ‘it appears that every condemnation of the *Lotus* judgment

can be juxtaposed with a competing pronouncement defending it.³³ Regrettably, the International Court of Justice (ICJ) has not brought any further clarity to the matter, and has not since *Lotus* ‘directly addressed the doctrine of (extraterritorial) jurisdiction’,³⁴ and its indirect pronouncements on the subject can be interpreted in support of both approaches.³⁵ As a result, the development of the law in this field ‘has come about solely in national legal practice, without supervisory guidance by an international court or regulator’.³⁶ This focus on ‘national legal practice’ brings with it a number of challenges.³⁷ Needless to say, the continuing confusion over the first principles of jurisdiction, from which all discussions of the lawful exercise must proceed (whether explicitly or not), has negative effects on this area of law, particularly in relation to controversial grounds such as universal jurisdiction.

6.2.2 The problem of state practice and *opinio juris*

In addition to ongoing uncertainty regarding *Lotus* and its continued relevance, clarity regarding the relevant jurisdictional rules under international law is hindered by the problems of state practice and *opinio juris*. The challenges in this regard are two-fold:

1. states take into account both international and domestic law, as well as policy considerations, when exercising jurisdiction (or refraining from doing so); and,
2. states do not react to each and every exercise of jurisdiction by other states.

When states choose to exercise jurisdiction (or refrain from doing so), the lawfulness of their action under international law is not their only consideration. Rather, states may take into account both international and domestic law, as well as policy ('extra-judicial') considerations. In other words, states may exercise self-restraint, and choose not to exercise jurisdiction because of domestic legal requirements or policy concerns (so-called 'comity' considerations). In their separate opinion in the *Arrest Warrant* case, Judges Higgins, Kooijmans, and Buergenthal noted:

[N]ational legislation reflects the circumstances in which a State provides *in its own law* the ability to exercise jurisdiction. But a State is not required to legislate up to the full scope of the jurisdiction allowed by international law. ... National legislation may be illuminating as to the issue of universal jurisdiction, but not conclusive as to its legality.³⁸ [own emphasis]

For example, the approach of the United States is first to consider whether there is a basis under international law for the exercise of jurisdiction, and second to consider the 'reasonableness' of the exercise of jurisdiction in the circumstances.³⁹ The latter is a domestic consideration and *not* a requirement of international law. Similarly, in *S v Mharapara*,⁴⁰ the Zimbabwean Supreme Court held:

International law merely permits every State to apply its jurisdiction against its own citizens even when they are situated outside its boundaries. ... Thus the fact that customary international law is part of the municipal law of a State does not assist, because there is only a permissive principle involved and not a mandatory rule. The permissibility under international law for a State to exercise jurisdiction is not a sufficient basis for the exercise of jurisdiction by a municipal court of that State. A municipal court must be satisfied in addition that the municipal law itself authorises the trial of a national for an offence committed abroad which would be punishable if committed at home.⁴¹ [own emphasis]

The result is that a decision to exercise jurisdiction, or not, might not reflect state practice or *opinio juris*, but rather domestic concerns of a political or legal nature. This leads to the difficulty in practice of distinguishing between a state's refusal to extend its jurisdiction as a result of a belief that *international law does not permit it*, and its refusal to do so on the basis of *domestic law or policy*. Only the former would be sufficient for the purposes of pointing to a rule of customary international law. As Crawford notes, ‘the appearance of clear principles has been retarded by the

prominence in the sources of municipal decisions, which exhibit empiricism and adherence to national policies'.⁴²

Furthermore, states do not typically react to each and every exercise of jurisdiction by other states. Generally, it is only a state with a competing jurisdictional claim, or some direct interest in the person or subject matter, that is likely to object to the exercise of jurisdiction. Objections may also not be based solely on what international law permits or prohibits, if at all, and may reflect other considerations. This is further complicated by the fact that states may not rely explicitly on one or another jurisdictional principle. As Crawford notes, these principles 'are in substance generalizations of a mass of national provisions which by and large do not reflect the categories of jurisdiction specifically recognized by international law', and that '[t]he various principles often interweave in practice'.⁴³

The result is that when states do object, they may do so based on a misunderstanding of the basis of jurisdiction, intentional or otherwise. For example, in the infamous *Cutting* case⁴⁴ (generally cited as evidence of the US objections to passive personality jurisdiction), the Mexican authorities were arguably relying on a different, far less controversial principle of jurisdiction – namely, territoriality. More recently, African states have complained vehemently about the alleged abuse of the principle of universal jurisdiction by European states. However, closer consideration reveals that many of the exercises of jurisdiction complained about were not in fact based on universal jurisdiction, but rather on more widely accepted principles of jurisdiction.⁴⁵

6.3 State jurisdiction under South African law

Broadly speaking, there are two possible approaches to jurisdiction – one permissive, the other restrictive. Ryngaert puts it succinctly:

Either one allows States to exercise jurisdiction as they see fit, unless there is a prohibitive rule to the contrary [the permissive approach], or one prohibits States from exercising jurisdiction as they see fit, unless there is a permissive rule to the contrary [the restrictive approach].⁴⁶

While the *Lotus* case supports the former approach, a number of scholars argue that the latter one is correct under customary international law.⁴⁷ Ultimately, in the absence of a definitive position, it is up to states in practice to decide which construction of jurisdiction – permissive or restrictive – to follow. South Africa's approach in this regard is not a model of clarity.

Historically, South Africa was willing to extend its laws beyond its territory in line with the permissive approach. In 1946, the Appellate Division noted that 'the general principle that a state will only punish crimes committed within its own territory or by its own subjects is not universally admitted'.⁴⁸ Then, albeit in unique circumstances, South Africa extended its laws to the territory of South West Africa, which, while not recognised by South Africa as a sovereign state at the time, was still outside the Republic.⁴⁹

Since 1994, the Constitutional Court appears to have adopted the restrictive approach to the exercise of jurisdiction extraterritorially on a number of occasions. First, in *Kaunda and Others v President of the Republic of South Africa*, the Constitutional Court noted that *Lotus* 'has been criticised by a substantial number of authorities',⁵⁰ and found that 'when the application of a national law would infringe the sovereignty of another state, that would *ordinarily* be inconsistent with and not sanctioned by international law.'⁵¹ Then, in *S v Basson*,⁵² the Constitutional Court – considering the 'scope of criminal jurisdiction in South Africa' – again followed the restrictive approach, finding that jurisdiction is ordinarily territorially limited, and can only be exercised extraterritorially in limited exceptional circumstances (generally relating to the nature of the crime).⁵³

Most recently, the Constitutional Court discussed the exercise of extraterritorial jurisdiction in detail in the *SALC* case.⁵⁴ To begin with, the court adopted a rather confusing formulation of the *Lotus* principle to the effect that it ‘allows states to exercise prescriptive, adjudicative and enforcement jurisdiction solely within the confines of their territory’.⁵⁵ This is a particularly restrictive formulation of *Lotus*, which is difficult to reconcile with the relevant passage. Not only does it fail meaningfully to distinguish, as the PCIJ did in *Lotus*, between a state ‘[exercising] its power in any form in the territory of another State’, and ‘a State ... exercising jurisdiction in its own territory, in respect of ... acts which have taken place abroad’,⁵⁶ but it is also difficult to square with the PCIJ’s statement that:

[f]ar from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.⁵⁷

Nevertheless, while inconsistent with what the PCIJ actually said in *Lotus*, it was consistent with the Constitutional Court’s generally restrictive approach to jurisdiction.

Notably, the court’s restrictive interpretation of *Lotus* was not carried through into its analysis of universal jurisdiction. In fact, the court ultimately found that while enforcement jurisdiction ‘is confined to the territory of the state seeking to invoke it’, prescriptive and (in some circumstances) adjudicative jurisdiction can be applied ‘universally’ (that is, outside the territory of the state).⁵⁸ In doing so, it left open the question of whether the general rule for exercising prescriptive and adjudicative jurisdiction extraterritorially is ‘permissive’ or ‘restrictive’.⁵⁹

However, Parliament has in recent times passed laws granting our courts ‘extraterritorial’ jurisdiction.⁶⁰ Notably, two such statutes (the Prevention and Combating of Corrupt Activities Act 12 of 2004, and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007) provide for such jurisdiction to be exercised over conduct that does not fall under the exceptions provided for under the restrictive approach to jurisdiction. By implication, this supports the permissive approach to jurisdiction, in terms of which ‘in the absence of a rule in international law to the contrary, a state may do whatever it pleases’.⁶¹

6.4 The six bases of jurisdiction

Against the background described above, six bases of jurisdiction asserted by states as lawful under international law (sometimes called grounds or theories of jurisdiction) are discussed below. In doing so, a distinction is made between *territorial* and *extraterritorial* exercises of jurisdiction – the former being the most common and uncontroversial (among states at least), and the latter being less common but the most fertile ground for international law and international legal scholarship.⁶² Notably, the Constitutional Court recently endorsed the application of all but one of these ‘bases of jurisdiction’ – namely the ‘effects principle’.⁶³

6.4.1 The principle of territoriality

The exercise of jurisdiction by states over acts committed in their territory is by far the most common and least controversial basis for jurisdiction. In terms of the principle of territoriality:

all crimes committed (or alleged to have been committed) within the territorial jurisdiction of a state may come before the municipal courts and the accused if convicted may be sentenced. This is the case even when the offenders are foreign citizens.⁶⁴

This principle is ‘universally recognized’,⁶⁵ and, as a matter of practice, states routinely assert jurisdiction over criminal acts that occur within their territory and over the persons responsible for such acts.⁶⁶

Doctrinally, the principle of territoriality is positioned as a (if not *the*) ‘central feature of state sovereignty’.⁶⁷ It is, according to Abbas, ‘the most visible way through which a State demonstrates its sovereignty’.⁶⁸ Moreover, it is ‘a logical manifestation of a world order of independent states’.⁶⁹ It is also justified in practical terms. As Shaw notes, ‘[i]t is also highly convenient since in practice the witnesses to the crime will be situated in the country and more often than not the alleged offender will be there too’.⁷⁰ As an empirical matter, territoriality is the ‘principal ground for the exercise of criminal jurisdiction’.⁷¹ For these reasons, the principle of territoriality holds considerable sway in existing literature on state jurisdiction.⁷² While this focus on territorial jurisdiction is useful (for ease of reference) and for the most part harmless, it has its limitations. These are dealt with further on in this chapter.

While the principle of territoriality applies in a straightforward manner in most instances, there are some unique circumstances where it is difficult to determine whether a crime took place within the territory of the state attempting to exercise jurisdiction over it. For one, territorial crimes in this sense include crimes committed ‘upon [a state’s] territorial sea and in certain cases upon the contiguous and other zones and on the high seas where the state is the flag state of the vessel’.⁷³ A more difficult question arises in respect of crimes which, by their nature, are not committed wholly within the territory of a single state. Scholars tend to distinguish between two approaches to territoriality in such cases:

1. Under the *subjective* approach, ‘[a] State can exercise territorial jurisdiction over a crime that commences on its territory, regardless of whether the crime is actually completed on its territory or elsewhere’.⁷⁴ This has also been termed the ‘initiatory theory’.⁷⁵
2. Under the *objective* approach, ‘a State is able to exercise jurisdiction if an offence is completed on its territory, regardless of where the offence is initiated’.⁷⁶ This has also been termed the ‘terminatory theory’.⁷⁷

This debate has, over the years, produced more heat than light.⁷⁸ In practice, South African courts have adopted the *subjective* approach to territorial jurisdiction on more than one occasion. In the somewhat unique case of *S v Vanqa*,⁷⁹ the accused brutally assaulted a man in the Republic of Ciskei (a nominally independent bantustan under apartheid South Africa). The victim was subsequently taken to hospital in Queenstown, where he succumbed to his injuries. When the accused was charged with murder in Ciskei, he pleaded that the court lacked jurisdiction to try him for the crime of murder as the deceased, although assaulted in Ciskei, had died in the Republic of South Africa, a separate country. In dismissing the plea, the court endorsed the view that ‘for the exercise of criminal jurisdiction there must, as a rule, be something done within the boundaries of the State’.⁸⁰ In its decision, the court appears to conflate domestic jurisdictional principles and those of international law – unsurprisingly given the context – but in effect, the court adopted a *subjective* approach to territorial jurisdiction (that is, it accepted that the crime was initiated in Ciskei but completed abroad).

More recently, in *S v Basson*, the Constitutional Court found that South Africa had jurisdiction over an alleged conspiracy entered into in South Africa, even though the crimes themselves were committed in Namibia. Notably, the court appeared to abandon the subjective versus objective distinction, endorsing the approach of the Supreme Court of Canada that ‘all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada’.⁸¹ The court went on to find that ‘[the] facts leave no doubt that there was a *real and substantial link* between [South Africa] ... and the conspiracy to commit murders in Namibia’.⁸² In practice, this attenuated form of territoriality can overlap with

the effects principle of jurisdiction, discussed below. However, the two are notionally separate.⁸³ Notably, this approach is similar to that followed by Zimbabwe,⁸⁴ Malawi⁸⁵ and Zambia.⁸⁶ The continued relevance of the subjective and objective approaches appears to be limited to academic classifications of jurisdiction, not legal determinations thereof. As Crawford notes, ‘The effect of the two principles combined is that whenever the constituent elements of a crime occur across an interstate boundary both states have jurisdiction.’⁸⁷

As a general rule, when it comes to the exercise of jurisdiction by states *within their territory*, international law generally gives states free reign. In this regard, Abbas argues that the ‘right’ of a state to exercise territorial jurisdiction is ‘absolute and unassailable’.⁸⁸ This holds true in respect of the exercise of prescriptive, adjudicative and enforcement jurisdiction by a state. That is to say, a state may *prescribe* rules governing acts that take place within its territory, may *adjudicate* disputes relating to those rule through its courts, and may *enforce* those rules in respect of any person within its territory. This includes the prerogative *not* to exercise jurisdiction in a particular case or in respect of a particular crime.⁸⁹ However, this general statement is subject to two important qualifications.

First, although states’ absolute right to exercise territorial jurisdiction remains intact for the most part, it has come under increasing strain in recent times.⁹⁰ Exceptions or limitations to this right *as a matter of international law* have begun to emerge in relation to international human rights law and the prosecution of international crimes. In so far as the former is concerned, Shaw notes that ‘the treatment by a country of its own nationals is now viewed in the context of international human rights regulations, although in practice the effect of this has often been disappointing’.⁹¹ Notably, much of this has taken place in response to the practice of apartheid in South Africa⁹² – a somewhat dubious distinction. The limitations placed on states’ ability to exercise jurisdiction in this regard primarily concern *enforcement* jurisdiction (for example, a trial must meet certain minimum standards), whereas states’ prerogative to criminalise conduct within its territory (that is, exercise prescriptive jurisdiction) remains almost unfettered.⁹³ One possible exception to this is emerging in the context of international crimes (such as genocide), where states may be obliged under customary international law to criminalise such acts (and many already do so under conventional international law), and where appropriate, to exercise such criminal jurisdiction through prosecutions.⁹⁴

Conversely, the trend is moving in the opposite direction in so far as the international rules governing immunity for certain foreign officials and diplomats are concerned.⁹⁵ Whereas traditionally states were prohibited from exercising jurisdiction over such officials as a matter of international law,⁹⁶ recent developments in international criminal law have led to such immunities being removed in circumstances where an official is accused of international crimes (such as genocide, war crimes and crimes against humanity). This has been driven primarily by international courts.⁹⁷ However, some states (including South Africa) have elected to remove such immunities in relation to prosecutions before their national courts as well.⁹⁸

Finally, as noted above, the focus in this chapter is on the *prescriptive* jurisdiction of states. However, for the sake of clarity, it is worth noting that whatever dispute there may be about lawful exercise of *prescriptive* jurisdiction extraterritorially, there is little doubt that states cannot exercise their *enforcement* jurisdiction (that is, they may not take coercive action) on the territory of another state.⁹⁹ Such coercive action would include the arrest of a person abroad,¹⁰⁰ regardless of the nature of the crime, and the sending of military units.¹⁰¹ To act thus would be a violation of the other state’s sovereignty.¹⁰² However, to the extent that states (through treaties or custom) permit other states to exercise enforcement jurisdiction on their territory, there is no rule under international law that prohibits such an arrangement. Such agreements, both formal and informal, are not uncommon¹⁰³ and are explicitly referred to in South African legislation.¹⁰⁴ Nor, it must be noted, can a state’s courts

sit and exercise *adjudicative* jurisdiction on the territory of another state, unless with that state's consent.¹⁰⁵

6.4.2 The nationality principle¹⁰⁶

In terms of the nationality principle, a state may choose to exercise jurisdiction over crimes committed abroad (that is, extraterritorial jurisdiction) when they are committed by nationals of that state. The link or connecting factor between the state and the conduct in question is the nationality of the perpetrator.

Generally, authors provide a philosophical basis for this form of jurisdiction with reference to a *personal* concept of sovereignty. Crawford, for example, suggests that nationality is a 'mark of allegiance and an aspect of sovereignty'.¹⁰⁷ Similarly, Shaw argues that '[s]ince every state possesses sovereignty and jurisdictional powers and since every state must consist of a collection of individual human beings, *it is essential that a link between the two be legally established*'.¹⁰⁸ Alternatively, or, in some cases in addition to this, support for this base of jurisdiction is sought in the rights associated with nationality, including the right to nationality.¹⁰⁹ This line of argument can lead to difficult historical questions, as nationality (and citizenship) has in the past been granted upon patriarchal and racial grounds, which states would sooner forget. It is debatable whether or not a philosophical basis is needed as what matters is state practice and *opinio juris* – the co-determinants of customary international law. On this score, in the exercise of jurisdiction based on nationality, there is sufficient of both determinants to dispel any doubts as to the legality of this ground of jurisdiction.¹¹⁰

Within *state practice*, there is a division between common and civil law countries in relation to the crimes over which nationality jurisdiction is exercised. Generally speaking, states with a legal system based on the civil law model exercise this form of extraterritorial criminal jurisdiction regularly; while states of the common law legal tradition often limit the exercise of this jurisdictional ground to certain 'serious' crimes.¹¹¹ The United Kingdom, for example, limits this kind of jurisdiction to treason, murder, bigamy, as well as international crimes.

South Africa, for the most part,¹¹² follows the common law approach, and restricts its exercising of nationality jurisdiction to a limited category of serious offences. Under the common law, South Africa exercises nationality jurisdiction over treason.¹¹³ In *R v Holm; R v Pienaar*, the Appellate Division found that 'there is no international custom or rule of law which prevents the Union of South Africa from punishing one of its nationals for the crime of high treason committed outside the Union'.¹¹⁴ Furthermore, in *R v Neumann*,¹¹⁵ a Special Criminal Court exercised jurisdiction over an alleged act of treason committed against the Union of South Africa in Italy and Cyrenaica (now part of Libya), notwithstanding the fact that the accused was an *alien resident*. The court extended jurisdiction based on an expanded interpretation of nationality, noting:

It is clear that a State has jurisdiction over all persons who owe it allegiance, that is, persons who receive protection from the State, *protecto trahit subjectionem et subjectio protectionem*, and such persons belong to one of three classes, namely, (a) natural born subjects (b) naturalised citizens and (c) domiciled persons, the respective *nexus subjectionis* being (a) birth (b) Statute and (c) residence.¹¹⁶

In recent times, South Africa has extended its criminal jurisdiction to a number of other serious offences on this basis, and currently exercises such jurisdiction over crimes against humanity, genocide and war crimes;¹¹⁷ terrorism and related offences;¹¹⁸ corruption;¹¹⁹ certain sexual offences;¹²⁰ and human trafficking.¹²¹ In respect of the majority of these offences, an expanded interpretation of nationality is used to include 'ordinary residents'.

Finally, South Africa appears unlikely to extend its jurisdiction to lesser offences committed by nationals abroad. For its part, the Constitutional Court in *S v Basson* expressed the view (albeit

obiter) that ‘it would be against the comity owed to [a] ... country for a South African court to punish a person for acts which can lawfully be committed there’.¹²²

6.4.3 Passive personality

In terms of the passive personality principle, a state may choose to exercise jurisdiction over extraterritorial crimes committed, or intended to be committed, *against* their nationals (and in some instances their ordinary residents). Here, the link between the state and the conduct in question is the nationality of the victim of the crime in question. This principle is in a sense the ‘reverse of the coin’¹²³ of the nationality principle.

Until fairly recently, this principle of jurisdiction aroused considerable controversy.¹²⁴ In this regard, reference is generally made to the 1886 *Cutting* case,¹²⁵ where a US national was arrested and convicted in Mexico for the publication of a defamatory statement made in Texas. Mexico allegedly exercised jurisdiction over the act, even though it was committed in the United States, based on the passive personality principle.¹²⁶ The US protestations at Mexico’s actions are cited as evidence of states’ historic discontent regarding this principle.¹²⁷ Certainly in the United States there was a general reluctance to exercise extraterritorial jurisdiction *generally* (until recently that is). However, it is by no means clear that this discontent was widespread among states.¹²⁸

Be that as it may, in recent times, state practice and *opinio juris* – including in the United States – have evolved to accept this principle of jurisdiction.¹²⁹ As Judges Higgins, Kooijmans and Buergenthal noted in the *Arrest Warrant* case:

Passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in the legislation of various countries ..., and today meets with relatively little opposition, at least so far as a particular category of offences is concerned.¹³⁰

As with the previous principle, South Africa’s recently adopted legislation concerning crimes against humanity, genocide and war crimes;¹³¹ terrorism and related offences;¹³² corruption;¹³³ certain sexual offences;¹³⁴ and human trafficking¹³⁵ provides for passive personality jurisdiction over such offences.

6.4.4 The protective principle

The bases of jurisdiction discussed above focus on the person (be it the offender or victim) concerned. In addition, states have asserted the right to exercise jurisdiction based on the *crime* concerned: these bases are protective jurisdiction, effects-based jurisdiction and universal jurisdiction. The first of these, protective jurisdiction, is ostensibly concerned with the special interest of a state that is affected or prejudiced by the crime in question. In principle, these interests are generally security related, and the crimes are those such as espionage¹³⁶ or broadcasting dangerous propaganda.¹³⁷ It has also been suggested that the principle extends to offences related to the ‘seals, currency instruments of credit, stamps, passport, [and] public documents’ issued by states.¹³⁸ A South African court endorsed this jurisdiction basis in principle in the case of *R v Neumann*, where the court held:

The Union of South Africa being a Sovereign State ... [is] therefore automatically entitled to punish crime directed against its independence and safety.¹³⁹

An example of a genuine invocation of this principle is that of *Joyce v Director of Public Prosecutions*,¹⁴⁰ where the United Kingdom exercised jurisdiction over an American pro-Nazi propagandist (who later claimed German nationality) on the basis that he had fraudulently misrepresented his birthplace to be Ireland in order to obtain a British passport.¹⁴¹

However, in practice, states have taken a very broad approach to security. As a result, ‘the variety of issues over which States now assert the protective principle jurisdiction are *dubious and tend to manifest an unprincipled application of an otherwise serious jurisdictional principle*’.¹⁴² For example, the United States has asserted protective jurisdiction over drug-related offences,¹⁴³ while Germany has asserted protective jurisdiction over ‘foreigners who had sexual intercourse with German girls on the ground that the act threatened the racial purity of the German nation’.¹⁴⁴

6.4.5 The effects principle

The effects principle is one of the more controversial forms of extraterritorial jurisdiction. In terms of this principle, ‘a state has jurisdiction to prescribe law with respect to ... conduct outside its territory that has or is intended to have substantial effect within its territory’.¹⁴⁵ Scholars have argued that the effects principle is an extension of ‘objective territorial jurisdiction’ so as to include ‘not only where the crime is completed, but where its *effect* is felt’.¹⁴⁶ This might place it more conservatively in line with the principle of territoriality. An alternative interpretation is that it is an extension of the already tenuous protective principle. However, the interest protected need not necessarily be security related, but could include economic interests.

This is borne out to some extent by the use of this basis of jurisdiction by the United States, its progenitor and main supporter. As Abbas notes, this principle ‘was developed by the USA through the adoption in 1890 of the Sherman Antitrust Act’, which ‘was intended to prevent business cartels outside the USA from collusion and monopoly, which may harm the US market’.¹⁴⁷ Notably, assertions of jurisdiction in this manner have been treated with scepticism by European states and the European Court of Justice.¹⁴⁸ Ultimately, this principle of jurisdiction ‘remains controversial, if apparently not objectionable in all cases’.¹⁴⁹

South Africa has adopted a version of this principle in the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, which criminalises ‘any act committed in or outside the Republic, which ... causes any major economic loss or extensive destabilisation of an economic system or substantial devastation of the national economy of a country’.¹⁵⁰ Notably, this principle also has potential for the regulation of cybercrime, although to date courts have preferred to use an expanded version of the territoriality principle.¹⁵¹

6.4.6 Universal jurisdiction

By far the most controversial exercise of extraterritorial jurisdiction is the so-called reliance on universal jurisdiction. According to *The Princeton Principles on Universal Jurisdiction*:

[U]niversal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.¹⁵²

Others define the ground in negative terms. Reydams, for example, suggests that universal jurisdiction ‘means that there is no link of territoriality or nationality between the State and the conduct or offender, nor is the State seeking to protect its security or credit’.¹⁵³ A more precise definition is offered by O’Keefe, who defines it as ‘the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct’.¹⁵⁴

Universal jurisdiction remains the subject of considerable controversy in terms of its origins, its doctrinal basis, the crimes covered, the conditions under which it can be exercised, and whether

there is a duty to exercise such jurisdiction under certain circumstances. State practice over the past decade – and in particular the implementation of legislation by a number of states in respect of the Rome Statute of the International Criminal Court¹⁵⁵ – suggests that the exercise of universal jurisdiction is *in principle* permissible under international law.¹⁵⁶ Notably, South African statutes provide for universal jurisdiction to be exercised over a number of offences, including crimes against humanity, genocide and war crimes;¹⁵⁷ terrorism and related offences;¹⁵⁸ corruption;¹⁵⁹ certain sexual offences;¹⁶⁰ and human trafficking.¹⁶¹ Furthermore, in the recent *SALC* case, the Constitutional Court explicitly confirmed the universal jurisdiction as a basis ‘on which domestic criminal jurisdiction may be founded’.¹⁶²

As such, debates concerning universal jurisdiction have shifted in recent times to the parameters and conditions of its exercise.¹⁶³ In particular, there is continued debate over whether international law requires a suspect to be present in the state exercising universal jurisdiction ('strict' or 'conditional' jurisdiction), or whether such jurisdiction can be exercised regardless of the location of the accused ('pure' or 'absolute' jurisdiction). At a conceptual level, proponents of 'strict' universal jurisdiction tend to blur the distinction between the jurisdiction to prescribe and the jurisdiction to enforce and/or adjudicate; they impose the territorial limitations of the latter on the former. Universal jurisdiction is 'a species of jurisdiction to prescribe'.¹⁶⁴ In contrast, the debate about the 'presence' requirement concerns the exercise of enforcement and adjudicative jurisdiction – that is, the power to arrest and detain, to prosecute, try and sentence, and to punish. Notably, prescriptive jurisdiction is conceptually and legally separate from enforcement jurisdiction;¹⁶⁵ it is not uncommon for states to have prescriptive but not enforcement jurisdiction over the same matter.¹⁶⁶ This is equally true of other grounds of extraterritorial jurisdiction (for example, nationality and passive personality). As a result, many commentators argue that the 'pure' versus 'conditional' universal jurisdiction debate is a debate about policy rather than substantive law, driven by 'practical prudence, or as a result of political pressure, rather than as a matter of law'.¹⁶⁷

However, as O'Keefe notes, 'logic and the *opinio juris* of states do not always go hand in hand', and states are free to condition the legality of the exercise of universal jurisdiction under international law on the proper and simultaneous exercise of enforcement jurisdiction (that is, with the offender present in the state concerned).¹⁶⁸ Such a condition would have to be evidenced by state practice. Notably, in the *SALC* case, the Constitutional Court limited its findings to the question of whether the presence of a suspect is required under international law for an *investigation* to commence, finding that:

[T]he exercise of universal jurisdiction, for purposes of the investigation of an international crime committed outside our territory, may occur in the absence of a suspect without offending our Constitution or international law [own emphasis].¹⁶⁹

However, with regard to the broader question of presence, the court remarked that '[i]t would appear that the predominant international position is that presence of a suspect is required at a more advanced stage of criminal proceedings, when a prosecution can be said to have started'.¹⁷⁰ So, it appears from the decision, that international law requires presence *at some point* in proceedings, but not from the outset.¹⁷¹ This supports the supposition – albeit by necessary implication – that under international law, universal jurisdiction (in some form) can be exercised without the suspect's presence being established.

This is not the end of the 'presence' debate, however. As noted above, when it comes to jurisdiction, what international law permits (or does not prohibit) is a separate question from what states themselves – based on policy concerns or domestic law – *choose* to do. In so far as universal jurisdiction is concerned, some states have chosen themselves to make the presence of an accused (or in some cases his or her 'anticipated presence') a requirement under their applicable domestic

law.¹⁷² Whether or not South Africa has done so is a matter of some debate. Section 4(3) of the Implementation of the Rome Statute of the International Criminal Court Act¹⁷³ states that:

In order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits [an International Criminal Court] crime outside the territory of the Republic, is deemed to have committed that crime within the territory of the Republic if ... (c) that person, after the commission of the crime, is present in the territory of the Republic.

This led some, including the National Prosecuting Authority, to conclude that an accused's presence is a jurisdictional precondition under this Act. However, in the *SALC* case, the Constitutional Court addressed the 'proper interpretation of the provisions of section 4 of the ICC Act which regulates the jurisdiction of South African courts in respect of international crimes'.¹⁷⁴ In doing so, it found that while presence is required under the ICC Act for 'the prosecution of a crime in a South African court' (pursuant to the constitutional requirement that an accused person be present during her or his trial), presence was not required for the purposes of an investigation under the Act.¹⁷⁵ This is in line with its findings regarding presence as a requirement under *international law*. However, what remains unclear is at which point presence is required under the ICC Act. The court consigned this requirement to the 'more advanced stage of criminal proceedings'¹⁷⁶ (that is, the prosecution or trial phase, where a court is involved), but did not state when this stage commences.

In addition, in the *SALC* case, the Constitutional Court set out three general principles that should be observed 'in order for universal jurisdiction to comply with the dictates of international law'¹⁷⁷ according to international law scholars:

1. a substantial and *bona fide* connection between the subject matter and the source of the jurisdiction;
2. the principle of non-intervention in the domestic or territorial jurisdiction of other states; and
3. 'elements of accommodation, mutuality and proportionality'.¹⁷⁸

Notably, these general principles are based solely on academic writings and their legal basis is questionable.¹⁷⁹

6.5 Specialised jurisdiction regimes

Where the sphere of human activity moves beyond the ordinary boundaries of states, the question of who has jurisdiction over such activity arises. Accordingly, the next sections discuss the specialised jurisdiction regimes that apply at sea, in Antarctica and in outer space.

6.5.1 Law of the sea

As far as international law is concerned,¹⁸⁰ the territories of the coastal states only extend to the outer limits of the territorial sea, which are at most 12 nautical miles from the baselines.¹⁸¹ Although that narrow strip of waters along the coast is part of the territories of the coastal states, foreign ships have the right of innocent passage.¹⁸² While they exercise that right to pass through the territorial sea without entering the internal waters¹⁸³ of a state, the latter 'may not take any steps on board ... to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea', except with respect to violations of laws and regulations applying in the exclusive economic zone (EEZ)¹⁸⁴ or the protection and preservation of the marine environment.¹⁸⁵

However, in the case of a crime committed on board the ship during its passage, the coastal state may exercise its criminal jurisdiction 'if the consequences of the crime extend to the coastal State';

‘if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea’; ‘if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State’; or if that exercise is ‘necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances’.¹⁸⁶ In other cases, the coastal states should not exercise their criminal jurisdiction.¹⁸⁷ Likewise, coastal states ‘should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship’.¹⁸⁸ In addition, ‘[t]he coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State’.¹⁸⁹

The fact that the territories of coastal states do not extend beyond the outer limits of the territorial sea means that jurisdiction cannot be based on *territoriality* beyond those limits. Indeed, most of the world’s oceans were, until recently, part of the high seas, over which no state was allowed to validly purport to claim sovereignty¹⁹⁰ (for instance, by claiming an area as part of its territory). As a result, all states could, in most parts of the oceans, exercise the freedom of the high seas, which comprises, *inter alia*, the freedom of navigation, the freedom of overflight, the freedom to lay submarine cables and pipelines, the freedom to construct artificial islands and other installations permitted under international law, the freedom of fishing and the freedom of scientific research.¹⁹¹

The high seas were not, however, a lawless space because states used *nationality* as the basic jurisdictional ground, although in an adapted version of the nationality principle that applies on land. Indeed, what matters at sea is the nationality of the *ship* (reflected by the flag that the ship is entitled to fly),¹⁹² and not the nationality of the individuals on the ship. At the same time, states gave effect to the principle of sovereign equality of states by agreeing that ships are subject to the exclusive jurisdiction of the flag state.¹⁹³ That rule applies in its adjudicative dimension even in factual situations such as the one that gave rise to the *Lotus* case,¹⁹⁴ but it is not absolute.

Indeed, a warship that encounters a foreign ship on the high seas may exercise the enforcement jurisdiction of its state by boarding the ship if there is reasonable ground for suspecting that the ship is engaged in piracy, the slave trade or unauthorised broadcasting.¹⁹⁵ Another exception is the right of ‘hot pursuit’, which allows a state to continue exercising its enforcement jurisdiction despite the fact that the ship pursued has moved into a maritime zone where the state no longer otherwise has a basis for exercising that jurisdiction.¹⁹⁶ Finally, states are obviously free to allow other states to exercise their jurisdiction over ships flying their flags. An example is the 1995 Agreement in Relation to Straddling Fish Stocks and Highly Migratory Fish Stocks,¹⁹⁷ to which South Africa is a party.¹⁹⁸

The straightforward division between territorial seas and high seas that had prevailed for centuries became complicated in the second half of the last century when coastal states claimed jurisdiction over areas further and further away from their shores. The ensuing tensions between the various ocean stakeholders resulted in the creation of maritime zones that have a legal regime somewhere between that of the territorial seas and that of the high seas and in which the coastal state has functional jurisdiction.

One of those zones is the contiguous zone, which, in cases where the coastal state does claim it, extends beyond the territorial sea up to at most 24 nautical miles.¹⁹⁹ Although that zone is not part of the territory of the coastal state, the latter may exercise its enforcement jurisdiction over all ships to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its land territory, internal waters or territorial sea as well as to punish infringement of those regulations committed therein.²⁰⁰

The contiguous zone overlaps the exclusive economic zone (EEZ), which extends up to 200 nautical miles from the baselines of a coastal state.²⁰¹ The coastal state does not have sovereignty over its EEZ, but rather sovereign rights over living and non-living resources found there.²⁰² This means that the coastal state may, and is actually expected to, exercise its prescriptive, enforcement and adjudicative jurisdiction over all ships in the EEZ in matters relating to resources in the zone. In contrast, in all other matters, such as navigation, the extent of the jurisdiction of the coastal state is the same in the EEZ as it is on the high seas.²⁰³

The sovereign rights of a coastal state over the seabed and subsoil may extend further than 200 nautical miles from the baselines.²⁰⁴ Beyond, the seabed and subsoil constitute the International Seabed Area (or ‘Area’)²⁰⁵ which, together with its solid, liquid or gaseous mineral resources,²⁰⁶ is the common heritage of humankind.²⁰⁷ This means that all rights in those resources are vested in humankind as a whole, on whose behalf the International Seabed Authority must act.²⁰⁸

6.5.2 Antarctic law

Climatic conditions in Antarctica are such that it is not permanently inhabited and, for this reason, it was initially regarded as a *terra nullius* open to acquisition by states. Seven states have indeed laid claims to sectors of the continent, leaving however one substantial section of the continent unclaimed.²⁰⁹ Three of those claims overlap and the legality of all the claims is contested by most countries. The continent’s legal regime is based on the Antarctic Treaty,²¹⁰ which was signed in 1959 by 12 states, including South Africa, and came into force in 1961. The treaty neither confirms the validity, nor denies the existence, of the territorial claims: article IV freezes them.

South Africa has an obvious interest in Antarctica because of the geographical relationship between the two areas.²¹¹ The South African National Antarctic Programme has been running for half a century and has had a permanent presence on the continent at the successive SANEAE bases since 1959.²¹² SANEAE IV, the current research base, is located in the sector claimed by Norway but, because South Africa does not recognise the claim, individuals at the base, and at any other place on the continent for that matter, are not subject to the territorial jurisdiction of any state as far as South Africa is concerned. Instead, as in the case of the high seas, the nationality principle applies, although in a different form (it is the nationality of the individuals concerned that matters).²¹³ Indeed, in terms of the Antarctic Treaties Act 60 of 1996, South Africa exercises jurisdiction over specified offences committed in the area south of 60° south latitude with regard to:

1. South African citizens;²¹⁴
2. persons who are not South African citizens, but are ordinarily resident in South Africa, unless those persons are on board a ship, vessel or aircraft that is operating, whether exclusively or not, in support of an expedition organised by the government of another contracting party to any of the Antarctic international instruments,²¹⁵ or those persons are citizens of another contracting party, and they are in the area for the purpose of exercising their functions, whether as inspectors, observers or other officials or exchange scientists contemplated in the instruments;²¹⁶
3. citizens of another contracting party, if the immunity of those persons has been waived by that party;²¹⁷
4. all persons, whether South African citizens or not, who are members of, or responsible for organising, an expedition that has been organised in South Africa to visit Antarctica, but not an expedition organised by the government of another contracting party;²¹⁸ and
5. companies, close corporations or other juristic persons registered as such in terms of the laws of South Africa, operating or using any ship, vessel or aircraft registered in South Africa.²¹⁹

6.5.3 Space law

A new jurisdictional frontier emerged in the 1950s with the advent of the space age, inaugurated by the Soviet Union's launch of the first artificial satellite 'Sputnik' on 4 October 1957. These developments raised the issue of regulating the conduct of states and individuals in space, including the exercise of 'extraterrestrial jurisdiction' by states. To this end, in 1961, the UN General Assembly adopted a resolution declaring that:

1. international law, including the Charter of the United Nations, applies to outer space and celestial bodies;²³⁰ and
2. outer space and celestial bodies are free for exploration and use by all states in conformity with international law and are not subject to national appropriation.²³¹

This was followed by a 1963 UN General Assembly resolution setting out guiding principles for the exploration and use of outer space, with the aim of ensuring 'broad international co-operation in the scientific as well as in the legal aspects of exploration and use of outer space for peaceful purposes'.²³² For present purposes, these included that '[t]he State on whose registry an object launched into outer space is carried *shall retain jurisdiction and control over such object, and any personnel thereon, while in outer space*'.²³³ Then, following some delay occasioned by debates among Cold War powers primarily relating to the use of space for military purposes,²³⁴ the first treaty aimed at regulating states' actions in space was opened for signature in January 1967 – namely, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (the Space Treaty).²³⁵

To this day, the 1967 Space Treaty remains the key international instrument concerning the exercise of state jurisdiction in outer space.²³⁶ The Space Treaty was modelled on the Antarctic Treaty and was motivated by similar concerns regarding the creation of 'a new form of colonial competition',²³⁷ and the weaponisation of outer space.²³⁸ With this in mind, states parties *inter alia* recognise outer space as 'the province of all mankind', which entails freedom of exploration and access,²³⁹ as well as the renunciation of any sovereign claim to outer space (including the moon and other celestial bodies) by any state, by means of use or occupation, or by any other means.²⁴⁰ As far as jurisdiction is concerned, article VIII of the Space Treaty states:

A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body [own emphasis].

The Space Treaty (and this provision in particular) leaves many jurisdiction-related questions unanswered. For one, at a conceptual level, the Space Treaty does not establish the general doctrinal basis of extraterrestrial jurisdiction. This raises the '*Lotus-type*' question of whether the states have *general jurisdiction* in outer space that is supplemented by the terms of the Space Treaty,²⁴¹ or whether the Space Treaty is the sole basis upon which states can exercise jurisdiction in outer space.²⁴² Furthermore, there is difficulty in understanding the provisions of article II (which 'in essence sets outer space aside as an *extra-jurisdictional territory* and [provides that] no State can exercise any sovereign rights over it')²⁴³ in relation to the exercise of jurisdiction by states (which classically is understood as a function of sovereignty).²⁴⁴ In this regard, Goroves argues that the Space Treaty only prohibits the exercise of sovereign authority 'if it amounts to *appropriation*', and therefore that the temporary exercise of such authority does not violate the treaty.

However, this raises the more difficult question of how outer space could be appropriated or occupied in conditions of zero gravity or microgravity. While earthbound concepts of appropriation – usually linked to *terra firma* – may possibly be extended to the celestial bodies (such as the moon), they appear inadequate in light of the unique dynamics of outer space. It is for these reasons that Blount notes: 'Since the "notion of jurisdiction finds its origins in the concept of territory, the

principle of sovereign equality, and non-interference with the domestic affairs of states,” *nations will have to use new and innovative legal regimes in order to exert legal controls over people in space*’.²³⁵

Be that as it may, the Space Treaty provides for one (and possibly two) principles of extraterrestrial jurisdiction that are analogous to the terrestrial principles of jurisdiction discussed above. First and foremost, the state ‘on whose registry an object launched into outer space [ie a spacecraft] is carried’ may exercise jurisdiction over that object.²³⁶ In this respect, the jurisdictional regime established by the Space Treaty is somewhat analogous to that applicable to a ship on the high seas, or an aircraft flying over the high seas where the ‘flag state’ exercises jurisdiction.²³⁷ Some authors have suggested that this is a form of subjective territorial jurisdiction, as ‘space vehicles and space stations being considered part of a nation’s territory’.²³⁸ However, given the prohibition on making sovereign claims to outer space, the territorial jurisdiction analogy is problematic.²³⁹ However, ‘[n]ationality theory … poses no such problems’,²⁴⁰ and can be used to explain flag-state jurisdiction under the Space Treaty as the ‘state of registry’ ascribing its nationality to the spacecraft concerned.²⁴¹

Notably, notwithstanding the Space Treaty, the 1998 intergovernmental agreement governing the International Space Station (ISS)²⁴² excludes the application of flag-state jurisdiction on the ISS.²⁴³ The International Space Station itself is made up of a number of modules or ‘flight elements’,²⁴⁴ contributed by the various participating states. These modules are registered by the relevant partner state in terms of the Registration Convention.²⁴⁵ Therefore, in terms of the Space Treaty, these modules would fall within the jurisdiction of their respective states under the flag-state jurisdictional principle. However, the ISS Agreement, which specifically addresses criminal jurisdiction in and on the ISS, does not include flag-state jurisdiction.²⁴⁶

The second possible basis upon which states may exercise extraterrestrial jurisdiction under the Space Treaty is over the personnel of space objects that are on their registers.²⁴⁷ On this interpretation, the reference to ‘personnel’ in article VIII of the Space Treaty is a separate ground of jurisdiction, one analogous to the nationality principle discussed above. There is some disagreement among academics on whether or not this interpretation is correct.²⁴⁸ However, if this is the case, then the state of registry will retain jurisdiction over personnel even once they have left the spacecraft and either entered another spacecraft (or the International Space Station) or are ‘in the void’²⁴⁹ – that is, outer space.

Notably, as far as the International Space Station is concerned, the ISS Agreement adopts the nationality principle *proper*, stating that ‘each Partner shall retain jurisdiction and control over … personnel in or on the Space Station *who are its nationals*’.²⁵⁰ What is more, the ISS Agreement provides for ‘passive personality’ and ‘effects-based’ jurisdiction in certain limited circumstances:²⁵¹ in terms of article 22(2), partner states can potentially exercise jurisdiction over an act that ‘affects the life or safety of a national’ of that state (passive personality jurisdiction), and ‘occurs in or on or causes damages to the flight element’ of the state (effects-based jurisdiction).²⁵² The status of these provisions, in light of the Space Treaty, is controversial.

The Space Treaty does not address the question of concurrent jurisdiction. The phrase in article VIII, ‘shall *retain* jurisdiction’, implies that the ‘sending state’ has *exclusive* jurisdiction. Were this not the case, and other states enjoyed concurrent jurisdiction, then article VIII’s designation of a particular state would be superfluous.²⁵³ However, on one interpretation, two or more states might enjoy ‘exclusive’ article VIII jurisdiction.²⁵⁴ In fact, this is inevitable if the Space Treaty is applied to the International Space Station. In such circumstances, as is the case with general international law jurisdiction, no preference is given by the Space Treaty to one jurisdictional claim over another. In contrast, the ISS Agreement ‘establishes an equitable framework for deciding which of those Partners should exercise jurisdiction’ over acts committed on the International Space Station.²⁵⁵ In

short, the partner state exercising ‘nationality’ jurisdiction has primacy over states exercising other forms of jurisdiction.²⁵⁶

Finally, the Space Treaty leaves open a number of other jurisdictional questions that are beyond the scope of this chapter. These include the question of civil jurisdiction in outer space,²⁵⁷ and the question of where outer space begins and national airspace ends.²⁵⁸

6.6 Immunity from state jurisdiction

International law may, in certain instances, prevent a court from exercising criminal or civil jurisdiction over foreign states and their representatives through the principle of immunity. Under this principle, international law will prohibit a state from exercising jurisdiction over a matter that would ordinarily fall within its jurisdiction, either based on the identity of the person or entity involved (for example, a head of state) or the nature of the conduct in question.²⁵⁹ In line with the focus of this chapter, particular attention will be paid to immunities that prevent courts from exercising criminal jurisdiction over individuals. It is important to stress at the outset that immunities are exceptional in international law and that, in recent times, their scope has been considerably narrowed. However, they continue to perform an important function in international law.

As Cryer et al note, ‘[t]he law of immunities has ancient roots in international law, extending back not hundreds, but thousands, of years’.²⁶⁰ Broadly speaking, immunities spring from two distinct, yet related, concerns of international law.²⁶¹

The first is the need to ‘ensure the smooth conduct of international relations’, which requires that ‘states are able to negotiate with each other freely and that those state agents charged with the conduct of such activities should be able to perform their functions without harassment by other states’.²⁶² This is said to be the predominant justification for personal or diplomatic immunity, which provides ‘inviolability for the person and premises of a foreign State’s representatives and immunities from the exercise of jurisdiction over those representatives.’²⁶³ Such immunities have truly ancient roots, and are said to date back as far as Greek and Rome times.²⁶⁴ However, their invocation in foreign courts began in the sixteenth century.²⁶⁵

The second source of immunities is the principle of state sovereignty, in terms of which all states are equals and no state may exercise jurisdiction over another state’s conduct. This is given expression to by the maxim *‘par in parem non habet imperium’*. Immunities of this sort (functional immunities) emerged with the modern, territorially bound states.²⁶⁶ They provide that a court may not exert jurisdiction over the sovereign or his or her property when he or she is in your territory as this is regarded as an affront to sovereignty.

It is important to note that prior to the recognition of the majority of non-European states as equal sovereigns, it was not uncommon for European states (and later the United States) to claim immunity for their nationals when they travelled outside their territory. In most instances, this restriction on jurisdiction did not amount to immunity *proper* as the ‘territories’ concerned were not recognised as sovereigns. However, in the case of those that received ‘partial recognition’ – such as the Ottoman empire – immunities were included in ‘treaties of capitulation’.²⁶⁷

In recent times, the idea of absolute immunity has begun to show some wear as a result of a number of developments, chiefly the increased commercial activities undertaken by states, and international law’s increasing concern with human rights violations, and the rise of international criminal law in particular.

6.6.1 Personal and functional immunity

Under international law, representatives of foreign states may be beneficiaries of *personal immunity* or *functional immunity*, or both. Personal immunity (immunity *ratione personae* or diplomatic immunity) ‘provides complete immunity of the *person* of certain officeholders while they carry out important representative functions’.²⁶⁸ Personal immunity is absolute, covering both private and public acts committed by officials (even those committed prior to their taking office), but temporary – that is, it only applies in so far as the person holds the office in question. This form of immunity is provided for under both customary international law,²⁶⁹ as well as various treaties but chiefly the 1961 Vienna Convention on Diplomatic Relations.²⁷⁰ In terms of the *Arrest Warrant* decision, these immunities also extend to ‘certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs’.²⁷¹ In addition to this, various treaties extend similar immunities to representatives of international organisations.²⁷²

Functional immunity (immunity *ratione materiae*) relates to *conduct* carried out on behalf of a State. This form of immunity is based on the notion that ‘a State may not sit in judgment on the policies and actions of another State, since they are both sovereign and equal’. Equally, when a person acts *on behalf of a state* – whether or not they are officials of that state – they may be able to rely on this form of immunity in respect of any criminal sanctions that would otherwise apply.²⁷³ In practice, however, functional immunity is more commonly raised in civil cases.²⁷⁴

In contrast to personal immunity, functional immunity does not attach to *all* conduct performed by state officials; it only applies to conduct carried out within the official capacity. While a foreign state’s public acts (*acts jure imperii*) are subject to immunity and no municipal court can assert jurisdiction in respect thereof, the question is more complicated in the case of the commercial acts of the state (*acts jure gestionis*). Unlike personal immunity, functional immunity is also *permanent* and does not lapse when the official ceases to hold office; it is the conduct itself and not the office bearer that forms the basis of that immunity.

This form of immunity is given effect to under South African law by the Foreign States Immunities Act,²⁷⁵ in terms of which ‘a foreign state shall be immune from the jurisdiction of the courts of the Republic’.²⁷⁶ Under the Act, there are a number of exceptions to this immunity that relate to civil claims, and it also provides for the waiver of immunity by the state concerned.²⁷⁷ This immunity would extend to agents of the state acting on its behalf (but not their private acts). Although the Act is primarily concerned with *civil immunity*, it expressly includes the subjection of ‘any foreign state to the criminal jurisdiction of the courts of the Republic’.²⁷⁸ As a result, any person acting on behalf of a state would also *in principle* be able to claim immunity from criminal prosecutions related to such conduct.

6.6.2 Immunity and international crimes

The rise of international criminal law in the past half-century has resulted in a scaling back of the immunity from criminal jurisdiction usually enjoyed by high-ranking officials and those acting on behalf of a state.²⁷⁹

First and foremost, it is widely accepted that immunity *ratione materiae* (functional immunity) does not apply to international crimes, whether prosecuted by international or domestic courts. The International Military Tribunal at Nuremberg, established after World War II to punish Nazi crimes, held that such immunity does not apply to ‘acts condemned as criminal by international law’.²⁸⁰ Similarly, both ad hoc UN Tribunals²⁸¹ contained a provision stating that ‘[t]he official position of any accused person, whether as Head of State or Government or as a responsible Government

official, shall not relieve such person of criminal responsibility nor mitigate punishment'.²⁸² The Rome Statute contains a similar provision.²⁸³

Similarly, a number of domestic courts have held immunity *ratione materiae* to be inapplicable to the prosecution of international crimes.²⁸⁴ The most famous decision is the *Pinochet* case where, albeit for different reasons, the UK House of Lords found that General Pinochet could not rely on functional immunity in order to avoid being extradited to Spain to face allegations of torture.²⁸⁵ A number of justifications have been advanced for the non-applicability of immunity *ratione materiae* in domestic trials involving international crimes. Most commonly, reliance is placed on the *jus cogens*²⁸⁶ norms that are violated by international crimes, which, it is argued, render them incapable of being sovereign or official acts, or create an obligation to punish them that overrides all other obligations, including those relating to immunity.²⁸⁷ However, Akande and Shah persuasively argue that the more appropriate justification for the non-applicability of immunity *ratione materiae* in such instances is that it has been superseded by more recent rules of international law that have developed to ensure individual criminal accountability for international crimes in domestic courts.²⁸⁸

The relevance of personal (diplomatic) immunity in the prosecution of international crimes is more complex. Here, there is a divide between proceedings before international tribunals and those before domestic courts. In the case of the former, the generally accepted view is that such immunities do not apply before international tribunals,²⁸⁹ although the question is somewhat complicated in the case of the International Criminal Court (ICC).²⁹⁰ Conversely, there is considerable authority for the proposition that personal immunity continues to apply in domestic courts regardless of the nature of the crime in question.²⁹¹ Most clearly (and authoritatively), in the *Arrest Warrant* case, the ICJ held that Belgium had 'failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of Congo enjoyed under international law' when it issued an arrest warrant for him for crimes against humanity and war crimes.²⁹² The court, after considering relevant state practice, concluded:

It has been unable to deduce ... that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.²⁹³

This has been almost unanimously upheld in state practice, as domestic courts in the United Kingdom, Belgium, France, Spain and the United States, among others, have refused to prosecute sitting officials for international crimes on the basis that they enjoy personal immunity.²⁹⁴ Therefore, under customary international law, heads of state and certain other officials enjoy absolute personal immunity, even for international crimes, before the domestic courts of other states.

While this is the position under international law (as confirmed by state practice and the *Arrest Warrant* decision), South Africa's own ICC Act appears to take the position that personal immunity does not apply to the prosecution of international crimes in South African courts. The ICC Act states:

[T]he fact that a person [...] is or was a head of State or government, a member of a government or parliament, an elected representative or a government official [...] is neither – (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime [own emphasis].²⁹⁵

Most commentators have interpreted this provision as removing personal immunity before South African courts.²⁹⁶ Dugard and Abraham argue that section 4(2)(a) of the ICC Act represents a choice by the legislature not to follow the 'unfortunate' *Arrest Warrant* decision, 'of which it must have been aware'.²⁹⁷ This is a significant departure from the international law concerning immunities and

puts South Africa at risk of violating the sovereign rights of another state should it choose to invoke it.

However, it is possible to ‘read down’ this section so that it comports with international law, as the wording of the provision is clearly modelled on article 27(1) of the Rome Statute, which deals with immunity *ratione materiae*, and not article 27(2), which deals with personal immunity.²⁹⁸ Therefore, arguably while article 4(2)(a) of the ICC Act effectively removes *functional* immunity of persons, it does not address *personal* immunity. In this regard, it is worth noting that the Constitution contains interpretive presumptions in favour of compliance with international law.²⁹⁹ The counter argument to this might be a teleological one, to the effect that according to customary international law, personal immunity is contrary to the spirit, purport and object of South Africa’s Constitution.

6.6.3 Immunity from civil jurisdiction

Historically, the absolute immunity enjoyed by states from the jurisdiction of foreign states’ courts extended to civil claims. However, states’ civil immunity has been scaled back in recent years. Since the end of the nineteenth century, as states became increasingly involved in commercial transactions beyond their borders, foreign courts (and later their legislatures) began to disregard the immunity of states in commercial matters.³⁰⁰ As a result, in a number of states today, states’ civil immunity only applies in respect of their public acts (*acts jure imperii*). However, their commercial acts (*acts jure gestionis*) are no longer beyond the jurisdiction of domestic courts.

In South Africa, this restrictive approach to state immunity was given effect to in the 1981 Foreign States Immunities Act³⁰¹ which, having recognised the general immunity of foreign states, sets out a number of instances where civil immunity will not apply. These include commercial transactions entered into by the state;³⁰² certain contracts of employment between the state and an individual;³⁰³ claims for personal injuries and damage to property caused in the Republic;³⁰⁴ claims concerning ownership, possession and use of property,³⁰⁵ or patents, trade marks, and the like;³⁰⁶ and certain admiralty proceedings.³⁰⁷

In recent times, a further exception to the civil immunity of states in foreign courts has been in cases of gross human rights violations. This has been spurred by the decline of criminal immunity for such abuses before international and (albeit to a lesser extent) domestic courts. Recently, the ICJ considered this question in the context of a case brought by Germany for violations of its state immunity by Italian courts that had heard civil cases against Germany brought by victims of Nazi atrocities.³⁰⁸ The ICJ held:

[U]nder customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict.³⁰⁹

Previously, the European Court of Human Rights had made a similar finding in respect of claims brought in English courts against the Emir of Kuwait,³¹⁰ and a number of domestic courts have reached the same conclusion:³¹¹

Finally, there is ongoing debate as to whether *individuals* acting on behalf of the state (and therefore ordinarily entitled to immunity *ratione materiae* or diplomatic immunity) are still entitled to such immunity when the acts in question amount to international crimes. In this regard, Akande and Shah argue that, as the exercise of civil jurisdiction is not more coercive than that of criminal jurisdiction, ‘where international law confers extraterritorial jurisdiction over international crimes there is no immunity in either criminal or civil proceedings’.³¹²

SUGGESTED FURTHER READING

J Barker *Immunities from Jurisdiction in International Law* Oxford: Oxford University Press (2009)

A Orakhelashvili (ed) *Research Handbook on Jurisdiction and Immunities in International Law* Cheltenham, UK; Northampton, USA: Edward Elgar (2015)

C Ryngaert *Jurisdiction in International Law* Oxford: Oxford University Press (2015)

P Vrancken *South Africa and the Law of the Sea* Boston & Leiden: Brill (2011)

¹ See M Milanovic ‘From compromise to principle: Clarifying the concept of state jurisdiction in human rights treaties’ 8(3) *Human Rights Law Review* (2008) 411, where the author notes that ‘a number of concepts hide themselves behind this single word, “jurisdiction”, and its different meanings contribute to the confusion found both in the jurisprudence and in academic commentary’. Similarly, Abass notes: ‘As a term of art, “jurisdiction” is capable of several meanings’ (A Abass *Complete International Law* (2012) 524). See further R Liivoja ‘The criminal jurisdiction of states: A theoretical primer’ 7 *No Foundations: Journal of Extreme Legal Positivism* (2010) 25.

² P Malanczuk *Akehurst’s Modern Introduction to International Law* (1970) 102.

³ RY Jennings & A Watts *Oppenheim’s International Law* 9th ed (1992) 456 [own emphasis].

⁴ For example, an individual is said to be *within the jurisdiction* of an international criminal tribunal (such as the ICC), while states are *within the jurisdiction* of the International Court of Justice under certain circumstances. See chapter 3 of this book.

⁵ See Convention for the Protection of Human Rights and Fundamental Freedoms (1950), art 1: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’. Other uses of the term include ‘to describe *the territory* in which a polity, or a judicial body, regularly exercises its authority’ and ‘somewhat colloquially, [to] refer to a political or judicial entity itself’. See R Liivoja op cit 26.

⁶ Abass op cit 524.

⁷ MN Shaw *International Law* 6th ed (2008) 645.

⁸ Liivoja op cit 27.

⁹ Milanovic op cit 420.

¹⁰ Some authors refer to these powers as ‘legislative’, ‘judicial’, and ‘executive’ jurisdiction *respectively*, after the branches of government that ordinarily exercise them. However, while useful as shorthand, this typology can be misleading as ‘this triad does not relate to branches of government but to functional manifestations of jurisdiction … [which] do not necessarily coincide’ (Liivoja op cit 27–8). There is also ongoing disagreement as to whether *enforcement* and *adjudicative* jurisdiction are distinct categories, or whether ‘adjudicative jurisdiction’ falls under the ‘enforcement jurisdiction’. The latter approach is common among British scholars, while the tripartite separation is common among American writers. This chapter follows the tripartite distinction, in line with the approach adopted by South African courts. See further R O’Keefe ‘Universal jurisdiction: Clarifying the basic concept’ 2(3) *Journal of International Criminal Justice* (2004) 735 at 737; Liivoja op cit 27–8 and C Ryngaert *Jurisdiction in International Law* (2008) 23.

¹¹ 2014 (2) SA 42 (SCA).

¹² SALC (SCA) at para 34. See also *R v Hape* [2007] 2 S.C.R. 292, 2007 SCC 26 at para 58.

¹³ Here, there is something to be made of the differing criminal procedures among states: in states where the investigation of crimes is left to the police, they are said to exercise *enforcement jurisdiction* in so doing. Conversely, in states where judges play a role in investigations, they are said to be exercising *adjudicative jurisdiction*.

¹⁴ In SALC (SCA) supra, the SCA listed ‘investigations’ as a form of enforcement jurisdiction (see para 34), whereas in *National Commissioner of Police v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC) (SALC (CC)) the Constitutional Court placed investigations in the adjudicative category of jurisdiction (at para 25).

¹⁵ Ryngaert op cit 9.

¹⁶ In this regard, Shaw (op cit 646–7) notes that classically, international law is concerned with ‘the limits of a state’s exercise of governmental functions while conflict of laws (or private international law) will attempt to regulate in a case involving a foreign element whether a particular country has jurisdiction to determine the question, and secondly, if it has, the rules of which country will be applied in resolving the dispute’.

¹⁷ J Crawford *Brownlie’s Principles of Public International Law* 8th ed (2012) 457.

¹⁸ Attempts to draft such a treaty during the interwar period (led by the *Harvard Research on International Law* project) produced a Draft Convention on Jurisdiction with Respect to Crime. However, no treaty was forthcoming ‘given the sensitivity of limitations on a State’s jurisdiction’ (Ryngaert op cit 28).

¹⁹ Ryngaert op cit 17 (at note 12). Moreover, states tend to adapt these provisions to reflect their understanding of jurisdiction under customary international law. For eg, South Africa's Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act) provides for the exercise by South African courts of 'nationality jurisdiction' (discussed below) in respect of both *citizens* and *ordinary residents*, whereas the correlative provision of the Rome Statute of the International Criminal Court does so only in respect of the former (see art 12(2)(b) of the Rome Statute of the International Criminal Court). Additionally, South Africa's ICC Act exercises forms of jurisdiction not included in the Rome Statute (namely, passive personality and universal jurisdiction). See further chapter 13 of this book.

²⁰ State practice is 'gleaned from States' adoption of certain laws, their application by courts and regulatory agencies, and protests by States against the application of other States' laws adversely affecting them' (Ryngaert op cit 4).

²¹ See chapter 3 of this book.

²² *The Case of the S.S. 'Lotus'* (*France v Turkey*) (Judgment) PCIJ (7 September 1927).

²³ '[T]he first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense, jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention ...' (*Lotus* supra, para 45).

²⁴ Ibid, para 46. For a summary of the facts of the case, see Shaw op cit 655.

²⁵ Ibid.

²⁶ Shaw op cit 656.

²⁷ Crawford op cit 477.

²⁸ Shaw op cit 656.

²⁹ Mann, for one, argues that the relevant *Lotus* passages 'have been condemned by the majority of the immense number of writers who have discussed them, and today they probably cannot claim to be good law'. FA Mann 'The doctrine of jurisdiction in international law' 111 *Recueil des Cours de l'Académie de droit international* (1964-I) 9, 35. Similarly, Ryngaert (op cit 21) argues that the restrictive approach 'has been taken by most States and the majority of the doctrine'.

³⁰ Ryngaert op cit 26.

³¹ See R Cryer, H Friman, D Robinson & E Wilmshurst *An Introduction to International Criminal Law and Procedure* (2007) 39. Notably, this inversion of legal principle would require considerable state practice. However, proponents of the permissive approach argue that state practice, if anything, tends to move in the opposite direction. Reydams notes: 'The Rapporteur of the Commission on the Extraterritorial Jurisdiction of States of the Institute of International Law concludes that 'a spirit of free appreciation of the authority of the concept [of jurisdiction] pervades the atmosphere, and it is this spirit which must be responsible for the continuing popularity of the [Lotus] judgment' (L Reydams *Universal Jurisdiction: International and Municipal Legal Perspectives* (2003) 14 fn 16, citing A Bos, 'The extraterritorial jurisdiction of states: Preliminary report' 65 *I Annuaire de l'Institut de Droit International* (1993) 14, 39). As discussed below, South Africa's own position on this question is a matter for debate.

³² O'Keefe (op cit 738 fn 12), for example, argues it '[d]oes not matter whether the so-called "Lotus presumption" ... is correct or accepted in principle, since, in practice, its application need not run counter to the observable situation whereby state assertions of prescriptive criminal jurisdiction are tolerated only if they fall under specific acceptable heads: all that is required is that, instead of characterising the accepted heads of prescriptive jurisdiction as permissive rules set against a backdrop of a general prohibition, we think of them as pockets of residual presumptive permission in the interstices of specific prohibitions.'

³³ Reydams op cit 14–15.

³⁴ Ryngaert op cit 22.

³⁵ See Separate Opinion of Sir Gerald Fitzmaurice, *Barcelona Traction* supra, para 70, Separate Opinion of Judge van den Wyngaert, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (Judgment), ICJ Reports 2002, 3 para 51).

³⁶ Ryngaert op cit 22.

³⁷ See below.

³⁸ Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, *Arrest Warrant* supra, para 45.

³⁹ See *Restatement (Third) of Foreign Relations Law, Part IV – Jurisdiction and Judgments*.

⁴⁰ 1986 (1) SA 556 (ZS).

⁴¹ *S v Mharapara* 1986 (1) SA 556 (ZS), Gubbay JA at 559.

⁴² Crawford op cit 457 [own emphasis]. Notably, there is a disproportionate focus in the existing literature on state practice of a few ‘powerful’ states. For example, in his recent treatise, Ryngaert focuses on US and EU practice, based on the questionable assumption that ‘almost all assertions of jurisdiction over foreign situations, in both the field of economic law and the field of human rights law, have originated in either the United States or in the European Union’ (Ryngaert op cit 3). Not only are these states’ jurisdictional practices given greater exposure, they are given greater prominence in the creation (or identification) of customary international law. Consider the following passage from Shaw regarding the passive personality principle: ‘The *overall* opinion has been that the passive personality principle is a rather dubious ground upon which to base claims to jurisdiction under international law and it has been strenuously opposed by the US and the UK, although a number of states apply it’ [own emphasis] (Shaw op cit 665). This can be seen in debates regarding the legality of the protective principle and effects principle of jurisdiction, which are driven primarily with reference to US practice.

⁴³ Crawford op cit 477. He goes on to note: ‘[T]he objective applications of the territorial principle and also the passive personality principle have strong similarities to the protective or security principle. Nationality and security may go together, or, in the case of the alien, factors such as residence may support an ad hoc notion of allegiance. These features of the practice have led some jurists to formulate a broad principle resting on some genuine or effective link between the crime and the state of the forum’ (*ibid*).

⁴⁴ ‘U.S. Department of State, 1887’ 751 *Foreign Relations* (1888) 2.

⁴⁵ As Jalloh notes: ‘[S]ome of the cases being pursued by various European courts in relation to Africa are not based on universal jurisdiction as such. Rather, they are extraterritorial assertions of criminal jurisdiction with usually some other type of link to the offence through passive nationality. This is what happened in respect of the two infamous cases in France and Spain that sparked the AU-EU diplomatic stand-off on universal jurisdiction’ (C Jalloh ‘Universal jurisdiction, universal prescription? A preliminary assessment of the African Union perspective on universal jurisdiction’ 21(1) *Criminal Law Forum* (2010) 20).

⁴⁶ Ryngaert op cit 21. Text in square brackets added by author.

⁴⁷ See discussion above.

⁴⁸ *R v Holm; R v Pienaar* 1948 (1) SA 925 (A) at 929–30.

⁴⁹ See Constitution of South West Africa Act 39 of 1968. Section 38 thereof empowered the State President to legislate for territory by proclamation and to establish authorities with legislative powers in territory. Notably, in *S v Basson* 2007 (3) SA 582 (CC) (*Basson CC II*), the Constitutional Court noted in this regard [at para 229]: ‘Namibia was not then a sovereign state [at the relevant time]. It was being administered by South Africa and the doctrine of comity, which is the foundation of the presumption against extraterritorial jurisdiction, could have had no application.’

⁵⁰ *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) para 39.

⁵¹ *Ibid*, para 40.

⁵² Supra.

⁵³ ‘We accept that as a general proposition our courts have declined to exercise jurisdiction over persons who commit crimes in other countries. This, as Dugard points out, is an aspect of sovereignty which has given rise to a presumption against the extraterritorial operation of criminal law’ (*S v Basson* supra, paras 222 and 223).

⁵⁴ *National Commissioner of Police v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC).

⁵⁵ SALC (CC) supra, para 26.

⁵⁶ *Lotus* supra, para 46.

⁵⁷ *Lotus* supra 19.

⁵⁸ SALC (CC) supra, para 29.

⁵⁹ See especially *ibid*, para 27, which lists four specific ‘grounds or bases’, recognised by international law, ‘on which domestic criminal jurisdiction may be founded’.

⁶⁰ A number of Acts provide for such ‘extraterritorial jurisdiction’, including the Regulation of Foreign Military Assistance Act 15 of 1998, the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the ICC Act), the National Conventional Arms Control Act 41 of 2002, the Defence Act 42 of 2002, the Prevention and Combating of Corrupt Activities Act 12 of 2004, the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and the Implementation of the Geneva Conventions Act 12 of 2012.

⁶¹ Crawford op cit 477.

⁶² Ryngaert (op cit 19) notes: ‘The public international law of jurisdiction guarantees that foreign nations’ concerns are also accounted for, and that sovereignty-based assertions of jurisdiction by one State do not unduly encroach upon the sovereignty of other States. The law of jurisdiction is doubtless one of the most essential as well as controversial fields of international law, in that it determines how far, *ratione loci*, a State’s laws might

reach. As it ensures that States, especially powerful States, do not assert jurisdiction over affairs which are the domain of other States, it is closely related to the customary international law principles of non-intervention and sovereign equality of States. Guaranteeing a peaceful co-existence between States through erecting jurisdictional barriers which States are not supposed to cross, the law of jurisdiction is one of the building blocks of the classical, billiard-ball view of international law as a “negative” law of State co-existence.⁶³

⁶³ In *SALC* (CC) *supra*, the Constitutional Court noted: ‘Alongside the principle of territoriality, international law recognises four other grounds or bases on which domestic criminal jurisdiction may be founded (*rationes jurisdictionis*). These are nationality, passive personality, the protective principle and universality or universal jurisdiction’ (at para 27).

⁶⁴ Shaw *op cit* 653.

⁶⁵ Crawford *op cit* 458.

⁶⁶ Shaw *op cit* 654. ‘Territory’ in this sense includes aircraft and ships registered in such states.

⁶⁷ Shaw *op cit* 645; Crawford *op cit* 456.

⁶⁸ Abass *op cit* 526.

⁶⁹ Shaw *op cit* 653.

⁷⁰ Ibid. See further Crawford *op cit* 458.

⁷¹ Shaw *op cit* 654.

⁷² Such that Crawford (*op cit* 456) argues that ‘[t]he starting point in this part of the law is *the presumption that jurisdiction (in all its forms) is territorial*, and may not be exercised extra-territorially without some specific bases in international law’ [own emphasis].

⁷³ Shaw *op cit* 656–7.

⁷⁴ Abass *op cit* 529.

⁷⁵ See G Williams ‘Venue and the ambit of criminal law’ 81(4) *Law Quarterly Review* (1965) 518.

⁷⁶ Abass *op cit* 528.

⁷⁷ See Williams *op cit* 518.

⁷⁸ This is, in part, because scholars do not define these two approaches consistently. Compare Abass’s definition of objective territorial jurisdiction (‘offence is completed on its territory’), with that of Crawford (‘jurisdiction is founded when *any essential constituent element of a crime is consummated* on the forum state’s territory [own emphasis]). Abass *op cit* 528 and Crawford *op cit* 458 respectively.

⁷⁹ 1991 (1) SACR 280.

⁸⁰ Ibid, 280 at 283.

⁸¹ *Basson CC II* *supra*, para 226 (citing *Libman v The Queen*, where La Forest J, after considering the objective and subjective approaches, noted: ‘As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. *As it is put by modern academics, it is sufficient that there be a “real and substantial link” between an offence and this country, a test well-known in public and private international law*’) [own emphasis].

⁸² These relevant facts include that ‘[a]t the time of the alleged conspiracy Namibia was being administered by the South African Government as an integral part of South Africa’ (*Basson CC II* *supra*, paras 227–8).

⁸³ See, for example, *S v Mharapara* (ZS) *supra*. In this regard O’Keefe (*op cit* 739 at note 16) notes: ‘The effects doctrine proper is to be distinguished from prescriptive jurisdiction on the basis of so-called “objective” territoriality, out of which it seems to have grown: we speak of the former rather than the latter *when no constituent element of the offence takes place within the territory of the prescribing state*’ [own emphasis].

⁸⁴ *S v Kanyamula* 1984 (2) SA 121 (ZS); *S v Mharapara* (ZS) *supra*.

⁸⁵ See s 5 of Malawi’s Penal Code.

⁸⁶ Section 6(2) of Zambia’s Penal Code Act.

⁸⁷ Crawford *op cit* 459.

⁸⁸ Abass *op cit* 526.

⁸⁹ In this regard, Shaw (*op cit* 652) notes: ‘There is no obligation to exercise jurisdiction on all, or any particular one, of these grounds. This would be a matter for the domestic system to decide.’

⁹⁰ Shaw (*op cit* 648) notes: ‘[T]he influence of international law is beginning to make itself felt in areas hitherto regarded as subject to the state’s exclusive jurisdiction.’

⁹¹ Shaw *op cit* 648.

⁹² See Shaw *op cit* 649.

⁹³ However, see Shaw *op cit* 650.

⁹⁴ See further chapter 13 of this book.

⁹⁵ See chapter 13 of this book.

⁹⁶ See Abass op cit 526.

⁹⁷ See art 27(2) of the Rome Statute of the International Criminal Court. See further chapter 13 of this book.

⁹⁸ See s 4(2)(a) of the ICC Act, and discussion thereof in chapter 13 of this book.

⁹⁹ See however s 22(3)(a) of the Defence Act 42 of 2002, which allows the South African Defence Force to enforce a provision of South African law on board a South African ship in the territorial waters of a foreign state.

¹⁰⁰ See *S v Ebrahim* 1991 (2) SA 553 (A).

¹⁰¹ See Shaw op cit 651. However, as Ryngaert (op cit 24–5) notes, ‘[A] State can use indirect territorial means to induce the conduct it desires. ... If a person outside the territory does not abide by the norm prescribed extraterritorially, he could be sued in the territory of the enacting State. If he does not pay the fine, his assets in the territory could be seized. Similarly, he could be precluded from entering the territory or registering with a government agency. Thus, territorial enforcement jurisdiction could compel persons to comply with norms prescribed extraterritorially.’

¹⁰² See UN Security Council Resolution S/RES 138(1960), which condemned the arrest of Adolf Eichmann in Argentina by Israeli agents operating without Argentina’s consent as a violation of its sovereignty and requested Israel to make ‘appropriate reparation’.

¹⁰³ See eg the 1903 Cuban-American Treaty (the legal basis of the US naval base at Guantanamo Bay), or the 1991 Protocol between the Government of the United Kingdom and the Government of Northern Ireland Concerning Frontier Controls and Policing, Co-operation in Criminal Justice, Public Safety and Mutual Assistance related to the Channel Fixed Link (the Eurotunnel). Notably, South African courts have endorsed this position. The Constitutional Court noted in *Kaunda and Others v President of The Republic of South Africa and Others* 2005 (4) SA 235 (CC): ‘Where there are formal agreements or informal acts of cooperation between states which sanction the one state’s exercise of jurisdiction in the territory of the other, questions of sovereignty do not arise and thus nationals affected by their state’s action in a foreign territory may conceivably invoke the protection of their Constitution’ (at fn 31).

¹⁰⁴ See, for instance, s 22(3)(a) of the Defence Act 42 of 2002.

¹⁰⁵ See eg the 1998 *Agreement between the Government of the United Kingdom and the Government of the Kingdom of the Netherlands Concerning a Scottish Trial in the Netherlands*, in terms of which the Netherlands consented to the trial of the ‘Lockerbie Bombers’ by a Scottish Court sitting in Utrecht in the Netherlands.

¹⁰⁶ This is also called ‘active personality’ jurisdiction.

¹⁰⁷ Crawford op cit 459.

¹⁰⁸ Shaw op cit 659 [own emphasis]. The solipsistic nature of this argument is self-evident.

¹⁰⁹ Shaw op cit 660. See *Nationality Decrees in Tunis and Morocco* case, PCIJ, 1923; Abass 536. The difficulties associated with developing a coherent, philosophical basis for this form of jurisdiction are compounded by the tendency of states in recent times to expand this form of jurisdiction ‘by reliance on residence and other connections as evidence of allegiance owed by aliens, and also by ignoring changes of nationality’ (Crawford op cit 460). The practice of some states in exercising nationality jurisdiction over naturalised persons for crimes before they were recognised as nationals also creates difficulties in this respect, as well as in respect of the *nullum crimen sine lege* principle (*ibid*).

¹¹⁰ Shaw notes that ‘[m]any countries, particularly those with a legal system based upon the continental European model, claim jurisdiction over crimes committed by their nationals, notwithstanding that the offence may have occurred in the territory of another state’ (Shaw op cit 663).

¹¹¹ Shaw op cit 663.

¹¹² One exception is the Antarctic Treaties Act 60 of 1996, which provides for the exercise of jurisdiction over nationals, ordinary residents and others for offences contemplated in the applicable treaties concerning Antarctica, which includes ‘non-serious offences’. See s 2 of the Act, read with s 9 thereof.

¹¹³ See *R v Holm; R v Pienaar* 1948 (1) SA 925 (A) and *R v Neumann* 1949 (3) SA 1238 (SCC).

¹¹⁴ *R v Holm; R v Pienaar* supra at 931. This was endorsed by the Constitutional Court in *Basson CC II* supra, para 224.

¹¹⁵ Supra.

¹¹⁶ At 1242–3.

¹¹⁷ ICC Act supra and the Implementation of the Geneva Conventions Act supra.

¹¹⁸ Protection of Constitutional Democracy Against Terrorist and Related Activities Act supra.

¹¹⁹ Prevention and Combating of Corrupt Activities Act supra.

¹²⁰ Criminal Law (Sexual Offences and Related Matters) Amendment Act supra.

¹²¹ Prevention and Combating of Trafficking in Persons Act 7 of 2013.

¹²² Basson CC II supra, para 237. The court was considering the hypothetical example of South Africa prosecuting a person for entering into a conspiracy to smoke cannabis in the Netherlands. Conversely, Zimbabwean courts have shown a willingness to extend this form of jurisdiction to *lesser* offences. See *S v Mharapara* 1985 (4) SA 42 (Z) and *S v Mharapara* (ZS) supra.

¹²³ Crawford op cit 461.

¹²⁴ Crawford, for example, notes that '[t]his is considerably more controversial, as a general principle, than the territorial and nationality principles' (*ibid*).

¹²⁵ Cutting supra.

¹²⁶ The matter was ultimately resolved by the withdrawal of the complaint by the victim.

¹²⁷ See Shaw op cit 664–5.

¹²⁸ In fact, the diverse range of practice among states was noted by South Africa's Appellate Division a decade later when, in *R v Holm; R v Pienaar* supra, Chief Justice Watermeyer noted (at 929–30): 'An elementary principle, stated by many text-writers on International law, is that every independent state has "dominion over its own territory, that is, not only over the soil and over all subjects but also over all foreigners commorant therein". So it seems that the general principle that a state will only punish crimes committed within its own territory or by its own subjects is not universally admitted' [own emphasis].

¹²⁹ This is particularly true in so far as 'terrorist-related' activities are concerned. Most famously, in the 1988 *Yunis* case, the US prosecuted a Lebanese national for his involvement in the hijacking of a Jordanian airline with US nationals on board. In that case, the court accepted that the 'international community recognises [the] legitimacy' of this principle (*US v Yunis* No.2 681 F. Supp. 896 (1988)). For a discussion of the US change in position, see Shaw op cit 665–6.

¹³⁰ Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in *Arrest Warrant* supra at 76–7.

¹³¹ ICC Act supra, and the Implementation of the Geneva Conventions Act supra.

¹³² Protection of Constitutional Democracy Against Terrorist and Related Activities Act supra.

¹³³ Prevention and Combating of Corrupt Activities Act supra.

¹³⁴ Criminal Law (Sexual Offences and Related Matters) Amendment Act supra.

¹³⁵ Prevention and Combating of Trafficking in Persons Act supra.

¹³⁶ See *US v Zehe* 601 F Supp 196 (D. Mass 1985).

¹³⁷ Abass op cit 537.

¹³⁸ Arts 7 & 8, Harvard Research Draft Convention (1935).

¹³⁹ Supra at 1250.

¹⁴⁰ [1946] AC 347.

¹⁴¹ See Shaw op cit 667.

¹⁴² Abass op cit 538 [own emphasis]. See further Crawford (op cit 462), noting that 'no criteria exists for determining such interests beyond a vague sense of gravity' [own emphasis]. Even here, Crawford is imposing a minimum criterion that is not reflected in state practice. He concludes, rather optimistically, that 'the identification of exorbitant jurisdiction may be a matter of knowing it when one sees it' (*ibid*).

¹⁴³ *US v Gonzales* 77 [11 Cir 1985].

¹⁴⁴ Abass op cit 539.

¹⁴⁵ *Restatement (Third) of Foreign Relations Law*, s 402.

¹⁴⁶ Abass op cit 532 [own emphasis].

¹⁴⁷ *Ibid*, 533.

¹⁴⁸ See *ibid*, 533–4.

¹⁴⁹ O'Keefe op cit 739.

¹⁵⁰ See definition of 'terrorist activities' in s 1(1)(a) (vii) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act supra.

¹⁵¹ See *LICRA v Yahoo!* [2000], Tribunal de Grande Instance de Paris. See further EA Okoniewski 'Yahoo!, Inc. v. LICRA: The French challenge to free expression on the Internet' 18(1) *American University International Law Review* (2002) 295.

¹⁵² Princeton University Program in Law and Public Affairs *The Princeton Principles on Universal Jurisdiction* 28 (2001), Principle 1(1).

¹⁵³ Reydams op cit 5.

¹⁵⁴ O'Keefe op cit 745.

¹⁵⁵ In this regard, Akande & Shah note: 'The fact that a very significant number of states have legislation permitting the exercise in principle of universal jurisdiction with respect to the crimes in the ICC Statute suggests that the principle does exist in customary international law' (D Akande & S Shah 'Immunities of state officials,

international crimes, and foreign domestic courts' 21(4) *European Journal of International Law* (2010) 815 at 849).

156 The African Union developed a Model Law on Universal Jurisdiction, suggesting that, at least regionally, the debate on whether it is legal has been resolved.

157 ICC Act *supra* and the Implementation of the Geneva Conventions Act *supra*.

158 Protection of Constitutional Democracy Against Terrorist and Related Activities Act *supra*.

159 Prevention and Combating of Corrupt Activities Act *supra*.

160 Criminal Law (Sexual Offences and Related Matters) Amendment Act *supra*.

161 Prevention and Combating of Trafficking in Persons Act *supra*.

162 The court noted: 'Alongside the principle of territoriality, international law recognises four other grounds or bases on which domestic criminal jurisdiction may be founded (*rationes jurisdictionis*). These are nationality, passive personality, the protective principle and universality or universal jurisdiction' (*SALC (CC)* *supra* at para 27).

163 Akande & Shah (op cit 848) note: '[Recent] challenges to the exercise of universal jurisdiction have not, in the main, been challenges to the very principle of universality, but rather challenges to particular applications of the principle'.

164 O'Keefe op cit 737.

165 In this regard, O'Keefe (op cit 741) notes: 'The lawfulness of a state's enforcement of its criminal law in any given case has no bearing on the lawfulness of that law's asserted scope of application in the first place, or vice versa'.

166 As O'Keefe (op cit 740) notes: 'A state's jurisdiction to prescribe its criminal law and its jurisdiction to enforce it do not always go hand in hand. It is often the case that international law permits a state to assert the applicability of its criminal law to given conduct but, because the author of the conduct is abroad, not to enforce it'.

167 Cryer et al op cit 45.

168 O'Keefe op cit 750. This would be exceptional however, as international law does not make the lawful exercise of other principles of jurisdiction (nationality, passive personality, etc) conditional upon the presence of the accused. In fact, international law allows (or does not prohibit) trials *in absentia*, which are not uncommon in civil law states.

169 *SALC (CC)* *supra* at para 47. See generally, paras 46–9.

170 *Ibid*, para 47.

171 The court's findings on this issue were tentative, and it remains to be seen whether (and when) presence is required once an actual case reaches this stage.

172 See the Supreme Court of Appeal's discussion of comparative foreign law in *SALC (SCA)* *supra* at paras 58–64.

173 Act 27 of 2002.

174 *SALC (CC)* *supra* at para 41.

175 *Ibid*, para 43.

176 *Ibid*, para 47.

177 *Ibid*, para 28.

178 *Ibid*.

179 For example, the judgment cites the 5th edition of *Brownlie's Principles of Public International Law*, which came out in 1998. The text is now in its 8th edition.

180 As far as the position in South African law is concerned, see PHG Vrancken 'The marine component of the South African territory' 127 *South African Law Journal* (2010) 207–23. See further P Vrancken *South Africa and the Law of the Sea* (2011).

181 Articles 2 and 3 of the United Nations Convention on the Law of the Sea (UNCLOS). A nautical mile is equivalent to 1.852 kilometres.

182 UNCLOS, art 17. The meaning of the right is explained in arts 18 and 19.

183 The internal waters are the waters on the landward side of the territorial sea and include bays and ports, for instance. See UNCLOS, arts 8(1), 10 and 11.

184 See further below.

185 UNCLOS, art 27(5).

186 UNCLOS, art 27(1).

187 UNCLOS, art 27(1).

- ¹⁸⁸ UNCLOS, art 28(1).
- ¹⁸⁹ UNCLOS, art 28(2).
- ¹⁹⁰ UNCLOS, art 89.
- ¹⁹¹ UNCLOS, art 87.
- ¹⁹² UNCLOS, art 91. The relevant South African legislation is the Ship Registration Act 58 of 1998.
- ¹⁹³ UNCLOS, art 92.
- ¹⁹⁴ 1927 PCIJ Reports, Series A No 10. See UNCLOS, art 97.
- ¹⁹⁵ UNCLOS, art 110(1)(a)–(c). See also art 110(4)–(5).
- ¹⁹⁶ UNCLOS, art 111.
- ¹⁹⁷ 2167 UNTS 88, 34 *International Legal Materials* (1995) 1542.
- ¹⁹⁸ See further art 21 of the Agreement.
- ¹⁹⁹ See art 33(2) of UNCLOS.
- ²⁰⁰ UNCLOS, art 33(1).
- ²⁰¹ UNCLOS, art 57.
- ²⁰² UNCLOS, art 56(1)(a). See also art 56(1)(b)–(c).
- ²⁰³ UNCLOS, art 58.
- ²⁰⁴ UNCLOS, art 76.
- ²⁰⁵ UNCLOS, art 1(1)(a).
- ²⁰⁶ UNCLOS, art 133(a).
- ²⁰⁷ UNCLOS, art 136.
- ²⁰⁸ UNCLOS, art 137(2).
- ²⁰⁹ See PHG Vrancken ‘Southern limit of the international seabed area’ 20 *South African Yearbook of International Law* (1995) 146–70.
- ²¹⁰ 402 UNTS 71, SATS 10/1959.
- ²¹¹ See K Dodds ‘South Africa, the South Atlantic and the international politics of Antarctica’ 3 *South African Journal of International Affairs* (1995) 60–80.
- ²¹² See J Cooper & RK Headland ‘A history of South African involvement in Antarctica and at the Prince Edward Islands’ 21 *SA Journal of Antarctic Research* (1991) 77–91.
- ²¹³ See s 2 of the Antarctic Treaties Act 60 of 1996.
- ²¹⁴ Section 2(a).
- ²¹⁵ Section 2(b)(i) read with s 1.
- ²¹⁶ Section 2(b)(ii) read with s 1.
- ²¹⁷ Section 2(c) read with s 1.
- ²¹⁸ Section 2(d) read with s 1.
- ²¹⁹ Section 2(e) read with s 1.
- ²²⁰ This principle was confirmed in the Space Treaty, art III.
- ²²¹ General Assembly Resolution 1721 (XVI) *International Co-operation in the Peaceful Uses of Outer Space* (20 December 1961). Prior to this, the General Assembly established a special ad hoc Committee on the Peaceful Uses of Outer Space in 1958, which was formalised in 1959. See General Assembly Resolution 1472 (XIV) *International Co-operation in the Peaceful Uses of Outer Space* (12 December 1959).
- ²²² General Assembly Resolution 1962 (XVIII) *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space* (13 December 1963).
- ²²³ Ibid, para 7 [own emphasis].
- ²²⁴ For a discussion of this history, see V Kopal ‘Introductory note’ to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (New York, 19 December 1966), available at <http://legal.un.org/avl/ha/tos/tos.html>.
- ²²⁵ The Space Treaty was adopted by the UN General Assembly (UNGA) in Resolution 2222 (XXI), and entered into force on 10 October 1967. South Africa signed on 3 January 1967, and ratified it on 9 September 1968.
- ²²⁶ It was followed by four additional space-related treaties: 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space; 1972 Convention on International Liability for Damage Caused by Space Objects; 1976 Convention on Registration of Objects Launched into Outer Space (the Registration Treaty); and 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the Moon Treaty). Of these, only the Moon Treaty addresses the question of criminal jurisdiction (see art 12), and to date it has only been ratified by 15 states. South Africa has not ratified the treaty.

²²⁷ Paraphrasing US President Johnson's statement in 1966, in relation to the law of the sea, that '[u]nder no circumstances ... must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations'. See UN Doc. A/C.1/PV. 1524, 1 November 1967, at 4.

²²⁸ To address these concerns, the Space Treaty includes an undertaking not to place weapons of mass destruction in space (Space Treaty, art IV).

²²⁹ Space Treaty, art 1.

²³⁰ Article II. Notwithstanding this provision, some states have made sovereign claims over the specific orbital paths of 'geostationary satellites'. See Declaration of the First Meeting of Equatorial Countries of Dec. 3, 1976, ITU DOC. WARC-BS-81-E (the Bogota Declaration). See further Crawford op cit 259; F Tronchetti *The Exploitation of Natural Resources of the Moon and Other Celestial Bodies* (2009) 175–7.

²³¹ Sinha, for example, adopts this broad interpretation of states' extraterrestrial jurisdiction. He argues that 'in order for a nation on Earth to be able to legitimately exert its criminal jurisdiction over activities in space, *it has to do so pursuant to a jurisdictional principle recognized by international law*' [own emphasis] (H Sinha 'Criminal jurisdiction on the International Space Station' 30(1) *Journal of Space Law* (2004) 85 at 93). Treaties, such as the Space Treaty, supplement or refine these (*ibid* 30.) See further PJ Blount 'Jurisdiction in outer space: Challenges of private individuals in space' 33(2) *Journal of Space Law* (2007) 299 at 304–6.

²³² Arguably, the text of art VIII supports this narrow interpretation of states' extraterrestrial jurisdiction as if states were granted general jurisdiction then the use of the phrase 'retain' would be unnecessary.

²³³ S Marchisio 'National jurisdiction for regulating space activities of governmental and non-governmental entities', paper presented at the United Nations/Thailand Workshop on Space Law on 16–19 November 2010 in Bangkok, Thailand (available at www.osa.unvienna.org/pdf/pres/2010/SLW2010/02-02.pdf).

²³⁴ S Gorove 'Interpreting article II of the Outer Space Treaty' 37(3) *Fordham Law Review* (1968–1969) 349 at 352.

²³⁵ Blount op cit 301 [own emphasis].

²³⁶ Notably, the Space Treaty did not elaborate on the issue of registration. However, in 1974 the General Assembly adopted the Registration Treaty (which came into force in 1976), in terms of which states are obliged to keep a register of all space objects launched from their territory (art II), and must keep the Secretary-General of the UN informed of the details and contents of such registry (art IV).

²³⁷ Crawford op cit 255–6. Notably, the United States has subsequently extended its domestic criminal jurisdiction to '[a]ny vehicle used or designed for flight or navigation in space and on the registry of the United States'. See 18 U.S.C., 7(6).

²³⁸ Sinha op cit 94, where he also notes: "Flag" jurisdiction derives from the treatment of ships as the sovereign territories of the nation whose flag they fly. This notion of territorial jurisdiction has been adopted and extended by the community of nations into space through a system of registration of space objects'. See further S Ratner 'Establishing the extraterrestrial: Criminal jurisdiction and the International Space Station' 22(2) *Boston College International and Comparative Law Review* (1999) 331.

²³⁹ In this regard, Ratner (op cit 342) notes, albeit in a slightly different context, '[s]ince previous international treaties prevent any country from claiming the moon or other planets as their territory, *the international agency entrusted with developing laws of criminal jurisdiction in outer space would be well-advised not to utilize territoriality as a basis for new legislation*' [own emphasis].

²⁴⁰ Ibid.

²⁴¹ Ibid, 331–2.

²⁴² The idea of an International Space Station was introduced in 1984 by the United States, which, together with various partner states, began the assembly of the station in 1998 in space. For background, see Ratner op cit 323–8.

²⁴³ In 1998, participating states adopted the Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America Concerning Cooperation on the Civil International Space Station (the 1998 ISS Agreement), which replaced a previous agreement signed in 1988 – namely, the Agreement Among the Government of the United States of America, Governments of Member States of the European Space Agency, the Government of Japan, and Government of Canada on Cooperation in the Detailed Design, Development, Operation, and Utilization of the Permanently Manned Civil Space Station (the 1988 ISS Agreement).

²⁴⁴ For facts and figures on the International Space Station, see http://www.nasa.gov/mission_pages/station/main/onthestation/facts_and_figures.html.

²⁴⁵ Agreement Between the United States of America and Other Governments (1998) (ISS Agreement), art 5.

²⁴⁶ While art 5(2) of the 1998 ISS Agreement recognises the jurisdictional principles of art VIII of the Space Treaty, art 22, which specifically concerns criminal jurisdiction, only provides for ‘nationality’ jurisdiction and, in certain circumstances, passive personality and effects-based jurisdiction. See discussion below. On the one hand, this exclusion is difficult to reconcile with the 1998 ISS Agreement’s commitment to the Space Treaty, and art VIII’s jurisdiction regime in particular (see arts 2(2) and 5(2), 1998 ISS Agreement). On the other hand, the Registration Treaty does anticipate multiple ‘launching states’, and agreements among them regarding jurisdiction and control over the space object. This, by implication, allows states to come to agreement among themselves regarding the exercise of jurisdiction. The question is whether the Registration Treaty has modified the terms of the Space Treaty, in terms of which ‘states of registry’ can claim jurisdiction over their space objects generally. See further Sinha op cit 116–17; Ratner op cit 335. However, partner states may still be able to claim *civil jurisdiction* as a ‘flag-state’ under the ISS Agreement (Sinha op cit 117).

²⁴⁷ Notably, ‘personnel’ is not defined in the Space Treaty or in the ISS Agreement. As Sinha (op cit 108 n 115) notes: ‘with the advent of “space tourists” visiting the ISS, a refinement of the word “personnel” may be necessary’. See further S Gorove ‘Criminal jurisdiction in outer space’ 6(2) *The International Lawyer* (1972) 313 at 319.

²⁴⁸ Compare Gorove 1972 op cit 321, and Brownlie who (although in the context of state responsibility) states: ‘The Space Treaty of 1967 does not employ the concept of nationality in relation to objects launched into outer space’ (Crawford op cit 534).

²⁴⁹ Gorove 1972 op cit 313.

²⁵⁰ ISS Agreement, art 5(2) [own emphasis]. Article 22(1) provides further that the partner states ‘may exercise criminal jurisdiction over personnel in or on any flight who are their respective nationals’. See Ratner op cit 335.

²⁵¹ See further Ratner op cit 335–6 and Sinha op cit 118–19 (who argues that these provisions provide for passive personality and *territorial jurisdiction*).

²⁵² Notably, this article was amended in the 1998 ISS Agreement. The 1988 correlative provision only gave the US extraordinary jurisdiction over non-nationals in a manner analogous to the ‘protective principle’ of jurisdiction discussed above. See further Sinha op cit 111–15; Ratner op cit 332–4.

²⁵³ Gorove 1972 op cit 317. However, as Gorove (at 316–7) argues, ‘little would seem to be gained by insisting on exclusivity’.

²⁵⁴ For example, when the personnel of one spacecraft leaves that spacecraft and enters another spacecraft registered to a foreign state.

²⁵⁵ See ISS Agreement, art 22(2). See further Sinha op cit 118–20.

²⁵⁶ Ibid. See further Ratner op cit 336–7.

²⁵⁷ On this question, see Blount op cit 319–30.

²⁵⁸ See Crawford op cit 256–7 (suggesting that ‘[t]he lowest limit above the earth sufficient to permit free orbit of spacecraft would make a sensible criterion: this limit would be of the order of 1 000 miles ...’). See further J Fawcett *International Law and the Uses of Outer Space* (1968) 23–4; and Sinha op cit 88.

²⁵⁹ Depending on the nature of the immunity, and the circumstances under which it is invoked, it may prevent a state from exercising prescriptive jurisdiction, or enforcement and adjudicative jurisdiction, or both.

²⁶⁰ Cryer et al op cit 422.

²⁶¹ Sovereignty is part of both. See Akande & Shah (op cit 824), who note: ‘[a] Head of State is accorded immunity *ratione personae* not only because of the functions he performs, *but also because of what he symbolizes: the sovereign state*’ [own emphasis].

²⁶² Akande & Shah op cit 818. In the *Tehran Hostages* case, the ICJ stated that there is ‘no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies’ (*United States Diplomatic and Consular Staff in Tehran case (United States of America v Iran)* [1980] ICJ Reports 3 at para 91).

²⁶³ Cryer et al op cit 422. Akande & Shah (op cit 824) argue that two further justifications for such immunity are (i) that the head of state (or representatives) symbolises the state, and (ii) the principle of non-intervention.

²⁶⁴ Van Alebeek notes: ‘The inviolability of diplomatic agents is one of the oldest rules of international law. Already thousands of years ago, in the practice of, for example, the Greek and the Romans, a diplomatic agent – then called a messenger or herald – was not to be maltreated or subjected to any form of arrest or detention’ (R van Alebeek ‘Diplomatic immunity’ in *Max Planck Encyclopedia of Public International Law* (2009) para 1).

²⁶⁵ Ibid.

²⁶⁶ See P Stoll ‘State immunity’ in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (2011) para 1.

²⁶⁷ Ottoman capitulations ‘provided non-Muslim foreigners with privileges of residence and safe passage, a variety of tax exemptions and low customs duties, *and partial if not complete immunity from the jurisdiction of Ottoman courts*’ [own emphasis] (O Özsu ‘The Ottoman Empire, the origins of extraterritoriality, and international legal theory’ in A Orford & F Hoffman (eds) *The Oxford Handbook of the Theory of International Law* (forthcoming 2016)).

²⁶⁸ Cryer et al op cit 422. Precisely which officials benefit from such immunity is not clear and is subject to some debate. Heads of state and government clearly do, and the ICJ has added to this foreign ministers. However, the court’s finding that ‘diplomatic and consular agents, [and] certain holders of high ranking office in a State, *such as* the Head of State, Head of Government and Minister for Foreign Affairs’ enjoy immunity *ratione personae* suggests that more officials might be added to this list (*Arrest Warrant of 11 April 2000 (DRC v Belgium)* (14 February 2002) para 51).

²⁶⁹ See *Arrest Warrant* case, para 52.

²⁷⁰ Adopted by the United Nations Conference on Diplomatic Intercourse and Immunities in Vienna on 18 April 1961. See also the 1963 Vienna Convention on Consular Relations.

²⁷¹ *Arrest Warrant* case, para 51 [own emphasis]. Notably, the language used by the court suggests that this is not a closed list of beneficiaries.

²⁷² See the 1946 Convention on the Privileges and Immunities of the United Nations, the 1947 Convention on the Privileges and Immunities of the Specialised Agencies, and the 1965 General Convention on the Privileges and Immunities of the Organization of African Unity.

²⁷³ The ICTY Appeals Chamber explains the rationale for functional immunity as follows: ‘State officials acting in their official capacity … are mere instruments of a State and their official actions can only be attributed to the State. They cannot be the subject of sanctions and penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called “functional immunity”’ (ICTY Appeals Chamber, *Prosecutor v Blaskic*, Judgment on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997 (29 October 1997), IT-95-14-AR108bis, para 38).

²⁷⁴ Akande & Shah (op cit 826) note: ‘[T]he circumstances in which a state official may face criminal prosecution in a foreign state for an act done in the exercise of official capacity are limited. Nevertheless, the assertion of immunity *ratione materiae* in criminal cases is not unknown and the reasons for which the immunity is conferred apply *a fortiori* in criminal cases.’

²⁷⁵ Act 87 of 1981. The Act was assented to on 6 October 1981 and commenced on 20 November 1981.

²⁷⁶ Section 2(1).

²⁷⁷ Section 3(1) of the Foreign States Immunities Act states: ‘A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings in respect of which the foreign state has expressly waived its immunity or is … deemed to have waived its immunity.’

²⁷⁸ Foreign States Immunities Act, s 2(3).

²⁷⁹ See chapter 13 of this book.

²⁸⁰ *In re Goering and Others* 13 ILR (1946) 203, 221. See further *Arrest Warrant* case (n 281) 36 (Dissenting Opinion of Judge Van den Wyngaert).

²⁸¹ See chapter 13 of this book.

²⁸² Art 7(2) of the ICTY Statute (Statute of the International Criminal Tribunal for the former Yugoslavia, as adopted by UNSC Res 827(1993) and as amended by UNSC Res 1329(2000)) and 6(2) of the ICTR Statute (Statute of the International Criminal Tribunal for Rwanda, as adopted by UNSC Res 955(1994) and as amended by UNSC Res 1329(2000)).

²⁸³ Rome Statute, art 27(1).

²⁸⁴ However, see Akande & Shah (op cit 849–51) on the position in respect of former diplomats, who may continue to enjoy protection under the 1961 Vienna Convention.

²⁸⁵ *R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte* (No. 3) [1999] 2 All ER 97, HL.

²⁸⁶ On these norms, see chapter 3 of this book.

²⁸⁷ Akande & Shah op cit at 828.

²⁸⁸ Ibid 840. At 843, Akande & Shah note: ‘[W]here extra-territorial jurisdiction exists in respect of an international crime and the rule providing for jurisdiction expressly contemplates prosecution of crimes committed in an official capacity, immunity *ratione materiae* cannot logically co-exist with such a conferment of jurisdiction.’

²⁸⁹ See Charter of the International Military Tribunal (1946), art 6. Although the ad hoc UN Tribunals of the 1990s did not contain a specific provision addressing immunity *ratione personae*, the ICTY indicted Slobodan Milosevic while he was still a sitting head of state. Similarly, the hybrid Special Court for Sierra Leone (not without controversy) held that ‘the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court’. See further, SCSL Appeals Chamber, *Prosecutor v Charles Taylor*, Decision on Immunity from Jurisdiction, (May 31, 2004) SCSL-03-01-I-059, 52, and *Arrest Warrant* case para 61.

²⁹⁰ Article 27(2) reads: ‘Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.’ See however chapter 13 of this book.

²⁹¹ Cryer op cit 425 (n 3).

²⁹² *Arrest Warrant* case supra, para 75.

²⁹³ Ibid, para 58.

²⁹⁴ See eg, *Gadhafi* case, No. 1414 (Cass. crim. 2001) (Fr.), 125 ILR 456; *Castro* case, No. 1999/2723, Order (Audencia nacional Mar. 4,1999) (Spain); *H.SA. et al v S.A.*, Cass. 2e civ., Feb. 12, 2003, No. P.02.1139.F (Belg.), translated in 42 ILM 596 (2003); *Regina v Bow Street Stipendiary Magistrate, ex parte Pinochet* (No. 3), [1999] 2 All E.R. 97, 126–27, 149, 179, 189 (H.L.) (per Goff, Hope, Millett, Phillips, L.JJ.); *Plaintiffs A, B, C, D, E, F v Jiang Zemin*, 282 F.Supp.2d 875 (N.D. Ill. 2003); *Tachiona v Mugabe*, 169 F.Supp.2d 259 (S.D.N.Y. 2001); *Arrest Warrant Against General Shaul Mofaz* (Bow St. Mag. Ct. Feb. 12, 2004) 53 ICLQ 769, 771. In this regard, Akande & Shah (op cit 820) note: ‘The only case which may be construed as denying immunity to a Head of State is *United States v Noriega*. However, immunity was not accorded in this case on the ground that the US government had never recognized General Noriega (the de facto ruler of Panama) as the Head of State.’

²⁹⁵ ICC Act, s 4(2)(a).

²⁹⁶ Du Plessis notes: ‘In terms of the Act, South African courts, acting under the complementarity scheme, are thus accorded the same power to “trump” the immunities which usually attach to officials of government as the International Criminal Court is by virtue of article 27 of the Rome Statute.’ See M du Plessis ‘South Africa’s implementation of the ICC Statute: An African example’ 5(2) *Journal of International Criminal Justice* (2007) 460, and J Dugard & G Abraham ‘Public international law’ *Annual Survey of South African Law* (2002) 140 at 166.

²⁹⁷ Ibid.

²⁹⁸ See generally Gevers op cit.

²⁹⁹ Section 233 of the Constitution states: ‘When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’.

³⁰⁰ See Stoll op cit para 6.

³⁰¹ Act 87 of 1981.

³⁰² Foreign States Immunities Act, s 4. In terms of s 4(3), ‘commercial transactions’ include ‘(a) any contract for the supply of services or goods; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such loan or other transaction or of any other financial obligation; and (c) any other transaction or activity or a commercial, industrial, financial, professional or other similar character into which a foreign state enters or in which it engages otherwise than in the exercise of sovereign authority.’

³⁰³ Foreign States Immunities Act, s 5.

³⁰⁴ Foreign States Immunities Act, s 6.

³⁰⁵ Foreign States Immunities Act, s 7.

³⁰⁶ Foreign States Immunities Act, s 8.

³⁰⁷ Foreign States Immunities Act, s 11.

³⁰⁸ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Judgment) ICJ Reports 2012, 99.

³⁰⁹ At para 91.

³¹⁰ *Al-Adsani v United Kingdom* [2001] XI Eur Court HR 79.

³¹¹ See *Jones v Ministry of Interior of Saudi Arabia* [2007] 1 AC 270 (England); *Bouzari v Islamic Republic of Iran* (2004) 243 DLR (4th) 406 (Ontario Court of Appeal) (Canada); *Fang v Jiang* [2007] NZAR 420 (New Zealand).

³¹² Akande & Shah op cit 852.

Chapter 7

Treatment of aliens

HENNIE STRYDOM

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7.1 Introduction

A state has a sovereign right to allow or disallow the nationals of another state (aliens) into its territory and to regulate the presence and actions of foreign nationals on its territory. Once admitted, an alien may be subject to restrictions that may not apply to the citizens of the territorial state; for instance, aliens may be prevented from exercising certain political rights, standing for and holding public office, or acquiring property. Deportation and extradition constitute two distinct methods according to which states may lawfully remove aliens from their territories. These methods are dealt with in chapter 8 of this book.

In exercising its sovereign rights in relation to aliens, the territorial state is not only bound by legal procedures provided for in domestic law, but also by international human rights law. For instance, article 12 of the 1966 International Covenant on Civil and Political Rights (ICCPR) provides that everyone lawfully within the territory of a state has the right to freedom of movement and to choose a residence. Any restrictions on these rights will only be allowed if they are provided for by law, are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others. In the case of expulsion of an alien, article 13 protects the alien against arbitrary action by the territorial state in requiring that any decision in this regard be authorised by law; and the alien should be given the opportunity to submit reasons against the expulsion and to have the territorial state's decision reviewed before a competent authority.

In this chapter, the general international law standard for the treatment of aliens is explained. At the outset, it must be noted that the standard of treatment to which aliens are entitled in the territorial state is not without controversy¹ and remains an important issue in international law; it intersects with other topics, such as state responsibility, diplomatic protection, refugee law and international human rights law. Since these topics are dealt with more fully in other chapters in this book, this chapter will be limited to some of the more immediately relevant issues concerning the treatment of aliens in general.

7.2 The standard of treatment

The controversy mentioned above relates to different views among states on what will constitute acceptable conduct in the treatment of aliens. Among developing states, the prevailing view is that the national standard of treatment is what is required, which means that an alien is not entitled to claim rights that are more extensive than those accorded the nationals of the territorial state. By contrast, developed states argue in favour of an ‘international minimum standard’, which entitles an alien to claim a higher standard of treatment when the national standard falls below what is internationally acceptable.

This can be illustrated by the *Neer Claim* between the United States and Mexico, in which the United States alleged a failure on the part of the Mexican authorities to exercise due diligence in apprehending and prosecuting the murderer of a US citizen.³ Recognising the difficulty in determining the boundary between an international delinquency of the nature espoused in the claim and an unsatisfactory exercise of sovereign power, the Claims Commission nevertheless determined that the governmental conduct in question should in the first instance be ‘put to the test of international standards’, and secondly, that for the treatment of an alien to constitute an international delinquency, it:

should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.³

Many decades later this customary law standard was invoked to determine the meaning of ‘fair and equitable treatment’ in relation to what a foreign investor would be entitled to under article 1105(1) of the 1994 North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico. This provision imposes an obligation on each of the parties to accord the investments of investors of another party ‘treatment in accordance with international law, including fair and equitable treatment and full protection and security’.⁴ In a protracted dispute between a Canadian gold mining company and the United States, the International Centre for the Settlement of Investment Disputes (ICSID) ruled that the strict test defined in the *Neer Claim* still determines the level of scrutiny in deciding what would constitute a violation of the treatment a foreign investor would be entitled to under article 1105 of NAFTA. Consequently, the conduct of the territorial state:

must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105(1).⁵

The trend in this and other investment arbitration cases to equate the minimum international standard in *Neer* with the fair and equitable treatment requirement for the protection of investor interests in investment treaties⁶ has led to opposing views among scholars. On the one side, there is the argument that the *Neer Claim* was about a denial of justice and that its adaptation to the varied and complicated economic relationships associated with investment arrangements is problematic. On the other hand, those favouring the equation of fair and equitable treatment with the international minimum standard point to the fact that the formulation of fair and equitable treatment in investment treaties is vague and indeterminate and that the standard’s precise wording differs from treaty to treaty. To avoid the difficulties in dealing with such formulations, there is a need to address the vagueness and indeterminacy of the standard, and to counter its open-endedness. This can be done with reference to well-established and substantial legal rules rooted in customary international law, which are to be found, according to the proponents of this argument, in the body of law relating to the international minimum standard.⁷

The protection of foreign investor interests in the territorial state, and the fair and equitable standard of treatment and its problematic relationship with the international minimum standard of treatment to which aliens are entitled, are discussed further in paragraph 7.5 of this chapter. However, what needs to be addressed at this point is whether it still makes sense to have a tenacious debate at all on the merits and demerits of the national treatment standard versus the international minimum standard of treatment of aliens by the territorial state. The fact that foreign nationals may, with a few exceptions, claim the same rights and fundamental freedoms to which nationals of the territorial state are entitled under national as well as international law, seems to provide adequate opportunity for linking the question about the content of the international minimum standard with the internationally recognised concept of fundamental human rights.⁸

This idea was already made part of the International Law Commission (ILC)'s earlier work on state responsibility when the then-Special Rapporteur, García Amador, explained the eradication of the distinction between nationals and aliens for purposes of their treatment in his 1957 report on the responsibility of states for injuries done to aliens on their territories:

The ‘international standard of justice’ was evolved and obtained recognition at a time when ideas differed from those which prevail at present: international law recognized and protected the essential rights of man in his capacity as an alien, or, in other words, by virtue of his status as a national of a certain State. The principle of equality between nationals and aliens, in its turn, was formulated in order to counteract the consequences of the difference in the status which the law attached to nationals and aliens. Both principles had therefore the same basis; the distinction between two categories of rights and two types of protection. That distinction disappeared from contemporary international law when that law gave recognition to human rights and fundamental freedoms without drawing any distinction between nationals and aliens. The object of the ‘internationalization’ ... of these rights and freedoms is to ensure the protection of the legitimate interests of the human person; human beings as such, are under the protection of international law.

At that time, the principle of equal treatment was already enshrined in articles 1 and 2 of the 1948 Universal Declaration of Human Rights. Strengthened by the two 1966 International Human Rights Covenants, this acceptance of the principle of equal treatment subsequently assisted the UN General Assembly in adopting a declaration on the human rights of individuals who are not nationals of the country in which they live.¹⁰ This declaration is fully aligned with the international obligations of states under international human rights law when regulating the entry of aliens and determining the terms and conditions of their stay. Thus, the enjoyment by aliens of rights in accordance with domestic law is made subject to the relevant international obligations of the territorial state – particularly with regard to the right to life and security of the person; to protection against arbitrary or unlawful interference with privacy, family, home or correspondence; to equal treatment before the courts; to choose a spouse, to marry and to found a family; to freedom of thought and expression; to the retention of their own language, culture and tradition; and to the transfer of moneys abroad.¹¹ Host state restrictions to the enjoyment of rights such as the right to leave the country; to freedom of expression; to peaceful assembly; and to own property must be prescribed by law, necessary in a democratic society to protect national security, public safety and order, the rights and freedoms of others and be ‘consistent with the other rights recognized in the relevant international instruments’.¹²

Although this declaration clearly demonstrates the equalising effect of international human rights law in the treatment to which aliens are entitled vis-à-vis the nationals of the territorial state, its legal status remains that of a non-binding resolution of the General Assembly. The question then is to what extent the rights enumerated in the declaration have already attained the status of customary international law. One would certainly be justified in stating that, at a minimum, the

principle of non-discrimination, the right to life, the prohibition of torture and of inhuman or degrading treatment or punishment, and the right to a fair trial form part of customary international law.¹³

These and other developing standards of treatment derived from international human rights law are increasingly likely to determine the content of the international minimum standard of treatment and to provide a synthesis between the latter and state prerogatives on the treatment of aliens in domestic law. In this regard, note should also be taken of the following conclusion by the ICJ in the *Diallo* case:

Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights.¹⁴

7.3 Administration of justice

Courts and tribunals capable of administering justice effectively and impartially constitute an essential part of a state's machinery for the protection of individual rights, including the rights of aliens. In this instance, the international standard requires states to allow foreigners in its territory full access to its courts, representation by legal counsel, and a trial without unnecessary delay and an impartial outcome of the proceedings.

Under international law on state responsibility, it is common cause that the acts or omissions of a state's judicial organs may render the state responsible. State responsibility in this regard may result from various types of judicial decision.¹⁵ These are discussed below.

7.3.1 Decisions incompatible with international law

State responsibility will be manifested if a judicial decision is evidently in breach of a state's international obligations. For example, this could happen when a court denies immunity to a foreign envoy under circumstances that justify immunity, or where a court has exceeded the limits of territorial jurisdiction recognised by international law.

7.3.2 Denial of justice

A denial of justice occurs when a foreign national is denied access to the courts and is thus prevented from vindicating his or her rights, or when undue and inexcusable delays occur in rendering judgment. In the case of *Robert Azinian v The United Mexican States*, the International Center for the Settlement of Investment Disputes (ICSID) gave the following useful definition for a denial of justice:

A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. ... There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of 'pretence of form' to mask a violation of international law.¹⁶

7.3.3 Decisions contrary to municipal law

State responsibility may also result from decisions that are contrary to municipal law. However, these instances will be exceptional and must be distinguished from judgments that are merely erroneous and which will not attract responsibility. For state responsibility to arise as a result of decisions contrary to municipal law, three cumulative requirements must be fulfilled – namely, (1) the decision must amount to a flagrant and inexcusable violation of municipal law; (2) the decision must be that of a court of last instance with all domestic remedies exhausted; and (3) bad faith and discriminatory intent on the part of the court must have been present.¹⁷ In the latter instance, factors such as corruption of judicial officers, undue influence by the executive or a wilful disregard of legal procedures could be indicative of intentional judicial malpractice.

7.4 Expulsion of aliens

In relation to the expulsion of aliens, some early incidents provide rules aimed at preventing arbitrary or unfair treatment. For instance, in the *Breger* incident it was pointed out that under general principles of international law, a state may at any time expel an alien, provided that the expulsion is not carried out in an arbitrary way, that unnecessary force and mistreatment are avoided and that the alien is given a reasonable opportunity to safeguard property.¹⁸ With regard to the latter, the Iran-US Claims Tribunal ruled in favour of compensation for a US citizen who was given only 30 minutes to pack his belongings before he was expelled from Iran on the basis that customary international law requires a state to give a foreigner to be expelled sufficient time to wrap up personal affairs.¹⁹

The general rule is that an alien has no right to remain indefinitely in the territory of the state of residence and can be expelled provided that expulsion takes place on justifiable grounds²⁰ and in accordance with certain guarantees. This is clear from article 13 of the ICCPR, which determines as follows:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority.²¹

An interesting question is whether this provision should be read jointly with article 14, which guarantees ‘all persons’ equality before courts and tribunals and to a fair public hearing by a competent, independent and impartial tribunal established by law. In General Comment no 32, the Human Rights Committee, established to oversee the implementation of the ICCPR, interpreted this provision as being applicable not only to citizens of states parties but to all individuals regardless of nationality who may find themselves in the territory or under the jurisdiction of the state party.²² However, the Committee has made it equally clear that the guarantees of article 14 do not apply to extradition, expulsion and deportation procedures.²³ This view is presumably based on a restrictive interpretation of article 14, which provides for these guarantees in the case of ‘criminal charges’ against a person or in determining such a person’s ‘rights and obligations in a suit of law’. The Committee understood this latter phrase as referring to judicial procedures in the areas of contract, property and delict (torts) in private law and to equivalent notions in administrative law – such as the termination of employment, the determination of social security grants, or the procedures regarding the use of public land.²⁴ However, according to the Committee, the procedural guarantees in article 13 incorporate notions of due process reflected in article 14 and should therefore be interpreted in light of the latter.²⁵

In 2004, the International Law Commission decided to include the expulsion of aliens in its programme of work. The matter is still under investigation and only some salient aspects of the ILC's 2012 report²⁶ will be highlighted here. The report contains the eighth report of the Special Rapporteur with a set of Draft Articles.

The Draft Articles apply to aliens who are lawfully or unlawfully present on the territory of the expelling state but not to aliens enjoying privileges and immunities under international law. By including unlawful presence, the Draft Articles extend their scope of application to aliens who have entered the territory of the expelling state unlawfully, or whose presence has subsequently become unlawful.²⁷ This position is contrary to existing treaty law, whose application is limited to aliens lawfully present on the territory of the expelling state²⁸ and is unlikely to obtain widespread support among states. The reference to aliens enjoying privileges and immunities has in mind the exclusion of aliens whose enforced departure from the territory of the expelling state is covered by special rules of international law. For instance, this would be the case when a person enjoying diplomatic or consular immunity is declared *persona non grata* by the receiving state and is then compelled to return to the sending state. Such matters are handled in accordance with international diplomatic law.

The Draft Articles make it clear, and confirm the established legal position, that a state has the *right* to expel an alien from its territory. However, the expulsion must take place in accordance with the rules of international law – in particular those relating to human rights.²⁹ Moreover, the decision to expel must be reached in accordance with the law, must state the grounds for expulsion that must be assessed in good faith and must be reasonable with reference to the gravity of the facts and in light of all the circumstances.³⁰

A range of other guarantees is included in the Draft Articles. For example, a state is interdicted from expelling an alien to a state or frontier where the alien's life or freedom will be threatened on grounds of race, religion, nationality, membership of a particular social group, or political opinion. This does not apply if the alien poses a danger to the state of residence or the community of that state.³¹ Collective expulsion is prohibited,³² and so is disguised expulsion, expulsion for the purpose of confiscating assets, and expulsion for circumventing extradition procedures.

Collective expulsion takes place when aliens as a group are expelled without a reasonable and objective assessment of each individual member of the group.³³ In such instances, expulsion takes the form of punishment of a specific group, which is often of an arbitrary nature. *Disguised expulsion* involves the forcible or provoked departure of an alien from the territory of the state of residence as a result of the state's actions or omissions.³⁴ This will occur when the expelling state, instead of adopting formal expulsion proceedings, engages in conduct that will result in the forcible departure of the alien from the territory of the expelling state. To attribute such unlawful conduct to the state, the alien must be compelled to leave the territory and the conduct of the expelling state must be intentional.³⁵ *Expulsion for the purpose of confiscating assets* occurs when the expelling state uses expulsion to facilitate the unlawful appropriation of the alien's property. In such instances, the exercise of the power of expulsion aims at an ulterior purpose – the confiscation of assets – and will be unlawful under international law. It may also amount to an arbitrary, and hence unlawful, deprivation of property.³⁶ *Expulsion for the purpose of circumventing ongoing extradition procedures* is likewise prohibited.³⁷ In this instance, the expulsion is for an ulterior motive – namely, to circumvent extradition proceedings already under way between the expelling state and the state that initiated the extradition proceedings.

Respect for the human dignity and the human rights of aliens feature prominently in the ILC Draft Articles. Draft article 14 contains a general obligation in this regard; all aliens subject to expulsion are entitled to respect for their human dignity and for their human rights. This is

supplemented by a number of provisions making reference to specific human rights that both the expelling and receiving state are obliged to honour.³⁸

An African case of relevance is *Good v Botswana*.³⁹ In this matter, an Australian national employed as a professor in political studies at the University of Botswana co-authored an article critical of how presidential succession takes place in Botswana. The criticism was not taken kindly and, by the President's executive decision, Good was declared an undesirable person and was expelled from Botswana without any reasons given.

Section 7(f) of the Botswana Immigration Act entitles the President to declare any person an undesirable inhabitant on the basis of information from any source and which the President deemed to be reliable. Section 11(6) of the same Act further determines that no appeal shall lie against the President's declaration and that no court may review the grounds for the President's decision. By virtue of section 36, the person affected has no right to be heard before or after the decision by the President or to demand any information as to the grounds for the decision and any such information may not be disclosed in court.

Left without a remedy at the national level, Good took the matter to the African Commission on Human and Peoples' Rights. There, the matter was challenged on several grounds, including the due process provision in article 7 of the African Charter on Human and Peoples' Rights (1983). This provision determines that every individual 'shall have the right to have his cause heard', which shall include the right to an appeal and the right to defence. Does this provision apply in the case of an executive decision affecting the rights of a person?

The Commission's point of departure in this instance was explained as follows:

The right to be heard requires that the Complainant has unfettered access to a tribunal of competent jurisdiction to hear his case. It also requires that the matter be brought before a tribunal with the competent jurisdiction to hear the case. ... Where authorities put obstacles on the way which prevent victims from accessing the competent tribunals or which oust the jurisdiction of judicial organs to hear alleged violations of human rights, they would be denying victims of human rights violations the right to have their causes heard.⁴⁰

The Commission found that the protection afforded by article 7 is not limited to the rights of arrested or detained persons in criminal proceedings but encompasses the 'right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief'.⁴¹

It must be noted that in the case of *Good*, the complainant was not prevented from accessing the courts. In fact, both the High Court and the Court of Appeal entertained his challenge to the President's decision, but declined actually to review the decision because their power to do so was taken away by the Immigration Act. This amounted to an ousting of the courts' jurisdiction to review executive action, which the African Commission correctly viewed as having the same effect as preventing judicial organs from entertaining human rights violations.⁴²

7.5 Protection of foreign investments

The right to expropriate alien property is a corollary of state sovereignty. But since expropriation constitutes the most severe form of interference with property rights, especially if it takes place without compensation, customary international law, as well as modern treaty law, require expropriation to fulfil certain conditions to be lawful. Complying with these conditions is in the interest of the host state since negative publicity on the treatment of alien property may do lasting damage to a state's reputation as a foreign investment destination; some, most notably developing states, can ill afford a delinquent reputation in the eyes of foreign investors.

Before the conditions for a lawful expropriation are dealt with, note should be taken of the different forms of expropriation or interference with foreign property. A basic distinction is made between direct and indirect expropriation. On the one hand, the former occurs when, by an official act, a state decides to take the title of a foreign investor's property, leaving the investor without any title. This form of expropriation, some argue, has become rare,⁴³ especially in view of its negative consequences for the expropriating state. Indirect expropriation, on the other hand, leaves the investor's title unaffected, but interferes with the full and meaningful enjoyment thereof, which may damage the investor's profit expectations. Interference with the enjoyment of legal title can take many forms, such as the imposition of new regulatory requirements by the executive; tax and tariff measures; modification or breach of the investment contract; denial of infrastructure and resources; and denial of justice.⁴⁴

Not every measure taken by a state will amount to indirect expropriation. Four factors must be taken into account in determining whether the government measure amounts to indirect expropriation:

1. Did the measure result in an interference with the investor's enjoyment of the investment?
2. Was the loss (in value, management, use or control) substantial?
3. Was the loss permanent or long-lasting?
4. Was the governmental measure taken in the public interest?⁴⁵

Even if a government measure has the first three effects, if it was taken in the interest of the public welfare, interference with the investor's title will not be considered as a form of expropriation that will attract compensation – provided that the interference is not intolerable, discriminatory or disproportionate.⁴⁶

These requirements take us into the realm of 'fair and equitable treatment', which has generated volumes of literature and arbitral disputes. Most investment treaties today provide for fair and equitable treatment of foreign investments. This concept is frequently invoked as a standard of treatment in investment disputes, often with reference to the international standard for the treatment of aliens referred to earlier. The origins of the concept go back to the treaty practice of states during the time of the treaties of friendship, commerce and navigation in the nineteenth and early twentieth centuries.⁴⁷ However, giving content to the concept in modern times, especially in view of the different formulations in treaty provisions, has become elusive and in many cases commentators have fallen back on established argumentation, definitions and cross-referencing in arbitral jurisprudence to give the concept some substance.

Analyses of arbitral jurisprudence have shown that the main elements of the 'fair and equitable' standard of treatment are concentrated on the following duties of the territorial state:⁴⁸

- Promises and undertakings made by the territorial state, and upon which the investor has relied, must be honoured since they create legitimate expectations on the part of the investor.
- Treatment of a foreign investor must be non-discriminatory and non-arbitrary.
- Judicial and administrative procedures must follow due process and allow for access to a remedy.
- The legal framework and procedures of the territorial state must be transparent and clear as to what is expected of the investor.
- State measures affecting the investment must be reasonable and rationally linked to their objective and not disproportionately burdensome to the investor.
- Where compensation is due, it must be paid promptly, adequately and effectively.

Given the protection afforded foreign investors under international law, the case of *Mike Campbell v Zimbabwe* before the SADC Tribunal⁴⁹ provides illustrative material.

According to section 16B of Amendment No 17 (2005) to the Zimbabwean constitution, land identified for resettlement purposes is subject to compulsory acquisition (expropriation) by the state after which full title in the land resides in the state and no compensation is payable except for improvements effected on such land. The provision further states unequivocally that an affected landowner is barred from challenging such an acquisition in court and that the courts have no jurisdiction for entertaining such a challenge.

All the lands belonging to the applicants were acquired by the state pursuant to this provision. Before the SADC Tribunal, they argued that: the Zimbabwean state, being a SADC member, acted in violation of the SADC Treaty; they were denied access to the Zimbabwean courts to challenge the legality of the compulsory acquisition of the lands; the acquisition was racially based (in that it was directed against white farmers) and therefore discriminatory; and they were denied the compensation they were entitled to.

The Tribunal assumed jurisdiction over the matter in view of the fact that the provision ousted the jurisdiction of the national courts to review the legality of the acquisition. In such circumstances, the well-established rule that an applicant must first exhaust all domestic remedies is rendered meaningless and the case could be lodged with an international judicial body with jurisdiction in the matter.⁵⁰ The Tribunal's jurisdiction in the matter was inferred from article 4(c) of the SADC Treaty, which requires SADC member states *inter alia* to act in accordance with human rights, democracy and the rule of law. These were the very issues raised in the application.

Access to justice was considered by the Tribunal as an integral part of the rule of law and it concluded that the applicants were denied their right of seeking redress for the deprivation of their property and that as a consequence the Zimbabwean state had acted in breach of article 4(c) of the SADC Treaty.⁵¹

The duty not to discriminate, the Tribunal pointed out, was entrenched in a number of international instruments and treaties to which Zimbabwe is party.⁵² Although the impugned legislative measure made no reference to race, the applicants argued that its *effects* render it discriminatory because the targeted lands were all owned by white farmers irrespective of other factors that could have justified the expropriation, such as the proper use of the land, their citizenship, or length of residence.⁵³

In finding that only white farmers were unjustifiably and disproportionately affected by the implementation of the measure, the Tribunal held that 'the differentiation of treatment meted out to the Applicants also constitutes discrimination as the criteria for such differentiation are not reasonable and objective but arbitrary and based primarily on considerations of race', which meant that the respondent state has violated its obligations under article 6(2) of the SADC Treaty.⁵⁴

Regarding compensation, the Zimbabwean government did not dispute the applicants' entitlement to compensation, but argued that this duty fell on the shoulders of the former colonial power, namely Britain, in terms of the independence agreement reached in 1978. The Tribunal held that in international law, the expropriating state has the duty to compensate and that the exclusion of compensation in the constitutional amendment was contrary to the clear legal position in international law.⁵⁵

7.6 Consular protection

Access to and communication with one's consular representative in a foreign country may be necessitated by a range of circumstances; in practice, the need arises most commonly in cases where lost or stolen travel documents need to be replaced or when a foreign national has been detained or imprisoned by the authorities of the territorial state. In such instances, the foreign national and the

consular office can rely on the provisions of article 36 of the 1963 Vienna Convention on Consular Relations (VCCR),⁵⁶ which determines as follows:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

- (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
- (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
- (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

In 2001, this provision became the subject of legal proceedings in the International Court of Justice between Germany and the United States in the *LaGrand* case.⁵⁷ In this matter, two German nationals, Karl and Walter LaGrand, who had lived for most of their lives in the United States under permanent resident status, were arrested in 1982, and later convicted, in the United States for their involvement in an attempted bank robbery in which the bank manager was killed. For this crime, they received the death sentence; on 24 February 1999, Karl LaGrand was executed; and on 3 March, his brother Walter followed suit.

At no time after their arrest or during the criminal proceedings was the German consular office informed about the matter by the US authorities as required by article 36, nor were the LaGrands themselves informed of their rights as required by article 36(1)(c). The information about their consular rights reached the LaGrands via non-official sources and only at a time when proceedings to have their convictions and death sentences set aside were instituted in 1992. At this point, they also alerted the German consul about their plight and their article 36 rights.

Various attempts in the US courts to have the death sentences reconsidered were unsuccessful. On 2 March 1999, the day before the execution of Walter LaGrand, Germany filed proceedings against the United States in the ICJ, accompanied by a request for provisional measures to the effect that the United States take all necessary steps to prevent the execution of Walter LaGrand pending the final outcome of proceedings in the ICJ. Although this request was granted by the ICJ, the relevant US authorities allowed the execution to go ahead as scheduled.

In the case before the ICJ, Germany argued first that the failure of the United States to inform the LaGrands of their consular rights prevented Germany from exercising its consular rights under article 36, which constituted a violation by the United States of its international legal obligations to Germany under the Convention; secondly, the US failure violated the individual rights conferred on the detainees by article 36(1)(a) and (b).

In finding that the US failure constituted a breach of its obligations under article 36, the court reasoned as follows in response to the first point:

It follows that when the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay, which was true in the present case during the period between 1982 and 1992, the sending State has been prevented for all practical purposes from exercising its rights under Article 36, paragraph 1. It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen.⁵⁸

In raising the second point, Germany relied on its right of diplomatic protection⁵⁹ of its nationals when their individual rights are violated in another country. It reasoned that the rights conferred on detainees by article 36 were not merely rights that individuals are entitled to, but that these rights have assumed the character of *human rights*, which meant that non-compliance with article 36 was even more serious.⁶⁰ The individual rights notion was disputed by the United States; it claimed that article 36 confers rights on states only and that any right that may benefit an individual under that provision is derived from the right of the state and not an individual or human right in itself.⁶¹

Relying on the ordinary and clear language of article 36, the court was not in doubt that ‘Article 36, paragraph 1, creates individual rights, which ... may be invoked in this Court by the national State of the detained person’ and then concluded that ‘[t]hese rights were violated in the present case’.⁶² Unfortunately, the court stopped there and declined to address Germany’s additional argument – namely, that the rights in question have assumed the character of human rights.

In 2004, the *Avena* case⁶³ was submitted to the ICJ. Here, Mexico brought proceedings against the United States on grounds similar to those in the *LaGrand* case. The matter involved 52 Mexican nationals whose cases were at different stages before judicial authorities at state or federal level. Relying on the *LaGrand* case, Mexico contended that the United States failed to comply with article 36 obligations to notify both Mexican consular authorities and the individuals concerned of their consular rights. Of importance in this judgment, which also turned out unfavourably for the United States, is the court’s ruling on the meaning of notification ‘without delay’ in article 36(1)(b).

As a first point, the court noted that the duty of notification that rests on the detaining authorities ‘arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national’, which may vary according to circumstances.⁶⁴ In the case of the United States, the court noted that the fact that large numbers of foreign nationals are living in the United States, legally or illegally, and that American society is multi-cultural, ‘suggest that it would be desirable for enquiry routinely to be made of the individual as to his nationality upon detention, so that the obligations of the Vienna Convention may be complied with’.⁶⁵

How then should notification ‘without delay’ be interpreted? Since ‘without delay’ is not defined in the VCCR and since the term’s ordinary dictionary definition offers diverse meanings, the court turned to the object and purpose of the VCCR for understanding the term. In noting that the consular functions in article 36 are different from the functions of (and direct involvement in the legal proceedings by) a legal representative, the result is that the phrase ‘without delay’ cannot be understood as ‘immediately upon arrest and before interrogation’.⁶⁶ Nonetheless, the court concluded, ‘there is ... a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national’.⁶⁷

In response to these cases, a few matters warrant some further attention. The first is the issue of remedies. In the *LaGrand* case, the convicted persons had already been executed when the judgment was handed down, and in the *Avena* case, it was too late for the judgment to have an effect on several of the trials. In the *LaGrand* case, Germany mainly sought the following assurances from the United States: that in future cases of detention and criminal proceedings against German nationals, the United States would ensure in law and practice the effective exercise of the rights under article 36; and that in cases involving the death penalty, the United States would undertake an effective review of and provide for remedies for criminal conviction affected by the violation of article 36. The assurance of non-repetition, the court felt, was answered by the steps that the United States had taken (and of which the court was informed) to ensure greater awareness of and compliance with the provisions of article 36 by the relevant authorities.⁶⁸ The court then allowed the request for review and reconsideration, and stated that such action should be undertaken in the case of prolonged detention or conviction involving severe penalties and taking into account the consequences of the violation of the rights under article 36. However, the court was of the view that the means chosen for such a review and reconsideration were within the discretion of the United States.⁶⁹

This approach was also followed in the *Avena* case.⁷⁰ Here, the court emphasised that the review and reconsideration process should be *effective* in guaranteeing that the violation (of article 36) ‘and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process’.⁷¹ Noteworthy in this instance is the court’s indication that its ruling must be understood as having addressed issues of principle in respect of the general application of the VCCR, which means that the fact that the ruling concerned only Mexican nationals ‘cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States’.⁷²

With regard to Germany’s argument in the *LaGrand* case that the article 36 rights are human rights (and the ICJ’s avoidance of such terminology in classifying the rights under article 36 as individual rights), it should be noted that in October 1999, before the ICJ gave its judgment in the *LaGrand* case, the Inter-American Court of Human Rights became seized of this same issue. The involvement of the Inter-American Court came about as a result of a request by Mexico for an advisory opinion regarding minimum judicial guarantees and due process requirements in cases involving the death sentence for convicted foreign nationals when the host state has failed to inform them of their rights under article 36 of the VCCR.⁷³ Although there is no indication in the text of the *LaGrand* case that the ICJ considered the advisory opinion of the Inter-American Court, the likelihood that the court was acutely aware of this development and that it influenced the outcome of the ICJ’s ruling cannot be excluded.

In any event, in a bold move, the Inter-American Court reconfigured the rights as they apply to foreign nationals under article 36 in the form of due process rights under international human rights law – in particular, with reference to article 14 of the International Covenant on Civil and Political Rights (1966). The court took the *rationale* for this approach from the practice of treaty interpretation, which allows for normative international law developments subsequent to the conclusion of a treaty to give meaning to the treaty’s provisions.⁷⁴ Finding this ‘particularly relevant in the case of international human rights’,⁷⁵ the court stated as follows:

The *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects. ... Its dynamic evolution has had a positive impact on international law in affirming and building up the latter’s faculty for regulating relations between States and the human beings within their respective jurisdictions.⁷⁶

Through the prism of this development, the court then proceeded to present the individual's rights under article 36 as due process (human) rights that are 'essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial', which 'makes it possible for the right to the due process of law upheld in Article 14 of the International Covenant on Civil and Political Rights' to be 'amplified in the light of other international instruments like the Vienna Convention on Consular Relations, which broadens the scope of the protection afforded to those accused'.⁷⁵ In the final analysis, the court concluded that the non-observance of the foreign national's rights under article 36 is prejudicial to guarantees of due process of law, causing the imposition of the death penalty in such circumstances to be an arbitrary deprivation of life as understood in terms of international human rights treaties with legal consequences for the state responsible for the violation with regard to the duty to make reparations.⁷⁶

A matter that remains unanswered in the wake of the Inter-American Court's advisory opinion is the meaning, for the state of nationality, of a human rights approach to the individual's rights under article 36 of the VCCR. Is there a corresponding duty to an article 36 right, and if so, what is the nature and scope of the duty that the state of nationality must comply with? If the nature of the response by the state of nationality remains discretionary, the reconfiguration of article 36 as a human rights instrument has a dubious meaning beyond the relationship between the foreign national and the host state.⁷⁷

The last development that warrants attention is the decision in 2005 by US President George Bush to issue a memorandum of implementation instructing the state authorities to comply with the ICJ's ruling in the *Avena* case.⁷⁸ This became a highly contentious issue, attracting widespread criticism and comments. In particular, the US Supreme Court in the *Medellin* case⁷⁹ refused to give effect to the *Avena* ruling, reasoning that the federal states had a discretion to comply or not (because the judgment did not constitute by its own force binding federal law) and that the President, without congressional or constitutional authority, had no power to interfere with the running of the criminal justice system at the state level. This stand-off raises contentious issues. One concerns the relationship between international and national law, especially in a country such as the United States that follows a dualist approach. Another is with regard to the distribution of powers between the judicial and executive branches of government in matters that involve international relations and executive policies relating to a state party's treaty obligations.⁸⁰

SUGGESTED FURTHER READING

A Walen & I Venzke 'Unconstitutional detention of nonresident aliens' 67 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (2007) 843–885

CD Weisselberg 'The detention and treatment of aliens three years after September 11' 38 *University of California Davis Law Review* (2005) 815–860

¹ See J Crawford Brownlie's *Principles of Public International Law* (2012) 612–14; J Dugard *International Law: A South African Perspective* (2011) 300; TW Bennett & J Strug *Introduction to International Law* (2013) 177.

² *US-Mexican General Claims Commission (US v Mexico)* 1926 3 ILR 213.

³ Ibid, 61, 62 para 4. See also *Roberts Claim (US v Mexico)* 1926 3 ILR 227.

⁴ It must be noted that the 'fair and equitable treatment' standard is one of the most commonly used standards in investment agreements of various kinds. See also R Kläger 'Fair and equitable treatment' in *International Investment Law* (2011).

⁵ *Glamis Gold Ltd v US* (2009) available at <http://www.state.gov/documents/organization/125798pdf> (accessed on 25 February 2014). See also *Cargill Inc v Mexico* 146 ILR 642 at 724–5.

⁶ See *Cargill* supra 724 para 284. See also KN Schefer *International Investment Law: Text, Cases and Materials* (2013) 328.

⁷ Kläger op cit 48–56.

⁸ See *ibid*, 53.

⁹ UN Doc A/CN.4/106 (1957) 113.

¹⁰ General Assembly Resolution 40/144 (13 December 1985).

- ¹¹ Ibid, art 5(1).
- ¹² Ibid, art 5(2).
- ¹³ See also K Hailbronner & J Gogolin ‘Aliens’ in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* Vol I (2012) 285 paras 12, 26; Dugard op cit 301; Crawford op cit 616.
- ¹⁴ Ahmadou Sadio Diallo (*Republic of Guinea v Democratic Republic of the Congo*) (Preliminary Objections) ICJ Reports 2007, 582 para 39.
- ¹⁵ E Jiménez de Aréchaga ‘General course in public international law’ *Recueil des Cours* (1978) I 279.
- ¹⁶ ICSID case no ARB(AF)/97/2 paras 102, 103.
- ¹⁷ Jiménez de Aréchaga op cit 281.
- ¹⁸ MM Whiteman *Digest of International Law* Vol 8 (1967) 861.
- ¹⁹ *Yeagar v Iran* (1987) 17 IRAN-US CTR 92 at 106.
- ²⁰ State practice suggests that the following may justify the expulsion of an alien: (1) entry in breach of the law; (2) breach of conditions of admission; (3) involvement in criminal activities; and (4) political and security considerations (W Kälin ‘Expulsion and deportation of aliens’ (October 2010) in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* Vol I (2012) 294 para B 7).
- ²¹ See also art 12(4) and (5) of the African Charter on Human and Peoples’ Rights (1983); and art 7 of the UN General Assembly’s Declaration on the Human Rights of Aliens; and General Assembly Resolution 40/144 (13 December 1985).
- ²² UN Doc CCPR/C/GC/32, 23 August 2007, para 9. See also *Ernst Zundel v Canada* Human Rights Committee Communication No 1341/2005, UN Doc CCPR/C/89/D/1341/2005, paras 6.7, 6.8; *Mario Esposito v Spain*, Human Rights Committee Communication No 1359/2005, UN Doc CCPR/C/89/D/1359/2005, para 7.6.
- ²³ UN Doc CCPR/C/GC/32 (23 August 2007) para 17.
- ²⁴ Ibid, paras 15, 16.
- ²⁵ Ibid, para 62.
- ²⁶ ILC Report 64th session, UN Doc A/67/10 (2012) Chapter IV.
- ²⁷ Ibid, draft art 1 and commentary at 18, 19.
- ²⁸ See for instance, Convention relating to the Status of Refugees (1951), art 32; International Covenant on Civil and Political Rights (1966), art 13; African Charter on Human and Peoples’ Rights (1981), art 12(4). Inter-American Convention on Human Rights (1969), art 22(6); Protocol 7 (1984) to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), art 1.
- ²⁹ ILC Draft Articles *supra*, draft art 3.
- ³⁰ Ibid, draft arts 4, 5.
- ³¹ Ibid, draft art 6. See also Convention relating to the Status of Refugees (1951), art 33.
- ³² See also Protocol No 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), art 4; African Charter on Human and Peoples’ Rights (1981), art 12(5); Inter-American Convention on Human Rights (1969), art 22(6).
- ³³ ILC Draft Articles *supra*, draft art 10.
- ³⁴ Ibid, draft art 11.
- ³⁵ Ibid, commentary at 36, 37.
- ³⁶ Ibid, draft art 12 and commentary at 39.
- ³⁷ Ibid, draft art 13.
- ³⁸ Ibid, draft arts 15–32.
- ³⁹ Communication 313/05.
- ⁴⁰ Ibid, para 169.
- ⁴¹ Ibid, para 170. See also *Rencontre africaine pour la défense des droits de l’homme v Zambia* African Commission on Human and Peoples’ Rights, Communication 71/92; *Zimbabwe Human Rights NGO Forum v Zimbabwe*, African Commission on Human and Peoples’ Rights, Communication 245/02.
- ⁴² Communication 313/05 *supra*, para 173.
- ⁴³ R Dolzer & C Schreuer *Principles of International Investment Law* 2nd ed (2012) 101; Schefer op cit 203.
- ⁴⁴ See Crawford op cit 617; Dolzer & Schreuer op cit 104–12 on illustrative case law.
- ⁴⁵ Schefer op cit 205.
- ⁴⁶ Ibid, 207; Dolzer & Schreuer op cit 121–3.
- ⁴⁷ See Dolzer & Schreuer op cit 130; M Paparinskas (ed) *Basic Documents on International Investment Protection* (2012) Doc nos 17–22.
- ⁴⁸ See Kläger op cit 116–19. See also Schefer op cit 188–9, ch 5.

- ⁴⁹ SADC (T) *Mike Campbell (PVT) Ltd and Others v Republic of Zimbabwe* Case No 2/2007, 48(3) ILM (2009) 534.
- ⁵⁰ Ibid, 539.
- ⁵¹ Ibid, 540–4.
- ⁵² Ibid, 544, 545.
- ⁵³ Ibid, 546.
- ⁵⁴ Ibid.
- ⁵⁵ Ibid, 547.
- ⁵⁶ See also section on diplomatic and consular protection in chapter 10.
- ⁵⁷ *LaGrand (Germany v United States)* ICJ Reports 2001, 466.
- ⁵⁸ Ibid, para 74.
- ⁵⁹ See also diplomatic protection discussed in chapter 10.
- ⁶⁰ *LaGrand* supra, paras 75, 78.
- ⁶¹ Ibid, para 76.
- ⁶² Ibid, para 77.
- ⁶³ *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ Reports 2004, 12.
- ⁶⁴ Ibid, para 63.
- ⁶⁵ Ibid, para 64.
- ⁶⁶ Ibid, para 85 and also 87.
- ⁶⁷ Ibid, para 88.
- ⁶⁸ *LaGrand* supra, para 124.
- ⁶⁹ Ibid, paras 125, 128(7).
- ⁷⁰ *Avena* supra, paras 122, 131, 138, 140.
- ⁷¹ Ibid, para 138.
- ⁷² Ibid, para 151.
- ⁷³ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* Inter-American Court of Human Rights (Advisory Opinion) OC-16/99, 1 October 1999.
- ⁷⁴ Ibid, para 113. See also VCLT, art 31(3); *Oil Platforms case (Iran v United States)* (Judgment) ICJ Reports 2003, 161 at 182 para 41.
- ⁷⁵ *Right to Information* supra, para 114.
- ⁷⁶ Ibid, para 115.
- ⁷⁷ Ibid, paras 122, 124.
- ⁷⁸ Ibid, para 137.
- ⁷⁹ See also CM Cerna ‘The right to consular notification as a human right’ 31(2) *Suffolk Transnational Law Review* (2008) 419, 436 *et seq.*
- ⁸⁰ US President’s memorandum of implementation reprinted in S McCaffrey, D Shelton & J Cerone *Public International Law: Cases, Problems and Texts* (2010) 205.
- ⁸¹ *Medellin v Texas* 128 S.Ct. 1346 (2008).
- ⁸² For literature on these issues, see inter alia J Townsend ‘*Medellin* stands alone: common law nations do not show a shared prostratification understanding of the ICJ’ 34(2) *Yale Journal of International Law* (2009) 463; ME McGuinness ‘Three narratives of *Medellin v Texas*’ 31(2) *Suffolk Transnational Law Review* (2008) 227; JF Murphy ‘*Medellin v Texas*: Implications of the Supreme Court’s decision for the United States and the rule of law in international affairs’ 31(2) *Suffolk Transnational Law Review* (2008) 247; JJ Paust ‘*Medellin, Avena*, the supremacy of treaties, and relevant executive authority’ 31(2) *Suffolk Transnational Law Review* (2008) 301.

Chapter 8

Extradition and deportation

GERHARD KEMP

8.1 Introduction

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8.4 Deportation

8.1 Introduction

Extradition and deportation both concern the removal of persons from the territory of a state. However, the function, legal frameworks and policy considerations underlying extradition and deportation are different.

The various issues (and controversies) discussed in this chapter are to a large extent the result of the particular function of extradition law as a criminal justice tool, and of extradition as a function of international relations and co-operation between states. Fundamentally, *extradition law and practice* are manifestations of state sovereignty, where sovereign states co-operate on the basis of agreement or comity in order to address criminal justice problems effectively.

Deportation shares with extradition the pre-eminence of state sovereignty (as an organising principle of the international legal order). Deportation furthermore shares with extradition the general position that states assert and control processes and access to their territory. These processes are, increasingly, subject to a broader normative framework informed by universal human rights and humanitarian considerations.

8.1.1 Extradition in general

Extradition is one of the modalities of co-operation in criminal matters between states. As such, it is a function of international relations between sovereign states. It is, however, also a function of the criminal justice system. Extradition law can therefore be situated at the interface between international law, international relations and criminal justice.

Gilbert defines extradition:

as a process whereby States provide to each other assistance in criminal matters. To achieve this international co-operation some form of arrangement, whether formal or informal, whether general or ad hoc, is necessary between the States involved. The arrangement may be based on a treaty, bilateral or multilateral, or on the application with respect to the

requesting State of the requested State's domestic extradition legislation. Regardless, some level of agreement must have been reached between the two States acknowledging that a fugitive might be surrendered given that certain prerequisites are met.¹

Although extradition is normally viewed as a function of the executive and as a practical manifestation of international relations between states, one should not overemphasise the international relations dimension of extradition. Dugard, for instance, puts the emphasis on the criminal justice dimension of extradition. The delivery or transfer of an accused or convicted offender from the territorial state to the requesting state is the primary aim of extradition.² Extradition as a function of international relations and of criminal justice respectively joins various considerations and interests that often make extradition a rather complex area of law. Central to this complexity is the fact that extradition is not just the co-operation between states in criminal matters in a mechanical or formal way; it always involves an individual accused or convicted person. The advent of human rights in international law and criminal justice has accordingly impacted on the development of extradition law and practice.

Under South African law, in addition to extradition, other modalities of international co-operation exist. These modalities are primarily provided for in the International Co-operation in Criminal Matters Act 75 of 1996. The aim of this Act is to 'facilitate the provision of evidence and the execution of sentences in criminal cases and the confiscation and transfer of the proceeds of crime between the Republic and foreign States; and to provide for matters connected therewith'.³

In addition to the modalities of co-operation provided for in the Act, section 27 of the Act provides for the more general power of the President to enter into agreements (bilateral or multilateral) with foreign states for purposes of co-operation in criminal matters. It is important to note that the Act is not a codification of all possible forms of co-operation between South Africa and foreign states in criminal matters, but exists rather to *facilitate* co-operation.⁴ On 25 May 2012, the Southern African Development Community Protocol on Mutual Legal Assistance in Criminal Matters became law in South Africa.⁵ This regional instrument provides for mutual legal assistance and is aimed at the 'broadest possible measure of mutual assistance in criminal matters between the states parties'. However, it does not apply to extradition.⁶

The International Co-operation in Criminal Matters Act is intended to facilitate co-operation between South Africa and other *states* – not between South Africa and other international bodies like the United Nations, or international courts and tribunals like the International Criminal Court (ICC). South Africa's co-operation with the ICC is governed by the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. The Implementation Act provides, *inter alia*, for the transfer of individuals from South Africa to the ICC,⁷ as well as for other forms of assistance to the ICC, including mutual legal assistance.⁸ The ICC is physically located in the Netherlands, but when South Africa receives a request to arrest and surrender an individual to the ICC, that process will be governed in terms of the procedures provided for in the Implementation of the Rome Statute Act, and not in terms of the Extradition Act. The surrender of the individual should thus not be viewed as an extradition process between South Africa and the Netherlands. There are two types of arrest provided for in the Implementation Act: one is based on an existing ICC arrest warrant; and one is based on a warrant issued by a South African magistrate upon request from the National Director of Public Prosecutions. After arrest, an individual to be surrendered to the ICC must be committed to prison pending the surrender.

8.1.2 Deportation in general

Like extradition, deportation is an executive function and a prime example of the way in which sovereign states assert their rights, which includes the right to refuse entry of foreigners⁹ and the right to deport foreigners.

As indicated above, extradition is primarily viewed as a function of the criminal justice system, but with considerable executive/foreign relations dimensions. Deportation (which is discussed below) also concerns the removal of persons from the territory of a state, but not primarily as a function of co-operation in criminal matters between states. Rather, deportation is an expression of the sovereign right to expel or deport undesirable persons, or persons who are not legally present in the territory of the state concerned. The right of states to expel or deport individuals is not an unfettered right, as is shown below. However, it can be said that extradition – as a function and extension of the criminal justice system in a transnational context – is arguably more regulated and subject to more safeguards in terms of individual rights than is the case with deportation. It is therefore not surprising that states from time to time try to circumvent the often-strict legal regimes governing extradition.

8.2 Disguised extradition

The abuse of deportation as a means to circumvent the strict requirements of extradition is also known as ‘disguised extradition’.

The practice of disguised extradition is generally condemned by international human rights courts as well as national courts. A clear international standard was set by the European Court of Human Rights (applying the European Convention on Human Rights) in *Bozano v France*.¹⁰ France could not lawfully extradite Mr Bozano to Italy, where he was convicted *in absentia* for a serious crime. French law prohibited extradition for purposes of enforcement of *in absentia* judgments. However, France proceeded to expel Bozano to Switzerland, from where he was eventually extradited to Italy. The European Court of Human Rights determined that this was a case of disguised extradition (by the French) in violation of the protections accorded to individuals under article 5 (the right to personal liberty) of the European Convention on Human Rights.

The practice of disguised extradition in the form of unlawful deportation was also firmly rejected by the South African Constitutional Court. In *Mohamed v President of the RSA*,¹¹ the Constitutional Court held that the South African government not only acted unlawfully by violating the Aliens Control Act of 1991, but also unconstitutionally when the applicant was deported to the United States. Mohamed was a suspect in a terrorism case to be tried in the United States; the case was thus one involving the real possibility of the death penalty upon conviction. Mohamed was not a national of the United States and could thus not legally be deported to that country. Indeed, the actions of the South African government amounted to disguised extradition, since the normal extradition procedures would probably cause too many obstacles, not least of which was the fact that there was the aforementioned possibility of the death penalty in the United States.

While the Constitutional Court set a clear standard regarding the unacceptable practice of disguised extradition, Dugard points out¹² that the South African authorities (notably the Department of Home Affairs) have not always followed the precedent set by the Constitutional Court. Dubious actions include cases where South Africa unlawfully deported individuals to countries with poor human rights records (including known practice of torture).

Disguised extradition is unacceptable for the legal and constitutional reasons highlighted above, but also from a broader policy perspective. In the era of ‘war on terror’, states (including liberal democracies) too easily limit or circumvent the safeguards provided by human rights and even

cynically ‘outsource’ harsh investigatory practices (including torture) to states that do not apply the same degree of human rights protections to individuals facing criminal investigations.¹³

Such practices undermine the rule of law and respect for human rights, while posing the challenge of how best to fight global criminal phenomena (notably transnational crime and terrorism).

8.3 Extradition under South African law

The process of extradition in South Africa is governed primarily by the provisions of the Extradition Act 67 of 1962. This Act, together with other relevant statutes and a considerable list of cases (including judgments by the Constitutional Court), form the body of extradition law.

The complexity and multidisciplinary nature of extradition is recognised by the courts. In *President of the Republic of South Africa v Quagliani*,¹⁴ the Constitutional Court (per Sachs J) described the nature of extradition proceedings as follows:

It involves three elements: acts of sovereignty on the part of two states; a request by one state to another state for the delivery to it of an alleged criminal; and the delivery of the person requested for the purposes of trial and sentencing in the territory of the requesting state.

Extradition law thus straddles the divide between state sovereignty and comity between states and functions at the intersection of domestic law and international law.

The above quote from the judgment in *Quagliani* underscores the fact that extradition is first and foremost a sovereign act between two states. It is necessary briefly to examine the nature of this aspect before the specific procedural aspects in terms of South African law are discussed.

Gilbert warns that extradition ‘should not be viewed as an arm of foreign policy.’ The author argues that ‘one aim of extradition laws is to provide for mutual assistance in criminal matters and the fugitive’s prosecution for his alleged crimes should override the general requirement that extradition relations should be reciprocal.’ Reciprocity ‘should go to the overall arrangement, not to specific cases or matters of procedure’.¹⁵ Two observations can be made in light of the Constitutional Court’s statement in *Quagliani* and the writings of Gilbert:

- international relations (including comity) between states govern the *general approach* to extradition requests between the requesting and the requested state; and
- individual requests are dealt with in terms of (a) the relations between the requesting state and the requested state (as pointed out above), and (b) the procedures and safeguards provided for in domestic frameworks such as the Extradition Act in South Africa.

It is important to look first at the international relations dimension. This is normally governed by bilateral or multilateral extradition treaties.

8.3.1 Extradition treaties

The Extradition Act 67 of 1962 provides for the extradition of individuals in terms of extradition agreements entered into by South Africa and other states.¹⁶ The Act further provides for the ratification and accession of these agreements by Parliament. The extradition agreements can be in the form of treaties or ad hoc agreements.¹⁷ It must be noted that South Africa does not have extradition treaties with all states, but does so with a significant number. An example is the bilateral treaty with the United States of America. Treaties are published in the *Government Gazette*.¹⁸ Multilateral extradition treaties are less common and can normally be found in regional contexts where the states of a certain region enter into a multilateral agreement that fits the particular needs

and processes best for the specific region. It may also happen that South Africa accedes to such a regional mechanism, primarily in order to avoid having to enter into bilateral agreements with each of the states in that particular region. Thus, for instance, in 2003 South Africa acceded to the European Convention on Extradition and the two protocols amending it.¹⁹ Since 2003, South Africa has been in the position to use this multilateral mechanism to co-operate with many European states.²⁰

The ‘international relations’ dimension of extradition, as exemplified by the existence of extradition agreements, might appear to be rather abstract and removed from the practical realities of the criminal justice system. Section 231 of the Constitution, 1996 provides for the entering into international agreements between South Africa and foreign states, as well as the agreements contemplated in sections 2 and 3 of the Extradition Act (referred to above). These need to become part of South African domestic law in order to have any meaningful role for purposes of the criminal justice system and co-operation in criminal matters between South Africa and foreign states.

The role, function and status of extradition agreements in South African law was addressed by the Constitutional Court in the *Quagliani* case.²¹ In this case, the extradition agreement between South Africa and the United States, and the question whether an extradition agreement between South Africa and a foreign state (such as the United States) needs to be enacted as such (that is, as a separate Act of Parliament) was considered by the Constitutional Court. The court held as follows:

It is clear that if the procedure stipulated in sections 2 and 3 of the [Extradition] Act, as well as section 231(1) and (2) of the Constitution is followed, an extradition agreement creates a binding international law obligation on South Africa. The question then is whether the Agreement ‘becomes law’ in South Africa as contemplated by section 231(4) of the Constitution. There are two ways in which this question can be answered. The first is to say that the Agreement itself does not become binding in domestic law, but the international obligation the Agreement encapsulates is given effect to by the provisions of the Act. The second approach is that once the Agreement has been entered into as specified in sections 2 and 3 of the Act, it becomes law in South Africa as contemplated by section 231(4) of the Constitution without further legislation by Parliament. It is not necessary for the purpose of this case to decide which of these approaches is correct, for their effect in this case is the same. Either the Agreement has ‘become law’ in South Africa as a result of the prior existence of the Act which constitutes the anticipatory enactment of the Agreement for the purposes of section 231(4) of the Constitution. Or the Agreement has not ‘become law’ in the Republic as contemplated by section 231(4) but the provisions of the Act are all that is required to give domestic effect to the international obligation that the Agreement creates ... [On] either of the approaches identified above, no further enactment by Parliament is required to make extradition between South Africa and the United States permissible in South African law.²²

The approach of the Constitutional Court in *Quagliani* is not without controversy. Some argue that the practical implementation of extradition agreements affects the rights of individuals (the persons to be extradited). The procedures and processes therefore need to be provided for very specifically in terms of domestic legislation incorporating the terms of the relevant extradition agreements. The Extradition Act and the Constitution only provide for the *general* framework. However, others point out that the Constitution and the Extradition Act provide for enough safeguards in order to protect the rights of the individual, while at the same time allowing South Africa to fulfil its international obligations and to co-operate effectively in criminal matters with other states.²³

8.3.2 Extradition procedure

Extradition procedure under South African law may be divided into two distinct categories. Which of the categories will apply depends largely on whether the other state is regarded as an *associated state* or a *foreign state*.

8.3.2.1 Associated states: the regional dimension

One of the characteristics of regional integration, or close regional, political and economic relations between states, is the potential for good and effective co-operation in criminal matters between states. In their dealings with each other for these purposes, such states in a particular region are ‘associated states’. A good example is the states in the southern African region, which also share membership in a regional association, the Southern African Development Community (SADC). The latter is also a generator of regional instruments aimed at better co-operation in criminal matters. Two relevant examples are the Southern African Development Community Protocol on Extradition²⁴ and the Southern African Development Community Protocol on Mutual Legal Assistance in Criminal Matters.²⁵

As mentioned, in some regions of the world, states enter into agreements to make co-operation easier and even to do away with many of the formalities associated with extradition and mutual legal assistance. In Europe, for instance, due to political and economic integration and the relatively free movement of people within the European Union,²⁶ it no longer makes sense for states to follow strict and cumbersome extradition procedures. In a highly integrated region like Europe, therefore, there has been a movement away from bilateral extradition processes towards the creation of a so-called common legal area where the region of Europe is viewed as one legal area for purposes of criminal investigations and law enforcement. In terms of article 2 of *Eurojust Decision 2002/187*, one of the objectives of Eurojust is to ‘improve co-operation between the competent authorities of the Member States, in particular, by facilitating the execution of international mutual legal assistance and the implementation of extradition requests’.²⁷ The emphasis is no longer on the international relations dimension (the state-to-state extradition requests), but is on law enforcement agencies in the various states communicating *directly* with each other in their investigations and requests for assistance, including extradition.

After the end of apartheid, South Africa and the other states in the Southern African region have enjoyed generally good relations. This, together with more pragmatic considerations, makes possible the fact that a more expeditious procedure is followed with respect to extradition requests between South Africa and its neighbours in the region.²⁸ The SADC Protocol on Extradition, 2002, also encourages greater co-operation between states in the region. The main feature of the more expeditious extradition procedure is comparable to the co-operation model in Europe, as mentioned above. Thus, the Extradition Act provides that the requesting state does not have to submit an extradition request via political or diplomatic channels. Rather, a warrant for the arrest of the relevant individual (fugitive, suspect or accused person) can be submitted directly to the Director of Public Prosecutions having jurisdiction. The request must be accompanied by a statement with details about the crime and *prima facie* evidence of the individual’s guilt. A magistrate then has the statutory authority to endorse the warrant for execution in South Africa.²⁹ The individual has the right to appeal to the High Court before the surrender to the associated state.³⁰

8.3.2.2 Extradition requests from foreign states

Unlike the more expeditious extradition procedures for requests from associated states, the procedures for purposes of requests from foreign states are still done through diplomatic channels, with a strong (albeit not exclusive) role for the executive. The process has been described as *sui*

generis and as a mixture of criminal procedure and executive/diplomatic action by the state.³¹ ‘Foreign states’ are those states that are not associated states.

First, the Minister of Justice receives the extradition request from the foreign state via diplomatic channels.³² The Minister then proceeds to inform a magistrate.

The second phase of the process is before the magistrate. The magistrate issues a warrant of arrest. The individual fugitive is arrested in terms of the warrant and is detained in order for a formal extradition hearing to be conducted before the magistrate in terms of section 9 of the Extradition Act. This hearing is conducted in the same manner in which a preparatory criminal examination in terms of Chapter 20 of the Criminal Procedure Act 51 of 1977 is conducted.³³ The primary aim of this examination is to establish whether the individual is extraditable and whether there is sufficient evidence to warrant a prosecution for the crime in the requesting state.³⁴ After the extradition hearing before the magistrate, the magistrate furnishes the Minister of Justice with a report stating whether there is sufficient evidence to warrant a prosecution in the requesting state. The magistrate may also order the further detention of the individual concerned, or his or her discharge, pending the extradition.

The third phase of the process can be described as executive in nature (unlike the second phase, which is predominantly judicial in nature, given the role of the magistrate). In this phase of the process, the Minister of Justice must make the ultimate decision whether or not to extradite the individual. The Minister may order or refuse surrender of the individual to the requesting state.³⁵

The Extradition Act provides for a number of circumstances where the Minister may refuse the surrender of an individual, or not before the expiration of a period fixed by the Minister. These include:

- where criminal proceedings against such person are pending in South Africa, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served;
- where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;
- if the Minister is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would, having regard to the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or
- if the Minister is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign state by reason of his or her gender, race, religion, nationality or political opinion.

It is thus clear that the Minister of Justice has a fair degree of discretion to refuse extradition requests – even in cases where the request would otherwise satisfy the formalities in terms of the Extradition Act. The discretionary grounds mentioned in section 11 of the Extradition Act include human rights concerns, and the political offence exception to extradition. These issues are discussed in more detail below.

8.3.3 Specific issues in extradition law from a South African perspective

It was noted above (in paragraph 8.1.1) that extradition law can be situated at the interface between international law, international relations and criminal justice. Extradition law is thus a complex

body of law that attempts on the one hand to find the right balance between demands for effective co-operation between states, and, on the other, due process and respect for individual human rights. Below are some of the main issues in extradition law that have emerged internationally, viewed from a South African perspective.

8.3.3.1 Double criminality

Extradition treaties often provide for double criminality as a requirement for extradition.³⁶ There are basically two different models of double criminality.

In terms of the *enumerative model*, the treaty or extradition framework will contain a list of all crimes for which extradition may be granted. This model is diminishing in use internationally,³⁷ notably because of its impracticality.

The more practical, realistic, and therefore more popular model internationally is the *eliminative model* of double criminality. This model, which is also followed by South Africa, defines extradition crimes with reference to a threshold or minimum penalty.³⁸ Thus, section 1 of the Extradition Act defines an ‘extraditable offence’ as:

any offence which in terms of the law of the Republic and of the foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more, but excluding any offence under military law which is not also an offence under the ordinary criminal law of the Republic and of such foreign State.

The test for whether the crimes correspond in South Africa and the requesting foreign state respectively is a substantive test. The crimes do not have to carry the same names. They must substantially share the same elements.³⁹ The relevant date for determination of whether double criminality exists is the date of the extradition request.⁴⁰

8.3.3.2 Human rights

It was noted above that the Minister of Justice may refuse extradition on a number of grounds, including where the Minister is satisfied that the individual concerned ‘will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion’.⁴¹ Some argue that this provision is ‘too limited in scope to constitute a general human rights exception to extradition’.⁴² While the Extradition Act provides for some human rights considerations (albeit not a wide or general exception), the Constitutional Court has made it clear that, in co-operation in criminal matters, where there is a possibility that the requesting state might impose the death penalty, the South African government has a *duty* either not to extradite or to obtain assurances that the death penalty will not be imposed with respect to the extradited individual.

In *Mohamed v President of the RSA (Society for the Abolition of the Death Penalty in SA intervening)*, the Constitutional Court held as follows:

For the South African government to co-operate with a foreign government to secure the removal of a fugitive from South Africa to a country of which the fugitive is not a national and with which he had no connection other than that he is to be put on trial for his life there, is contrary to the underlying values of our Constitution. It is inconsistent with the government’s obligation to protect the right to life of everyone in South Africa, and it ignores the commitment implicit in the Constitution that South Africa will not be a party to the imposition of cruel, inhuman or degrading punishment.⁴³

While the facts in the *Mohamed* case concerned the *unlawful deportation* (‘disguised extradition’) of a man to the United States where he would face terrorism charges and the possibility of the death

penalty, the principle as formulated by the Constitutional Court has clear implications for extradition law.

Any doubt about the impact of the possible imposition of the death penalty by the requesting state on South African extradition law was removed by the Constitutional Court in *Minister of Home Affairs and Others v Tsebe and Others*.⁴⁴ This case concerned an extradition request from Botswana. The fugitives were sought to stand trial on murder charges and could have faced the death penalty. An important issue in the case was whether the South African government was allowed to extradite or deport an individual in the absence of an assurance by the requesting state that the death penalty would not be imposed. With reference to the facts and context of this case, the Constitutional Court noted that there exists an extradition treaty between Botswana and South Africa. Article 6 of this bilateral treaty provides that extradition may be refused ‘if under the law of the requesting Party the offence for which extradition is requested is punishable by death and if the death penalty is not provided for such offence by the law of the requested Party’.

Furthermore, the court also noted that Botswana and South Africa are both parties to the SADC Protocol on Extradition. This instrument provides that a requested state may refuse an extradition request if ‘the offence for which extradition is requested carries a death penalty under the law of the requesting State, unless that State gives such assurance, as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out’. The bilateral and regional instruments thus provide some guidance, but couched in discretionary language. The South African government submitted that its only duty was to *seek an assurance* that the death penalty would not be imposed – not to *obtain the assurance*. This rather ‘minimalist’ view⁴⁵ of the government’s constitutional duty was rejected by the Constitutional Court. The court confirmed the principle as articulated in the *Mohamed* case and held that the government has a duty not to deport, extradite or transfer a person sought by the requesting state in the absence of an *assurance* that the death penalty would not be imposed or executed.⁴⁶

It must be noted that the Constitutional Court’s position regarding extradition and the (possible) imposition of the death penalty by the requesting state is in line with comparative human rights law.⁴⁷ The European Court of Human Rights,⁴⁸ the Supreme Court of Canada,⁴⁹ the Italian Constitutional Court⁵⁰ (to name but a few) have pronounced on this issue and have come out in favour of the view that the requested state should, as a matter of principle, not extradite an individual to the requesting state where there is the possibility of the imposition of the death penalty.

While the extradition and death penalty issue seems to be settled in South Africa, the question remains whether there is (or should be) a more *general* human rights exception to extradition. The Extradition Act itself contains a rudimentary human rights exception (section 11(b)(iv) of the Act). This, together with the jurisprudence of the Constitutional Court as briefly discussed above, may be regarded as pointers toward a general human rights exception. Some suggest that the Constitutional Court’s view on extradition and the death penalty must be seen as support for the argument that extradition can be refused in instances where other constitutional rights are implicated; there is no reason for the right to life to be singled out.⁵¹ Others, however, warn against the unintended consequences of too broad a human rights exception to extradition. They point out that international co-operation in criminal matters may suffer as a result of refusal of extradition ‘in a wide range of situations’. A balanced approach is thus advocated.⁵²

8.3.3.3 The risk of torture

The Prevention and Combating of Torture of Persons Act 13 of 2013 entered into force on 29 July 2013. This Act aims to give effect to South Africa’s obligations in terms of the United Nations

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.⁵³ Section 8 of the Prevention of Torture Act provides as follows:

- (1) No person shall be expelled, returned or extradited to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.
- (2) For the purpose of determining whether there are such grounds, all relevant considerations must be taken into account, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The principle espoused in the UN Torture Convention, and as incorporated in South African law via the Prevention of Torture Act, can also be linked to the principle in conventional and customary international law known as *non-refoulement*. In terms of this principle, a state is prohibited from extraditing, deporting or returning a person to a state where there is a risk that his or her rights will be violated (in particular the right not to be subjected to torture or cruel and unusual punishment). A number of international and regional instruments dealing with various aspects of international refugee law, international humanitarian law, international criminal law, and international human rights law provide for the principle of *non-refoulement* in some way or another.⁵⁴ Clearly, the modern understanding is that *non-refoulement* forms part of the body of international human rights law and should therefore serve as an important normative check on extradition law and practice.⁵⁵

Given the international prohibition of torture, and the number of international and regional instruments that contain some or other form of the principle of *non-refoulement*, it is perhaps not unreasonable to argue that the principle of *non-refoulement* has attained *jus cogens* status. However, it is clear from case law and state practice that many states reserve the right to take into account such considerations as state security and the fight against transnational and international crimes, especially terrorism, when deciding on extradition matters. In this sense, one can say that the general principle of *non-refoulement* is qualified by considerations of state security and the fight against international crimes like terrorism. *Non-refoulement* thus appears not to be an absolute norm, at least not in terms of international state practice.

The international fight against terrorism, in particular, appears to cause some difficult legal and moral problems in terms of the application of the principle of *non-refoulement*. For instance, the European Court of Human Rights, in *Othman (Abu Qataba) v The United Kingdom*,⁵⁶ delivered a decision on the circumstances in which it may be permissible under the European Convention on Human Rights to expel an individual to a state (where there is evidently widespread torture practised) on the basis of diplomatic assurances that torture will not be inflicted. In this matter, the individual concerned was Abu Qataba, a radical Islamic cleric who at the time resided in the United Kingdom. In fact, he had been residing in the United Kingdom since 1993. He was a refugee from the Kingdom of Jordan, where he was subjected to torture in detention on various occasions. He was granted asylum in the United Kingdom. Despite this, the United Kingdom still regarded Abu Qataba as a dangerous individual and as a security risk and wanted to extradite him to Jordan. The court considered the status and effect of bilateral assurances obtained from the requesting state (Jordan), and held that despite consistent reports of the existence of widespread and routine practice of torture in Jordan, the United Kingdom was not precluded from seeking to rely on assurances as to the individual's treatment while in custody or on trial in Jordan.⁵⁷

It would appear that section 8 of South Africa's Prevention of Torture Act is a firm and unqualified statement of the principle of *non-refoulement*. The letter and spirit of the Act, taken together with Constitutional Court jurisprudence on extradition and human rights (discussed above), suggest that extradition, deportation, and return of an individual should generally not be allowed by South Africa where there is evidence of a real risk of torture in the requesting or

receiving state. Ultimately, any extradition or deportation decision will have to be considered in light of the clear normative framework of the Constitution, relevant statutes, as well as South Africa's international obligations.

8.3.3.4 The ‘political offence exception’ and crimes of terrorism

Section 15 of the Extradition Act provides for the so-called ‘political offence exception’ to extradition. The section provides as follows:

The Minister [of Justice] may at any time order the cancellation of any warrant for the arrest of any person issued or endorsed under this Act, or the discharge from custody of any person detained under this Act, if he is satisfied that the offence in respect of which the surrender of such person is or may be sought, is an offence of a political character or that the surrender of such person will not be sought.

The operation of section 15 is qualified by section 22 of the Extradition Act, which provides: **a request for extradition based on the offences referred to in section 4 or 5 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004, may not be refused on the sole ground that it concerns a political offence, or an offence connected with a political offence or an offence inspired by political motives.**

These two provisions of the Terrorism Act provides for offences associated or connected with the financing of terrorist offences, and offences relating to explosive or other lethal devices. The usefulness of the political offence exception in light of the qualification provided for in section 22 of the Extradition Act seems to be questionable – especially in light of the broad notion of terrorism and the fading rationales that were historically put forward to justify the political offence exception to extradition. Nevertheless, the exception is still provided for in the Extradition Act.⁵⁸ Van den Wyngaert identifies three arguments or rationales that underpin the political offence exception:

(1) [T]he *political argument* that States should remain neutral vis-à-vis political conflicts in other States and that therefore extradition of political opponents is to be *a priori* refused; (2) the *moral argument*, based on the premise that resistance to oppression is legitimate and that political crimes can therefore be justified; and (3) the *humanitarian argument*, whereby a political offender should not be extradited to a State in which he risks an unfair trial.⁵⁹

8.3.3.5 The principle of speciality

Section 19 of the Extradition Act provides for the principle of speciality. In terms of this principle, a requesting state may not prosecute an extradited person for offences committed before the extradition and for which the extradition was not sought.⁶⁰ South African courts have interpreted this provision to mean that extradited individuals should only be prosecuted for those offences for which they have been extradited – that is, for those offences for which extradition has been *requested* and *granted*. In *S v Stokes*, the court held as follows:

[The] word ‘sought’ in s 19 could not have been intended to mean anything other than ‘successfully sought’. This is so because extradition may have been sought in respect of offences A, B and C and may have been granted only in respect of offence A. To interpret ‘sought’ so as to mean only ‘sought’ and not ‘successfully sought’ would have the anomalous result that, in terms of the section, the fugitive may be prosecuted in respect of offences B and C without the consent of the requested State or the fugitive, whereas the section specifically requires such consent in respect of offences other than offences A, B and C. To interpret ‘sought’ so as to relate to offences for which extradition was required but not disclosed to the requested State or to the fugitive would have an equally anomalous result.⁶¹

8.4 Deportation

The international legal and political system is (still) dominated by sovereign states, and, as a general rule, states tend to protect their national interests and their sovereignty and territorial integrity. One manifestation of this is that states normally reserve the right to refuse entry of non-nationals. States can also expel non-nationals. This is known as deportation (as opposed to extradition, which as we have seen above, has a different rationale). Deportation is a ‘unilateral act of the deporting State to remove a foreigner, who has no right or entitlement to be in its territory’.⁶²

Deportation (or expulsion) is not an absolute or unfettered right of states.⁶³ There are various norms and principles that impact on the modern practice of deportation and expulsion as is clear from chapter 7 of this book on the international standard for the treatment of aliens. The point of departure is that individuals who are subject to deportation should not be mistreated.⁶⁴ Furthermore, article 13 of the International Covenant on Civil and Political Rights provides that individuals who are subject to deportation are entitled to submit reasons as to why they should not be deported and to have their cases reviewed by a competent authority – ‘except where compelling reasons of national security otherwise require’.⁶⁵ There is no closed list of possible reasons against deportation. Typical reasons include: fear of torture or human rights abuses upon return to the country of origin; access to family members in the country of visitation; and medical and general humanitarian reasons. Purely economic reasons (for instance lack of job opportunities in the country of origin) are generally not regarded as good enough reasons against deportation.

South Africa follows international practice and asserts the right to admit and deport aliens.⁶⁶ At the same time, case law makes it clear that deportation must be done in a ‘humanitarian manner’.⁶⁷ Deportation law and practice in South Africa have also been influenced by the Constitution and the Bill of Rights and other legislative frameworks.⁶⁸ Thus, while the Bill of Rights reserves certain rights for citizens of South Africa⁶⁹ (for instance section 21(3) and (4) – the right to enter and reside in the Republic and the right to a passport), the protection of the Bill of Rights and human rights jurisprudence also impact on the position of non-nationals and the law and practice of deportation.⁷⁰

Deportation law and practice in South Africa is governed primarily by the provisions of the Immigration Act 13 of 2002. This Act gives content and structure to the norms and values with regard to deportation in a humane and human rights-friendly way. In terms of the Immigration Act, the Minister of Home Affairs (or his or her delegate) has the power to deport foreigners from South Africa.⁷¹

SUGGESTED FURTHER READING

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- SD Bedi *Extradition* Buffalo, NY: WS Hein & Company (2001)
- C Nicholls, C Montgomery & J Knowles *The Law of Extradition and Mutual Assistance* 3rd ed Oxford: Oxford University Press (2013)
- A Sambei & JRWD Jones *Extradition Law Handbook* Oxford: Oxford University Press (2005)
- I Zanotti *Extradition in Multilateral Treaties and Conventions* Leiden: Martinus Nijhoff (2006)
- BM Zimmer (ed) *Extradition and Rendition: Background and Issues* Huntington, NY: Nova Science Publishers (2011)
- 1 G Gilbert *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* (1998) 27.
- 2 J Dugard *International Law: A South African Perspective* 4th ed (2011) 214 fn 2.
- 3 See long title of Act 75 of 1996.
- 4 *Thatcher v Minister of Justice and Constitutional Development and Others* 2005 (1) SACR 238 (C) at para 50; E Du Toit et al *Commentary on the Criminal Procedure Act* (1987) (Loose-Leaf) Revised and updated Biannually (Revision Service 54, 2015) App B42D.
- 5 *Government Gazette* 35368 GN 406 (25 May 2012).
- 6 Du Toit et al op cit, App B42D.
- 7 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, ss 8 and 9.

⁸ For a discussion, see Du Toit et al op cit, App B59–App B60. See also the order issued by the high court in *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and others*, Case No 27740/15, 15 June 2015 (HCGP). A full bench of the high court ordered the respondents to take all reasonable steps to prepare to arrest Omar al Bashir, the President of Sudan and to detain him, pending a formal request for his surrender to the ICC. Al Bashir, who at the time of writing was the sitting president of Sudan, is sought by the ICC on charges of genocide, war crimes and crimes against humanity. A first warrant for his arrest (relating to the charges of crimes against humanity and war crimes) was issued by the ICC on 4 March 2009. A second warrant of arrest, for charges of genocide, was issued by the ICC on 12 July 2010. During June 2015, Al Bashir visited South Africa to attend a summit of the African Union (AU) held in Johannesburg. Government officials insisted that Al Bashir was immune from arrest due to his attendance of an official AU event. However, the high court evidently disagreed and ordered his arrest. President Bashir was ultimately not arrested because he left the country, even though the court order explicitly stated that a failure to arrest and/or detain President Bashir would be inconsistent with the Constitution, 1996. On 24 June 2015, the court gave reasons for its decision of 15 June. In essence, the court based its decision not only on the Constitution, but also on South Africa's obligations in terms of the Rome Statute of the ICC (a multilateral treaty of which South Africa is a state party) as well as the relevant provisions of the Implementation of the Rome Statute of the ICC Act, 2002.

⁹ This right must be viewed in the context of other relevant areas, including human rights law and refugee law. For general comments, see JC Hathaway (ed) *Reconceiving International Refugee Law* (1997).

¹⁰ *Bozano v France* 9990/82, decision of 15 May 1984 DR 39, 119. For a discussion, see C van den Wyngaert 'Applying the European Convention on Human Rights to extradition: Opening Pandora's box?' 39(4) *International and Comparative Law Quarterly* (1990) 757 at 774.

¹¹ *Mohamed and Another v President of the RSA and Others (Society for the Abolition of the Death Penalty in SA intervening)* 2001 (2) SACR 66 (CC); also discussed in para 8.3.3.2 below on extradition and human rights.

¹² Dugard op cit 233.

¹³ On the practice of unlawful or extraordinary rendition, see D Weissbrodt & A Bergquist 'Extraordinary rendition and the Torture Convention' 46(4) *Virginia Journal of International Law* (2006) 585. Extraordinary rendition is typically the practice by which states abduct terrorism suspects abroad and transfer them to third countries where they are likely to be tortured or in other ways violated.

¹⁴ *President of the Republic of South Africa and Others v Quagliani, and Two Similar Cases* 2009 (2) SA 466 (CC) at para 1.

¹⁵ Gilbert op cit 32.

¹⁶ Sections 2 and 3 of the Extradition Act 67 of 1962.

¹⁷ For a discussion, see Dugard op cit 214–18; Du Toit et al op cit, App B16–App B17.

¹⁸ For the bilateral treaty with the United States, see *Government Gazette* 22430 (29 June 2001).

¹⁹ *Government Gazette* 24872 (13 May 2003).

²⁰ See further Du Toit et al op cit, App B15–App B16.

²¹ Supra.

²² *Quagliani* supra at paras 46–8.

²³ For more on the debate, see Du Toit et al op cit, App B16–App B17. See also the observations by the Constitutional Court in *Geuking v President of the Republic of South Africa and Others* 2003 (1) SACR 404 (CC) at para 1.

²⁴ The Protocol was signed in 2002 and entered into force on 1 September 2006. In *Minister of Home Affairs and Others v Tsebe and Others* 2012 (5) SA 467 (CC), the Constitutional Court took note of the fact that South Africa is a party to the SADC Extradition Protocol.

²⁵ The Protocol entered into force on 1 March 2007. It became law in South Africa by notice in *Government Gazette* 35368 (GN 406, 25 May 2012).

²⁶ The Schengen Agreement, to which many but not all the members of the European Union belong, provides for the transiting of individuals from one state to another (within the Schengen area) without border controls. For the text of the agreement, see <http://eur-lex.europa.eu/en/treaties/new-2-26.htm> (accessed 15 December 2013).

²⁷ For further discussion, see A Klip *European Criminal Law: An Integrative Approach* (2009) 401–4.

²⁸ For a discussion, see Dugard op cit 231.

²⁹ Extradition Act, 1962, s 6.

³⁰ Extradition Act, 1962, s 13.

³¹ Du Toit et al op cit, App B17 & App B18. The difference between a domestic criminal process and an extradition request has been described by the court in *Minister of Justice and Another v Additional Magistrate, Cape Town* 2001 (2) SACR 49 (C) at 62a–b, as follows: 'In a criminal matter, the *lis* [dispute or issue] between the State and the accused is whether or not he or she is guilty of the crime of which he or she is accused. The

cardinal question in an extradition enquiry under ss 9 and 10 [of the Extradition Act] ... is whether, in the case where the person whose extradition has been requested is accused of an offence committed in a foreign state, there is sufficient evidence to warrant a prosecution for the offence in the state concerned.'

³² As pointed out above, this is the main difference between the extradition requests received from associated states and foreign states respectively.

³³ *Garrido v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2007 (1) SACR 1 (SCA) at para 24.

³⁴ Extradition Act, 1962, s 10; *S v McCarthy* 1995 (2) SACR 157 (A) at 168j–169b; *Harksen v Attorney-General, of the Province of the Cape of Good Hope and Others* 1998 (2) SACR 681 (C) at 698i; *Harksen v Director of Public Prosecutions, Cape of Good Hope, and Another* 1999 (2) SACR 272 (C) at 282e–h; *Director of Public Prosecutions, Witwatersrand v Paz and Another* 2000 (1) SACR 467 (W).

³⁵ Extradition Act, 1962, s 11.

³⁶ See for instance art 2.1 of the European Convention on Extradition, to which South Africa has acceded.

³⁷ Gilbert op cit 84–85; Du Toit et al op cit, App B20.

³⁸ Du Toit et al op cit, App B20.

³⁹ *Geuking v President of the Republic of South Africa and Others* 2003 (1) SACR 404 (CC) at para 45; *Bell v S* [1997] 2 All SA 692 (E) at 699b–c; *Harksen v President of the Republic of South Africa and Others* 1998 (2) SA 1011 (C) at 1038H–I; *Palazzolo v Minister of Justice and Constitutional Development and Others* (unreported, WCC case no 4731/2010, 14 June 2011) para 30.

⁴⁰ Dugard op cit 220; Du Toit et al op cit, App B20–App B20A. These academic commentators correctly submit that the court in *Palazzolo v The Minister of Justice and Constitutional Development* supra was wrong to determine the date for double criminality as the date of the alleged offence, and not the date of the extradition request.

⁴¹ See para 8.3.2.2 above on extradition requests from foreign states; Extradition Act, 1962, s 11(b)(iv).

⁴² Du Toit et al op cit, App B20B.

⁴³ *Mohamed v President of the RSA* supra, para 58.

⁴⁴ 2012 (5) SA 467 (CC).

⁴⁵ Du Toit et al op cit, App B20C.

⁴⁶ *Minister of Home Affairs and Others v Tsebe and Others* supra, para 74; Du Toit et al op cit, App B20C – App B20D.

⁴⁷ See in general WA Schabas ‘Indirect abolition: Capital punishment’s role in extradition law and practice’ 25(3) *Loyola of Los Angeles International and Comparative Law Review* (2003) 581.

⁴⁸ *Soering v the United Kingdom* (1989) 11 EHRR 439.

⁴⁹ *United States v Burns* [2001] 1 SCR 283, 2001 SCC 7.

⁵⁰ *Venezia v Ministero di Grazia e Giustizia* 79 Rivista di Diritto Internazionale 815 (1996).

⁵¹ See, for instance, M du Plessis ‘The extra-territorial application of the South African Constitution’ 120(4) *South African Law Journal* (2003) 797. In the context of other forms of international co-operation in criminal matters (including mutual legal assistance), see G Kemp ‘Foreign relations, international co-operation in criminal matters and the position of the individual’ 16(3) *South African Journal of Criminal Justice* (2003) 370; G Kemp ‘Mutual legal assistance in criminal matters and the risk of abuse of process: A human rights perspective’ 123(4) *South African Law Journal* (2006) 730.

⁵² J Dugard & C van den Wyngaert ‘Reconciling extradition with human rights’ 92(2) *American Journal of International Law* (1998) 187.

⁵³ Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 23(5) *International Legal Materials* (1984) 1027.

⁵⁴ For instance, the UN Convention relating to the Status of Refugees (1951); UN Convention Against Torture (1984); UN Model Treaty on Extradition (1990); European Convention on the Protection of Human Rights and Fundamental Freedoms (1950); American Convention on Human Rights (1969); African Charter on Human and Peoples’ Rights (1981); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949).

⁵⁵ See UN Human Rights Committee, General Comment 20, Article 7 (U.N. Doc. HRI/GEN/1/Rev.6 at 151, 1992) para 9: ‘In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.’

⁵⁶ *Othman (Abu Qataba) v The United Kingdom* [2012] ECHR (ECHR case no 8139/09, 17 January 2012).

⁵⁷ Ibid, para 194.

⁵⁸ For a brief discussion, see Du Toit et al op cit, App B20E–App B21.

⁵⁹ C van den Wyngaert ‘The political offence exception to extradition: How to plug the “terrorists’ loophole” without departing from fundamental human rights’ 19 *Israel Yearbook on Human Rights* (1989) 297 at 298 [emphasis in the original].

⁶⁰ Du Toit et al op cit, App B20F-1 – App B20F-2.

⁶¹ *S v Stokes* 2008 (2) SACR 307 (SCA) para 10.

⁶² *Jeebhai and Others v Minister of Home Affairs and Another* 2009 (5) SA 54 (SCA) para 20.

⁶³ See OHCHR Discussion paper ‘Expulsions of aliens in international human rights law’ Geneva, September 2006, available at <http://www2.ohchr.org/english/issues/migration/taskforce/docs/Discussion-paper-expulsions.pdf> (accessed 18 December 2013).

⁶⁴ Dugard op cit 299.

⁶⁵ Ibid.

⁶⁶ *Tshwete v Minister of Home Affairs* 1986 (2) SA 240 (E); *Xu v Minister van Binnelandse Sake; Tsang v Minister van Binnelandse Sake* 1995 (1) SA 185 (T).

⁶⁷ See Dugard op cit 299; *S v Nyimbili; S v Mutembe* 1969 (2) SA 242 (N); *S v Mweetwa* 1973 (1) SA 40 (C).

⁶⁸ See also discussion on extradition and human rights, and extradition and torture, above.

⁶⁹ See, in general, I Currie & J de Waal *The Bill of Rights Handbook* 6th ed (2013) 442–50.

⁷⁰ See for instance, *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) on the detention of illegal aliens prior to deportation.

⁷¹ Dugard op cit 354; *Ulide v Minister of Home Affairs and Another* 2009 (4) SA 522 (SCA); *Jeebhai and Others v Minister of Home Affairs and Another* 2009 (5) SA 54 (SCA).

Chapter 9

Refugees

HENNIE STRYDOM

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9.1 Asylum and state sovereignty

The forced movement of large numbers of people across state borders has become an integral part of the modern world and a matter of concern for the international community as a result of the

associated socio-economic and political consequences, especially for states at the receiving end. Global migration patterns of this kind are becoming increasingly complex. People may decide to leave their country of origin to settle elsewhere for a wide variety of reasons – including economic hardship and a search for a better life, armed conflict, generalised violence, political instability, famine, natural disasters, or personal persecution. The global migration thus involves different categories of people. In this chapter, the discussion is limited to the legal status and protection of refugees.

Strictly speaking, in international law, the term ‘refugee’ refers to a person who has experienced persecution in his or her country of origin and who, fearing for his or her life and well-being, has decided to seek refuge in another country. Such a person has the *right to seek and enjoy* asylum from persecution in another state.¹ However, the receiving state has no unqualified duty to allow an asylum seeker into its territory. As explained in chapter 7 on the treatment of aliens, it is an inherent right of a sovereign state to forbid the entrance of foreigners, or to allow them entry on such conditions as it may deem necessary. However, the exercise of this power cannot be totally free from legal constraints. One of the most well-known scholars in the field made this assessment:

The movement of people between states, whether refugees or ‘migrants’, takes place in a context in which sovereignty remains important ... Like every sovereign power, this competence must be exercised within and according to law, and the state’s right to control the admission of non-citizens is subject to certain well-defined exceptions in favour of those in search of refuge.²

The legal protection afforded refugees may derive from international as well as national law. The international law component, explained below, comprises primarily treaty law, customary law and international human rights law principles. At the national level, state obligations in respect of the treatment of refugees in the receiving state are determined by constitutional and administrative law principles including those human rights guarantees to which *every person* (even non-nationals) are entitled.³ What follows is a brief explanation of the main international law developments in this area.

9.2 The Office of the UN High Commissioner for Refugees (UNHCR)

The establishment by the UN General Assembly in 1950 of the UNHCR came about as a result of the displacement of large numbers of Europeans during World War II. The Office, which came into being on 1 January 1951, was given the mandate to provide international protection to refugees and to seek permanent solutions for the problem of refugees, by assisting governments to facilitate the voluntary repatriation of refugees or their assimilation within new national communities.⁴

In 1956, the UNHCR faced its first major emergency as a result of the outpouring of refugees when Soviet forces crushed the Hungarian Revolution. Then in the 1960s, the decolonisation of Africa and the ensuing civil wars produced the first of the continent’s numerous refugee crises, which to the present day are fuelled by political unrest, armed conflict and terrorist activities in several parts of Africa. According to 2013 figures, the world’s refugees numbered 10.4 million, with the Middle East accounting for just under 50 per cent and Africa for 28 per cent.

9.3 The 1951 UN Convention and its 1967 Protocol

The establishment of the UNHCR coincided with the adoption in 1951 of the UN Convention Relating to the Status of Refugees (Refugee Convention), which entered into force on 22 April

1954. The application of this Convention was limited with regard to time and place in two respects. For the purposes of the Convention, the term ‘refugee’ applies to any person who: (i) in terms of article 1A(1) read with article 1B(1) has been considered as a refugee under earlier arrangements and conventions; and (ii) by virtue of article 1A(2):

[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

After the 1951 Convention was concluded, refugee crises continued to grow and in areas unrelated to the historical events mentioned in the Convention, so illustrating the untenability of a refugee definition limited by time and space. Thus, in 1967, the Convention was supplemented by a Protocol Relating to the Status of Refugees, which, by excluding the requirements relating to time and geographical region, made the definition of refugees universally applicable to all cases that met the other requirements of the Convention’s definition.⁵ The applicable requirements in the Convention’s definition are explained below.

9.3.1 A ‘well-founded fear’

Although central to the question whether a person will qualify for refugee status, the Refugee Convention provides no definition of what will constitute a ‘well-founded fear’. Moreover, the fear in question must be specific in the sense of a fear of being persecuted – another concept that is left undefined in the Convention. And the persecution must be for reasons of a person’s race, religion, nationality, membership of a particular social group or political opinion.

In order to assist states to determine whether a person qualifies for refugee status under the Convention’s definition, the UNHCR has provided certain guidelines. For instance, in determining what will constitute a ‘well-founded fear’, the following criteria are suggested:

To the element of fear – a state of mind and a subjective condition – is added the qualification ‘well-founded’. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term ‘well-founded fear’ therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.⁶

Note that an evaluation of the subjective element cannot be undertaken separately from an assessment of the applicant’s personality and psychological disposition in the circumstances of each individual case.⁷ In determining whether the subjective fear is reasonable, an assessment of credibility is essential. This may be arrived at by taking into account the applicant’s family background, membership in one or more of the groups mentioned in the definition and personal experience and interpretation of the situation.⁸ The objective element involves an assessment of the applicant’s statements to the authorities in the country of refuge, which must be assessed against the background of the real situation (as opposed to the official’s own understanding and interpretation of the situation) in the applicant’s country of origin. Thus, the applicant’s fear:

should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.⁹

As to what will constitute ‘persecution’, the UNHCR guidelines comment as follows:

There is no universally accepted definition of ‘persecution’, and various attempts to formulate such a definition have met with little success. From Article 33¹⁰ of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution.¹¹

The human rights approach¹² followed here in determining what will constitute persecution, has also been applied by the UNHCR in its 2012 *Guideline No 9 on International Protection*, which has replaced the *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*. It states as follows:

The term ‘persecution’, though not expressly defined in the 1951 Convention, can be considered to involve serious human rights violations, including a threat to life or freedom as well as other kinds of serious harm. In addition, lesser forms of harm may cumulatively constitute persecution. What amounts to persecution will depend on the circumstances of the case, including the age, gender, opinions, feelings and psychological make-up of the applicant.¹³

9.3.2 ‘Outside the country of his nationality’

The act of crossing an international border to find refuge is what distinguishes a refugee from an internally displaced person.¹⁴ Being outside the person’s country of nationality is therefore an intrinsic part of refugee status. This element also has relevance for the ‘well-founded fear’ requirement in that the reasons for the fear could have developed after the person claiming refugee status has left his or her country of origin, even if the reason for fleeing is unrelated to the reasons specified in the definition.¹⁵ In such instances, the determining factor is whether the refugee is unable as a result of new circumstances, or, owing to a well-founded fear of being persecuted for the reasons mentioned in the definition, is unwilling to avail him- or herself of the protection of the state of nationality.

9.3.3 ‘For reasons of race, religion, nationality, membership of a particular social group or political opinion’

According to the UNHCR *Handbook*:

It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention is met with in this respect. It is evident that the reasons for persecution under these various headings will frequently overlap. Usually there will be more than one element combined in one person, e.g. a political opponent who belongs to a religious or national group, or both, and the combination of such reasons in his person may be relevant in evaluating his well-founded fear.¹⁶

The effect of this requirement in the Convention’s refugee definition is that refugees forced to leave their state of nationality or prevented from returning there for reasons unrelated to the persecution requirement – for instance, as a result of war, famine, natural disasters – fall outside the scope of the Refugee Convention. This deficit in the Refugee Convention has led to a topical debate about the protection such refugees can rely upon under international law. Of particular concern are the large numbers of ‘war refugees’ – that is, civilians in war-torn countries who are displaced as a result of the hostilities and forced to find refuge in other, usually neighbouring, countries. Such

refugees are usually accommodated in refugee camps where they rely for their daily survival on relief aid procured by international relief agencies and NGOs. Their protection in the state of refuge is first and foremost informed by human rights law, but commentators have also raised the question whether recourse to international humanitarian law¹⁷ may offer additional remedies to fill the protection gap left by refugee law. Since the respective spheres of application of refugee law and international humanitarian law may overlap in situations of armed hostilities, this approach may raise important issues of compatibility and interaction between the two legal regimes.¹⁸

A rather unusual case featuring the ‘membership of a social group’ criterion in asylum matters is *In Re Kazinga*, which took place before the US Board of Immigration Appeals (BIA).¹⁹ The applicant in this matter was a 19-year old female national of Togo and member of a tribe that practised female genital mutilation (FGM). Knowing that she would be forced to undergo this practice at the age of 15, she fled to the United States via Ghana and Germany and applied in the United States for asylum on the basis that were she to return to Togo she would be forced to undergo FGM. Her application was dismissed by the immigration judge and she then appealed to the BIA, which reviewed her application *de novo* and granted her asylum in the United States. Two related issues before the BIA are of relevance here – namely, whether FGM constituted persecution, and whether the applicant was a member of a social group. The level of harm to which the applicant would have been exposed in Togo was informed by evidence that the FGM practice followed by the applicant’s tribe was of an extreme form with serious health and other consequences for the applicant and other information on the poor human rights record and human rights abuses in Togo. In these circumstances, the BIA found that FGM constituted persecution for purposes of asylum. As to the ‘membership of a social group’ requirement, the BIA found this to be satisfied as well, on the ground that the applicant belonged to a group of young females who still had to undergo FGM and who were opposed to the practice.²⁰

9.4 Forms of protection²¹

Protection for refugees under international law comes in various forms, including *non-refoulement*, freedom of movement, prohibition of expulsion and human rights in general. These are discussed in more detail below.

9.4.1 Non-refoulement

One of the foremost obligations accepted by states parties to the Refugee Convention is the principle of *non-refoulement*. It derives from the French verb ‘*refouler*’ – to drive back or repel – and is based on the idea that in certain circumstances the state of refuge will be prevented from returning a refugee to another state.²² The principle is enshrined in article 33 of the Refugee Convention and prohibits a state party from expelling or returning a refugee to territories where the refugee’s life or freedom could be threatened on the grounds mentioned in the Convention’s definition provision. The prohibition has the status of customary international law²³ and allows for only one exception – namely, where there are reasonable grounds to believe that the presence of the refugee on the territory of the state of refuge constitutes a danger to the security of that state, or to the community of that state after having been convicted of a serious crime.²⁴ It is important to note that the principle of *non-refoulement* is not limited to refugee law but may find application in other instances where a state must decide on the expulsion or return of an alien to another territory where the alien may face consequences harmful to his or her life or well-being.²⁵ This could have the consequence that the territorial state may have no other choice but to tolerate the alien on its territory until another solution has been found.

9.4.2 Freedom of movement

Refugees lawfully in the territory of a state have the right to choose their place of residence and to move freely within the state's territory. This right may be subject to regulations generally applicable to aliens in the same circumstances.²⁶ Refugees are also entitled to identity papers²⁷ and travel documents, even for the purpose of travel outside the territory of the state, unless compelling reasons of national security or public order require otherwise.²⁸

9.4.3 Prohibition of expulsion

Expulsion of refugees lawfully in a country is prohibited, unless required by reasons of national security or public order. Any expulsion must be preceded by due process of law.²⁹

9.4.4 Human rights in general

The treatment of refugees within a state is also governed by general human rights guarantees found in international human rights law and in national human rights provisions. For instance, the South African Refugees Act 130 of 1998 links the protection of refugees to the Universal Declaration of Human Rights,³⁰ any other relevant convention or international agreement to which the Republic is a party³¹ and the rights enumerated in the Bill of Rights.³²

9.5 The 1969 OAU Refugee Convention

To cater for the specific refugee problems in Africa, the Organization for African Unity (OAU) (the predecessor of the African Union (AU)), in 1969, adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa. In many respects, the OAU Convention mirrors the 1951 UN Refugee Convention, but with one notable exception – namely, the broadening of the definition of refugee. Article 1(1) of the OAU Convention reproduces the definition of the UN Convention, but then goes further in article 1(2) by stating that the term 'refugee':

shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

This provision should be read together with article 2, which deals with the granting of asylum. States parties are obliged to use their best endeavours, consistent with national legislation, to receive refugees and to secure their settlement.³³ Moreover, the provision prohibits the rejection at the frontier of refugees or their return or expulsion that would compel them to return to or remain in a territory where their life, physical integrity or liberty would be threatened.³⁴

Inspired by the OAU Convention and the actual experience in Latin American countries with regard to the factors underlying cross-border refugee movements, the 1984 Cartagena Declaration on Refugees³⁵ has also advocated a broadening of the refugee definition in the 1951 UN Convention. Almost identical to the broadened definition in the OAU Convention, the Cartagena Declaration adds another factor – namely 'massive violations of human rights',³⁶ which are often responsible for the influx of large numbers of refugees into neighbouring countries.

These developments are commendable but until such time as a broadened definition of refugee status is taken up in a binding universal instrument, the restrictive approach of the 1951 UN

Convention will divide the refugees of the world into two groups: those who can claim refugee status based on a well-founded fear of persecution and those, the vast majority, who will be subject to alternative arrangements under the watchful eye of the UNHCR. Although a broadened definition makes sense from a humanitarian point of view, the socio-economic, political and administrative consequences associated with the large-scale influx of displaced persons into the territory of the state of refuge cannot be discounted. For these reasons, states will remain reluctant to agree to a dispensation that will bring about an increase in legal entitlements that they are incapable of fulfilling.

9.6 Persons not entitled to refugee status

In terms of article 1(F) of the 1951 UN Convention, the Convention shall not be available to a person who (a) has committed a crime against peace, a war crime, or a crime against humanity; (b) has committed a serious non-political crime outside the country of refuge prior to admission to that country; or (c) is guilty of acts contrary to the purposes and principles of the United Nations. A similar sanction is to be found under article 1(5) of the 1969 OAU Convention.

SUGGESTED FURTHER READING

H Alexander “‘Unable to return’ in the 1951 Refugee Convention” 26 *Florida Journal of International Law* (2014) 532–574
JM Amayo-Castro ‘International refugees and irregular migrants’ in 44 *Netherlands Yearbook of International Law* (2014) 65–88

R Byrne & G Noll ‘International criminal justice, the Gotovina judgement and the making of refugees’ in T Gammeltoft-Hansen (ed) *Protecting the Rights of Others: Festschrift for J Vedsted-Hansen* Copenhagen: Djøf Publishing (2013)

V Holzer *Refugees from Armed Conflict: The 1951 Refugee Convention and International Humanitarian Law* Geneva: UN High Commissioner for Refugees (2012)

¹ Universal Declaration of Human Rights (1948), art 14(1).

² GS Goodwin-Gill ‘The international law of refugee protection’ in E Fiddian-Qasmiyah et al (eds) *The Oxford Handbook of Refugee and Forced Migration Studies* (2014) 36.

³ See for instance Ch 2 of the South African Constitution (1996); Refugees Act 130 of 1998, s 27(b); S Budhu ‘The extent of municipal obligation towards refugees in South Africa’ 26 *South African Yearbook of International Law* (2001) 246; *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA).

⁴ General Assembly Resolution 428(V) (14 December 1950) Annex para 1. See also E Guild ‘The mandate of the Office of the United Nations High Commissioner for Refugees’ in V Chetail & C Bauloz (eds) *Research Handbook on International Law and Migration* (2014) 389.

⁵ Protocol Relating to the Status of Refugees, art 1.

⁶ UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (2011 re-issue) 11 para 38, available at www.unhcr.org/3d58e13b4.html, accessed on 17 January 2015.

⁷ Ibid, para 40.

⁸ Ibid, para 41.

⁹ Ibid. See also *Ward v Canada* [1993] 2 SCR 689 at 740 *et seq.*

¹⁰ This provision prevents the state of refuge from returning a refugee (see below) to a country where the refugee’s life or freedom will be threatened.

¹¹ UNHCR *Handbook* supra, para 51.

¹² See also HJ Vedsted ‘Persecution: Towards a working definition’ in V Chetail & C Bauloz (eds) *Research Handbook on International Law and Migration* (2014) 459 at 469 *et seq.*

¹³ UN High Commissioner for Refugees (UNHCR) *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, available at: <http://www.refworld.org/docid/50348afc2.html>, accessed on 17 January 2015.

¹⁴ On internally displaced persons, see chapter 11.

¹⁵ Goodwin-Gill op cit 38; Vedsted op cit 491.

¹⁶ UNHCR *Handbook* supra, para 67.

¹⁷ See chapter 12.

- ¹⁸ See the collection of essays in DJ Cantor & J-F Durieux (eds) *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (2014).
- ¹⁹ *In Re Kazinga* US Board of Immigration Appeals 35 *International Legal Materials* (1996) 1145.
- ²⁰ See also *Adelaide Abankwa v Immigration and Naturalization Service* US Court of Appeals, Second Circuit, Docket No 98-4304, 38 *International Legal Materials* (1999) 1267.
- ²¹ See also chapter 7 on the treatment of aliens and chapter 11 below.
- ²² See also TA Aleinikoff ‘The principle of *non-refoulement* in international refugee law’ in V Chetail & C Bauloz (eds) *Research Handbook on International Law and Migration* (2014) 417.
- ²³ Goodwin-Gill op cit 40.
- ²⁴ Refugee Convention, art 33(2).
- ²⁵ See for instance *Soehring v United Kingdom* [1989] 11 EHRR 439; *Mamatkulov & Askarov v Turkey* 41 EHRR (2005) 25; *Al Sadoon & Mufdhi v United Kingdom* Application no 61498/08, Judgment of 2 March 2010; C Michaelsen ‘The renaissance of non-refoulement? The Othman (Abu Qatada) decision of the European Court of Human Rights’ 61(3) *International and Comparative Law Quarterly* (2012) 750–67. See also M Scott ‘Natural disasters, climate change and non-refoulement: What scope for resisting expulsion under articles 3 and 8 of the European Convention on Human Rights?’ 26(3) *International Journal of Refugee Law* (2014) 404–32.
- ²⁶ Refugee Convention, art 26.
- ²⁷ Ibid, art 27.
- ²⁸ Ibid, art 28.
- ²⁹ Ibid, art 32.
- ³⁰ South African Refugees Act 130 of 1998, s 6(1)(d).
- ³¹ Section 6(1)(e).
- ³² Section 27(b). For a treatment of South African refugee law, see J Dugard *International Law: A South African Perspective* 4th ed (2011) 359 *et seq.*
- ³³ OAU Convention, art 2(1).
- ³⁴ Ibid, art 2(2).
- ³⁵ Regional Refugee Instruments & Related *Cartagena Declaration on Refugees Colloquium on the International Protection of Refugees in Central America, Mexico and Panama* (22 November 1984), available at <http://www.refworld.org/docid/3ae6b36ec.html>, accessed on 18 January 2015.
- ³⁶ Ibid, para III(3). See also DT Mora ‘A simple solution to war refugees: The Latin American expanded definition and its relationship to IHL’ in DJ Cantor & J-F Durieux (eds) *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (2014) 204; T Wood ‘The African war refugee: Using IHL to interpret the 1969 African Refugee Convention’s expanded refugee definition’ in Cantor & Durieux op cit 179.

Chapter 10

Diplomatic privileges and immunities

HENNIE STRYDOM

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10.1 Introduction

The manner in which international relations is conducted may take many forms, varying from ad hoc state visits and occasional or regular summits between heads of state and government to permanent diplomatic missions at international organisations and daily exchanges between foreign ministries and between the agents of diplomatic and consular missions. In this chapter, we are concerned first with the privileges and immunities to which diplomatic and consular missions are entitled when representing their countries abroad. This branch of international law is the product of long-standing state practice going back to ancient times. It is now the subject of substantial codification at the international level with many of the basic principles also reflected in national legislation and judicial decisions. Secondly, since article 105 of the UN Charter provides for privileges and immunities to be enjoyed by the United Nations and its representatives in the territory of its member states, the relevant conventions giving effect to this provision also deserve attention, especially in view of their incorporation into domestic law by legislative enactment.

The rationale for assigning privileges and immunities to certain categories of state representatives in international relations is as follows: the representative of the sending state is charged with the exercise of official state functions on the territory of another (the receiving) state under conditions aimed at ensuring respect for the sovereignty and independence of the sending state, and so as to allow the foreign mission to perform its functions without hindrance or interference from the receiving state. This is well illustrated by the *Tehran Hostages* case.¹ In this matter, several hundred Iranian students and other demonstrators took possession of the US Embassy in Tehran by force and held embassy personnel hostage during the political turmoil that beset the country in the 1970s. During these events, the Iranian security forces failed to protect the US embassy. In proceedings before the ICJ, the United States subsequently requested a declaration to the effect that Iran had failed to comply with its international law obligations in terms of the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations (VCDR and VCCR) respectively.

In terms of a number of provisions in these treaties, the court found:

Iran was placed under the most categorical obligations, as a receiving state, to take appropriate steps to ensure the protection of the United States Embassy and Consulates, their staffs, their archives, their means of communication and the freedom of movement of the members of their staff.²

Obligations of this nature, the court then pointed out, were not merely obligations that derived from the treaties in question, but are ‘also obligations under general international law...’.³

Before proceeding, a brief explanation of the difference in functions performed by diplomats and consuls respectively is needed. A *diplomatic* mission represents (primarily) the political interests of the sending state in the receiving state and negotiates with the government of the receiving state.⁴ In contrast, a *consular* mission is traditionally associated with furthering shared commercial, economic, cultural and scientific interests of the two states and in assisting with the issuing of travel documents for persons wishing to travel to the sending state, and in assisting the nationals of the sending state with matters in the receiving state.⁵

This distinction oversimplifies the various functions; in certain instances, functions may be blurred. For instance, article 3(2) of the VCDR clearly states that the Convention does not prohibit

the performance of consular functions by diplomatic missions⁸ and in terms of article 5(m) of the VCCR, any other functions may be entrusted to a consular post by the sending state if they are not prohibited by the laws of the receiving state or objected to by that state. Moreover, if a sending state has no diplomatic mission in a receiving state, the consular officer of the sending state may, with the consent of the receiving state, also be authorised to perform diplomatic functions, without affecting the consular status of the mission.⁹

In explaining the nature and scope of the privileges and immunities to which diplomatic and consular missions are entitled, this chapter will rely mainly on the provisions of the 1961 VCDR and the 1963 VCCR.

10.2 Select provisions of the 1961 and 1963 Conventions

Provision for immunities and privileges for diplomats and consular officials is made in the 1961 Vienna Convention on Diplomatic Relations and in the 1963 Vienna Convention on Consular Relations. Since these conventions overlap to a considerable degree, they are discussed together with a focus on just a few of the more important provisions.

10.2.1 Consent as basis for diplomatic relations

Mutual consent is the basis for establishing diplomatic and consular relations between states.⁸ This also implies that no state is entitled as of right to establish a foreign mission in another state, and a receiving state is under no obligation to give reasons for refusing the establishment of a foreign mission on its territory. The receiving state may also at any time, and without having to explain its decision, notify the sending state that the head of the mission or a diplomatic or consular staff member is *persona non grata*, meaning that the person is not acceptable in the view of the receiving state. In such instances, the sending state must recall the person or terminate his or her functions with the mission.⁹ This form of rejection may also be used by the receiving state to demonstrate its displeasure when a foreign representative is guilty of some form of misconduct, has committed an offence in the receiving state, or has abused his or her diplomatic privileges and immunities.

10.2.2 Duties owed to the receiving state

All persons entitled to privileges and immunities under these conventions have a duty to respect the laws of the receiving state and to refrain from interfering in the internal affairs of the receiving state. This includes the obligation not to allow the premises of the foreign mission to be used in a manner incompatible with the functions of the mission – as laid down in the respective conventions, the rules of general international law or special agreements in force between the sending and receiving states.¹⁰

10.2.3 Protection of the premises of the foreign mission

Once established, a foreign mission is entitled to protection by the receiving state. In this instance, the receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against intrusion or damage, and to prevent disturbance of the peace of the mission, or an impairment of the mission's dignity. Agents of the receiving state are not entitled to enter the premises of the mission without the consent of the head of the mission and the premises, the

property thereon and the mission's means of transport are immune from search, requisition, attachment or execution.¹¹

The archives, documents, official correspondence and the diplomatic bag of a foreign mission, wherever they may be, are also inviolable and the receiving state must permit free communication on the part of the mission for all official purposes.¹² However, given past incidents of abuse of certain privileges and immunities and the need to find a balance between the rights and duties of the states involved, it is inconceivable that the receiving state, on reasonable grounds of suspicion of abuse, will not be entitled to investigate a matter, especially when national security is at risk or some other grave offence is suspected.

A good example is the case of the 1973 arms consignment that ended up in the Iraqi embassy in Pakistan.¹³ When the Pakistani Ministry of Foreign Affairs alerted the Iraqi ambassador to evidence suggesting an abuse of diplomatic immunity in bringing arms into Pakistan and storing it at the Iraqi embassy, permission for a search was refused by the ambassador. This led to a raid by armed policemen on the embassy in the presence of the ambassador resulting in the discovery of the arms. A strong protest note was then sent to the Iraqi government and the Iraqi ambassador was declared *persona non grata*. Pakistan also recalled its own ambassador from Iraq, which is a normal course of action for states to take in showing their dissatisfaction with a situation. However, the forceful entry of the diplomatic premises by the Pakistani police without the consent of the head of the mission is another matter. Such a measure will only be justifiable in extreme cases of abuse. It would be reasonable to argue that the Iraqi foreign mission allowed the premises to be used in a manner incompatible with the functions of the mission and it was therefore in breach of article 41(3) of the VCDR.

10.2.4 Privileges and immunities of foreign mission agents and other persons

Diplomatic agents and consular officers should be treated with due respect and the receiving state must take all appropriate steps to prevent any attack on their person, freedom or dignity.¹⁴ In the case of diplomatic agents, this principle of inviolability also protects the agent against any form of arrest or detention.¹⁵ Consular officers, however, enjoy a more limited inviolability, in the sense that they may be arrested or detained pending a trial in the case of a grave crime and pursuant to a decision by a competent judicial authority.¹⁶

The personal inviolability of diplomatic agents also entitles them to *ratione personae* (by virtue of their office) immunity against the criminal, civil and administrative jurisdiction of the receiving state,¹⁷ but not of the sending state.¹⁸ However, in the case of civil and administrative jurisdiction, immunity will not apply in the case of:

1. a real action relating to privately held property in the territory of the receiving state;
2. an action relating to succession in which the agent acts as executor, administrator, heir or legatee in his or her private capacity; and
3. an action relating to any professional or commercial activity exercised by the agent outside his or her official duties.¹⁹

Consular officers enjoy immunity in relation to judicial and administrative authorities only *ratione materiae* – that is, in respect of acts performed in the exercise of their official functions.²⁰

A diplomatic agent is also not obliged to give evidence as a witness.²¹ However, members of a consular post called upon to attend judicial or administrative proceedings as witnesses may not decline to give evidence.²² But such members are under no obligation to give evidence concerning matters that are connected with their official functions.²³

The private residence of a diplomatic agent, and the agent's papers and correspondence, enjoy the same inviolability and protection as the premises of the diplomatic mission and the mission's official documentation and correspondence.²⁴ Other privileges and immunities to which diplomatic agents and consular officers are entitled relate to the exemption from social security obligations, taxes, custom duties, work permits and the rendering of certain services.²⁵

The immunities to which a diplomatic agent is entitled are also enjoyed by members of the agent's family forming part of the agent's household and, subject to certain limitations, by members of the administrative, technical and service staff of the mission.²⁶

10.2.5 Waiver of immunity

The immunity from jurisdiction dealt with in the previous section may be waived by the sending state. Such a waiver must be in express terms and communicated to the receiving state in writing.²⁷ A waiver in this instance simply means that the protective veil is removed and the person who enjoyed the immunity may no longer claim it against judicial and administrative proceedings instituted by the receiving state. Immunity does not, in the end, erase the liability of the person entitled to it, but merely constitutes a procedural bar to judicial and other proceedings.

10.3 Diplomatic and consular asylum

Since diplomatic and consular premises are inviolable and may not be entered by the authorities of the receiving state, political fugitives and opponents of oppressive regimes have often sought, and have been granted, refuge in foreign diplomatic and consular missions.²⁸ This practice also includes a number of incidents in South Africa during apartheid when political dissidents took refuge in foreign missions to escape arrest or detention in terms of security laws.²⁹ In these and other instances, humanitarian considerations have often been relied upon by the sending state in accepting fugitives into its foreign mission and for refusing to surrender them to the authorities of the receiving state. However, that reasons of political expediency may also play a role in a sending state's decision to grant a fugitive diplomatic asylum is not inconceivable.

Allowing this kind of asylum is not uncontroversial. Not only is it not provided for in the conventions on diplomatic and consular immunities and privileges, but it is also doubtful that the practice is recognised by general international law. Latin America is currently the only region in the world where this kind of asylum is regulated by treaty – namely, the 1954 Caracas Convention on Diplomatic Asylum. By granting asylum in these circumstances, the rule on the inviolability of the foreign mission must be jointly applied with the rule on non-interference with the internal affairs of the receiving state and respect for the latter's laws in articles 41 VCDR and 55 VCCR respectively. Clearly, these opposing positions could give rise to diplomatic tensions between a sending and a receiving state. In such instances, finding a solution through negotiation may be the only option available to them.

A matter to be considered is whether human rights guarantees to which both the sending and the receiving state have committed themselves (by virtue of their membership in multilateral human rights treaties) could play a role in reconciling the receiving state's sovereign rights with the humanitarian grounds for granting protection to someone seeking refuge in the mission of the sending state. This question is raised by a recent notorious incident involving the granting of diplomatic asylum by the Ecuadorian government on 16 August 2012 to the controversial founder of WikiLeaks, Julian Assange. In June of that year, Assange entered the Ecuadorian embassy in London seeking asylum to prevent his extradition to Sweden, where he was needed for questioning

on charges of sexual assault and rape. Prior to this, Assange made world news when WikiLeaks publicly disclosed large volumes of unlawfully obtained national security information potentially damaging to the US war efforts and intelligence operations relating to the Iraq and Afghanistan wars.

Ecuador's granting of asylum was in direct response to Assange's unsuccessful attempts in the British courts to prevent his extradition to Sweden, which the United Kingdom, the receiving state, seized upon to honour its legal obligations in terms of a European arrest warrant for Assange's extradition to Sweden. And since the principle of diplomatic asylum was not recognised by the United Kingdom, the British government was furthermore not prepared to guarantee Assange safe passage out of the country, which meant that Assange was for all intents and purposes 'imprisoned' in the Ecuadorian embassy. This stalemate was further complicated by Ecuador's justification for granting diplomatic asylum – namely, that Assange, once extradited to Sweden (or if turned over to the British authorities) might then be surrendered to the United States where he was sought for the alleged unlawful activities of WikiLeaks and fears that he would not receive a fair trial or face cruel and demeaning treatment there on account of his disclosure of information compromising to the United States.

There is a general sense that the Ecuadorian claims lack substance,³⁰ but in the abstract they raise interesting questions about the role of human rights guarantees in a new context concerning the reciprocal obligations of the sending and receiving states in terms of orthodox diplomatic law. In many respects, the development and growing importance of international human rights law has had a profound influence on international relations over the years, and there is no reason that diplomatic relations between states on the issue of diplomatic asylum should remain free from this influence. In this instance, analogies could be drawn with the changes that occurred in two related fields of international law – namely, extradition law and refugee law, both of which allow individuals to benefit from the protective regimes of international human rights treaties, and which are dealt with in chapters 8 and 9.

The question remains to what extent human rights considerations must be allowed to qualify the legal obligations that a sending state owes to a receiving state in the case of granting diplomatic asylum to a fugitive, and how such considerations could influence the options available to the receiving state in determining the ultimate fate of the fugitive. While there is no right to be granted asylum under current international law, a human rights perspective may well move the debate in that direction, making it not only possible for an individual to claim such a right under justifiable circumstances, but also for the sending state to assert the granting of asylum as a right against the receiving state.³¹

10.4 Privileges and immunities of the United Nations and its specialised agencies

The introduction to this chapter referred to article 105 of the UN Charter, which provides for the enjoyment by the United Nations and its representatives of privileges and immunities in the territories of its member states. The adoption of the Convention on the Privileges and Immunities of the United Nations in 1946 gave further effect to these privileges and immunities.

In terms of this Convention, the United Nations, its property and assets enjoy immunity from every form of legal process in a member state except in so far as the immunity has been expressly waived by the organisation.³² The premises of the United Nations are inviolable and its property and assets are immune from search, requisition, confiscation, expropriation or any other form of interference.³³ This inviolability also extends to the archives and documents of the United Nations

wherever they are located.³⁴ The Convention further entitles the United Nations to be exempted from financial regulations and controls, including taxes, custom duties and prohibitions or restrictions in respect of imports and exports of its publications.³⁵

While exercising their official functions, member state representatives of the United Nations' principal and subsidiary organs enjoy: immunity from personal arrest or detention or from seizure of their personal baggage; inviolability of their papers and documents; exemption in respect of themselves and their spouses from immigration restrictions and alien registration; and the same immunity that is accorded to diplomatic envoys in respect of their personal baggage.³⁶ Officials and experts of the United Nations constitute two other categories of persons entitled to these and other privileges and immunities and it is within the discretion of the Secretary-General of the United Nations to determine the categories of officials to which the respective privileges and immunities will apply.³⁷

In all these cases, the Convention makes it clear that the privileges and immunities in question are accorded to the above categories of persons not for their personal benefit, but to safeguard the independent exercise of their functions in connection with the United Nations. Consequently, a member state, in the case of representatives, and the Secretary-General, in the case of officials and experts, not only has the right, but the duty, to waive immunity in any case where the immunity would impede the course of justice.³⁸ Furthermore, the United Nations must at all times co-operate with the appropriate authorities of member states to facilitate the proper administration of justice, to secure the observance of police regulations and to prevent any abuse with regard to the privileges and immunities and facilities.³⁹

It should be evident that these provisions have in mind the balancing of interests between upholding UN privileges and immunities on the one hand, and the administration of justice within member states on the other. This brings into focus the role of the Secretary-General as chief administrative officer of the United Nations and the weight that local authorities should accord to the Secretary-General's views on whether immunity should be upheld or waived in matters involving the administration of justice. The excerpt below gives the ICJ's views on the matter:

As the Court has observed, the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that the Secretary-General has the authority and responsibility to inform the Government of a member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings.

When national courts are seized of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts. The governmental authorities of a party to the General Convention are therefore under an obligation to convey such information to the national courts concerned, since a proper application of the Convention by them is dependent on such information. Failure to comply with this obligation, among others, could give rise to the institution of proceedings under Article VIII, Section 30, of the General Convention.⁴⁰

This makes it clear that the final decision rests with the domestic courts and that the outcome will depend on whether evidence is placed before them that is compelling enough to rebut the presumption created by the Secretary-General's findings. Disputes arising out of these circumstances and involving a UN official or the interpretation or application of the Convention

may then be referred to the ICJ or another mode of settlement agreed upon by the parties in accordance with article VIII of the Convention.

The above privileges and immunities accorded to UN missions, representatives, officials and experts are also extended to UN specialised agencies. This has been done through the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, which came into force in 1948.⁴¹ Moreover, since article 104 of the UN Charter entitles the United Nations, in the territory of each member state, to enjoy the legal capacity necessary for the performance of its functions, this Convention invests the specialised agencies with legal personality in terms of which they have the capacity to contract, to acquire and dispose of immovable and movable property and to institute legal proceedings.⁴²

If a state party to this Convention is of the view that an abuse of a privilege or immunity has occurred, the state and specialised agency must enter into consultations to determine whether any such abuse has occurred and if so, how to prevent a repetition. If the consultations fail to produce a satisfactory result for the negotiating parties, the matter must be submitted to the ICJ for an advisory opinion, which must be accepted as decisive by the parties.⁴³ If the ICJ finds that an abuse has occurred, the state affected by it shall have the right to withhold privileges and immunities from the agency after the agency has been notified thereof.⁴⁴

The legal complexities of the privileges and immunities dealt with in this chapter are illustrated by the diplomatic row that erupted between the United States and India in 2013 in relation to the arrest and treatment of an Indian consular official accredited to the United States.⁴⁵ Accused of having submitted false documents to US authorities to obtain a work visa for her housekeeper, the Indian Deputy Consul-General in New York, Ms Devyani Khobragade, was arrested by US authorities on charges of visa fraud. What upset the Indian authorities in particular was that Ms Khobragade was arrested at her daughter's school, handcuffed and subjected to strip search.

As previously indicated, consular officers enjoy immunity from the jurisdiction of the receiving state in respect of acts performed in the exercise of their official consular functions under article 43(1) of the VCCR. Since the employment of housekeeping staff is a private matter and has nothing to do with the exercise of consular functions, the US authorities were entitled to prosecute Ms Khobragade. However, in certain cases, consular officers enjoy immunity from arrest or detention even if they relate to a private matter. This is clear from article 41 of the VCCR, which provides immunity to consular officers against arrest or detention 'pending trial', except in the case of a 'grave crime'.

Whether the charges against Ms Khobragade were grave enough to justify her arrest and (brief) detention in terms of article 41 is questionable since 'grave crime' is not defined by the VCCR. The further question is then by what criterion should one decide whether an offence is of a certain gravity. If the penalty (up to 10 years' imprisonment for the offence in question) constitutes the criterion, then the arrest and detention could have been justified. But this approach makes national law (and therefore the receiving state) the sole judge of what constitutes a grave offence under article 41, with the further result that treatment in such instances may differ from state to state. To prevent anomalies from occurring as a result of different penalties being prescribed in different jurisdictions for similar or comparable offences, there is some justification for the call for a universal understanding of what constitutes a 'grave offence'. An understanding that is independent of the meaning attached to that concept in domestic law would be more advantageous to the fair and equitable treatment of consular officers in different countries.⁴⁶ How to arrive at such a universal understanding remains a vexing issue.

Apart from these difficulties, the matter between the United States and India took another twist. On 8 January 2014, Ms Khobragade was moved by her government to India's permanent mission

to the United Nations. Whether this was done to avoid prosecution under the immunity granted to UN representatives is not clear. As indicated, this immunity is only available for acts carried out in the exercise by representatives of their official functions as UN representatives and is therefore not different from what Ms Khobragade enjoyed under the VCCR. However, of further relevance is the UN Headquarters Agreement between the United Nations and the United States of 1947. Under article 15 of this agreement, depending on her rank and/or what has been agreed between the United States, the United Nations and India,⁴⁷ Ms Khobragade could fall into a category of representatives entitled to claim immunity that is accorded diplomatic envoys. As indicated, such envoys enjoy *ratione materiae* immunity against arrest and prosecution but also *ratione personae* immunity against all criminal proceedings.

On 9 January 2014, Ms Khobragade was indicted for visa fraud and making false statements to government by a grand jury.⁴⁸ Following this indictment, the District State Attorney informed the court that ‘the defendant was recently accorded diplomatic immunity’ (apparently in reference to Ms Khobragade’s move to India’s permanent mission to the United Nations) and that ‘the charges will remain pending until such time as she can be brought to court to face the charges, either through a waiver of immunity or the defendant’s return to the United States in a non-immune status’.⁴⁹ A request by the US State Department for immunity to be waived was subsequently turned down by the Indian government, upon which the State Department requested Ms Khobragade’s immediate departure from the country.

On the same day as the indictment, counsel for Ms Khobragade filed a motion for the dismissal of the case against her on grounds of diplomatic immunity, a fact that was conceded by the US government. The immunity in question was the immunity she enjoyed between her appointment to the UN mission on 8 January and her departure from the United States on 9 January, which overlapped with the date of the proceedings for the indictment. The District Court held that since the defendant enjoyed full diplomatic immunity at the time of the indictment proceedings, the court lacked jurisdiction with the result that the motion for dismissal must be granted; diplomatic status is determined at the time of the procedural acts and not at the time of the arrest.⁵⁰

10.5 National law

Diplomatic and consular privileges and immunities are regulated at the domestic level in the Diplomatic Immunities and Privileges Act 37 of 2001. This Act also incorporates into South African law: the 1961 Vienna Convention on Diplomatic Relations (Schedule 1), the 1963 Vienna Convention on Consular Relations (Schedule 2), the 1946 Convention on the Privileges and Immunities of the United Nations (Schedule 3), and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (Schedule 4). Moreover, the Act makes it clear that, subject to the provisions of the Act, the Conventions have the force of law in the Republic.⁵¹

The privileges and immunities contained in these Conventions will accordingly apply in the Republic in respect of the persons and properties entitled to the privileges and immunities.⁵² Other privileges and immunities may be conferred by special agreement and published in the *Government Gazette*, or if that is not expedient, but nevertheless in the interest of the Republic, by the Minister of International Relations and Cooperation by notice in the *Government Gazette*.⁵³ The Minister is also required to keep a register with the names of persons entitled to privileges and immunities and to cause an updated list to be published on the website of the Department of International Relations and Cooperation. In the case of a legal dispute about whether a person enjoys any immunity or privilege in terms of the Act or the Conventions, a certificate issued under the authority of the Director-General will constitute *prima facie* evidence of any fact relating to that question.⁵⁴

The Act also creates certain offences relating to the non-observance of the privileges and immunities provided for in the Act or the Conventions. For instance, any person who wilfully and without the exercise of reasonable care, issues, obtains or executes a legal process against a person entitled to immunity, whether as party, attorney or official, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding three years, or to both. This applies equally to any other offence that has the effect of infringing the inviolability of a person, or of his or her property or of the premises occupied by him or her.^{ss}

SUGGESTED FURTHER READING

JC Barker *The Abuse of Diplomatic Privileges and Immunities* Aldershot: Dartmouth (1996)

P Gully-Hart 'The function of state and diplomatic privileges and immunities in international cooperation in criminal matters' 23 *Fordham International Law Journal* (2000) 1334–1343

VL Maginnis 'Limiting diplomatic immunity' 28 *Brooklyn Journal of International Law* (2003) 989–1023

VP Nanda 'Human rights and sovereign and individual immunities – some reflections' in 5 ILSA *Journal of International and Comparative Law* (1999) 467–479

1 *US Diplomatic and Consular Staff in Tehran case (US v Iran)* ICJ Reports 1980, 3.

2 Ibid, para 61.

3 Ibid, para 62.

4 VCDR, art 3.

5 VCCR, art 5.

6 See also VCCR, art 3.

7 VCCR, art 17.

8 VCDR, art 2; VCCR, arts 2, 4.

9 VCDR, art 9; VCCR, art 23.

10 VCDR, art 41; VCCR, art 55.

11 VCDR, art 22; VCCR, art 31.

12 VCDR, arts 24, 27; VCCR, arts 33, 35.

13 This example is taken from DJ Harris *Cases and Materials on International Law* 4th ed (1991) 330.

14 VCDR, art 29; VCCR, art 40.

15 VCDR, art 29.

16 VCCR, art 41(1).

17 VCDR, art 31(1).

18 VCDR, art 31(4).

19 VCDR, art 31(1).

20 VCCR, art 43(1).

21 VCDR, art 31(2).

22 VCCR, art 44(1).

23 VCCR, art 44(3).

24 VCDR, art 30.

25 VCDR, arts 33–6; VCCR, arts 46–52.

26 VCDR, art 37.

27 VCDR, art 32; VCCR, art 45.

28 For historical examples, see M den Heijer 'Diplomatic asylum and the Assange case' 26(2) *Leiden Journal of International Law* (2013) 399, 401 *et seq.*

29 For examples, see J Dugard *International Law: A South African Perspective* 4th ed (2011) 265–8.

30 See Den Heijer op cit 419.

31 Ibid, 419.

32 Art II (2).

33 Art II (3).

34 Art II (4).

35 Art II (5)–(7).

36 Art IV.

37 Arts V, VI and VII.

38 Arts IV(14); V(20) and VI(23).

39 Art V(21).

40 Difference Relating to Immunity from Legal Process of a Special Rapporteur on the Commission on Human Rights (Advisory Opinion) ICJ Reports 1999, 62, paras 60, 61.

41 The specialised agencies listed in art I of the Convention are: the International Labour (ILO) Organization; the Food and Agricultural Organization (FAO); the United Nations Educational, Scientific and Cultural Organization (UNESCO); the International Civil Aviation Organization (ICAO); the International Monetary Fund (IMF); the International Bank for Reconstruction and Development (IBRD); the World Health Organization (WHO); the Universal Postal Union (UPU); the International Telecommunications Union (ITU); and any other agency brought into relationship with the UN in terms of arts 57 and 63 of the UN Charter.

42 Article II, s 3.

43 Article VII, s 24 read with art IX, s 32.

44 Article VII, s 24.

45 See D Akande ‘Immunity of consular officials: The arrest by the US of an Indian Deputy Consul-General’ *European Journal of International Law: Talk!* (20 December 2013).

46 See *ibid*, 4.

47 See Agreement between the United Nations and the United States regarding the Headquarters of the United Nations (1947) art 15(4). Agreement available at <http://avalon.law.yale.edu/> under 20th Century, A Decade of American Foreign Policy Basic Documents 1941-1949, part III ‘Headquarters of the United Nations’.

48 *United States of America v Devyani Khobragade* Case no 14 Cr 008 (SAS) US District Court, Southern District of New York (12 March 2014).

49 United States Attorney, Southern District of New York (9 January 2014) ‘Letter to Judge Scheindlin’, available at <http://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/Khobragade%20Devyani%20Govts%201.9.2014%20Letter%20to%20Judge%20Scheindlin.pdf>.

50 *Khobragade* *supra*.

51 Act 37 of 2001, s 2(1).

52 *Ibid*, ss 3–5.

53 *Ibid*, s 7.

54 *Ibid*, s 9.

55 *Ibid*, s 15. See also *Portion 20 of Plot 15 Athol (Pty) Ltd v Rodrigues* 2001 (1) SA 1285 (W); G Abraham ‘Portion 20 of Plot 15 Athol: “Some corner of a foreign field that is forever ...” Angola’ 118(3) *South African Law Journal* (2001) 441.

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The international law of human security

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Chapter 11

International protection of human rights

FRANS VILJOEN

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11.1 Introduction

International human rights law functions at three levels: the global, regional and sub-regional. In this chapter, the advantages and disadvantages of each layer are considered. After discussing the tension between universality and socio-cultural specificity and the extraterritorial application of human rights, an overview is provided of the global system for the promotion and protection of human rights that functions under the United Nations (UN). This is followed by an introduction to the three most well-established regional human rights systems, with an emphasis on the African system. The focus of the chapter then turns to the emergence of a human rights system at the sub-regional level, particularly in Africa. Against this background, the chapter considers the relationship between international and national law (focusing on South African law), and examines some of the procedures through which international law exerts its influence upon national law.

11.2 The rationale for and nature of international human rights law

While most states now have constitutions with Bills of Rights that provide for many of the universally recognised rights at the domestic level, human rights have since World War II (1939–1945) not only grown domestically, but have also been internationalised. This evolution also represents the humanisation of international law, as the individual has taken a more prominent position as a subject of international law. Starting with the adoption of the Universal Declaration of Human Rights (Universal Declaration) in 1948, it became widely accepted that international human rights law has a crucial role to play in supplementing national protection.¹

The rationale for the existence of international human rights law is primarily two-fold. On the one hand, it serves as a beacon based on international consensus about what minimum rights all persons should enjoy, and towards which states should steer their domestic law, policies and practices. International human rights law aims to exert a kind of gravitational pull on all states, drawing them towards accepting a core of human rights. On the other hand, it acts as a safety net,

providing the possibility of recourse when efforts to obtain a remedy in the national legal system have failed.

The requirement that local (domestic) remedies need to be exhausted before affected persons may seek recourse from an international body underscores the relationship of subsidiarity between the national and international levels. It is at the national level that states have to protect the rights of everyone under their jurisdiction. International human rights law plays only a complementary role, and does not replace the state or remove its primary responsibility to promote and protect human rights.

Two of the main sources of international law, international conventions (treaties) and international custom,³ also constitute the main sources of international human rights law. Intergovernmental organisations have adopted a multitude of multilateral treaties dealing with various aspects of human rights and are discussed in more detail below. When states become party to these treaties, through ratification or accession, they are bound to give domestic effect to the rights in these treaties. While obligations derived from treaties are based on the consent of states, their obligations under customary international law arise irrespective of their consent. Even if the exact content of customary international human rights law is uncertain, some norms have come to be accepted as meeting the relevant requirements. These include the prohibition against genocide, racial discrimination, slavery and forced labour.

Traditionally, human rights – both within the national and international spheres – have been divided into three ‘generations’: Civil and political (first generation) rights; socio-economic (second generation) rights; and collective/solidarity (third generation) rights. Increasingly, this categorisation has been criticised and replaced by a focus on the obligations that rights impose on states. Under the new categorisation, the relevant issue is whether a particular right, in a given context, imposes the obligation to respect, protect or fulfil.³

The obligation to *respect* entails that states should refrain from unjustifiably interfering with rights. This obligation applies to all rights – even a ‘socio-economic right’, such as the right to housing – in that states should, for example, not be allowed arbitrarily to evict persons from their homes. The obligation to *protect* requires states to protect individuals from the unjustifiable interference of their rights by non-state actors (such as other persons or corporations). Again, this obligation adheres to all rights, whether ‘civil and political’ or ‘socio-economic’. An example is the obligation of a state to ensure that non-state actors do not deny persons their right to housing – for example, by preventing the destruction of homes by other persons. The obligation to *fulfil* entails the allocation and use of state resources towards realising rights. Although this obligation is most often associated with ‘socio-economic’ rights, such as the right to education, this obligation is also relevant to all rights. For example, the right to vote, a classical ‘civil and political’ right, requires extensive resource allocation towards voter education, printing and distribution of ballot papers, and management of the election process.

11.3 The layers of international human rights law

International human rights law comprises layers of protection outside the ambit of the national state and potentially manifests at three levels: *global*, *regional* (continental) or *sub-regional*. At each of these levels, ‘systems’ for the promotion and protection of human rights have been established. In each case, these systems function under the auspices of an intergovernmental organisation. They have a normative framework providing for rights, and they have institutions that allow for procedures such as complaints and state reporting.

The coexistence of human rights institutions and procedures at each of these layers leads to the question: which one of these possible routes should affected persons take, and on what basis should decisions be made to determine the most suitable ‘forum’ to approach? Although no easy or clear answer can be given, four factors may be taken into account: jurisdiction; the availability of most appropriate norms; the accessibility of institutions; and the effectiveness of the system as a whole.

As a first step, it must be established which institution has *jurisdiction* to hear the matter. The following questions will arise:

- Which treaties (applied by the various institutions) provide for the substantive rights that have allegedly been violated? (substantive jurisdiction)
- Which treaties are binding on the relevant state? (personal jurisdiction)
- Which institution has jurisdiction over the place where and time at which the violation allegedly occurred? (territorial and temporal jurisdiction)

Where more than one of these institutions have jurisdiction, the best ‘system’ to approach is the one that has a legitimate *normative framework* that squarely addresses the issue at hand. From the point of view of national constituencies, standards developed at the sub-regional and regional levels should enjoy the greatest democratic legitimacy, as the lawmakers at those levels may be presumed to be more closely linked and more directly accountable to domestic audiences than global lawmakers would be. Because normative consensus seeking at the global level often results in watered-down and vaguely formulated compromise positions, sub-regional and regional norms are also likely to be more detailed and specific. As far as women’s rights treaties are concerned, for example, the provisions of the SADC Protocol on Gender and Development, at the sub-regional level, are particularly detailed, going as far as setting specific targets;⁴ at the regional level, the African Union’s Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (African Women’s Protocol) speaks to regional specificities such as female genital mutilation;⁵ but at the global level, the corresponding provisions of the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) are much more open-ended.⁶

Another factor to consider is *accessibility*: institutions at the sub-regional level are inclined to be more accessible than those at the regional level, both geographically and psychologically. Compared to institutions at the global level, however, regional institutions are likely to be more accessible and approachable. Based in Geneva and New York, the global human rights institutions are inaccessible to many, especially in the South.

The *effectiveness* (linked to the likelihood of actual enforcement) of human rights institutions depends in part on how binding the decisions are likely to be and in part on the political will (resolve) of the intergovernmental organisation under whose auspices the system functions. In the absence of a World (UN) Human Rights Court,⁷ enforcement at the UN level remains weak – with the exception of the rarely used UN Security Council (UNSC) competence to take action when world peace is affected by human rights violations.⁸ Human rights courts with the competence to take binding decisions exist only at the regional, and to some extent, sub-regional level. In theory, at least, actual enforcement also seems likely to be stronger at a sub-regional level, where there is a close convergence of interests and potential effect of sanctions on member states and where naming and shaming is potentially more meaningful. However, if the close convergence is based on a common history of anti-colonial struggle, this closeness may stifle effective action against one of the members. In SADC, for example, a decision of the SADC Tribunal that the implementation of Zimbabwe’s land reform programme violated the SADC Treaty⁹ caused the SADC heads of state (Summit) to rally around President Mugabe and led to an amendment to the treaty regime that abolished the possibility of individual access to the tribunal.¹⁰

The possibility of approaching an institution at more than one of the layers obviously also exists. However, the choice of the most appropriate route primarily depends on the hierarchy stipulated or foreseen in the relevant treaty regimes. For example, a complaint is not admissible before the African Commission on Human and Peoples' Rights (African Commission) if it has been settled by another international human rights institution.¹¹

11.4 The tension between universality and socio-cultural specificity

The notion that human rights are universal, in the sense that all human beings deserve equal respect for their inherent dignity and worth, has been expressed by many philosophies and religions. The Universal Declaration is also premised on this notion. However, it is uncontestable that all human beings do not in fact enjoy equal rights – if rights are understood as entitlements guaranteed by states, allowing individuals to seek recourse for violations of their rights. This discrepancy can be explained by the distinction between *human rights* (understood as ontological claims that all human beings can make irrespective of where they find themselves) and *human rights law* (understood as guarantees codified in legal instruments that bind states and lead to the possibility of accountability when these guarantees are not complied with).¹² From this perspective, the universality of human rights law is an aspiration rather than a description of reality. To a large extent, the international human rights project is an attempt to ‘convert’ as much of *human rights* as possible into *human rights law*, so that the notion of universal protection becomes a matter of fact for all.

States often resist the expansion of human rights law on the basis that human rights treaties are products of a particular ('Western') world view, and argue that not all 'universally accepted' rights are applicable in all contexts.¹³ They draw on the anthropologically based notion of socio-cultural relativity or distinctiveness to argue that the norms to which they should be bound should be aligned with the socio-cultural contexts prevailing in their states. This seems to be a reasonable claim, as long as it is not an excuse for repression and denial of rights, and as long as the core dignity and worth of all human beings are still respected. Clearly, one cannot expect that human rights guarantees will be uniform among all nations in all corners of the globe.

The question is: how should the balance be struck between subscribing to universality in principle, and allowing some leeway for its divergent manifestation in practice? International human rights law has developed a number of mechanisms aimed at guiding states in finding this balance. The point of departure is the principle of subsidiarity, which holds that it is the primary responsibility of national legal systems to guarantee rights by, among other measures, giving detailed content to often open-ended international norms. However, this process of domestication is still subject to the monitoring role of international treaty bodies.

Another mechanism allows states to enter reservations when ratifying or acceding to treaties. However, even if a state is allowed to exclude some provisions of a treaty to which it is party, it can only do so if the effect of the reservation is not to undermine the object and purpose of the treaty.¹⁴ In the European human rights system, states are allowed a 'margin of appreciation', in terms of which some deference is given to national authorities when it comes to issues of social morality in particular.¹⁵ The competence of states to derogate from some rights – for example, during validly declared states of emergency – and to limit certain rights to give effect to societal goals, also allows rights to be tailored to domestic imperatives. The proviso to these derogations and limitations is that they be based on clear legal rules of general application and be justifiable and proportionate to the aim to be achieved. Nonetheless, the understanding is that international inspection of these measures, for example by human rights treaty bodies, remains in place.

11.5 Extraterritorial application of human rights

Increasing globalisation gives rise to the following question: do states' human rights-based duties extend to persons outside the sovereign territory of these states – that is, extraterritorially? Does the United States, for example, violate international human rights law if its 'drones' kill someone in Pakistan?¹⁶ The answer lies in the main source of states' human rights obligations – that is, in human rights treaties. Many of these treaties provide that states parties are bound to secure the rights of everyone 'within their jurisdiction'.¹⁷

What does the 'jurisdiction' of a member state entail? The most frequent answer is that a state's jurisdiction (and, thus, its responsibility) extends to situations over which it has 'effective control'. Control has a *territorial* or *spatial* dimension, in that it relates to the extent of effective control over the territory where human rights violations occur. It may also have a *personal* dimension, in so far as it relates to the extent of authority a state has over an alleged perpetrator or victim – for example, is the alleged victim held in the state's custody? Generally speaking, a state must act with 'due diligence' to ensure the rights of everyone within a territory under its effective control, and of persons under its effective control.

As indicated above, a state's obligation to *respect* rights does not generally entail the allocation of resources, while its obligation to *fulfil* rights generally requires positive measures entailing the allocation of resources. In identifying the extent of a state's extraterritorial obligations, it may therefore be useful to distinguish between the *nature* of the obligations at stake. For this reason, a distinction is here drawn between states' extraterritorial obligations in relation to 'civil and political' rights (which most often entail obligations to respect) and those in relation to 'socio-economic' rights (which most often entail fulfilment obligations).

In a series of judgments emanating from hostilities in Iraq, the European Court of Human Rights confirmed that the European Convention (containing 'civil and political' rights almost exclusively) applies extraterritorially when a state party exercises control over an individual, both during peace time and in armed conflict.¹⁸ In a 2014 case, *Hassan v United Kingdom*,¹⁹ it was alleged that the United Kingdom had violated an Iraqi national's right to liberty and security under article 5 of the Convention when its armed forces captured him, and detained him in a British army facility within Iraq without following Convention guarantees and procedures. The United Kingdom argued that the Convention does not apply during international armed conflict in an area where the United Kingdom was not an occupying power. The court rejected this argument, and held that it had jurisdiction under article 1 of the Convention. In terms of article 1, states parties undertake to 'secure to everyone within their jurisdiction' the Convention rights. However, the court did not find a violation of article 5 because it interpreted this provision in the light of other international law obligations²⁰ – in particular, international humanitarian law. On the basis that the British forces acted in line with the Fourth Geneva Convention, a treaty forming part of international humanitarian law allowing for the internment of combatants and civilians posing a security threat, their actions were considered not to have resulted in a Convention violation. On the facts, the court found that the detainee did pose a security threat and that the Geneva Convention mandated the procedures followed.

Economic globalisation means that states, and in particular transnational corporations, may have an impact on the livelihood of persons (and thus on the realisation of their socio-economic rights) outside their territory or country of registration or incorporation. The 2012 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, issued by 40 international law experts from all regions of the world, aim to clarify the extraterritorial reach and scope of socio-economic rights. In terms of these Principles, states must take action, separately and jointly through international co-operation, to respect, protect and fulfil the socio-economic

rights of persons within their territories and extraterritorially, and must ensure the right to a remedy.²¹ In a 2014 report, the UN Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation observed that ‘violations of extraterritorial obligations are a growing concern in relation to the rights to water and sanitation, for instance in the context of transboundary water resources, the activities of transnational corporations, or donor activities’.²²

Some human rights treaty bodies have also emphasised that human rights apply extraterritorially. For example, the UN Human Rights Committee in its concluding observations after examining Germany’s sixth periodic report, encouraged the state to take an unequivocal position that all business enterprises ‘domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant’ when they operate abroad.²³

11.6 The global system for the promotion and protection of human rights

The global system for human rights promotion and protection has been established under the auspices of the United Nations. A brief discussion of the human rights standards developed within the UN is provided. The UN human rights system takes two forms: one based on states’ membership of the United Nations, and one based on their voluntary acceptance of obligations under various UN human rights treaties.

11.6.1 The United Nations and its human rights standards

After World War II, the international community established the United Nations as an organisation to prevent future resort to war by enhancing international co-operation. In its founding document, the 1945 UN Charter, UN member states commit themselves to promote human rights through ‘joint and separate action’.²⁴

Soon thereafter, on 10 December 1948, UN member states adopted the Universal Declaration as a statement containing the global agreement about a minimum set of human rights standards. Although the Universal Declaration is not, as such, binding on states, it has acquired great moral force, and carries persuasive weight. No state has explicitly denounced it;²⁵ there is agreement that at least some of its provisions have attained the status of customary international law;²⁶ it has inspired the adoption of many subsequent treaties and national bills of rights; and it has subsequently been used as the core yardstick in one of the United Nation’s central human rights processes, the Universal Periodic Review (UPR), which is discussed in more detail below.

Many other non-binding (or ‘soft law’) standards, mostly referred to as ‘declarations’, were subsequently adopted under the auspices of the United Nations. Some of these have later been converted into binding treaties, as wider consensus around particular norms evolved. However, this evolution has not taken place in a number of pertinent instances – for example, the 1986 Declaration on the Right to Development, and the 2007 UN Declaration on the Rights of Indigenous Peoples.

Following the adoption of the Universal Declaration, a process was set in motion to convert its provisions into a single binding treaty. However, it soon emerged that such a process was beset with difficulties, mostly owing to different views held by East and West during the Cold War period. Socialist/capitalist fault lines made agreement on the inclusion of justiciable socio-economic rights impossible. As a result, and in order to advance human rights, it took almost two decades before sufficient consensus emerged to adopt two separate treaties to capture the spirit of

the Universal Declaration: the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).

While the ICCPR rights were viewed as being potentially immediately enforceable, the ICESCR rights were to be implemented progressively and were not expected to lead to immediately achievable remedies. This duality clearly contradicted the notion of the *indivisibility* of human rights. An Optional Protocol to the ICCPR (the First Optional Protocol) was adopted, allowing for complaints and redress in individual cases, but no such procedure was foreseen under the ICESCR. It took more than a further four decades, a period that saw the end of the Cold War and the emergence of multi-party democracy across the globe, before the principle of *indivisibility* was restored. It came with the adoption of an Optional Protocol to the ICESCR, in 2008, which allows for individual complaints similar to those allowed under the ICCPR.

The list of human rights treaties has subsequently been expanded to encompass people in need of specific protection, and in particular situations threatening their rights (discussed in more detail below).

11.6.2 The UN Charter-based human rights system

Initially, the most prominent institution within the United Nations dealing with human rights was the UN Commission on Human Rights (UNCHR). It was established under the auspices of the UN Economic and Social Council (ECOSOC). Although the UNCHR made significant contributions to human rights, particularly in relation to standard setting and through its system of special procedures, over time, it was increasingly viewed as applying double standards.

In his 2005 report, *In Larger Freedom*, the UN Secretary-General called for the replacement of the UNCHR by a smaller, permanent and more human rights-compliant council that would fill the credibility gap left by states that used their commission membership to insulate themselves from criticism. The major reason for replacing the UNCHR was the highly selective way in which it exercised its country-specific mandate. This practice was due mainly to the political bias of representatives and the ability of more powerful countries to deflect attention away from themselves and those enjoying their support.

The Human Rights Council (HRC) was consequently established in 2006, and functions as a subsidiary organ of the UN General Assembly.²⁷ It is the primary organ of the UN Charter-based human rights system. While all UN member states fall under its authority, only 47 states are represented on the HRC. The General Assembly elects these members for three-year periods by majority vote. HRC membership is thus rotational. It is also based on the principle of equitable geographic distribution according to the five UN regions: 13 members from Africa; 13 from Asia; eight from Latin America and the Caribbean; seven from the Western Europe and Other region; and six from Eastern Europe. A state's human rights record and human rights pledges and commitments – for example, its ratification of UN human rights treaties and assistance in UN human rights field operations – are also factors to be considered during elections. There is also a human rights conditionality: a state may be suspended from HRC membership if it commits 'gross and systematic violations of human rights'.²⁸ When it embarked on a campaign of terror against its own population in 2011, Libya became the first state to be suspended from the Council.

South Africa was elected to the HRC in November 2013. On the one hand, it joined states such as China, Saudi Arabia, Ethiopia and the Russian Federation on the Council. The human rights record of these states is, at best, debatable. On the other hand, South Africa serves together with all the other members of two international regional groupings to which it belongs: BRICS (Brazil, Russia, India, China) and IBSA (India, Brazil). On the geopolitical plane, South Africa's

membership of BRICS and IBSA may lead to contradictory positions on human rights-related issues.

The most visible and regular activity undertaken by the HRC is the Universal Periodic Review (UPR). It is ‘universal’ in the sense that the human rights record of *every* UN member state is reviewed. It is ‘periodic’ in that the review is done in regular four-year cycles. The first cycle was 2008–2011, and the second cycle started in 2012. The substantive yardstick for the review is the UN Charter, the Universal Declaration and the treaties ratified by the state under review. A state is reviewed on the basis of its national report, a report prepared by the UN Office of the High Commissioner for Human Rights on the state’s UN human rights compliance, and a report by ‘other stakeholders’ – mainly local and international civil society.

The HRC appoints a Working Group to assess the report of a particular country, followed by an interactive dialogue with the state under review, during which questions are posed.²⁹ Non-HRC members may also participate in this dialogue. The process ends with ‘recommendations’ directed at reviewed states. The fact that states are not obliged to accept all these recommendations underscores the voluntary nature of the review process. Reviewed states indicate which recommendations are accepted, and which are rejected. During a subsequent review, other states have the opportunity to draw attention to the reviewed state’s response to these recommendations.³⁰ While it is true that friendly states often queue up to pose harmless questions, many other states have consistently raised contentious and problematic issues.

There is some overlap between the UPR and state reporting under UN human rights treaties. The two are supplementary. For example, the UPR is used to engage states on the implementation of recommendations issued by treaty bodies. There are also major differences. While the UPR covers *all* UN member states, state reporting only applies to states parties to a particular treaty. Many states parties to treaties have been reluctant to submit reports, but all of them have subjected themselves to the UPR. While the UPR deals with human rights in a general way, the state-reporting process focuses on the more detailed and specific provisions of treaties ratified by reviewed states.

11.6.3 The UN treaty-based human rights system

While all UN member states fall under the UN Charter-based system, only states that are party to UN human rights treaties have obligations under these treaties.

While the ICCPR and ICESCR mentioned above provide for a comprehensive catalogue of human rights, the United Nations has adopted a series of more specialised treaties aimed at groups or categories of persons at particular risk of their rights being violated, or in situations that pose a great risk to human rights. The first of these treaties, which predates the ICCPR and ICESCR, is the 1965 Convention on the Elimination of Racial Discrimination (CERD). The early adoption of CERD is testimony to the influence within the United Nations of states emerging from racism and colonialism, particularly in Africa, and to the level of international agreement on the abhorrence of racism, particularly after the 1960 ‘Sharpeville massacre’ in apartheid South Africa.

Further treaties were adopted on the rights of particularly vulnerable groups – namely, women (the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)); children (the 1989 Convention on the Rights of the Child (CRC)); migrant workers (the 1990 International Convention on the Protection of the Rights of All Migrants and Members of their Families (CMW)); and persons with disabilities (the 2006 Convention on the Rights of Persons with Disabilities (CRPD)). Thematic treaties were further adopted to deal with some of the most serious human rights issues on which global consensus had emerged – namely, torture (the

1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)); and enforced disappearances (the 2006 Convention on Enforced Disappearances (CED)).

While a plethora of human rights standards has been developed within UN organs and agencies, the treaties mentioned above are considered core treaties. These core treaties have in common that each of them establishes a treaty-monitoring body (referred to as a ‘committee’). These committees all consist of *independent experts*. The number of experts differs from treaty body to treaty body. These experts do not need to be legally qualified. In addition to the treaty bodies established under the nine treaties mentioned above, a Sub-Committee on the Prevention of Torture was also established.³¹

The primary obligation of states under each of these treaties is to give domestic effect to the treaty provisions – in legislation, policies and practices. A number of procedures through which the treaty bodies monitor state observance of their obligations under these treaties have been established. The treaty bodies perform these functions during meetings (or sessions) of varying duration and frequency.³² These procedures are: periodic reporting by states parties (*state reporting*); the submission of communications (complaints) by individuals against states parties (*individual communications*); communications (complaints) submitted by one state party against another (*interstate communications*); and on-site visits to conduct *inquiries* into states parties in response to systemic violations. In addition, these bodies also expand on the normative content of the treaties they supervise through the adoption of *General Comments*.

11.6.3.1 State reporting

A relatively non-confrontational procedure – periodic state reporting – was instituted to monitor states’ compliance with this obligation. Under all nine treaties above, states are required to submit periodic state reports.

State reporting aims at providing an opportunity for *national introspection* (by individual states’ periodically taking stock of the extent of their conformity with their treaty obligations), and for *international inspection* (by the treaty-monitoring body). The introspection culminates in a national state report, which should ideally also reflect civil society concerns. As this is rarely the case, non-governmental organisations (NGOs) often submit ‘shadow’ (or alternative) reports to supplement or correct the overly rosy picture likely to be painted by the state. The inspection takes the form of questions to a government delegation (often provided in advance), answers by them during an oral presentation of their state report, and culminates in ‘Concluding Observations’ by the committee containing positive features, problematic issues and recommendations.

11.6.3.2 Individual communications

In addition to state reporting, all nine treaties now also allow for the submission of individual complaints (or ‘communications’). The acceptance of individual complaints under all these treaties is optional. The major reason for making acceptance optional is that it represents a greater inroad into state sovereignty than state reporting, in that such complaints may lead to a finding, in a particular case, that the state has violated its treaty commitments, even if these findings are not legally binding.

The increased ‘judicialisation’ of the human rights system (and humanisation of international law)³³ appears from the introduction of individual complaints under treaties that did not initially provide for this possibility. The adoption of the Optional Protocol to the ICESCR of 2008 was mentioned above.³⁴ Another telling example of expanding ‘judicialisation’ is the status of complaints in relation to the CRC. No complaints procedure was originally allowed for in 1989

when this treaty was concluded. A protocol allowing for individual complaints was only adopted in 2011, and entered into force on 14 April 2014, after ratification by 10 states parties. Only one African state, Gabon, was among the first 10 states to ratify this Optional Protocol.

Article 8(4) of the Protocol to the ICESCR gives the following direction to the Committee on Economic, Social and Cultural Rights (CESCR):

When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

The drafting history of this provision indicates that South Africa's experience with justiciable socio-economic rights – in particular, the jurisprudential approach of the South African Constitutional Court³⁵ – has been influential in the acceptance of a 'reasonableness' approach to the adjudication of the rights in the ICESCR.

By 2014, two communications submitted against South Africa had been decided, both by the Human Rights Committee. In *Prince v South Africa*,³⁶ the Committee found that South Africa had not violated the ICCPR. The following is an excerpt from the Committee's views:

7.4 On the author's claim that the failure to provide an exemption for Rastafarians violates his rights under article 27, the Committee notes that it is undisputed that the author is a member of a religious minority and that the use of cannabis is an essential part of the practice of his religion. The State party's legislation therefore constitutes interference with the author's right, as a member of a religious minority, to practice his own religion, in community with the other members of his group. However, the Committee recalls that not every interference can be regarded as a denial of rights within the meaning of article 27 (See Communication No.24/1977, *Lovelace v. Canada*, Views adopted on 30 July 1981, para.15). Certain limitations on the right to practice one's religion through the use of drugs are compatible with the exercise of the right under article 27 of the Covenant. The Committee cannot conclude that a general prohibition of possession and use of cannabis constitutes an unreasonable justification for the interference with the author's rights under this article and concludes that the facts do not disclose a violation of article 27.

In *McCallum v South Africa*,³⁷ the Human Rights Committee found that South Africa had violated the ICCPR. Following the death of a prison warden, the complainant, an inmate of the prison (St Alban's Correctional Facility in the Eastern Cape), alleged that he was severely assaulted and for more than a month refused access to a lawyer and his family, and was not provided with medical treatment. Due to the unfortunate failure of the South African government to respond, the Committee based its finding on the complainant's uncontested allegations as far as they were adequately substantiated. As a result, the Committee found South Africa in violation of article 7 of the ICCPR, which reads as follows:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

The following is an excerpt from the Committee's finding:

6.5 Regarding the author's claim that the St. Alban's Correctional Facility was locked down after the incident of 17 July 2005 and that he was held incommunicado for a month without access to a physician, a lawyer or his family, the Committee recalls its General Comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, which recommends that States parties should make provisions against incommunicado detention and notes that the total isolation of a detained or imprisoned

person may amount to an act prohibited by article 7. In view of this observation, the Committee finds an additional violation of article 7 of the Covenant.

6.6 With regard to the author's complaint that despite several requests to various authorities he was not tested for HIV, which he feared to have contracted as a result of the incident of 17 July 2005, the Committee finds that the prevalence of HIV in South African prisons, as attested by the Committee against Torture in its concluding observations of the State party's initial report, which had been brought to the Committee's attention by the author, as well as the particular circumstances of the incident of 17 July 2005 warrants the finding of a violation of article 7 of the Covenant.

11.6.3.3 Interstate communications

Initially, UN human rights treaties provided for interstate communications. This procedure allows one state party to complain to the treaty-monitoring body about the violation of the treaty by another state party. However, owing to factors such as fear of reprisals, international comity and the geopolitics of international relations, states have not made any use of these avenues. More recent treaties have consequently omitted this possibility.

11.6.3.4 Inquiries

The most invasive procedure for state sovereignty is an inquiry (also referred to as an 'on-site investigation'). Established under the Optional Protocol to CAT, the Sub-Committee on the Prevention of Torture has the competence to undertake not only periodic visits to places of detention but also ad hoc visits, if reliable information about systemic torture has been received. The CESCR may undertake inquiries on grave or systematic violations of any of the economic, social and cultural rights contained in the ICESCR.³⁸

11.6.3.5 General Comments

In addition to the procedures described above, each of the human rights treaty bodies adopts 'General Comments'³⁹ (called 'General Recommendations' by the CEDAW Committee), in which these bodies give their detailed understanding of vaguely formulated treaty provisions. Although these comments do not have the same binding legal force as treaty provisions, their persuasive value is enhanced by their quality, the extent to which they fill normative gaps, and their subsequent use.

11.7 Regional systems for the promotion and protection of human rights

Regional human rights systems have evolved in some regions (continents or combination of continents). In Europe, the Americas and Africa, regional human rights regimes, in the sense of a set of human rights norms that are accepted by states as binding, and which are being monitored by relatively effective and functioning institutions, have been established. Fledgling systems have also emerged in the Arab and Islamic world, and in South East Asia.

11.7.1 The three main regional human rights systems

The intergovernmental organisations within which the European, American and African regional human rights systems function, as well as their respective main normative standards, institutions and procedures are briefly sketched below.

11.7.1.1 Intergovernmental organisations

Each of these regional systems operates under the auspices of an *intergovernmental organisation*.

In *Europe*, this is the Council of Europe (CoE). Soon after the end of World War II, in 1949, 11 Western European states founded the CoE. Their aim was to promote human rights and the rule of law, and to create a bulwark against communism and totalitarianism.

A distinction should be drawn between the European Union (EU) and the CoE. The main objectives and membership of the two organisations are different. While the EU was established with the main aim of realising economic integration, the CoE was established with a clear mandate to realise human rights and secure the rule of law. However, as the EU has evolved into a political union in which human rights feature more prominently, a blurring of this distinction has occurred.

After the end of the Cold War and the demise of communism, both organisations expanded their initial membership from exclusively West European states to include states from Central and Eastern Europe. However, membership of the EU is still more limited than that of the CoE. The EU initially consisted of only six members, but by 2015 had increased its membership to 28; the CoE initially had 11 members but had grown to 47 by 2015. Today, states such as Iceland, Ukraine and Russia are all members of the CoE and are party to the European Convention.

Disputes about the process of European economic integration are adjudicated by the Court of Justice of the European Communities, which is based in Luxembourg. The European Court of Justice adjudicates disputes related to the process of economic integration within the EU. Although the EU and its Court of Justice were not established with a human rights mandate, in practice, there has been some convergence between EU and European Convention law, and the European Courts of Human Rights and of Justice. The increasing influence of human rights in the EU has led to the adoption of an EU Charter of Fundamental Rights.

The human rights system in the *Americas* has been established by the Organization of American States (OAS), which was founded in 1948 to promote regional peace, security and development in the Americas. Its membership includes all 35 states in the Americas, stretching from Latin America, through the Caribbean to the United States and Canada.

In *Africa*, a human rights system was adopted under the auspices of the Organization for African Unity (OAU), which in 2002 transformed itself into the African Union (AU). With the exception of Morocco, the AU's 54 members include all states on the African continent, including the most recent state, South Sudan. Morocco withdrew from the OAU in 1984, when the organisation admitted the Sahrawi Arab Democratic Republic (the SADR or 'Western Sahara') as a member. Both Morocco and the SADR (through the Polisario Front) claim sovereignty over the Western Sahara territory. The UN, which recognises the SADR not as a state, but as a non-self-governing territory, has over many years unsuccessfully endeavoured to resolve the disputed claim by way of a referendum.

11.7.1.2 Normative frameworks

In each of the three systems, the substantive norms are set out in one principal treaty. However, the substantive basis of each of the systems also goes beyond the main instruments, and includes, for example, subsequent protocols.

In *Europe*, in 1950, the Council of Europe adopted its primary human rights treaty, the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) as a common binding normative framework.

The catalogue of rights initially comprised only classical ‘civil and political’ rights, but was extended through the adoption of Protocols to the European Convention and the adoption of a further, separate treaty – the 1961 European Social Charter, which is monitored by its own treaty body, the European Committee on Social Rights. Initially adopted in 1965, this charter has undergone a process of reformulation into the ‘1996 Revised Social Charter’. Although the system is still evolving, it is less effective than the European Convention system. For one thing, states are not bound to observe all the substantive rights in the Charter, but are allowed the flexibility to choose from the menu of provisions. For another, the body responsible for monitoring state compliance is not a court, but a quasi-judicial body. In any event, the procedure for monitoring respect for rights is periodic state reporting, and not individual complaints. Under an amending Protocol, a collective complaints process is allowed for.⁴⁰ Although it has been accepted by only a limited number of states, the procedure is increasingly making an impact. Another factor limiting the potential impact of the Social Charter is its weak wording and the limited personal application. The Charter does not apply to non-nationals of the CoE or non-state parties.

The CoE has adopted a further separate treaty, the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

A regional human rights system also exists in the *Americas*. It is based on two legal instruments (a declaration and a treaty), which creates two coexisting and partly overlapping legal regimes. The declaration is the American Declaration on the Rights and Duties of Man (American Declaration), which the OAS adopted in 1948, just before the UN’s Universal Declaration. The OAS adopted the American Convention on Human Rights (American Convention) in 1969. It entered into force in 1978 and has been ratified by 25 states (of which two, Trinidad and Tobago, and Venezuela, have denounced the Convention). It binds only those states that have become party to it. An important constraint is that the two major economic powers in the region, the United States and Canada, are not party to the American Convention. The American Convention contains rights similar to those in the European Convention, but goes further by also providing for minimum ‘socio-economic’ rights in article 26, which aims at the progressive realisation of these rights. In a subsequent treaty, the Protocol of San Salvador, a list of much more extensive socio-economic rights is provided for. However, only two of them (the right to unionise and the right to education) are directly justiciable.

In contrast to these two treaties, the *African Charter* (African Charter on Human and Peoples’ Rights), adopted by the OAU in 1981, and coming into force in 1986, contains both traditionally accepted ‘civil and political’ rights and justiciable ‘socio-economic’ rights, and elaborates on the duties of individuals and the rights of peoples. The Charter is supplemented by other treaties, which are discussed more fully below.

11.7.1.3 Institutions

The principal treaty is differently implemented or enforced in each region.

In an evolution spanning many decades, the *European* system of implementation developed from a coexisting commission and court to a single judicial institution – namely, the European Court of Human Rights based in Strasbourg, France, which deals with individual cases.⁴¹

Since the 1950s, the judicial enforcement of rights has gained much momentum. Although individuals could initially submit petitions or complaints, this was an optional procedure that few states accepted, and few complaints were in fact submitted. Also, aggrieved individuals first had to approach the European Commission of Human Rights (which could only make recommendations)

before they could submit the case to the European Court of Human Rights. The commission was abolished in 1998, when Protocol 11 entered into force, making direct access to the court compulsory for all states parties to the Convention and transforming the court into a permanent judicial body.

Today, the European Court of Human Rights is the only body responsible for adjudicating individual cases arising from the European Convention. Its workload has increased dramatically over the last few decades, leading to a huge backlog of pending cases. One of the reasons for this constant stream of cases is the court's effectiveness, which inspires submission of cases by potential applicants across Europe. Once a violation is found, the Committee of Ministers of the CoE (the Ministers of Foreign Affairs) oversees the execution of the court's order. When the order is for payment of an amount of compensation, as has been the case almost exclusively, states generally comply. However, when the order requires specific measures aimed at addressing systemic issues, compliance is less uniform.

Another reason for the constant stream of cases relates to structural or systemic violations. Once a particular individual has obtained an order – for example, concerning undue delay in court proceedings – many others (often thousands) approach the court with similar cases. Faced with such 'repeat cases', the court has developed a 'pilot judgment' procedure, in terms of which subsequent cases are dealt with according to the first ('pilot') judgment.⁴² The introduction of this procedure underscores the evolution of the European system from an approach focused on individual violations to one much more alive to collective concerns and systemic problems.

The most obvious solution to the increase in the number of cases submitted to the European Court of Human Rights (and the ensuing backlog) lies at the domestic level of member states. It is in the first place the responsibility of national systems to ensure respect for and to give effect to the Convention. The crucial role of the national level is captured by the principle that complainants have to exhaust domestic remedies before approaching the European Court. In other words, the subsidiary role of the national system has to be taken more seriously. Further, to avoid a flood of 'repeat cases', the national system should respond to findings of violations in individual cases by effecting the required structural changes to address the root causes of the individual violation.

The procedure before the European Court is under constant review. One of the most important recent changes (set out in Protocol 14 to the European Convention) allows the court to declare applications inadmissible on the ground that the applicant has not suffered a 'significant disadvantage'.⁴³

As has been mentioned, two additional human rights regimes exist under the CoE, each with its own set of legal norms and implementation body. The European Social Rights Committee was established under the European Social Charter; and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was established under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Each of these treaties establishes a separate institutional mechanism independent from the European Court of Human Rights.

In the *Inter-American system*, a two-tiered model is in place. It comprises a quasi-judicial body, the Inter-American Commission (based in Washington DC), and a judicial institution, the Inter-American Court (based in San José, Costa Rica). All complaints by individuals first have to be submitted to the Inter-American Commission. If it finds a state to be in violation of the American Convention, it may then refer the case to the Inter-American Court of Human Rights.

The Inter-American Commission on Human Rights was established in 1959. This commission surprised its founding fathers when, in 1962, it began to interpret its very general mandate as allowing it to prepare and publish country reports on the human rights violations attributable to

individual states. This led to the commission issuing reports on the Dominican Republic and Cuba. This power was extensively used in the 1970s and 1980s to bring to light human rights violations – for example, in Nicaragua.

In 1965, the OAS granted the commission powers to examine communications based on alleged violations of the American Declaration. All 35 OAS member states fall under this competence.

The American Convention on Human Rights established the American Court of Human Rights. However, states have to accept the court's jurisdiction by making a declaration to this effect. Complainants cannot approach the court directly. The commission has the competence to refer to the court complaints (cases) that it has finalised and in respect of which the state does not comply with the commission's recommendations. After some initial hesitancy, the commission referred its first case to the court. In the ensuing decision, *Velásquez Rodríguez v Honduras*,⁴⁴ which deals with the forced disappearance of a human rights activist by state agents, the court found that because such disappearances were 'supported or tolerated' by the government, and the disappearance of the applicant could be linked to that practice, the state of Honduras was held responsible, and in violation of the American Convention.

After some recent institutional reforms, the *African* system now resembles the Inter-American system. The African Commission, which started functioning in 1987, is a quasi-judicial institution with a promotional and protective mandate. The African Court on Human and Peoples' Rights, in existence since 2007, complements the commission's protective mandate. The African system is discussed in more detail below.

11.7.1.4 Procedures

All three systems are mandated to find violations arising from individual communications or cases. One of the major features of the Inter-American system is the adoption of precautionary measures to safeguard the rights of those under imminent threat. Various forms of reporting are also observed.

11.7.2 Other regional systems

A number of other regional systems to protect and promote international human rights are also operational, notably in the Arab and Muslim worlds and in South East Asia. They may be less developed and influential than the three main ones discussed above, but nonetheless, they have importance and this may grow in the future.

11.7.2.1 Fledgling systems in the Arab and Muslim worlds

Fledgling Arab and Muslim regional systems have also emerged. According to the Islamic world view, the Qur'an and other religious sources play a dominant role in the regulation of social life. All Muslims are perpetually bound to other Muslims according to tenets based on the will of Allah.⁴⁵ Legislation is exceptional, and is reserved for areas not covered by religious prescription. A religion-based scepticism of codified ('human') law, in general, and constitutionalism, in particular, no doubt finds its way to the international law sphere.

African states feature prominently among the members of the two major Arabic and Islamic organisations, the League of Arab States and the Organisation of the Islamic Cooperation (OIC). Ten African states (Algeria, Comoros, Djibouti, Egypt, Libya, Mauritania, Morocco, Somalia, Sudan and Tunisia) are members of both. The role of human rights under these two regimes is therefore discussed in some depth.

The *League of Arab States* was founded in 1945. Its overriding aim is to strengthen unity among Arab states. The League's founding document does not mention the contents or principles of human rights.⁴⁶ In 1994, the League of Arab States adopted the Arab Charter on Human Rights. However, it never secured the required number of ratifications. In 2004, it was replaced by the Revised Arab Charter on Human Rights. This Charter entered into force in 2008 and by the start of 2014, it had been ratified by 17 states.⁴⁷

The 2004 Revised Charter restates and improves on the 1994 version. Its Preamble invokes the Shari'ah in conjunction with 'other divinely-revealed religions' to underline the 'eternal principles of fraternity, tolerance and equality among all human beings'.⁴⁸ According to its Preamble, the Arab Charter reaffirms the principles of the two UN Covenants. The Charter enshrines the principle of non-discrimination in the scope of its application, including on grounds of sex and religion.⁴⁹ Similar to the ICCPR, the Arab Charter contains a derogation clause, stipulating circumstances under which rights may be derogated from and listing non-derogable rights. The Arab Charter mirrors most of the ICCPR provisions. It contains a number of fair trial rights, and although it does not outlaw the death penalty, it allows it only for 'the most serious crimes'.⁵⁰ The Arab Charter emulates the ICESCR in the same way, in that it includes the rights associated with employment, the right to 'own private property', the right to education, the right to participate in cultural life, the right to social security and the right to health. One negative feature is the inclusion of some 'claw-back clauses'. For example, the right to freedom of religion may be 'prescribed by law'.

Supervision is undertaken by the Arab Human Rights Committee, which consists of seven experts who serve in their personal capacity. It is mandated to review state reports (submitted every three years). One of the major weaknesses of the Arab system is the lack of an individual communications procedure.

The *Organization of the Islamic Cooperation* (OIC), established in 1969, aims at the promotion of Islamic solidarity among member states. It works towards co-operation in the economic, cultural and political spheres. Of its 57 members at the end of 2014, 27 states were African.⁵¹

The major human rights document adopted under this framework is the Cairo Declaration on Human Rights in Islam. It was adopted by members of the OIC in Cairo in 1990. As its title indicates, it is of a declamatory nature only, and the declaration is closely based on the principles of the Shari'ah. In a concluding provision, it is stipulated that all 'rights and freedoms ... are subject to the Islam Shari'ah' (art 24). Many rights are explicitly limited by the provisions of the Shari'ah. Examples are the right to life,⁵² regulation of punishment⁵³ and the right to assume public office.⁵⁴ These deviations are extreme to the extent of threatening the international project to attain a core consensus on human rights across cultural barriers. An expert body with an exclusively advisory mandate, the Independent Permanent Human Rights Commission (IPHRC), has also been established.⁵⁵

In 2004, the OIC adopted a binding instrument with a specific focus – namely, the Covenant on the Rights of the Child in Islam.⁵⁶ This Covenant is open for ratification and will enter into force after 20 OIC member states have ratified it. No state has done so yet, prompting the OIC Conference of Foreign Ministers to 'request' member states to 'sign and ratify' the Covenant.⁵⁷ Compared to other international instruments dealing with children's rights, the Covenant on the Rights of the Child in Islam is more restrictive in scope and application. Its 'principles' include the observance by states parties of 'domestic legislations' and of the principle of non-interference in the internal affairs of states. Although the Covenant includes some socio-economic rights, they are either framed in a very particular Islamic context,⁵⁸ or made contingent on 'national laws'.⁵⁹ Although the Covenant provides for a monitoring mechanism (the Islamic Committee on the Rights of the Child), its mandate is only vaguely drafted.⁶⁰

A process, initiated by Bahrain, is now underway to establish an Arab Court of Human Rights. However, the creation of a judicial institution seems premature, given the fragile nature and ineffectiveness of the existing structure.

11.7.2.2 Developments in South East Asia

Stretching from India to Japan, the Asia-Pacific region comprises a mixed group of nations that somewhat overlaps with the Muslim world. There is still no regional human rights system in the Asian region as a whole – mainly because there is no intergovernmental organisation to unite the diverse states of the region.⁶¹ The emergence of a human rights system has been further curtailed by deep-seated ‘disinterest or hostility shown by many governments in the region towards domestic or international concern about human rights’,⁶² and the notion that ‘Asian’ understandings of human rights are at odds with the ‘universal’ discourse. The exception in the region is South East Asia, where the existence of an intergovernmental organisation, the Association of Southeast Asian Nations (ASEAN), has no doubt contributed to standard setting and the establishment of a human rights mechanism. ASEAN brings together states as diverse as Cambodia, Indonesia, Singapore and the Philippines. It comprises a diverse group of regimes with a variety of human rights and development challenges.

The first step towards an effective regional human rights mechanism was the establishment in 2009 of the ASEAN Intergovernmental Commission on Human Rights (AICHR) as the overarching ASEAN human rights body.⁶³ However, its legitimacy and potential effectiveness suffer from serious constraints. AICHR’s mandate is only consultative and promotional. It does not have the mandate either to receive individual complaints or to examine state reports. It consists of one representative from each member state who serves on behalf of his or her government. Government may recall representatives. However, some states have appointed members of civil society organisations to serve on the AICHR. According to its terms of reference, the mandate and functioning of the AICHR must be reviewed after a period of five years.

In 2012, a normative basis for the system was provided, taking the form of the non-binding ASEAN Human Rights Declaration.

11.8 The African system for the promotion and protection of human rights

Bringing together newly independent African nations jealously guarding their hard-fought independence, the OAU was strongly premised on the principle of non-interference in the internal domestic affairs of member states. The OAU’s founding document, the 1963 OAU Charter, did not place an obligation on states to respect human rights. It is therefore hardly surprising that the OAU did not at its founding dedicate any treaty or institution to human rights.

Clearly, there is a close correlation between human rights observance at the domestic (national) and regional levels. Ultimately, a regional system depends on backing by its political leaders, and pressure generated by domestic actors. The human rights system in Africa only started maturing in the 1990s. After the end of the Cold War, a wave of democratisation, often spearheaded by civil society and other democratic forces, culminated in the adoption of new constitutions and multi-party electoral systems across the continent. Against this background, the African Commission became more assertive in the exercise of its mandate, and the OAU adopted a number of significant human rights treaties. These included, most notably, the 1990 African Charter on the Rights and

Welfare of the Child, and the 1998 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights.

Informed by the notion that the OAU needed to be revamped to respond better to changing realities, and driven by the personal ambitions of Libyan leader Gadhafi, the OAU by the turn of the century had transformed itself into the AU. Under its new founding document, the AU Constitutive Act, human rights take a central place. At least on paper, the AU is distinctly different from the OAU. Although its Constitutive Act restates the principle of non-interference of one member state in another member's internal affairs, it also contains a ground-breaking provision. Article 4(h) allows the AU, by a decision of the heads of state, to intervene as a collective (even with military force) in a member state that is unwilling or unable to protect its own population in situations where genocide, crimes against humanity or war crimes are taking place.

11.8.1 The political organs of the OAU/AU

A number of the AU's political organs each play a role in the African regional human rights architecture.⁶⁴

The *AU Assembly of Heads of State and Government* consists of the heads of African states, and is the highest organ of the AU. It usually meets twice annually in ordinary session. One of these leaders serves as chairperson. As the highest AU organ, the Assembly is mandated to 'determine the common policies' of the AU, which includes the adoption of human rights treaties such as the Women's Rights Protocol. It is also responsible for the funding and effective functioning of the African human rights treaty bodies, and further oversees the activities of these bodies and takes action on the basis of their reports, including the enforcement of findings. Under article 59 of the African Charter, protective measures (findings in respect of complaints or 'communications') taken by the African Commission must remain confidential until the Assembly adopts them and allows their publication. In recent times, the Assembly has delegated this function to the Executive Council. The AU Assembly also elects members of various human rights bodies. Initial criticism that the members of the African Commission lacked independence was rectified when the Assembly adopted a directive to states advising them that members of the executive or diplomatic corps should not be nominated as members of the African Commission or the African Human Rights Court.

The *Executive Council* (previously the OAU Council of Ministers) is composed of the Ministers of Foreign Affairs (or other designated Ministers) of AU member states. Meeting more frequently than the AU Assembly, and adopting decisions to be considered by the Assembly, the Executive Council in many ways is more influential in the domain of human rights than the Assembly. In 2003, the Assembly mandated the Executive Council to consider the African Commission's activity reports. The Executive Council's involvement in this process brought much more intense discussion to bear on the African Commission's recommendations (as contained in its activity reports), compared to the rather routine and superficial way in which the Assembly had dealt with these reports.

The *Peace and Security Council* (PSC) is a 'standing decision-making organ for the prevention, management and resolution of conflicts'.⁶⁵ Departing from the premise that there is an important link between peace, security and human rights, the PSC Protocol in numerous respects stresses the importance of human rights. Included among the PSC's objectives and principles is the protection of human rights and fundamental freedoms and respect for human life. As part of its peace-building activities, the PSC must assist member states with social and economic reconstruction, demobilisation and reintegration especially of child soldiers, resettlement of refugees and internally displaced persons. It must provide assistance to 'vulnerable persons, including children, the elderly, women and other traumatized groups'.⁶⁶ Under the PSC Protocol, the African Commission should

provide the PSC with relevant information, and the PSC should co-operate closely with the commission. However, the potential synergy between the PSC and the commission has not yet amounted to much.

Although the *Pan-African Parliament* (PAP) currently acts only as an organ for deliberation and oversight, its evolution into a legislative organ is anticipated as regional integration is strengthened and the need for the harmonisation of laws across Africa increases. The PAP has a role in overseeing the AU executive. It also has a clear human rights mandate. Its aims (to consolidate democracy and good governance, and to promote and protect human rights ‘in accordance with the African Charter’ and ‘other relevant human rights instruments’) are highlighted in its founding treaty.⁶⁷ Similarly, its main competence – that of examining, discussing and expressing opinions on ‘any matter’ – is illustrated by a list of specific substantive issues that include human rights, democracy, good governance and the rule of law.⁶⁸ Acting under this mandate, the PAP has adopted a number of human rights-related resolutions, among them a call in 2005 for the release of detained Ugandan opposition leader Dr Kizza Besigye. In 2004, the PAP decided to deploy a fact-finding mission to Darfur. The mission report analyses the causes and consequences of the conflict and makes a number of recommendations. Following this precedent, similar missions to Côte d’Ivoire, the Democratic Republic of Congo (DRC), and Mauritania were also mandated. However, thus far the PAP has not been able to become much more than a forum for discussion.

11.8.2 Norms

This section outlines and describes key human rights instruments and human rights under the African human rights system. The discussion begins with the OAU Refugee Convention, and proceeds to sketch the key features of the African Charter, the African Children’s Charter, the Women’s Protocol and the Kampala Convention. Read together, the features of these instruments give a picture of the African perspective on human rights and the norms that are embraced by Africa in this regard. Compared to the standards at the global level, the African regional treaties in certain respects, highlighted below, constitute ‘*lex specialis*’ (specific articulation or application of a general rule in particular circumstances).

11.8.2.1 OAU Refugee Convention

The 1969 OAU Refugee Convention, on the whole, mirrors the wording of the 1951 UN Refugee Convention, but expands the definition of the term ‘refugee’. The UN Convention requires a ‘well-founded fear of being persecuted’ as a fundamental precondition for refugee status.⁶⁹ However, the OAU Refugee Convention extends the term to include anyone who is compelled to flee a country of residence, essentially on the basis of ‘events seriously disturbing public order in either part or the whole of his country of origin or nationality’.⁷⁰ It is no longer the subjective fear of the individual alone, but also an objectively ascertainable circumstantial compulsion that may give rise to ‘refugee’ status. This expansion of the term was necessary to overcome the restrictions in the initial approach to refugees. ‘Fear of persecution’ places the emphasis on a person’s beliefs, and not on the socio-political context. The broadened definition of the OAU Convention allows for many more factors to be considered when evaluating a person’s refugee status, including serious natural disasters (such as famine, which remains prevalent in Africa). In this way, the OAU Refugee Convention both confirms the globally accepted (general) standard, and articulates a regional (special) standard, responsive to the particular context. Still, there is no normative conflict between these standards, as the definition of refugee in the OAU Refugee Convention represents ‘the simultaneous application of the special and the general standard’.⁷¹

11.8.2.2 African Charter

Being a product of competing tensions within the OAU, the African Charter represents a compromise. On the one hand were forces for a progressive human rights instrument. On the other were those intending only to establish a façade of human rights protection serving the interests of established political elites and without any serious implications for state sovereignty. The Charter is thus marred by an ambiguous complaints mechanism, a number of claw-back clauses that potentially erode human rights,⁷³ and a weak monitoring system operated by 11 part-time commissioners meeting only twice a year for short sessions.

A number of distinguishable features of the African Charter are discussed below.

11.8.2.2.1 Rights of ‘peoples’

As its title stresses, the African Charter recognises not only individual rights, but also those of ‘peoples’. According to the Charter, peoples have the right to existence, to self-determination, to dispose freely of their natural resources, to development, to international peace and security, and to a generally satisfactory environment.⁷⁴ One of the reasons for their inclusion was the insistence of then-President of Senegal, Léopold Senghor. He held the view that, in Africa, ‘the individual and his rights are wrapped in the protection of the family and other communities’.⁷⁵ However, during the drafting of the Charter, the concept ‘peoples’ was deliberately left undefined.

Three ways of understanding the term ‘peoples’ in the context of the Charter are suggested:

1. Following the most common understanding of the term ‘people’ (essentially encompassing ‘everyone’), the term ‘people’ has been interpreted to denote ‘everyone within a state’ – that is, all the inhabitants of any member state, also in the post-colonial context. In *DRC v Burundi, Rwanda and Uganda*,⁷⁶ the African Commission clearly refers to the right of all (affected) Congolese – the ‘people’ of Congo. Even if the Charter’s term, ‘peoples’, is used, it essentially denotes ‘the people’ of Congo.
2. The term ‘peoples’ (or ‘a people’) may denote distinct minority groups, such as linguistic, ethnic, religious or other groups sharing common characteristics, consisting of individuals who are usually – but not necessarily – inhabitants of the same state. Such an interpretation is most in line with the linguistic analysis above, and goes the furthest in extending the potential benefits of the Charter. The African Commission has steered towards this interpretation in a number of cases.
3. Should the meaning of the term be placed in its historical context, ‘peoples’ may denote the inhabitants of an African territory under colonial rule, as ‘oppressed peoples’, or as groups under alien domination. However, if this interpretation is accepted as the single correct interpretation of the term, the question arises whether the end of colonial rule in Africa has not rendered the term obsolete.

Ouguergouz has aptly described the word ‘people’ as a ‘chameleon-like term’ that ‘varies in nature according to the right which is to be implemented’.⁷⁷ For this reason, a search for a single meaning of ‘people’ should be abandoned.

Article 20(1) provides that ‘all peoples’ have the right to ‘self-determination’. When the Katangese Peoples’ Congress requested that the African Commission recognise the right of the ‘Katangese people’ to complete sovereign independence, the complex issue of secession was introduced.⁷⁸ The commission found that the facts of the particular case did not amount to a violation of article 20(1), because the claimants had not shown that they had made efforts to exercise this right in accordance with constitutional options open to them, ranging from confederalism to self-

government. As the African Commission is ‘obliged to uphold’ the territorial integrity and sovereignty of Zaire,⁷⁸ there is a strong presumption that all nationals who happen to find themselves in a particular state will be able to express their ‘right to self-determination’ within the boundaries of that state. However, the commission left the door open for the right to be extended to groups within a state who are persecuted, whose rights are consistently violated and who are denied a meaningful say in government.⁷⁹

11.8.2.2.2 Inclusion of justiciable socio-economic rights

The African Charter is celebrated as the first international human rights instrument to include not only civil and political rights, but also socio-economic rights, and to make the two previously separated categories of human rights equally justiciable. While the inclusion of these rights is very important, they are only minimally provided for in the text of the African Charter. Essentially, only the rights to health and education are unequivocally provided for. The drafters of the Charter, in the late 1970s and early 1980s, indicated that their purpose in this regard was to save the fledgling states from being too heavily burdened.⁸⁰ It is only this historical background that makes intelligible the omission of the right to basic necessities, such as nutrition or food, shelter or housing and water.

In 2001, the African Commission decided *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (the *Ogoniland* case),⁸¹ which dealt with the responsibility of the Nigerian government for oil pollution by the Nigerian National Petroleum Company, a government-controlled consortium with Shell, and victimisation of the affected populations in the Niger Delta. This decision testifies to the categorical acceptance of socio-economic rights as justiciable guarantees. The case also saw an adventurous commission extending the limited scope of the explicitly guaranteed socio-economic rights to include the right to housing and food, on the basis of the implied rights theory.⁸² Although the commission did not hold Shell directly liable, its decision foregrounded the corrosive effect on human rights of the government of Nigeria’s collusion with this multinational oil company.

In a later case decided in 2009, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (the *Darfur* case),⁸³ the African Commission seemed to have second thoughts about the wisdom of extending the scope of socio-economic rights on the basis of the implied rights theory. In this case, the Commission was invited to find that the poisoning by the Janjaweed of the wells of the people in the Darfur region of Sudan amounted to a violation of the right to water.⁸⁴ As the right to water is not explicitly provided for in the Charter, accepting this argument would have meant a further extension of the rights in the Charter on the basis of the implied rights theory. However, the Commission declined the invitation. Instead, perhaps aware of the perception by states that reliance on the implied rights theory may weaken the fragile institutional legitimacy of the African Commission, it reinterpreted one of the existing rights in the Charter (the right to health) in an expansive way to encompass the right to access to water, thus facilitating a finding that the poisoning of the wells violated the right to health.⁸⁵

Interestingly, when the African Union in 2003 adopted the Protocol to the African Charter on the Rights of Women in Africa (Women’s Protocol) (after sustained activism over a long period of time), the extended scope of socio-economic rights, as elaborated by the commission in the *Ogoniland* case, was formalised as part of the standards of the African regional human rights system.

11.8.2.2.3 Indigenous peoples’ rights

The concept ‘indigenous people’ defies easy definition. The African Commission established a working group on this thematic issue, and mandated it to compile a report on the applicability of this concept to Africa. In its report, the working group concluded that four characteristics may assist in identifying such a group in an African context:

1. The group has a long-standing presence in a territory.
2. The group members follow a lifestyle that is often closely dependent on the land and other natural resources, and which is distinct from that of the majority.
3. The group experiences political and economic marginalisation and exclusion, often threatening its very existence.
4. Members of the group self-identify as indigenous, and surrounding communities regard them as such.

In the African context, complexities may arise in respect of the first characteristic, as most ethnic groups may qualify as ‘indigenous’ in the ordinary sense of that word, in that they often have a long-standing historical claim to particular land, predating colonialism. For this reason, in the African context, colonial conquest is not used as a marker of indigenousness, as this term is understood under international human rights law as a technical human rights concept.

Despite initial misgivings about acknowledging the rights of indigenous peoples under international law, an overwhelming majority of African states have supported the adoption of the UN Declaration on the Rights of Indigenous Peoples (2007).

In its first case dealing directly with the rights of indigenous peoples, Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya* (the *Endorois* case),⁸⁶ the African Commission confirmed the approach of its working group, finding that the Endorois is an indigenous people. In its finding, the Commission emphasises that this status does not confer special privileges, but is used to address ‘historical and present-day injustices and inequalities’.⁸⁷ The eviction of the Endorois community from their ancestral lands around Lake Bogoria, in Kenya, to make room for the development of a game reserve, resulted in the violation of numerous of their rights. For example, their right to the free practice of their religion was violated because they were forcibly removed from their religious sites; and their right to property was encroached upon without the payment of prompt and adequate compensation.

11.8.2.4 Right to development

The African Charter is the first international human rights treaty to include the right to development as a binding right. Under article 22, the right to development entails individual and collective state obligations. As far as the individual aspect is concerned, the right arguably imposes an obligation on individual states to address developmental disparities within states. The New Partnership for Africa’s Development (NEPAD), which has been instituted alongside the AU as a mechanism to spearhead economic growth in AU member states, may be understood as a manifestation of African states’ collective obligation towards the development of the continent.

In the *Endorois* case, the African Commission reiterated that a finding of violation of the right to development is based both on matters of substance and process.⁸⁸ The Commission found that the eviction of the Endorois people from their ancestral lands to create a game reserve, without proper consultation, constituted a violation of article 22.

11.8.2.5 Individual duties

Another distinguishing feature of the Charter is the emphasis placed on individual duties.⁸⁹ The individual has duties to other individuals, to his or her family, towards the community, to the state whose national he or she happens to be and to the African and international community.⁹⁰ Individual duties have as yet not been the subject of any communications, and the African Commission has as yet also not elaborated upon this concept.

One of the factors inspiring the committee of experts drafting the African Charter in the late 1970s was President Senghor's speech in 1979, calling for the inclusion of 'individual duties', 'contrary to what has been done so far in other regions of the world'.⁹¹ Senghor emphasised the interrelated nature of traditional African society, where, he said, 'the individual and his rights are wrapped in the protection the family and other communities ensure everyone'. He contrasted the African approach with the European tradition, which has allowed human rights to be used as a 'weapon' with which the individual can defend 'himself against the group or entity representing it'. By accepting that rights in Africa *in the form of rites* 'must be obeyed' because they 'command', and by insisting that rights-as-rites cannot be separated from the duties to family and 'other communities', Senghor fuses the dividing lines between legal enforcement and moral obligation. Painting with a philosopher's brush, Senghor does not suggest ways in which this tension may be settled.

The African Commission's Guidelines for National Periodic Reports shed some light on the content of these duties by indicating that states should provide particulars about legislative measures, administrative regulations and court decisions 'establishing the atmosphere for enforcement and effectuation of these duties'.⁹² This corresponds with Umozurike's view that these duties require states to 'instil these duties in their subjects'.⁹³

11.8.2.3 African Children's Charter

As a global instrument, the 1989 UN Convention on the Rights of the Child (CRC) is the product of numerous compromises. Regional specificities often are the victims in this process of global consensus seeking. Therefore, from a legal point of view, there was a need to adopt a regional human rights instrument dealing with issues of particular interest and importance to children in Africa.

Compared to the CRC, the 1990 African Charter on the Rights and Welfare of the Child (African Children's Charter), adopted in the immediate wake of the CRC, raises the level of children's protection in three important respects:

1. While the CRC allows child soldiers to be recruited and to be used in direct hostilities, the African Children's Charter completely outlaws the use of child soldiers.⁹⁴
2. In terms of the CRC, child marriages are allowed, because article 1 stipulates that childhood ends at 18 years, unless majority is acquired at an earlier age. The African Children's Charter is explicit in its prohibition of child marriages.⁹⁵ It further adds that legislation must be adopted to specify the age of marriage to be 18 years.
3. In its protection of child refugees, the African Children's Charter extends its ambit to 'internally displaced children',⁹⁶ something the CRC does not do.⁹⁷

In these three respects, the African Children's Charter has succeeded in addressing concerns of particular relevance to Africa. It has therefore fulfilled the objective of supplementing the CRC with regional specificities. The African treaty also includes the possibility of individual communications being submitted against state parties – something that did not exist under the CRC.

11.8.2.4 Women's Protocol

Compared to CEDAW, the African Women's Protocol speaks in a clearer voice about issues of particular concern to African women. It locates CEDAW in an African reality, and returns into its fold some casualties of the quest for global consensus in the adoption of CEDAW. More specifically: the Protocol expands the scope of protected rights beyond those provided for under CEDAW; it deals with aspects already covered in CEDAW with greater specificity; in some important respects, it emphasises the private sphere as an important domain in which rights are to be realised; and it underlines the need for 'positive action'.⁹⁸ The Protocol expands the protective scope of women's rights by addressing numerous issues of particular concern to African women that have not been included in CEDAW as a few examples will illustrate.

The Women's Protocol is the first treaty to provide for the right to circumscribed 'medical abortion'⁹⁹ and to provide for the right of a woman to be protected against HIV infection and to know the HIV status of her (sexual) partner.¹⁰⁰ The Protocol places an obligation on states parties to encourage monogamy.¹⁰¹ A necessary implication of targeting violence against women and 'unwanted or forced sex' in the private sphere is that the Protocol requires domestic violence legislation and the criminalisation of 'rape in marriage'.

Compared to CEDAW, the Protocol also provides in greater detail for the protection of women in armed conflict, and reiterates the need to accord women refugee protection under international law.¹⁰² Under the Protocol, the girl-child may, in particular, not be recruited or take direct part in hostilities.¹⁰³

States parties to the Protocol must set the minimum age of marriage at 18, and all marriages must be recorded in writing.¹⁰⁴

11.8.2.5 Internally displaced persons (IDPs)

According to the Internal Displacement Monitoring Centre of the Norwegian Refugee Council, there are more than nine million internally displaced persons in Africa, involving 21 sub-Saharan countries. This figure represents over a third of the world's total internally displaced persons (IDPs). The main causes of displacement are violent struggles between government forces and rebel movements (internal armed conflicts), and intercommunal violence inspired by either control over natural resources or political representation and power.¹⁰⁵

Addressing this phenomenon is of crucial importance to Africa. In 2009, the AU took the innovative step of adopting binding normative standards in the form of the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (also known as the Kampala Convention). Although this treaty's standards do not vary greatly from the norms already existing at the UN level,¹⁰⁶ it deals with the subject in much greater detail and converts UN norms into binding state obligations.

Article 1(k) defines IDPs as:

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border.

The qualification 'have not crossed an internationally recognised State border' distinguishes an IDP from a refugee.¹⁰⁷ Once displacement causes an IDP to leave the territory of the state of nationality and to seek refuge in another state, the IDP becomes a refugee – provided that the conditions for refugee status are fulfilled.¹⁰⁸

Under article 3 of the Kampala Convention, states parties must comply with a range of obligations aimed at providing protection for displaced persons and at ensuring individual and state responsibility¹⁰⁹ for acts causing the internal displacement of persons.¹¹⁰ Among the protective measures, specific reference is made to the obligation of states parties to '[r]espect and ensure respect and protection of the human rights of internally displaced persons, including humane treatment, non-discrimination, equality and equal protection of law'.¹¹¹ Provision is further made for international and national criminal responsibility of individuals, who, through their acts, have caused the arbitrary displacement¹¹² of persons; and for the accountability of non-state actors, including multinational companies and private military companies responsible for arbitrary displacement.¹¹³ States parties must also ensure that non-state actors involved in the exploration and exploitation of economic and natural resources causing displacement are held accountable.¹¹⁴

If displacement coincides with an armed conflict situation, international humanitarian law (IHL)¹¹⁵ provides another normative framework for the protection of IDPs. In the first instance, there is the general protection for civilians in times of armed conflict based on considerations of humanity, dignity, respect for life and humanitarian assistance.¹¹⁶ This is supplemented with provisions specifically regulating relief operations in times of armed conflict and aimed at alleviating the suffering of those in need as a consequence of armed hostilities. For instance, in terms of article 59 of the Fourth Geneva Convention, the population of an occupied territory is entitled to relief consignments undertaken by states or other impartial humanitarian organisations if the occupying power cannot adequately provide humanitarian aid. Consignments of this nature must be given free passage and their protection guaranteed, subject only to searches by the occupying power and conditions of passage. The legal position, briefly spelled out here, has been further strengthened by article 70 of the first Additional Protocol and by the ICRC study of 2005 assigning a customary law status to the duty of states parties to allow and facilitate rapid and unimpeded passage for humanitarian relief and to respect and protect humanitarian relief personnel and objects.¹¹⁷

Under article 5(7) of the Kampala Convention, these obligations now form part of the duties of states parties with regard to protection and assistance to internally displaced persons within their territories or jurisdiction. Elsewhere in the Convention, one also finds a general obligation imposed on states parties to '[r]espect and ensure respect for international humanitarian law regarding the protection of internally displaced persons'.¹¹⁸

11.8.3 Institutions and processes

Under the African regional human rights system, there are institutions and processes to facilitate the realisation of human rights. The role of these institutions and processes – in particular, the African Commission, African Human Rights Court, African Children's Rights Committee, and the African Peer Review Mechanism (APRM) instituted under the New Partnership for Africa's Development (NEPAD) – is the focus of this section.

11.8.3.1 African Commission

The mandate given to the African Commission in article 45 of the African Charter reads as follows:
The functions of the Commission shall be:

1. To promote human and peoples' rights and in particular:

(a) To collect documents, undertake studies and research on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and

- peoples' rights, and, should the case arise, give its views or make recommendations to governments;**
- (b) To formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislations;**
- (c) Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.**
- 2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.**
- 3. Interpret all the provisions of the present Charter at the request of a state party, an institution of the Organization of African Unity or an African organisation recognised by the Organization of African Unity.**
- 4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.**

The mandate of the African Commission is thus dual, having both promotional and protective elements.

It has undertaken *promotional* visits to sensitise governments and African people about human rights, generally, and the Charter, specifically. It has also established a number of special mechanisms, along the lines of those within the UN system, in the form of thematic Special Rapporteurs and working groups. Understandably, in a continent where there is low awareness of human rights, the Commission has paid much attention to this aspect, including the elaboration of new standards. Similar to the requirement under UN human rights treaties, states are also required to report on the domestic implementation of the Charter.¹¹⁹ The Commission examines these reports and issues concluding observations. A problem in this regard is that state initiative is required: states have to invite or at least agree to the visits of special mechanisms; and states have in fact to submit reports. Unfortunately, most states have reported irregularly or late, while some have failed to submit any reports.

As for its *protective* mandate, the Commission may consider individual and interstate communications (complaints). In almost a quarter of a decade, the Commission has only handled a total of 442 individual communications, of which 361 have been finalised.¹²⁰ This number is not only strikingly lower than the number of cases in the other regional systems, but also a drop in the ocean, considering the pool of potential cases. It must be abundantly clear that some 17 cases per year, in a vast continent comprising 53 Charter states parties, is an unacceptably low caseload. In the single interstate communication that it has thus far decided, the Commission found three states (Burundi, Rwanda and Uganda) to be in violation of the Charter in relation to actions of their armed forces within the DRC.¹²¹

The Commission may also conduct on-site protective missions, in response to allegations of serious or massive human rights violations. Regrettably, it has undertaken only a small number of these visits – the most recent being one to Darfur in 2004.

Since its establishment in 1987, the African Commission has gradually extended its mandate. It has allowed for an unequivocal, individual complaints mechanism, has held numerous extraordinary sessions, and has gradually extended the duration of its sessions. As far as the substance of its decisions is concerned, the Commission has in the main adopted a purposive, progressive and generous approach to the Charter.¹²² Crucially, when the Commission interpreted article 27(2) of the Charter as imposing a general limitation clause to be applied as part of a proportionality test in respect of all rights,¹²³ it proved wrong the view of initial commentators that the Charter's 'claw-back clauses' would cause a severe erosion of rights.¹²⁴

Two main factors have contributed towards this positive development.

The first is the role of African and international civil society. Perhaps more so than in any of the other regional systems, African non-governmental organisations (NGOs) have ensured that the system forges ahead. This has been achieved through their presence and their insistent lobbying of commissioners at sessions, as well as by their submitting communications and shadow reports, proposing resolutions, and lobbying for normative and institutional changes. By mid-2015, 485 NGOs enjoyed observer status with the African Commission.

The second factor is the presence of a significant number of receptive, independent-minded and dedicated commissioners who were prepared to take the first progressive steps.

Over time, these two factors have contributed significantly to the emergence of a rich jurisprudence, a strengthening of the Commission's protective mandate by the establishment of the African Human Rights Court, and in the adoption of progressive normative standards such as those dealing with the rights of women and internally displaced persons. It should be added that the personalities who have played the most inspirational roles as commissioners have been academics, legal practitioners, and human rights activists.

However, the Commission has been and is still hampered by a number of factors. One of these is the confidentiality of its protective activities, and delays in respect thereof. Under article 59 of the Charter, all protective measures taken must 'remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide'. In effect, the Assembly has now delegated the consideration of the Commission's activity reports to the Executive Council. Since the Executive Council has been considering these reports, more attention has been paid to the Commission's activities. Despite this closer attention, all activity reports have been made public, but on some occasions, the publication of the activity report has been delayed to allow states an opportunity to present their views.¹²⁵

Another factor hampering the Commission is that its findings are only recommendations. In one notable instance, Botswana registered its express refusal to abide by the Commission's finding in the case of *Good v Botswana* (*Good case*).¹²⁶ Here, the Commission found Botswana to be in violation of the Charter for deporting Professor Good (a long-term resident of the country), without due process, on the basis of his criticism of aspects of the political system. The Commission recommended that Botswana pay adequate compensation to him, and that it amend its immigration legislation. To its credit, the African Commission brought the state's non-compliance to the attention of the Executive Council in its combined 32nd and 33rd Activity Report, as follows:

The Commission would like to bring to the attention of the Executive Council the refusal of the Republic of Botswana to implement the Commission's Decision in Communication 313/05 – Kenneth Good v. Botswana. Through Diplomatic Note Ref: 10/12 BEA5/21 C VIII (4) AMB of 23 March 2012, the Republic of Botswana unequivocally stated the following: 'the Government has made its position clear; that it is not bound by the decision of the Commission.' It will be recalled that this decision was referenced in the 28th Activity Report of the Commission which was authorized for publication by the Executive Council through Decision EX.CL/600(XVII). The Commission is bringing this refusal to the attention of the Council for appropriate action.¹²⁷

Unfortunately, the Executive Council has not taken any concerted action. This series of events illustrates that a human rights system to a large extent depends for its effectiveness on the political organs under whose auspices it functions.

11.8.3.2 African Human Rights Court

The African Human Rights Court was established to complement and improve upon the weaknesses of the African Commission's protective mandate. The court has both contentious and advisory jurisdiction. Its contentious jurisdiction comes into play when it decides a dispute between two or more parties – for example, when an individual alleges that a state party has violated her or his rights. Decisions in these cases are binding on the parties involved. Its advisory jurisdiction comes into play when the court is called upon to answer a question about the interpretation of a relevant treaty outside the ambit of a dispute between parties. Such a finding (usually referred to as an ‘opinion’) is not binding, but may – depending on factors such as the quality of the reasoning – still be very persuasive.

The court’s contentious jurisdiction applies only to states that have ratified the African Human Rights Court Protocol. By mid-2015, only half of the AU member states had ratified this Protocol. Generally, contentious individual complaints (including those submitted by NGOs) still have first to be submitted to the African Commission. The Commission may then refer the case to the court. If the Commission has found a state to be in violation of the Charter, the state is given an opportunity to comply with the Commission’s non-binding finding within six months.¹²⁸ Non-compliance by the state is the trigger that allows the Commission to exercise its discretion to refer the case to the court.

By 2015, the African Commission had not referred to the court any of the cases it had decided on the merits. One of the primary candidates for possible referral is the *Endorois* case. The Commission decided this case on the merits as far back as 2010. The reasons for non-referral may have both a factual and legal basis. On the facts, the issue is establishing ‘non-compliance’. As this case vividly illustrates, the extent of compliance is not always immediately apparent. It needs to be established along a complex continuum where political will may appear, disappear and reappear. Applying rules inflexibly may not be the most appropriate way of dealing with a dynamic political context, where political willingness is constrained by the polycentricism of the indigenous peoples’ claim to land.

Exceptionally, if a state has made an optional declaration under article 34(6) of the Protocol (in addition to having ratified the Protocol), individual complaints (or cases) may be submitted *directly* to the court. By bypassing the Commission, the time-consuming process before the Commission is avoided. By mid-2015, only seven states (not including South Africa) have made this optional declaration.

According to article 4 of the Court Protocol, the AU and its organs, all AU member states, and ‘African organizations recognized by the AU’ have standing to approach the court directly with requests for advisory opinions. This raises the question whether NGOs that enjoy observer status with the African Commission will be entitled to bring requests for advisory opinions. In other words, do they qualify as ‘African organizations recognized by the AU’?

The substantive scope of the court’s jurisdiction is very wide. Apart from the Charter and the Protocol, it extends to ‘any other relevant human rights instrument ratified by the states concerned (in respect of contentious cases)¹²⁹ and to ‘any other relevant human rights instrument’ (in respect of advisory opinions).¹³⁰ Particularly with regard to the contentious cases, this wide scope may lead to overlapping jurisdiction with existing UN human rights treaty bodies, such as the Human Rights Committee.

Potentially, the court’s jurisdiction is a significant improvement on the commission’s limited powers and competence. It gives binding judgments, has a clear competence to order a wide range of remedies, and will hear cases in open court. Most importantly, the Court Protocol binds states to implement court decisions, and gives a supervisory role to the AU’s political organs. Arguably, however, it is not so much the legal character of the decision that inspires compliance, but rather

the political commitment of the respondent state, the participatory role of civil society, and the follow-up actions of the deciding body.

Two parallel processes are under way to change the AU's judicial architecture. At first, the idea was to amalgamate the African Human Rights Court and the Court of Justice, which is provided for under the AU Constitutive Act but has not yet been set up. In June 2008, the AU accordingly adopted a Protocol providing for the 'merger' of the two courts, in the form of the Protocol on the Statute of the African Court of Justice and Human Rights (Merged Court Protocol). Once ratified by 15 states, a new institution consisting of two separate sections (chambers), one dealing with human rights and one with 'general affairs' (such as matters arising from economic integration or interstate disputes related to contested borders), would replace the existing African Human Rights Court. The main reasons for this intended institutional fusion was the avoidance of duplication and cost saving.

However, before this two-chambered court had come into being, the AU also set in motion a process to consider the desirability and suitability of an African jurisdiction to try international crimes as a third section to the future African Court of Justice and Human Rights. In July 2014, this process culminated in the adoption by the AU Assembly, in Malabo, Equatorial Guinea, of an amended version of the Merged Court Protocol (Amended Merged Court Protocol). In terms of this Protocol, a third section would, alongside the 'human rights' and 'general affairs' sections, be created to deal with individual responsibility for international crimes. As 15 ratifications are required for the Amended Merged Court Protocol to enter into force, its establishment is still only a distant possibility.

Whatever the merits of an African-based court on criminal justice may be, the court to be established by the Amended Merged Court Protocol will be justifiably viewed with scepticism due to the inclusion of a clause granting immunity from prosecution not only to heads of states, but also to 'senior state officials', in its article 46Abis, which reads as follows:

No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

By mid-2015, the African Human Rights Court had decided only three cases on the merits, *Mtikila v Tanzania* (*Mtikila case*);¹³¹ *The Beneficiaries of the Late Norbert Zongo and Others v Burkina Faso* (*Zongo case*);¹³² and *Konaté v Burkina Faso* (*Konaté case*).¹³³ All three of these cases were submitted directly to the court.

In the *Mtikila* case, the court found that Tanzanian law, which made membership of a political party a prerequisite for running for elected office, violated the right of citizens to 'participate freely in the government' of their country, as guaranteed in article 13 of the African Charter. In the *Zongo* case, the court found Burkina Faso to be in violation of the Charter for failing to investigate diligently and bring to justice those responsible for the death of Norbert Zongo, an investigative journalist, and his three companions. Following some articles exposing malpractices in high government circles, Zongo and his companions were found assassinated in their vehicle in December 1998. In the *Konaté* case, the court found that a sentence of imprisonment for defamation violated not only the African Charter (article 9), but also the ICCPR (article 19) and the Revised ECOWAS Treaty (article 66(2)(c)).

In addition, the court has also issued a number of orders for provisional measures. Its first order related to the situation of alleged massive violations of human rights in Benghazi, Libya, in early 2011 at the start of the armed conflict in that country. Responding to a case submitted to it by the African Commission, the court called on Libya to 'immediately refrain from any action that would result in loss of life or physical integrity of persons'.¹³⁴ As the historical record shows, the then-government did not pay much heed to this order. In a subsequent case following the end of

hostilities, the court in 2013 again ordered provisional measures in respect of Libya, this time to ensure that a detainee, Saif Al-Islam Gadhafi, the son of the deceased Colonel Gadhafi, be provided access to a lawyer, be allowed to receive visits, and that his personal integrity be guaranteed.¹³⁵ The lack of implementation by Libya of the court's order in the case of Gadhafi's son prompted the court to draw the attention of the AU Assembly to Libya's failure to report back to the court on measures taken.¹³⁶ It called on the Assembly to 'express itself' on the matter; and to take appropriate measures to ensure that Libya fully complies with the order. There is, however, no indication that the Assembly has taken any action in response.

11.8.3.3 African Children's Rights Committee

Given the weaknesses besetting the African Commission, the decision in 1990 to establish a separate body to monitor the African Children's Charter seemed curious. The creation of a separate instrument and institution also casts a shadow over the status of the African human rights system as 'system' in the sense of a co-ordinated, integrated and effectively functional network of structures.

The mandate of the 11-member African Children's Rights Committee mirrors that of the African Commission: the African Children's Rights Committee can receive individual and inter-state communications, is mandated to examine state reports, and to undertake fact-finding missions. As in the case of the African Commission, emphasis is also placed on the importance of the promotional mandate of the African Children's Rights Committee. The African Children's Rights Committee has much wider powers than the UN Committee on the Rights of the Child. However, due in particular to resource constraints, the committee has not yet become an effective monitoring body. The delay in full functionality is in part due to the long time it took the committee to adopt Rules of Procedure in respect of state reporting and communications.

More recent signs give cause for some optimism about the future role of the committee.¹³⁷ In the last few years, the committee has started examining state reports and has considered its first communications. An important related development is the organisation of Civil Society Organisations Forum before committee meetings. Starting in May 2008, the committee organised a 'Pre-Session to Consider State Party Reports'. By the end of 2013, the committee had examined and adopted concluding observations in respect of eight states: Burkina Faso, Egypt, Kenya, Mali, Nigeria, Rwanda, Tanzania, and Uganda. As of mid-2015, three communications had been decided: Kenya was found in violation of the rights to nationality of Nubian children in that country;¹³⁸ Uganda was found to have recruited and used children in armed conflict in the period 2001 to 2005 in violation of the African Children's Charter;¹³⁹ and Senegal was found in violation of its obligation to enforce its laws effectively against begging and the exploitation of children attending Qur'anic schools.¹⁴⁰

11.8.3.4 NEPAD's African Peer Review Mechanism

The African Peer Review Mechanism (APRM), instituted under the New Partnership for Africa's Development (NEPAD), is a voluntary process of submission to review by 'peers' (fellow heads of state) of a country's record in political, economic and corporate governance. Its substantive basis is the Declaration on Democracy, Political, Economic and Corporate Governance, which sets out the principles to which the participating states agree to adhere. Primarily a codification of existing standards adopted by the OAU/AU and other international organisations such as the United Nations, the Democracy and Governance Declaration accords prominence to human rights. The APRM thus reinforces the link between development and the protection of human rights. The ideological basis

of the Democracy and Governance Declaration has been described as neo-liberal and free-market oriented;¹⁴¹ and it is premised on the notion that good governance and democracy will lead to the alleviation of poverty, among others, by benefiting from development aid.

The philosophy of ‘peer review’ is aimed at a constructive dialogue between equals, and derives from the self-imposed commitment of states to take ownership of a national process of self-assessment. The process allows participating states to identify weaknesses in governance and to benefit from shared experience in devising strategies to overcome these weaknesses, set out in a national Programme of Action. States voluntarily accept the APRM process by signing a Memorandum of Understanding on the APRM (MOU).¹⁴²

Taking ultimate political responsibility for APRM process, the participating Heads of State and Government (the APRM Forum) discuss reports and take a final decision at the end of a review. The peer review is preceded by a technical assessment, undertaken by a member of the Panel of Eminent Persons, with the assistance of an APRM Secretariat and African experts, which oversee the running of the review process. The APRM is similar to the UPR in that both these processes result in the review of a country’s human rights record. However, as set out in Table 11.1 below, there are important differences between the two processes. These differences relate to the states under review; the nature of the reviewing entity; and the substantive scope of the review.

Table 11.1 Comparison of the UPR and APRM

Item of comparison	Universal Periodic Review (UPR)	African Peer Review Mechanism (APRM)
States reviewed	All UN members	Selected AU member states
Reviewing entity	Government delegates to HRC	Selected AU heads of states
Scope of review	Only human rights	Economic, political and corporate governance, of which human rights is a part

11.9 Sub-regional economic communities in Africa and their role in the promotion and protection of human rights

At the sub-regional level in Africa, a number of sub-regional economic communities (regional economic communities or RECs) have emerged, primarily to ensure greater growth, trade links and economic integration within sub-regions. Primary among them are the Economic Community of West African States (ECOWAS), the East African Community (EAC), and the Southern African Development Community (SADC). Each of these RECs has also established a judicial organ, and initially allowed individual access to these judicial institutions. With these two features in place, the RECs provide fertile ground for the evolution of sub-regional human rights systems, provided that the substantive jurisdictional scope of the REC courts extends to human rights. Such an evolution was inspired, in part, by the weaknesses of the regional system, in particular the non-binding nature of the African Commission’s findings, and the non-acceptance of the jurisdiction of

the African Human Rights Court by key violators of human rights in these regions, such as Zimbabwe.

While the ECOWAS Court has explicit jurisdiction to hear human rights cases on the basis of the African Charter, the other two REC courts have decided cases related to human rights on the basis of the provisions of the treaties founding the RECs.

In unambiguous terms, the legal instruments establishing the ECOWAS Court of Justice stipulate that the court ‘has jurisdiction to determine cases of violation of human rights’ (including those set out in the African Charter) instituted by individuals in member states.¹⁴³ The ECOWAS Court has decided numerous cases on this basis, often finding that a state has violated provisions of the African Charter. In one such case, *Chief Ebrahim Manneh v The Gambia*,¹⁴⁴ the ECOWAS Court found that the arrest without a warrant and illegal detention of Manneh, a journalist of the Gambian newspaper, the *Daily Observer*, violated articles 6 and 7 of the African Charter. Thus far, the Gambia has not given effect to the court’s order for Manneh’s immediate release. In another landmark decision,¹⁴⁵ the ECOWAS Court found that Niger was in violation of the African Charter due to its failure effectively to curb contemporary forms of slavery on its territory.

Under the EAC Treaty, the EAC Court of Justice has the jurisdiction to apply and interpret the Treaty. The EAC Council, which may, at a future date, extend its jurisdiction to include human rights, has not yet done so.¹⁴⁶ In a case brought against Uganda, it was contended that Uganda had violated the EAC Treaty when it rearrested 14 accused persons after they had been granted bail.¹⁴⁷ Finding that it lacked jurisdiction to adjudicate on disputes ‘concerning violation of human rights *per se*’, the court held that it nonetheless ‘will not abdicate’ its general jurisdiction to interpret the Treaty merely because a case ‘includes allegations of human rights violation’. In this particular case, the court found that Uganda had violated the doctrine of the rule of law, as enshrined among the fundamental principles governing the EAC. The court has used the same approach in a number of subsequent cases.

In its first decision on the merits of a case, *Mike Campbell (Pvt) Limited and Others v Republic of Zimbabwe*,¹⁴⁸ the SADC Tribunal held that it had jurisdiction, on the basis of the SADC Treaty, to deal with the acquisition of agricultural land by the Zimbabwean government carried out under an amendment of the Constitution (Amendment 17). The Tribunal found that by ousting the jurisdiction of the courts, and thus depriving the applicants from access to justice, Amendment 17 violated article 4(c) of the Treaty, which requires SADC states to act in accordance with human rights, democracy and the rule of law. The Tribunal further found that, as it targeted white farmers, the Zimbabwean land reform programme violated article 6(2) of the SADC Treaty, which outlaws discrimination on the ground of race, among other factors. As to the remedial order, the Tribunal directed Zimbabwe to protect the possession, occupation and ownership of the lands of the applicants, and to pay fair compensation to those applicants whose land had already been expropriated. Zimbabwe not only failed to comply with this order, but government officials publicly declared that it would not abide by the Tribunal’s decision.

In response to the failure by Zimbabwe to give effect to this decision, the SADC Tribunal ruled that Zimbabwe had failed to comply with its decision. Zimbabwe subsequently questioned the legality of the very establishment of and interpretation of its mandate by the SADC Tribunal, prompting the SADC Summit, in 2010, after refusing to fill vacancies on the Tribunal, to commission a study on the jurisdiction and functioning of the Tribunal. Apparently dissatisfied with the outcome of this study, the SADC Summit effectively suspended the SADC Tribunal, pending the completion by August 2012 of a review to be conducted by the SADC Ministers of Justice/Attorneys General themselves. The Summit subsequently, in 2014, decided that the SADC treaty regime had to be amended to abolish the possibility of individual access to the SADC Tribunal.¹⁴⁹

11.10 Domestic enforcement of international human rights with a focus on South Africa

As observed earlier, it is the role of states at the national level to protect the rights of everyone under its jurisdiction: international human rights law plays only a complementary role, and is no substitute for states' primary responsibility to promote and protect human rights. With its focus on South Africa, this section examines the domestic enforcement of international human rights law. In particular, it considers closely the issues of domestication, self-execution, interpretive guidance and domestic enforcement of international law decisions in the context of South African constitutional law and practice.

11.10.1 Domestication

The domestic status of international human rights law is determined by South African constitutional law.¹⁵⁰ Section 231(4) of the Constitution provides that, following their ratification, international treaties only become 'law' when enacted into national legislation. However, it further stipulates that 'a self-executing provision approved by Parliament is law unless it is inconsistent with the Constitution or an Act of Parliament'. In other words, to find direct domestic application, non-self-executing treaties have to be domesticated through legislation. An example of such legislation is the Children's Act 38 of 2005, which domesticates the Hague Convention on Intercountry Adoption, giving it the 'force of law'.

Section 256 of the Children's Act provides as follows:

- (1) The Hague Convention on Inter-Country Adoption is in force in the Republic and its provisions are law in the Republic.**
- (2) The ordinary law of the Republic applies to an adoption to which the Convention applies but, where there is a conflict between the ordinary law of the Republic and the Convention, the Convention prevails.**

Having ratified the Statute of the International Criminal Court (ICC Statute), South Africa adopted the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, through which the international crimes provided for in the ICC Statute, such as 'crimes against humanity', became statutory crimes under South African law. Similarly, the duty to prosecute acts of torture, provided for under the UN Convention against Torture (CAT), was domesticated in the Prevention and Combating of Torture of Persons Act 13 of 2013.

In other instances, for example in respect of the Child Justice Act 75 of 2008, there is no wholesale domestication. Instead, the Preamble to the Act refers to the CRC and the African Charter on the Rights and Welfare of the Child, but only as part of what is 'in broad terms' taken 'into account' to guide the 'incremental' creation of 'appropriate' procedures and mechanisms for children in conflict with the law.

11.10.2 Direct application/self-execution

The introduction in the present Constitution of the notion of 'self-executing' treaties and treaty provisions opens the door for the use by South African courts of human rights treaties as a self-standing and direct source of remedies without the prerequisite that the treaty should have been incorporated into national law. A treaty provision is 'self-executing' if it is capable of direct enforcement on the basis of the wording and intention of that particular provision. Still, its actual

self-execution arguably depends on some domestic legal rule or principle allowing for its internal domestic effect.¹⁵¹

Since the entry into force of the current Constitution, only two South African cases have dealt directly with this issue. Justice Yacoob did remark, in the *Grootboom* case, that ‘where the relevant principle of international law binds South Africa, it will be directly applicable’,¹⁵² but perhaps he was referring to the ‘applicability’ of domesticated treaties rather than to the issue of self-execution. This reticence may in part be due to the fact that the Bill of Rights contains a relatively comprehensive catalogue of rights. Self-executing international law provisions are most likely to be invoked only to supplement existing domestic legal protection. If domestic law exists, including rights protected under the Constitution, international law should be relied upon to steer the interpretation (thus, serving as interpretive guide) rather than as a self-executing provision of law (as a source of a remedy). Only when a treaty provision enlarges the scope of available protection, while being consistent with the Constitution, will the need arise to render its provisions self-executing.

A further factor contributing to the non-use of this possibility is the generally critical and even dismissive view of South African commentators on the provision allowing for self-execution of treaties. In Van der Vyver’s view, this ‘exception’ is ‘entirely nonsensical and can best be ignored’.¹⁵³ In his opinion, the introduction of the notion of ‘self-execution’ is an inappropriate importation into South African law, probably from America, based on the distinction between ‘international treaties’ and ‘international agreements’, which in his view does not exist in South Africa. He concludes his brief argument with the rather contentious statement that ‘all international treaties are non-self-executing’.¹⁵⁴ De Wet also suggests that all treaties should in practice be regarded as non-self-executing, based in the main on the assertion that ‘treaties do not serve as a direct basis for litigation between private parties’, leaving a potential litigant who invokes a self-executing treaty provision without legal standing.¹⁵⁵ However, it may be argued that the requisite standing is derived from the Constitution (section 231(4)) and not from the relevant treaty. Although invoking self-execution may not often be appropriate, its application should not be denied on the basis of a rigid adherence to established doctrine.

An opportunity to clarify the position and declare a provision in an international human rights treaty as self-executing came in *Claassen v Minister of Justice and Constitutional Development*.¹⁵⁶ In this case, the High Court considered whether a provision of the ICCPR was self-executing under South African law. Put differently, the court considered whether a provision of an international treaty could be used as the basis for a legal remedy, without that provision having first been domesticated through South African national legislation. This question arose because article 9(5) of the ICCPR, which guarantees to any person who had been detained unlawfully an ‘enforceable right to compensation’, has no equivalent in the South African Bill of Rights. Unfortunately, the court answered the question in the negative, and did nothing to provide greater clarity. Killander’s argument that article 9(5) is specific enough to be applied as a self-executing provision should have been followed, thus allowing a provision of the ICCPR to be self-executing.¹⁵⁷

11.10.3 Interpretive guidance

Section 39(1) of the Constitution guides the interpretation of the Bill of Rights. It reads as follows:
When interpreting the Bill of Rights, a court, tribunal or forum –

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;**
- (b) must consider international law; and**
- (c) may consider foreign law.**

According to section 233, when interpreting any legislation, courts must prefer any reasonable interpretation consistent with international law over an alternative inconsistent interpretation.

The content of the requirement to ‘consider international law’ is not overly burdensome; courts have only to *consider* (and not *apply* or *enforce*) international law. Despite this relatively minimalist obligation, there is little evidence in South African court judgments of consistent engagement with international law. One of the reasons for this dearth of reliance may be that reference to international human rights law is often considered unnecessary, as many of the relevant norms have already seeped into the South African Bill of Rights. Indeed, international human rights law in no small measure inspired the drafting of the South African Constitution, and in particular the Bill of Rights. In *Director of Public Prosecutions, Transvaal*,¹⁵⁸ the Constitutional Court, for example, noted that section 28(2) of the Bill of Rights, which enshrines the best interests of the child, was ‘no doubt inspired by international and regional instruments’,¹⁵⁹ citing the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child (African Children’s Charter).

While it is true that the Bill of Rights reflects many of the provisions of international human rights treaties – the ICCPR in particular – this is not a sufficient explanation for the apparent judicial reluctance to enter into a conversation with and assess the relevance of international human rights standards. Particularly when there are close similarities between the wording of constitutional and international texts, the need to refer to interpretations of these very provisions becomes pronounced.

In *S v Makwanyane*,¹⁶⁰ then-President of the Court, Chaskalson P, held that international agreements and customary international law, ‘non-binding as well as binding law’, provide a ‘framework’ for the interpretation of the Bill of Rights. However, when the Constitutional Court in fact subsequently made reference to international law, it tended merely to restate the provisions of treaties, often enumerating treaty provisions while highlighting the similarities of differences between these provisions and those under the South African Bill of Rights. More often than not, only the international *treaties* are referred to, rather than the more insightful *interpretations* of these treaties by relevant tribunals and treaty bodies. Section 39(1)(b) of the Constitution creates an expectation that referral will be made not only to international treaties, but also to precedent – that is, the outcomes of the application of provisions, similarly worded to the South African Constitution, in concrete cases. In fact, it seems more important that courts engage with and assess the persuasiveness of the reasoning in comparable cases than merely point to the similarities (or dissimilarities) in the wording between the Bill of Rights and other human rights instruments. In other words, it is the judicial elaboration by treaty bodies and international tribunals, rather than the legislative elaboration of standards, that could provide meaningful guidance to South African courts.

More recently, in *Glenister v President of the Republic of South Africa*,¹⁶¹ the court emphasised the obligatory nature of section 39(1)(b), and characterised international law as ‘the measure of the State’s conduct’. International law was used, at least ‘in part’, to reach the conclusion that the creation of an anti-corruption unit was one of the measures required under the Constitution to fulfil the rights in the Bill of Rights.¹⁶² In *National Commissioner of Police v Southern Africa Human Rights Litigation Centre and Another*,¹⁶³ the court held that international law compels the South African Police Service to investigate allegations of crimes against humanity committed by and against Zimbabwean nationals in Zimbabwe. In arriving at its decision, the court makes extensive reference to international human rights law, including a finding of the African Commission.¹⁶⁴

It is submitted that the South African Constitutional Court is in need of a more ‘methodological approach’ to the role of international law in its jurisprudence.¹⁶⁵ In this regard, a distinction between two categories of ‘international law’ is suggested.

First, the court should consider and attach weight to:

1. treaties ratified by South Africa and enacted into domestic legislation (and related jurisprudence), as an embodiment of its binding international obligations and the general dualist approach followed;
2. treaties ratified but not domesticated (and related jurisprudence); and
3. customary international law.

All these sources give rise to binding obligations on South Africa, either viewed from a domestic or international angle.

A second category of ‘international law’ relates to those treaties South Africa has not ratified or cannot ratify, as well as soft law standards. Although lesser weight should be attached to these non-binding sources, they may still be persuasive in the interpretive process. However, the source of their persuasiveness is located not in the country’s inherent binding international commitments, but in the nature, authority and suitability of these norms. The jurisprudence of the European Court of Human Rights, for example, falls in this secondary category.

11.10.4 Domestic enforcement of international decisions

Neither the South African Constitution nor any statute establishes a procedure or provides principles for the domestic enforcement or other means of giving effect to the binding decisions of international courts (such as the SADC Tribunal or African Human Rights Court) or the recommendations of quasi-judicial bodies (such as UN human rights treaty bodies or the African Commission).

The SADC Tribunal decision in the *Campbell* case brought the issue of the domestic enforcement of a decision by an international court before the South African courts for the first time. Part of the remedy in that case was payment of reasonable compensation to the applicants.¹⁶⁶ Pursuant to the failure of the Zimbabwean government to pay compensation, and the applicants’ unsuccessful attempt to have the SADC Tribunal’s order executed within the Zimbabwean legal order,¹⁶⁷ they had recourse to the South African courts. Before the Cape High Court, the applicants sought and secured the domestic enforcement of the SADC Tribunal’s order by way of the attachment of Zimbabwean property located in Cape Town. This order was subsequently upheld by the South African Supreme Court¹⁶⁸ and Constitutional Court.¹⁶⁹

Although South African (and Zimbabwean) law is silent on the issue of domestic enforcement of international decisions, the position in the SADC legal regime is unequivocal. Article 32 of the Protocol on the SADC Tribunal, dealing with ‘enforcement and execution’, provides as follows:

- (1) **The law and rules of civil procedure for the registration and enforcement of foreign judgements in force in the territory of the State in which the judgement is to be enforced shall govern enforcement.**
- (2) **States and institutions of the Community shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.**
- (3) **Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the States concerned.**

The Constitutional Court found that the South African statutory rules of civil procedure for the enforcement of foreign judgments were not appropriate to cover judgments of international courts. In the absence of any specific legislative basis, the applicants argued for a broad and international law-aligned interpretation of the common law. Under South African common law, a number of requirements (such as jurisdiction by the originating court; certainty; the finality and conclusiveness of the judgment; and the need for enforcement not to be contrary to public policy) have to be complied with before a ‘foreign judgment’ may be enforced domestically. Having found that the

Campbell judgment conforms with all these requirements, the court had to address the obstacle that, thus far, South African common law had only viewed the judgments of other *national* (and not *international*) courts as ‘foreign judgments’. However, having regard to the constitutional provisions listed above, the court held that the common law should be developed to include judgments by international courts (such as the SADC Tribunal), so as to ensure that the promise of access to (sub-regional) justice is not rendered illusory due to the lack of effective (domestic) enforcement of court orders.

SUGGESTED FURTHER READING

- P Alston & R Goodman *International Human Rights* Oxford University Press: Oxford (2013)
- J Church, C Schulze and H Strydom *Human Rights from a Comparative and International Perspective* UNISA: Pretoria (2007)
- O de Schutter *International Human Rights Law: Cases, Materials and Commentaries* Cambridge University Press: Cambridge (2014)
- T Hsien-Li *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in Southeast Asia* Cambridge University Press: Cambridge (2011)
- S Joseph and A McBeth (eds) *Research Handbook on International Human Rights Law* Edward Elgar Publishing: Cheltenham (2010)
- D Moeckli, S Shah, S Sivakumaran & D Harris (eds) *International Human Rights Law* Oxford University Press: Oxford (2013)
- R Smith *Textbook on International Human Rights* 6th ed Oxford University Press: Oxford (2014)
- F Viljoen *International Human Rights Law in Africa* 2nd ed Oxford University Press: Oxford (2012)

¹ For introductory texts on international human rights law, see S Joseph & A McBeth *Research Handbook on International Human Rights Law* (2010); P Alston & R Goodman *International Human Rights* (2012); D Moeckli, S Shah, S Sivakumaran & D Harris (eds) *International Human Rights Law* 2nd ed (2013); O De Schutter *International Human Rights Law: Cases Materials Commentary* 2nd ed (2014); and R Smith *Textbook on International Human Rights* 6th ed (2013).

² Statute of the International Court of Justice, art 38(1); see also chapter 2 of this book.

³ See H Shue *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980) 52–3. For a concrete example of an application of these three manifestations of state obligations, see the *Ogoniland* case (*Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (12th Activity Report).

⁴ Article 26(a), which requires state parties to adopt and implement laws, programmes and policies to ‘reduce the maternal mortality ratio by 75% by 2015’.

⁵ Article 5.

⁶ See art 2(f), requiring states parties to take measures to ‘modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women’.

⁷ For an argument in favour of such a court, see M Nowak ‘The need for a world court of human rights’ 7(1) *Human Rights Law Review* (2007) 251.

⁸ Under UN Charter, art 42, read with art 19, the UN SC can take measures ‘necessary to maintain or restore international peace and security’. This competence has on occasion (such as in the case of the crisis in Libya, but not in respect of Syria) been invoked in the context of serious human rights violations.

⁹ *Mike Campbell (PVT) Ltd and Others v Zimbabwe* (2008) AHRLR 199 (SADC 2008); also see discussion on treatment of aliens in chapter 7 of this book.

¹⁰ The SADC Tribunal has effectively been suspended since August 2010. In August 2014, the SADC Summit adopted a revised version of the Protocol on Tribunal and Rules of Procedure thereto, which allows only states parties to approach the Tribunal. However, this Protocol is not yet in force.

¹¹ African Charter, art 56(7).

¹² See S Meckled-García and B Çali ‘Lost in translation: The human rights ideal and international human rights law’ in S Meckled-García and B Çali (eds) *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (2006) 11.

¹³ On this tension, see AD Renteln *International Human Rights: Universalism versus Relativism* (2013).

¹⁴ Vienna Convention on the Law of Treaties, art 18.

¹⁵ See eg, the judgment of the European Court of Human Rights in *Handyside v United Kingdom*, Application 5493/72 (7 December 1976) Series A No. 24 para 47.

¹⁶ For an extensive discussion of this issue, see eg M Milanovic *Extraterritorial Application of Human Rights Treaties: Law Principles and Policy* (2011).

- ¹⁷ See eg, art 1 of the European Convention; art 1(1) of the American Convention; art 2(1) of the UN CRC.
- ¹⁸ European Court of Human Rights (Grand Chamber), *Al-Skeini and Others v United Kingdom*, Application 55721/07, Judgment (Merits and Just Satisfaction) (7 July 2011); and *Al-Jedda v United Kingdom*, Application 27021/08, Judgment (Merits and Just Satisfaction) (7 July 2011).
- ¹⁹ European Court of Human Rights (Grand Chamber), Application 29750/09, Judgment (Merits) (16 September 2014).
- ²⁰ The court invoked art 31(3)(c) of the Vienna Convention on the Law of Treaties, which allows relevant rules of international law applicable in the relations between states parties to be taken into account in the interpretation of a treaty.
- ²¹ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2013), Principle 37.
- ²² A/CHR/27/55 (30 June 2014) para 70.
- ²³ CCPR/C/DEU/CO/6, para 16.
- ²⁴ UN Charter, arts 1(3), 55 and 56.
- ²⁵ When the UN General Assembly adopted the Universal Declaration in 1948, eight states abstained, among them the USSR, Saudi Arabia and (the Union of) South Africa.
- ²⁶ See eg, International Law Association, Report of the Sixty-sixth Conference, Buenos Aires, August 1994 (available at <http://www.corteidh.or.cr/tablas/12393.pdf>), p. 525, identifying eg right to life, freedom and security (art 3), the prohibition against slavery (art 4), the prohibition of torture (art 5) and the prohibition of prolonged arbitrary detention (art 9) as having attained that status; see also JA Oraá 'The Universal Declaration of Human Rights' in FG Isa and K de Feyter (eds) *International Human Rights Law in a Global Context* (2009) 163 at 232.
- ²⁷ General Assembly Resolution 60/251 (15 March 2006).
- ²⁸ Ibid, para 8.
- ²⁹ UPR proceedings are webcast live and are archived at www.un.org/webcast/unhrc.
- ³⁰ See the informative site of Universal Periodic Review, UPR Watch, which traces subsequent implementation by states: <http://www.upr-epu.com/ENG/index.php>.
- ³¹ See eg, E Steinerte 'The jewel in the crown and its three guardians: Independence of national preventive mechanisms under the Optional Protocol to the UN Torture Convention' 14(1) *Human Rights Law Review* (2014) 1.
- ³² The sessions of treaty bodies are broadcast live; see UN Treaty Body webcast: <http://www.treatybodywebcast.org>.
- ³³ See T Meron *The Humanization of International Law* (2006).
- ³⁴ This Optional Protocol came into force on 5 May 2013.
- ³⁵ See *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).
- ³⁶ Communication No. 1474/2006 CCPR/C/91/D/1474/2006 (14 November 2007).
- ³⁷ Communication No. 1818/2008 UN Doc CCPR/C/100/D/1818/2008 (25 October 2010).
- ³⁸ Optional Protocol to ICESCR, art 11.
- ³⁹ These general comments are compiled in two volumes, HRI/GEN/1/REV.9(VOL.I) and HRI/GEN/1/REV.9(VOL.II) (2008) and can be accessed at: <http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>.
- ⁴⁰ The 1995 Additional Protocol to the European Social Charter provides for a 'System of Collective Complaints'.
- ⁴¹ Note that this court is different from the European Court of Justice that has been established under the aegis of the EU.
- ⁴² P Leach, H Hardman, S Stephenson & B Blitz *Responding to Systemic Human Rights Violations: An Analysis of Pilot Judgments of the ECHR and their Impact at National Level* (2010).
- ⁴³ European Convention on Human Rights, art 35(3)(b). This requirement, which was added to the existing admissibility grounds as a means of filtering cases and thus of reducing the caseload of the European Court of Human Rights, made it possible for the court to declare as inadmissible cases in which the financial compensation likely to be awarded was minimal.
- ⁴⁴ Judgment of 29 July 1988, Series C No. 4.
- ⁴⁵ MH Syed (ed) *Human Rights in Islam: The Modern Perspective* Vol 1 (2003) 140–50.
- ⁴⁶ F Viljoen *International Human Rights Law in Africa* 2nd ed (2012) 13.

- ⁴⁷ Algeria (2006), Bahrain (2006), Iraq (2012), Jordan (2004), Kuwait (2006), Lebanon (2011), Libya (2006), Palestine (2007), Qatar (2009), Saudi Arabia (2009), Syria (2007), the United Arab Emirates (2008), and Yemen (2008).
- ⁴⁸ 2004 Arab Charter on Human Rights, Preamble.
- ⁴⁹ Ibid, art 3.
- ⁵⁰ Echoing the ICCPR, art 6(2).
- ⁵¹ Algeria, Benin, Burkina Faso, Cameroon, Chad, Comoros, Côte d'Ivoire, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Libya, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Togo, Tunisia and Uganda.
- ⁵² Cairo Declaration, art 2.
- ⁵³ Cairo Declaration, art 19(d).
- ⁵⁴ Cairo Declaration, art 23(b).
- ⁵⁵ See Organization of Islamic Cooperation ‘Report on Islamophobia October 2013 – April 2014’, available at www.oic-iphrc.org.
- ⁵⁶ OIC/9-IGGE/HRI/2004/Rep.Final.
- ⁵⁷ Resolution 1/33 – LEG on the Coordination among Member States in the Field of Human Rights. See www.oic-oci.org/baku2006/english.
- ⁵⁸ Covenant on the Rights of the Child in Islam, art 12(1) (the right to ‘free compulsory basic education’ is qualified by its aim of ‘learning the principles of Islamic education’).
- ⁵⁹ Ibid, art 14(2) (the right to social security ‘in accordance with their national laws’).
- ⁶⁰ Ibid, art 24(1) (“to examine the progress made in the implementation of this Covenant”).
- ⁶¹ See generally, B Tae-Ung *Emerging Regional Human Rights Systems in Asia* (2012).
- ⁶² S Jones ‘Regional institutions for protecting human rights in Asia’ 50 *Australian Journal of International Affairs* (1996) 269, 271.
- ⁶³ See Hsien-Li Tan *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in Southeast Asia* (2011).
- ⁶⁴ See Viljoen op cit (2012) ch 4.
- ⁶⁵ PSC Protocol, art 2(1).
- ⁶⁶ PSC Protocol, art 14(3).
- ⁶⁷ PAP Protocol, preamble.
- ⁶⁸ PAP Protocol, art 11(1). See also the inclusion of human rights in its objectives, PAP Protocol 3(2).
- ⁶⁹ UN Refugee Convention, art 1.
- ⁷⁰ OAU Refugee Convention, art I(2).
- ⁷¹ International Law Commission *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* General Assembly A/CN.4/L.682 (13 April 2006), para 88.
- ⁷² An example of such a ‘claw-back’ clause is art 9(2) of the Charter, which provides that ‘every individual shall have the right to express and disseminate his opinions within the law’. If interpreted to refer to domestic law, the phrase ‘within the law’ would render the right illusory. See full discussion below.
- ⁷³ African Charter, arts 19–24.
- ⁷⁴ Address delivered by Leopold Sedar Senghor, President of the Republic of Senegal at the opening of the Meeting of Africa Experts preparing the Draft African Charter in Dakar, Senegal 28 November to 8 December 1979.
- ⁷⁵ Communication 227/1999, 20th Annual Activity Report, paras 87 & 95.
- ⁷⁶ F Ouguergouz *The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda* (2003) 211.
- ⁷⁷ Communication 75/92, *Katangese Peoples’ Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) (8th Annual Activity Report) (*Katangese Secession case*).
- ⁷⁸ Ibid, para 5.
- ⁷⁹ Ibid, para 6: ‘In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government ..., Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire’ [emphasis added].
- ⁸⁰ See Viljoen op cit (2012) 215.
- ⁸¹ (2001) AHRLR 60 (ACHPR 2001) 12th Activity Report.

⁸² The Commission adopted the view that the existence of explicitly guaranteed Charter rights, such as the right to life (art 4), dignity (art 5), health (art 16) and family (art 18), by necessity implied the existence of the right to shelter (housing) and food (nutrition), even though these rights were not explicitly enumerated.

⁸³ (2009) AHRLR 153 (ACHPR 2009) 26th Activity Report.

⁸⁴ Ibid, para 124.

⁸⁵ Ibid, para 126.

⁸⁶ (2009) AHRLR 75 (ACHPR 2009) 27th Annual Activity Report.

⁸⁷ Ibid, para 149.

⁸⁸ Ibid, para 277.

⁸⁹ See Makau wa Mutua ‘The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties’ 35(2) *Virginia Journal of International Law* (1995) 339–80.

⁹⁰ Charter, arts 27 to 29.

⁹¹ Address delivered by Léopold Sedar Senghor, President of Senegal, at the opening of the Meeting of African Experts preparing the draft African Charter, Dakar, Senegal, 28 November–8 December 1979, in C Heyns (ed) *Human Rights Law in Africa Series* Vol 4 (1999) 78–80.

⁹² Para. IV.7 of the Guidelines, Second Activity Report of the African Commission, Annex XII.

⁹³ UO Umozurike *The African Charter on Human and Peoples’ Rights* (1997) 65.

⁹⁴ African Children’s Charter, art 22(2).

⁹⁵ African Children’s Charter, art 21(2).

⁹⁶ African Children’s Charter, art 23(4).

⁹⁷ CRC, art 22.

⁹⁸ On the Women’s Protocol, see F Banda ‘Blazing a trail: The African Protocol on Women’s Rights comes into force’ 50(1) *Journal of African Law* (2006) 72.

⁹⁹ African Women’s Protocol, art 14(2)(c).

¹⁰⁰ Ibid, 14(1)(d).

¹⁰¹ Ibid, art 6(c).

¹⁰² Ibid, art 11.

¹⁰³ Ibid, art 11(4).

¹⁰⁴ Ibid, art 6(b) and (d).

¹⁰⁵ See IDMC Internal Displacement Monitoring Centre: <http://www.internal-displacement.org> (accessed on 15 July 2014).

¹⁰⁶ See UN Doc E/CN.4/1998/53/Add.1 (11 February 1998); UN Doc E/CN.4/1996/52/Add.2 (5 December 1997).

¹⁰⁷ See also Kampala Convention, art 1(l): “Internal displacement” means the involuntary or forced movement, evacuation or relocation of persons or groups of persons *within* [own emphasis] internationally recognized state borders’.

¹⁰⁸ On this, see chapter 9 of this book.

¹⁰⁹ See Kampala Convention, art 5(1).

¹¹⁰ See also *ibid*, art 4(4).

¹¹¹ Ibid, art 3(1)(d).

¹¹² Ibid, art 4(4).

¹¹³ Ibid, art 3(1)(g) and (h).

¹¹⁴ Ibid, art 3(1)(i).

¹¹⁵ See also chapter 12 of this book.

¹¹⁶ See in general Geneva Conventions I–IV (1949), common art 3; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War; and Additional Protocol I (1977) to the Geneva Conventions.

¹¹⁷ Rules 31 and 32 of the ICRC’s Study on Customary International Humanitarian Law available at <http://www.icrc.org/>.

¹¹⁸ Kampala Convention, art 3(1)(e). See also art 4(1).

¹¹⁹ African Charter, art 62.

¹²⁰ See the Commission’s ‘Report on Communications’ (ACHPR/53/OS/1204, presented at the Commission’s 53rd ordinary session, April 2013, Banjul, The Gambia; by the end of 2012, the reported situation was as follows: a total of 426 cases, of which only 210 had been completed (see Combined 32nd and 33rd Activity Report of the African Commission on Human and Peoples’ Rights, EX.CL/782(XXII) Rev.2, para 19).

¹²¹ *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 18 (ACHPR 2003) (20th Activity Report).

¹²² For an assessment of the Commission's first 25 years, see F Viljoen 'From a cat into a lion? An overview of the progress and challenges of the African human rights system at the African Commission's 25 year mark' 17 *Law, Democracy & Development* (2013) 298.

¹²³ In *Media Rights Agenda and Another v Nigeria* ((2000) AHRLR 200 (ACHPR 1998), among other communications, the Commission held that any 'limitation on the Charter rights must be in conformity with the provisions of the Charter' (para 66), that the only legitimate reasons for limiting a right 'must be founded in a legitimate state interest' (*ibid*) and that limitations must be 'strictly proportionate with an absolutely necessary for the advantages which are to be obtained' (para 69).

¹²⁴ See eg, R Gittleman 'The Banjul Charter on Human and Peoples' Rights: A legal analysis' in C Welch & RI Meltzer (eds) *Human Rights and Development in Africa* (1984) at 159; and P Takirambudde 'Six years of the African Charter on Human and Peoples' Rights: An assessment' 7(2) *Lesotho Law Journal* (1991) 35 at 50–2.

¹²⁵ See eg, the 17th Annual Activity Report.

¹²⁶ (2010) AHRLR 43 (ACHPR 2010).

¹²⁷ EX.CL/782(XXII) Rev.2, para 24.

¹²⁸ See the Commission's Rules of Procedure, rule 118(1).

¹²⁹ African Court Protocol, art 3(1): 'The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and *any other relevant Human Rights instrument ratified by the States concerned*' [emphasis added].

¹³⁰ *Ibid*, art 4(1): 'At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or *any other relevant human rights instruments*, provided that the subject matter of the opinion is not related to a matter being examined by the Commission' [emphasis added].

¹³¹ Applications 9 and 11/2011, *Mtikila and Another v Tanzania*, Judgment (14 June 2013).

¹³² Application No 013/2011, *The Beneficiaries of the Late Norbert Zongo and Others v Burkina Faso*, Judgment (28 March 2014).

¹³³ Application 4/2013, *Konaté v Burkina Faso*, Judgment (5 December 2014).

¹³⁴ Application 4/2001, *African Commission v Libya* (*Provisional Measures* case), Order for Provisional Measures, 25 March 2011, para 25.

¹³⁵ Application 2/2013 *African Commission v Libya* (*Gaddafi's son* case), Order for Provisional Measures, 15 March 2013, para 15.

¹³⁶ See African Court 'Interim Report of the African Court on Human and Peoples' Rights Notifying the Executive Council of Non-Compliance by a State, in accordance with Article 31 of the Protocol', available at <http://www.african-court.org>

¹³⁷ See African Committee of Experts on the Rights and Welfare of the Child (ACERWC) website: www.acerwc.org (last accessed 18 May 2012).

¹³⁸ Communication 2/2009, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v Kenya* (25 March 2011).

¹³⁹ Communication 2/2009, *Hansungule and Others* (*on behalf of children in Northern Uganda*) v *Uganda*, decided at the Committee's 21st ordinary session (15–19 April 2013).

¹⁴⁰ Communication 1/2012, *Centre for Human Rights and la Rencontre Africaine pour la Défense des Droits de l'Homme (RADHO)* (*on behalf of Senegalese Talibés*) v *Senegal* (15 April 2014).

¹⁴¹ K Appiagyei-Atua 'Bumps on the road: A critique of how Africa got to NEPAD' 6 *African Human Rights Law Journal* (2006) 524–48 at 545.

¹⁴² As of December 2008, 29 states had signed the MOU (but Mauritania was suspended after the 2008 coup d'état).

¹⁴³ 1991 Protocol on the Community Court of Justice, amended by the 2005 Supplementary Protocol Amending the Protocol relating to the Community Court of Justice, art 9(4) ('The Court has jurisdiction to determine case of violation of human rights that occur in any Member State') and art 10(d) (Access to the Court is open to the following: Individuals on application for relief for violation of their human rights').

¹⁴⁴ Suit no. ECW/CCJ/APP/04/07, ECOWAS Court of Justice, 5 June 2008.

¹⁴⁵ *Koraou v Niger* (2008) AHRLR 82 (ECOWAS 2008).

¹⁴⁶ EAC Treaty, art 27(2).

¹⁴⁷ *James Katabazi and Others v Secretary-General of the EAC and Attorney-General of Uganda*, Reference 1 of 2007, East African Court of Justice (1 November 2007).

¹⁴⁸ 2/2007 [2008] SADCT 2 (28 November 2008).

¹⁴⁹ Adopted at the 34th SADC Summit (August 2014).

¹⁵⁰ This section on domestic enforcement is based on J Kweitel, R Singh and F Viljoen ‘The role and impact of international and foreign law on adjudication in the apex courts of Brazil, India and South Africa’ in O Vilhena, U Baxi and F Viljoen (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013) 176.

¹⁵¹ See MCR Craven ‘The domestic application of the International Covenant on Economic, Social and Cultural Rights’ 40(3) *Netherlands International Law Review* (1993) 367, 369, 381–95.

¹⁵² *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 26.

¹⁵³ JD van der Vyver ‘Universal jurisdiction in international criminal law’ 24 *South African Yearbook of International Law* (1999) 107 at 130–1 and 131 n18.

¹⁵⁴ Ibid, 131 n 18.

¹⁵⁵ E De Wet ‘The “friendly but cautious” reception of international law in the jurisprudence of the South African Constitutional Court: Some critical remarks’ 28(6) *Fordham International Law Journal* (2005) 1529, 1578, 1587.

¹⁵⁶ 2010 (6) SA 399 (WCC).

¹⁵⁷ M Killander ‘Judicial immunity, compensation for unlawful detention and the elusive self-executing treaty provision: *Claassen v Minister of Justice and Constitutional Development* 2010 (6) SA 399 (WCC)’ 26(2) *South African Journal on Human Rights* (2010) 386.

¹⁵⁸ *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* (CCT 36/08) [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC) (1 April 2009).

¹⁵⁹ Para 76.

¹⁶⁰ *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

¹⁶¹ 2011 (3) SA 347 (CC) para 178.

¹⁶² Para 192.

¹⁶³ 2015 (1) SA 315 (CC).

¹⁶⁴ Footnote 45.

¹⁶⁵ J Church et al *Human Rights from a Comparative and International Perspective* (2007) 218; De Wet op cit 1541–6.

¹⁶⁶ *Campbell* case supra, para 4.

¹⁶⁷ High Court of Zimbabwe, *Gramara v Zimbabwe* 49 ILM 1383 (2010) (26 January 2010).

¹⁶⁸ *Government of the Republic of Zimbabwe v Fick and Others* (657/11) [2012] ZASCA 122 (20 September 2012).

¹⁶⁹ *Government of the Republic of Zimbabwe v Louis Karel Fick* (hereinafter the *Fick* case), (CCT 101/12) [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) (27 June 2013); for a discussion, see E de Wet ‘The case of *Government of the Republic of Zimbabwe v Louis Karel Fick*: A first step towards developing a doctrine on the status of international judgments within the domestic legal order’ 17(1) *Potchefstroom Electronic Law Journal* (2014) 554.

Chapter 12

International humanitarian law

GERHARD KEMP

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12.1 Introduction

International humanitarian law (IHL) forms part of public international law. The primary aim of IHL ‘is to humanise warfare by limiting the human suffering caused by armed conflict’. IHL does

not forbid armed conflict.² Rather, this body of law is pragmatic in the sense that it accepts that war or armed conflict is part of the human condition. IHL aims to set certain legal boundaries to the methods of warfare and the conduct of hostilities. In essence, the rules of IHL ‘strike a careful balance between concerns for humanity and military necessity’.³ The standard view is that IHL should apply equally to all parties in an armed conflict irrespective of which party was responsible for starting the conflict.⁴ The body of law that constitutes IHL comprises an important legal regime aimed at the protection of humans and property during armed conflict. While the focus in this chapter is on the content of the rules of IHL, brief reference is also made to the enforcement of IHL through national legal systems, international criminal law, and state responsibility, as well as to the relationship between IHL and international human rights law. IHL, together with the related fields of international criminal law and international human rights law, form a normative whole.

The aim of this chapter is to provide an overview and discussion of the most important features and underlying principles of IHL. For this purpose, first, an overview of the historical foundations and sources of IHL is presented. Thereafter, some conceptual issues (notably the distinction between the *jus ad bellum* and the *jus in bello*) is dealt with. This is followed by a discussion of the most important rules and principles of IHL as they apply in international and non-international armed conflicts. IHL is not only an aspirational body of law, but is, indeed, enforceable at the national and international levels. This aspect is dealt with in the penultimate section of this chapter. Finally, the relationship between IHL and (international) human rights law is also briefly discussed.

12.2 A brief historical overview of IHL and the sources of IHL

IHL is a very detailed and complex body of rules and norms, with a relatively long and layered history.

War and armed conflict have always been part of the human condition. Mercy and considerations of humanitarianism in the conduct of hostilities (such as in the treatment of wounded soldiers and unarmed civilians) have also played a role in the way in which wars have been conducted. Indeed, in some ancient civilisations such as the Sumerian, Persian and Greek civilisations, rules pertaining to the conduct of hostilities, the treatment of prisoners, and respect for religious and cultural property were quite well established. In later civilisations, such as medieval Christendom in Europe, and Islam in the Middle East, religious considerations and notions of chivalry informed a developing practice of humanitarianism in times of conflict. A famous example is that of the Sultan Saladin who, during the times of the crusades in the twelfth century, ordered equal treatment of wounded combatants on both sides of the conflict. He also allowed hospital services to be provided to enemy soldiers.⁵

The traces of humanitarianism in ancient and medieval civilisations formed the basis for further philosophical and jurisprudential analyses in the works of great scholars like Francisco de Vitoria and, of course, in the works by the ‘father’ of international law, Hugo de Groot (Grotius). In his famous *De Jure Belli ac Pacis* (1625), Grotius also addressed questions of rules and standards applicable during armed conflict.⁶

The modern humanitarian movement has its roots in a booklet. Between 1859 and 1862, a Swiss national called Henry Dunant wrote and later published his memories and impressions of the horrors of war during and after the Battle of Solferino, Italy. In the book, the English title of which is *A Memory of Solferino*,⁷ Dunant described the conduct of hostilities, the plight of the wounded and sick, and the particularly vulnerable position of the wounded prisoners of war. The book was more than just a description of what Dunant witnessed during and after the conflict. It also contained

certain ideas and proposals, which later would form the basis for the adoption of the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864). One of the important principles underlying the Convention was that wounded and sick soldiers must be taken in and cared for *without distinction* of nationality. The heraldic symbol of the Red Cross⁸ was also chosen as an emblem guaranteeing *protection* and *assistance*.

Figure 12.1 The logo of the International Committee of the Red Cross

Because of changing realities in warfare and circumstances surrounding armed conflict, the first International Peace Conference was held in 1899 in The Hague in the Netherlands. The participants adopted the Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1864, to supplement the original Geneva Convention of 1864. In 1907, a second International Peace Conference was held in The Hague. On this occasion, the participants adopted regulations concerning the laws and customs of war on land. This body of rules prohibits certain means and methods of warfare that cause cruel and unnecessary suffering (for instance, certain types of bullets). Furthermore, it provides for the humane treatment of prisoners of war and the observance of certain fundamental rights of inhabitants of occupied territories.

Unfortunately, the second Hague Peace Conference was followed by the devastation and immense loss of life of World War I (1914–1918). In 1929, a diplomatic conference was held to revise and reform the rules provided for in the predecessor conventions. The 1929 Geneva Convention Relative to the Treatment of Prisoners of War was adopted. It added to the regulations provided for in the Hague Regulations on the means and methods of warfare. The content of the 1929 Geneva Convention was no doubt informed by the experiences of World War I.

By 1949, in the post-World War II era, there was clearly a need for a comprehensive review of the various instruments that formed the body of law known as the law of Geneva (the various conventions adopted since 1864). At a diplomatic conference in Geneva,⁹ yet another instrument, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War was adopted. It can be seen as an extension of the relevant regulations under the Hague Rules on war on land. In total, four different conventions¹⁰ were adopted at the conference in 1949, namely:

1. Geneva Convention I: For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (the successor to the historic first Geneva convention that was adopted in 1864);
2. Geneva Convention II: For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (essentially a successor and supplement to the Hague Convention of 1899 and the maritime ‘twin’ of the first Geneva convention);
3. Geneva Convention III: Relative to the Treatment of Prisoners of War (by volume the most comprehensive of the four Geneva Conventions, containing as it does 143 articles, and the successor to the 1929 Geneva Convention and the relevant chapter on prisoners of war in The Hague Convention of 1907); and
4. Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War (providing for an important development compared to the original Geneva Convention of 1864, which only provided for combatants, since changing realities made it clear that civilians were now affected by war to a far greater extent than had been the case even in 1864 – this fourth convention on civilians should not be seen as a replacement of the relevant Hague rules and regulations, but rather as supplementary).

The four Geneva Conventions are supplemented by three Additional Protocols, namely:

1. Protocol I: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977);
2. Protocol II: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (8 June 1977); and
3. Additional Protocol III: In December 2005, the Swiss government convened a diplomatic conference in Geneva that was attended by most of the states parties to the Geneva Conventions. At this meeting, a third Additional Protocol to the Geneva Conventions was adopted. This Additional Protocol, entered into force in 2007, provides for an additional emblem (the Red Crystal) to be used by governments and the Red Cross and Red Crescent Movement. The main reason for the adoption of the Red Crystal symbol was to make it easier for societies or governments who do not want to use the Red Cross or Red Crescent symbols.¹¹

Today, the three emblems (Red Cross, Red Crescent and Red Crystal) are the symbols that provide protection for military medical services in armed conflicts. National societies of the Red Cross and Red Crescent Movement are also allowed to use the emblems for identification purposes, for instance during relief work in times of humanitarian crises. The rules pertaining to the protective and indicative use of the emblems are discussed in more detail below.

Figure 12.2 *The three (red) emblems providing protection for military medical services in armed conflicts*

Apart from the Law of Geneva and the Law of The Hague (as briefly set out above) there are currently a number of other important sources and frameworks that are relevant for IHL. The most important of these are:

- the statutes of various international criminal tribunals, including the Statutes of the International Criminal Tribunal for the Former Yugoslavia,¹² the International Criminal Tribunal for Rwanda,¹³ and the International Criminal Court;¹⁴
- national laws on IHL (for instance, the Implementation of the Geneva Conventions Act 8 of 2012 in South Africa);
- the International Committee of the Red Cross, Study on Customary International Humanitarian Law;¹⁵ and
- in addition to customary international humanitarian law, the so-called Martens Clause. This clause was adopted in the Preamble to Hague Convention IV (1907).¹⁶ Additional Protocol I also adopts the Martens Clause, which essentially provides that the absence of a prohibition of certain conduct by an international treaty does not imply that the conduct is permitted. Article 1(2) of Additional Protocol I provides as follows:

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

12.3 The relationship between the *jus ad bellum* and the *jus in bello*

The use of armed force and the right of states to use armed force (the *jus ad bellum*) is today regulated by international law. This was not always the case. Historically, the anarchic international system that preceded the modern system of international law and collective security was a system characterised by war as a means to further the national interests of states. Indeed, in the period before 1914 (the outbreak of World War I), states generally asserted the *sovereign right* to resort to war.¹⁷ The post-World War I era changed the nature of the *jus ad bellum* fundamentally. No longer was the use of force by states regarded as a legitimate expression of state sovereignty; rather, it was now exceptional.

The Kellogg-Briand Pact of 1928 (General Treaty for Renunciation of War as an Instrument of National Policy)¹⁸ was a multilateral declaration that war would no longer be used as an instrument of national policy or as a method to settle disputes.¹⁹ Some commentators suggest that instruments such as the Kellogg-Briand Pact changed the normative content of the *jus ad bellum* to such an extent that the body of rules and principles should henceforth better be known as the *jus contra bellum*: the prohibition of war and the use of armed force as instruments of national policy and international dispute settlement. From this normative framework was born the present international system as embodied in the Charter of the United Nations, and which was adopted after World War II. The prohibition of the use of force is furthermore one of the peremptory norms in international law.²⁰

The UN Charter provides for the two important legs of the modern *jus contra bellum* – namely, (a) the general prohibition of the use of force by states, unless justified in terms of the inherent right of states to use force in self-defence (articles 2(4) and 51), and (b) the use of force in conformity with Chapter VII of the Charter, which authorises the Security Council to decide on measures, including the use of force, in order to protect or restore international peace and security.

There is an important normative link between the *jus contra bellum* and the *jus in bello* (the legal rules concerning the rights and duties that apply during armed conflicts). Even where the use of armed force is legal in terms of international law, the norms of the *jus in bello* (essentially the rules of international humanitarian law as discussed in this chapter) still apply.²¹ Thus, whether or not a state acts within the confines of the *jus contra bellum*, the rules of international humanitarian law will apply *equally* between belligerents.²² This is not an uncontroversial principle – especially when one of the belligerent parties is clearly the aggressor. Nevertheless, it can be argued that without the principle of equal application of the *jus in bello*, the incentive for states (and certainly aggressor states) to adhere to the rules of IHL would be eroded.²³

12.4 Differentiating between international and non-international armed conflicts

The application and enforcement of the rules and norms of IHL still rest on the classification of armed conflicts as either international or non-international. International instruments and case law still draw this distinction. Thus, the determination of a conflict as either international or non-international has legal consequences.

The historical overview of the development of IHL (and the foundational Law of Geneva and Law of The Hague) shows that at its inception, IHL was mostly concerned with war and armed conflicts between states. Indeed, almost the entire legal regime provided for in the four Geneva Conventions is aimed at the protection of the various protected groups in times of ‘international’ armed conflict. Of course, even in 1949 there was a realisation that the norms of IHL should also extend to at least some persons in armed conflicts that could not be classified as international. Thus common article 3 (in all four Geneva Conventions) provides for some protection of persons (for

instance, members of the armed forces that have laid down their arms) in non-international armed conflicts.²⁴ ‘Armed conflict not of an international character’ is not defined in common article 3, but certain criteria crystallised that are helpful in order to determine the nature of the conflict. One important criterion is that the conflict should not ‘merely’ be civil unrest or some kind of anarchy, but should resemble a more organised armed conflict between the *de jure* government and some organised military force (not of another state) that is also in control of part of the national territory.

In 1977, Additional Protocol II was adopted. This instrument, which has been ratified by more than 150 states,²⁵ provides for further and more comprehensive protection of IHL norms relating to non-international armed conflicts. Both common article 3 (Geneva Conventions) and Additional Protocol II are also enforceable from an international criminal law point of view. The ad hoc international criminal tribunals (ICTY and ICTR) have accepted that violations of either common article 3 or Additional Protocol II can constitute war crimes.²⁶

The applicability of the norms of IHL during international armed conflicts has attained the status of customary international law.²⁷ This means that the most important norms of IHL are applicable during international armed conflicts even in the unlikely event that a state decides to withdraw from the Geneva Conventions. The customary status of IHL norms for purposes of non-international armed conflicts is also gaining traction. In *Prosecutor v Tadic*, the ICTY confirmed the customary status of common article 3, the most important provisions of Additional Protocol II, as well as article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954).²⁸

It is clear that the need to protect the norms of IHL in non-international armed conflicts has gained prominence because of the changing nature of conflicts. The impetus for the adoption of the major IHL frameworks (notably the four Geneva Conventions and the various Hague Conventions) was, no doubt, war and conflict between states. But after World War II, the majority of conflicts have occurred not between the big states but on the periphery of the big powers’ spheres of influence, and within states – often within so-called failed states. In short, the nature of conflict has became more complex and not easily recognisable as either international or non-international.²⁹

Despite the blurring of the lines between international and non-international armed conflicts, the position is that, under international law, the distinction still has significance. For instance, the ICTY Appeals Chamber confirmed that ‘only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts’, and, furthermore, ‘this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts’.³⁰

Other international instruments, notably the Rome Statute of the International Criminal Court, maintain the differentiation between the laws applicable to international as opposed to the laws applicable to non-international armed conflicts.³¹

12.5 Conduct of hostilities: the principles and rules of international humanitarian law

As was pointed out above,³² there are various sources (notably treaties as well as customary international law) that form the body of norms and rules that we collectively call IHL. It falls beyond the scope of this chapter to discuss the multiple and detailed international instruments and precedents that exist. However, the Study on Customary International Humanitarian Law, as prepared by the International Committee of the Red Cross (ICRC) is a useful way to identify the most important rules and principles of IHL.

In 1995, the ICRC was asked to:

prepare, with the assistance of experts in international humanitarian law representing various geographical regions and different legal systems, and in consultation with experts from governments and international organisations, a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies.³³

There are inherent limitations in the approach used by a study of this nature (albeit the most authoritative one) in order to discuss the rules of IHL. Some relevant rules and detailed provisions of treaties are left out.

However, the Study on Customary International Humanitarian Law certainly covers the essence and the normative landscape of modern IHL. Indeed, the ICRC study notes that ‘the great majority of the provisions of the Geneva Conventions of 1949, including common Article 3, are considered to be customary law, and the same is true for the 1907 Hague Regulations’.³⁴ The ICRC study further notes that the Geneva Conventions have been ratified by virtually all states in the world, and are binding as treaty law in a truly global way.³⁵ Using the ICRC study on customary international humanitarian law as a basis to discuss the rules of IHL thus corresponds with the essential legal framework binding on all states.

The structure of the ICRC study will be employed below in order to identify and to illustrate the various principles and rules that constitute the body of law known as IHL.

12.5.1 The principle of distinction

The ICRC study reveals that IHL rules are based on important conceptual distinctions. These rules require that a distinction is made between civilians and combatants in international armed conflicts, and between fighters and civilians in non-international conflicts. It is similarly important to differentiate between civilian objects and military objectives. Following from these distinctions, rules of IHL outlaw indiscriminate attacks as opposed to attacks having a narrow military purpose, and attacks that are not proportional to the advantage they hope to gain. It follows also that precautionary measures must be taken to protect civilian life. These rules are discussed in more detail below.

12.5.1.1 Distinction between civilians and combatants (international armed conflicts), and between fighters and civilians (non-international armed conflicts)

The first distinction to be made is between civilians and combatants. Under this principle, the rule provides that the parties to a conflict ‘must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians’.³⁶ It must be noted that this rule is applicable in both international and non-international armed conflicts. ‘Combatant’ means any person who does not enjoy ‘the protection against attack accorded to civilians’. At the same time, the term ‘combatant’ ‘does not imply a right to combatant status or prisoner-of-war status’. Furthermore, all members of the armed forces of a party to the conflict, except medical and religious personnel, are regarded as combatants. ‘Civilian’ means a person who is not (or who is no longer) a member of the armed forces.³⁷

A further rule emanating from the principle of distinction between civilians and combatants is the rule that acts or threats of violence whose primary purpose is to spread terror among a civilian

population are prohibited. Again, this rule is applicable in both international and non-international armed conflicts.³⁸ Examples of this form of terror (which also constitute war crimes under international criminal law)³⁹ include indiscriminate and widespread shelling, regular bombardment of cities, sexual crimes like rape, and torture and abuse.⁴⁰

International humanitarian law provides that the armed forces of a state party to a conflict consist of all organised armed forces, groups and units that are under a command responsible to that party for the conduct of its subordinates.⁴¹ This rule is applicable in international armed conflicts and is also relevant for the state armed forces in non-international armed conflicts. Whether paramilitary units, or law enforcement agencies like the police, form part of the armed forces for purposes of the principle of distinction, is not always clear. It is therefore important that states should clearly indicate (for instance, by way of an Act of Parliament) that paramilitary forces or law enforcement agencies are formally incorporated into the armed forces of the state. The absence of a formal act of incorporation does not preclude a finding that paramilitary forces or law enforcement agencies serve *de facto* as part of the regular armed forces.⁴²

The distinction between civilians and combatants is eroded when civilians take direct part in hostilities. The rule is therefore that civilians are protected against attack unless and for such time as they take direct part in hostilities. The concept of ‘direct participation in hostilities’ is not altogether clear. There is no international or universally accepted definition. However, state practice and the interpretations of the term by regional human rights organisations provide some guidance. A cursory reading of state practice and various pronouncements by international and regional human rights bodies reveals a rather strict interpretation of the term ‘direct participation’. Thus it would be safe to say that civilians who *contribute* to the war effort (by working in munitions factories, for instance), but who are not actually using weapons against the enemy, are still regarded as civilians who do not participate in the hostilities directly.⁴³

In non-international armed conflicts, there is no designation or classification of combatants. Thus, in non-international armed conflicts, there is no combatant status. Historically, participants in non-international armed conflicts were simply treated as criminals, and often prosecuted for crimes like treason or murder. The reality of twenty-first century conflicts is that, more often than not, conflicts are not between states, but are indeed non-international in character. International humanitarian law nevertheless provides for the minimum standard of treatment of participants in non-international armed conflicts. Common article 3 of the Geneva Conventions as well as Additional Protocol II provide for the humane treatment of fighters in non-international armed conflicts. Additional Protocol II also distinguishes between fighters and civilians in a non-international armed conflict, as well as between military objectives and civilian objects. In this regard, it is clear that Additional Protocol II in a sense emulates the normative aims of the principle of distinction, which is, of course, well established in the context of international armed conflicts.

12.5.1.2 Distinction between civilian objects and military objectives

An important manifestation of the principle of distinction is the collection of rules aimed at distinguishing between civilian objects and military objectives during armed conflicts. Attacks may only be directed against military objectives. This may sound self-evident from a humanitarian perspective, but the realities of modern armed conflict make the application of these rules very difficult. The destructive nature of modern weaponry holds the potential for large-scale destruction of not only enemy military targets but also civilian objects and property. At the same time it should be noted that technological development has made it possible for military commanders to target military objects with far greater precision, thus avoiding civilian injury and/or damage to civilian objects. The question of so-called ‘collateral damage’ – that is, where civilian injury or death, or

damage to civilian objects, is incidental to military operations – is controversial. Indeed, a hallmark of many of the conflicts of the past few decades has been the rise in so-called ‘collateral damage’ – no doubt as a result of urban warfare and the blurring of civilian and military objects and objectives.⁴⁴ This poses a challenge to the application of IHL. The rule of distinction between civilian objects and military objectives applies during international and non-international armed conflicts. An important exception to the rule is that only direct attacks against civilian objects are prohibited. The implication is that attacks that affect civilian objects indirectly or in an incidental way are not unlawful under the rules of IHL. The qualification is that such incidental or indirect damage must not be excessive.⁴⁵

With respect to *objects*, IHL determines that military objectives are limited to those objects that, by their nature, location, purpose or use, make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances at the relevant time, offers a definite military advantage.⁴⁶ This rule applies to international and non-international armed conflicts. The problem, again, is the question of ‘collateral damage’. Many states assert that the presence of civilians in the vicinity of military objectives does not make the target immune from attack.⁴⁷ The dual nature of buildings and facilities can also cause problems. For instance, communications facilities that in peace time are obviously civilian in nature may in times of conflict also serve to support military action. The facility then becomes dual-purpose and could, depending on the particular facts and context, be classified as a legitimate military objective. If something is not a military objective, it is classified as a civilian object.⁴⁸ The humanitarian imperative determines that in cases of doubt, objects should be presumed to be civilian in nature. Thus, for instance, article 52(3) of Additional Protocol I provides that ‘in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used’.

12.5.1.3 Indiscriminate attacks

International humanitarian law prohibits indiscriminate attacks. Such attacks can be defined as attacks:

- not directed at a specific military objective;
- employing a method or means of combat that cannot be directed at a specific military objective; or
- employing a method or means of combat the effects of which cannot be limited as required by IHL.⁴⁹

In each of the above cases, the principle of distinction is clearly undermined. A key example would be the case of biological weapons. The nature of such weapons is that it is almost impossible to control the effects, regardless of the initial intended target. The use of such weapons can lead to excessive civilian casualties.⁵⁰ In line with the principle of distinction, IHL further prohibits attacks by bombardment by any method or means that treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilian objects.⁵¹

12.5.1.4 Attacks must be proportional

A key rule of IHL, and a manifestation of the principle of distinction, is that any attack that may cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination

thereof, and which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.⁵² This rule applies in international and non-international armed conflicts. It is evident that such a rule is difficult to interpret in the abstract. States are understandably reluctant to prejudge any given situation. States therefore generally assert that proportionality in the context of military strategy refers to the ‘advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack’.⁵³

12.5.1.5 Precautionary measures

The general humanitarian imperative that underscores IHL requires that, in the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. Indeed, it is required that all feasible precautions (including advance warnings)⁵⁴ must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects.⁵⁵ Related to this rule is the rule that parties to the conflict must ensure that targets are indeed military objectives.⁵⁶ The application of the principle of distinction in this context not only requires precautionary measures regarding the identification of the target, but also with regard to the choice of means and methods of warfare. The humanitarian imperative again requires that the aim must be to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects.⁵⁷ Parties to the conflict should, as a general rule, cancel or suspend an attack if it becomes apparent that the target is not a military objective, or that the attack may be expected to cause unnecessary collateral damage.⁵⁸

International humanitarian law requires that parties to a conflict must take all feasible precautions to protect the civilian population and civilian objects under their control from the effects of attacks.⁵⁹ In particular, parties to a conflict should avoid locating military objectives within or near densely populated areas. For instance, parties should not locate refugee camps close to or in the vicinity of military installations; there should be a clear distinction between civilian and military establishments.⁶⁰

12.5.2 Specifically protected persons and objects

Flowing largely from the principle of distinction are a number of IHL protections for specific persons and objects. These are discussed in more detail below.

12.5.2.1 Medical and religious personnel

The pragmatism and humanitarian concerns underlying IHL inform the rule that medical personnel who are exclusively assigned to medical duties must be respected and protected in all circumstances. Such personnel lose their protection if they commit, outside their humanitarian functions, acts that are harmful to the enemy.⁶¹ This rule of IHL is historically one of the most obvious and prominent manifestations of the working of IHL in times of conflict. The rule dates back to the original Geneva Convention of 1864. It can now be found in the four Geneva Conventions of 1949, as well as an expanded version of it in Additional Protocol I. The rule is also provided for in Additional Protocol II (and is implicit in common article 3 of the Geneva Conventions). The rule is thus also applicable in non-international armed conflicts. The expanded notion of medical personnel provides for the inclusion of civilian medical personnel (in addition to military medical staff). Intentionally to target medical personnel who are working under the distinctive emblems of the Geneva Conventions can also lead to criminal liability under international criminal law.⁶²

Under IHL, the category of persons protected as ‘medical personnel’ can be defined as:
personnel assigned, by a party to the conflict, exclusively to the search for, collection, transportation, diagnosis or treatment, including first-aid treatment, of the wounded, sick and shipwrecked, and the prevention of disease, to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary.⁶³

In conjunction with the general rule of IHL protecting medical personnel, a further rule provides that it is generally prohibited to punish a person for performing medical duties that are compatible with medical ethics or compelling a person engaged in medical activities to perform acts contrary to medical ethics. The general guideline here seems to be the medical-ethical principle that medical personnel must always and as far as possible act in their patients’ best interests.⁶⁴

In addition to the rule that medical personnel must be protected and respected during armed conflicts, another rule also dating back to the original Geneva Convention of 1864 provides for the respect and protection of religious personnel exclusively assigned to religious duties. Such persons lose their protected status if they commit, outside their humanitarian function, acts harmful to the enemy. This category of protected persons is arguably more difficult: (a) to recognise outwardly during times of conflict, and (b) to define substantively for purposes of IHL. In general terms, ‘religious personnel’ refers to persons, whether military or civilian, who are exclusively engaged in the work of their ministry and attached to a party to the conflict, to its medical units or transports or to a civil defence organisation.⁶⁵

12.5.2.2 Humanitarian relief personnel and objects

It should be self-evident that a fundamental concern of IHL is the protection of humanitarian relief personnel. Civilian personnel who deliver humanitarian relief to civilian populations should furthermore be treated with the necessary respect by parties to a conflict. These twin norms of protection and respect apply in both international and non-international armed conflicts.

It is important to note that in international armed conflicts, *members of armed forces* delivering humanitarian aid are *not* covered by this rule.⁶⁶ Armed personnel operating under the colours of the United Nations and with specific humanitarian missions are protected under the Convention on the Safety of United Nations and Associated Personnel, 1994.⁶⁷

In addition to the rules set out above regarding the protection of humanitarian relief personnel, a further rule of IHL determines that objects and supplies involved in a humanitarian relief operation are to be treated as civilian objects and supplies. Such objects, which will be discussed below, should thus be protected from attack.⁶⁸

12.5.2.3 Personnel and objects involved in a peacekeeping mission

Armed personnel deployed under the colours of the United Nations, or regional organisations such as the African Union, as part of peacekeeping missions are protected persons under IHL. The reason for this is that IHL treats peacekeeping forces as civilians, since the members of such forces are by definition not members of the parties to the conflict. In addition, UN peacekeeping forces are also protected under the terms of the 1994 Convention on the Safety of United Nations and Associated Personnel.⁶⁹ There is a further observation to be made: members of peacekeeping forces are not allowed to take direct part in hostilities – if they do, they lose their protected status.⁷⁰ Below are some further comments to put the general principle and the qualification in perspective. The

comments are made with reference to the United Nations, which is the pre-eminent international peacekeeping organisation.

In terms of the sources and general principles of IHL, it is first important to note that the various international instruments (notably the Geneva Conventions and Additional Protocols) are binding on *states* parties. The United Nations is not a state and can therefore not become a party to the Conventions. Of course, it is safe to say that the vast majority of UN member states are also states parties to the Geneva Conventions. Although the United Nations as an organisation has legal personality under international law, it cannot become a party to the Geneva Conventions. This legal reality does not mean that the conduct of UN peacekeepers is free from the normative constraints provided for by international humanitarian law.⁷³ Indeed, the United Nations itself is of the view that the normative framework of IHL should apply to peacekeepers when such peacekeepers are *actively engaged* in a conflict situation.⁷⁴

Peace and security is, of course, one of the principal mandates of the United Nations. Peacekeeping operations, under the colours of the United Nations, are conducted within a certain legal framework. When the United Nations (via the Security Council or the General Assembly) determines that a given situation warrants a peacekeeping operation, such an operation becomes, in a technical and legal sense, a subsidiary organ of the United Nations. The typical legal framework governing the peacekeeping operation consists of a number of elements: the relevant resolution (of the Security Council or General Assembly), the status of force agreement between the United Nations and the relevant host state, the agreement (by exchange of letters) between each of the states that are participating in the peacekeeping operation and the United Nations, and the relevant regulations for the peacekeeping force issued by the UN Secretary-General.⁷⁵ While this framework provides peacekeeping operations with legal status under international law, it is not self-evident what role the rules and principles of IHL play or should play in each and every peacekeeping operation. Much will depend on the degree of involvement of UN peacekeepers, and also the nature of the conflict.⁷⁶

The Geneva Conventions and the Additional Protocols are silent on the specific role and expectations associated with UN peacekeepers. As noted above, as long as peacekeepers refrain from participating in the conflict, they are regarded as civilians and are protected as such under IHL.

The problem arises when peacekeepers are also *participating* in the conflict. Are they then also bound by the detailed rules of international humanitarian law? The position of the United Nations is that peacekeepers are indeed bound by the rules and principles of IHL, although on what legal basis is less clear. At a minimum, it seems that the United Nations, as an international legal entity, can be held responsible for wrongful acts that can be attributed to the organisation.⁷⁷ The question is then whether substantive violations of international humanitarian law by UN peacekeepers can be attributed to the United Nations. It is clear that situations on the ground can quite easily escalate to such an extent that the theoretically impartial (and passive) role of the UN peacekeepers transforms into a far more active, combative role. From a humanitarian law perspective, ‘it is the fact of participation in hostilities, not the existence of authority to do so’⁷⁸ that is relevant.

As has been pointed out, in principle, the United Nations cannot be a party to the relevant Geneva Conventions and other humanitarian instruments, since it is not a state. However, from a practical point of view, and given the UN’s insistence that it is bound by the underlying principles of international humanitarian law, one can assume that UN peacekeepers will normally strive to adhere to the principles (and spirit) of international humanitarian law. Indeed, the International Committee of the Red Cross has in the past obtained such assurances from the United Nations.⁷⁹

Against the above background, there appears to be a *political* and *normative* commitment on the part of the United Nations (as an organisation) to respect and uphold the values and principles of

international humanitarian law, despite the fact that the United Nations itself is not (and cannot be) a party to the Geneva Conventions and the Additional Protocols. Where UN peacekeepers are not participating in hostilities, they are protected by their status as non-combatants, and by the provisions of the Convention on the Safety of United Nations and Associated Personnel. When the situation on the ground or the aims of the mission dictate that the peacekeepers become active participants in hostilities, it can be argued that, at a minimum, the rules of international humanitarian law that have customary status will apply to UN peacekeepers just as they would to other parties to international or non-international armed conflicts. Those rules and principles of international humanitarian law that do not yet enjoy customary status should at least be adhered to as far as possible and in the spirit of the United Nations' commitment to these principles as pointed out above.⁷⁸

12.5.2.4 Journalists

The 24-hour international news outlets like CNN, Sky, Al Jazeera and BBC World have brought to the fore the role of journalists in times of war and armed conflict. However, journalists have covered armed conflicts since long before the days of international cable television. Today, IHL provides that 'civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities'.⁷⁹ A distinction should be drawn between a *civilian journalist* (any journalist doing professional work in the theatre of conflict) and a *war correspondent*. The latter category of journalist is still regarded as a civilian journalist, but he or she accompanies the armed forces of a state (although not as a member of the armed forces). War correspondents are, in terms of Geneva Convention III, entitled to prisoner-of-war status in the event of capture by the enemy.⁸⁰

12.5.2.5 Protected zones

A key humanitarian rule is that parties to a conflict are prohibited from attacking zones that are established to shelter the wounded, the sick and civilians from the effects of hostilities. Such zones include hospitals and safety zones (removed from the areas of conflict)⁸¹ as well as neutralised zones (normally to be found within the areas of conflict).⁸² A related rule of IHL provides that parties to a conflict are prohibited from directing attacks against demilitarised zones agreed upon by the parties concerned. A demilitarised zone can be defined as 'an area, agreed upon between the parties to the conflict, that cannot be occupied or used for military purposes by any party to the conflict'.⁸³

It should be self-evident that civilian areas like villages, towns, suburbs and other areas not associated with the military effort of a party to the conflict are protected under IHL. Indeed, the principle that undefended places should not be attacked is found in various instruments, including the Hague Regulations, Additional Protocol I and common article 3 of the Geneva Conventions. The targeting of undefended buildings, dwellings, villages and towns that are not military objectives constitutes a war crime under various international criminal law statutes.⁸⁴

12.5.2.6 Cultural property

International humanitarian law is not only concerned with the impact of war and armed conflict on human beings, but also on broader civilisational interests represented by cultural objects and property. Since time immemorial, one of the many tragic consequences of war has been the destruction and damage to buildings, objects and artefacts of cultural significance. A recent example is the theft or destruction of some of the most significant Babylonian, Sumerian, and Assyrian

antiquities housed in the National Museum in Baghdad, Iraq, in the aftermath of the American-led invasion of that country in 2003. While it was not the American forces who were responsible for the looting, the general chaos and lawlessness that came as a result of the conflict provided the opportunity for looters and vandals to steal or destroy cultural property of great historical significance.⁸⁵

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 seeks to protect buildings of cultural value by encouraging the marking of such buildings and significant property with a distinctive shield in blue and white as in [Figure 12.3](#) below

Figure 12.3 *The distinctive marking (in blue and white) of cultural property under the Hague Convention*

The aims of the Hague Convention reflect customary international law on the protection of cultural property in times of war and armed conflict. The rule under customary international humanitarian law can be stated as follows: parties to an armed conflict (international or non-international) must respect cultural property. Thus, special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes, and historic monuments unless they are military objectives. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.⁸⁶ Furthermore, parties to a conflict must protect cultural property. Seizure of or destruction or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited. In addition, any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of cultural importance is prohibited.⁸⁷ Occupying powers have the duty to prevent the illicit export of cultural property from the occupied territory. Illicitly exported cultural property (like works of art) must be returned to the competent authorities of the occupied territory.⁸⁸

[12.5.2.7 Dangerous works and installations](#)

Damage to certain installations can be particularly dangerous and may cause significant damage to the environment and human populations. International humanitarian law therefore provides that if works and installations containing dangerous forces (such as dams, dykes and nuclear electrical generating stations, as well as other installations located at or in their vicinity) are attacked, care must be taken in order to avoid the release of dangerous forces (for example, severe flooding or nuclear contamination) and consequent severe losses among the civilian population.⁸⁹ Note that attacks on such installations are not prohibited (in an absolute sense). Some states assert that the legality of attacks on installations containing dangerous forces must be assessed in terms of the principles of proportionality and military necessity.⁹⁰

[12.5.2.8 The natural environment](#)

A key principle in IHL is that a distinction should be made between military objectives and civilian objects. The principle is applied to include the natural environment. Thus, no part of the natural environment may be attacked, unless it is a military objective. Furthermore, destruction of any part of the natural environment is prohibited, unless required by imperative military necessity. Finally, launching an attack against a military objective that is expected to cause incidental damage to the

environment and which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.⁹¹

The launching of an attack (in the context of an international armed conflict) that may cause excessive damage to the natural environment is a war crime under the Rome Statute of the International Criminal Court.⁹² Although the incorporation of this norm of IHL into the Rome Statute and the provision for individual criminal liability for this type of conduct are hailed as a great achievement, the formulation of this type of war crime in the Rome Statute is also criticised for being too vague. In addition, it is said that the threshold of damage to the environment required for purposes of individual criminal liability is set too high. Such a high threshold might make the provision impractical and of little use.⁹³

Some states (notably the ‘nuclear powers’) keep nuclear weapons and assert the right to use such weapons for defensive purposes, but nuclear weapons are notoriously destructive and obviously damaging to the environment. It is therefore unsurprising that states like the United States, the United Kingdom and France persistently object to the application of the rule under IHL that prohibits the use of methods or means of warfare intended or expected to cause widespread, long-term and severe damage to the natural environment to the *use of nuclear weapons*.⁹⁴

12.5.3 Methods of warfare

The various international frameworks and instruments that form the body of IHL rules and principles provide for the modern ethics and practices of warfare – that is, the types of conduct that are regarded as acceptable in international and non-international armed conflicts. Kinds of conduct that are unacceptable are discussed in more detail below.

12.5.3.1 Denial of quarter

To give quarter is to show mercy or pity towards an enemy who is in one’s power.⁹⁵ In the context of international armed conflicts, a number of instruments provide for the prohibition on declarations by a party to an armed conflict that no quarter will be given.⁹⁶ For purposes of non-international armed conflicts, there is a corresponding rule in article 4 of Additional Protocol II that prohibits orders that there be no survivors. An order that there be no survivors clearly also violates common article 3 of the Geneva Conventions.

A fundamental rule of IHL, and one that applies in international as well as non-international armed conflicts, is the rule that persons *hors de combat* shall not be attacked. A person is *hors de combat* when he or she is in the power of an adverse party; or defenceless because of unconsciousness, shipwreck, wounds or sickness; or clearly expresses an intention to surrender. An important qualification to this status is that such a person must abstain from any hostile act and must not attempt to escape.⁹⁷

12.5.3.2 Destruction and seizure of property

The destruction or seizure of property of the enemy is in general prohibited, unless such seizure or destruction is required by imperative military necessity. International humanitarian law does not prohibit the seizure of military equipment belonging to the enemy.⁹⁸

One of the oldest excesses associated with warfare is the practice of pillaging (plundering). Typically this would be the case where an invading army forcibly takes private property from the enemy’s subjects. This is, of course, theft or robbery by another name, in the context of an armed

conflict. This practice is prohibited by IHL for purposes of international as well as non-international armed conflicts.⁹⁹

12.5.3.3 Starvation and access to humanitarian relief

The use of starvation of a civilian population as a method of warfare is prohibited in international and non-international armed conflicts. Furthermore, it is unlawful in terms of IHL to attack, destroy, remove, or render useless objects that are indispensable to the survival of a civilian population. If objects qualify as legitimate military targets (for instance, they are needed for the sustenance *exclusively* of combatants), they may be attacked. A further exception to the prohibition on starvation strategies – the so-called scorched-earth exception – still seems to apply to international armed conflicts but probably not to non-international armed conflicts.¹⁰⁰ A ‘scorched earth policy’ means destroying large parts of a territory so that the enemy will not be able to live off it or to use it to sustain themselves.

Parties to a conflict must always allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need. As a matter of principle, parties to a conflict should not refuse passage of humanitarian aid on arbitrary grounds. This principle does not prohibit a party from exercising control over the relief action.¹⁰¹

12.5.3.4 Deception

A pragmatic and general rule of IHL provides that ruses of war (acts intended to confuse the enemy) are not prohibited as long as they do not infringe another rule of IHL. The most important forms of deception that are prohibited under IHL include the following:

- the improper use of the white flag of truce;
- the improper use of the distinctive emblems of the Geneva Conventions (see [Figure 12.2](#) above);
- the use of the United Nations emblem and uniform, unless authorised by the United Nations;
- the improper use of other internationally recognised emblems (for instance the emblem provided for in the Hague Convention for the Protection of Cultural Property – see [Figure 12.3](#) above); and
- the improper use of the flags or military emblems, insignia or uniforms of the enemy, or of neutral states.¹⁰²

Perfidy is a particular form of deception that is prohibited under IHL. The rule provides that ‘killing, injuring or capturing an adversary by resort to perfidy is prohibited’.¹⁰³ A concise definition of perfidy is contained in Additional Protocol I; perfidy means ‘acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence’.¹⁰⁴ Examples of perfidy (which may also overlap with some of the rules against deception mentioned above) are:

- simulation of being disabled by injuries or sickness because an enemy who is thus disabled is considered *hors de combat* and may not be attacked;
- simulation of surrender;
- simulation of an intent to negotiate under the white flag of truce;
- simulation of protected status by using the distinctive emblems of the Geneva Conventions; and
- simulation of civilian status.¹⁰⁵

12.5.3.5 Communication with the enemy

Military and humanitarian concerns necessitate the rule of IHL that commanders may enter into non-hostile contact through any means of communication, as long as the contact is based on good faith.¹⁰⁶ For instance, it may be necessary for commanders in a particular area of conflict to enter into agreements to arrange for access of humanitarian aid, or the transportation of wounded and sick, or to agree on safety zones, or even demilitarised zones. While the rule is flexible enough to include contact between the commanders ‘through any means of communication’, the rule is often associated with the related rule concerning the correct use of the white flag of truce that is used to facilitate communication between enemies in good faith.¹⁰⁷

12.5.4 The use of certain types of weapons

It was pointed out above,¹⁰⁸ that IHL is pragmatic in the sense that this body of law does not prohibit war or armed conflict; rather, the aim of IHL is to *humanise warfare by limiting the human suffering caused by armed conflict*. Since the use of weapons is, of course, an integral part of warfare, it follows that IHL does not prohibit the use of weapons in general. However, there are certain norms and principles in IHL that limit and qualify the means and methods of warfare with reference to certain types of weapons. The general norms and principles regarding the use of certain types of weapon are discussed below with reference to a number of specific weapons. The selection of weapons represents some of the most important weapons specifically governed by IHL but is not exhaustive of all weapons specifically governed by a plethora of international instruments, and by the rules of IHL.

12.5.4.1 General principles for the use of weapons

International humanitarian law prohibits the use of means and methods of warfare that in their nature cause superfluous injury or unnecessary suffering.¹⁰⁹ For international armed conflicts, a number of instruments, including the Hague Regulations, Additional Protocol I¹¹⁰ and the Rome Statute of the International Criminal Court,¹¹¹ prohibit the use of weapons and means and methods of warfare that in their nature cause superfluous injury or unnecessary suffering. The same prohibition can be found in a number of instruments applicable to non-international armed conflicts – for instance, the Ottawa Convention banning anti-personnel mines,¹¹² the Convention on Certain Conventional Weapons¹¹³ (since 2001 also applicable to non-international armed conflicts), and Amended Protocol II to the Convention on Certain Conventional Weapons.

It is debatable whether the above-mentioned prohibition renders certain weapons illegal per se, or whether it is only a particular use of the weapons that is prohibited. In practice, however, one can point to certain examples of weapons that have been cited as causing unnecessary suffering:¹¹⁴ lances or spears with a barbed head; serrated-edged bayonets; expanding bullets; explosive bullets; poison and poisoned weapons; biological and chemical weapons; certain booby-traps; anti-personnel mines; and blinding laser weapons. It needs to be stressed that not all of these weapons (or their use) are prohibited under customary international law. Some of these examples will be discussed in more detail below.

The use of weapons that are by nature indiscriminate is prohibited under IHL. This rule is based on the principle of distinction and discrimination. Weapons should have the ability to be directed at specific targets – and specifically military targets or targets with a military objective. Some examples of weapons having indiscriminate effect are chemical weapons, biological weapons and cluster bombs.¹¹⁵

12.5.4.2 Nuclear weapons

The possession, manufacture and potential use of nuclear weapons is one of the more enduring controversies in international diplomacy and international political discourse. Given the destructive and indiscriminate nature of nuclear weapons (since they can wipe out entire cities and destroy and contaminate environments for many years after use), it is not surprising that the International Court of Justice stated in its advisory opinion on the legality of the threat or use of nuclear weapons¹¹⁶ that such threat or use would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.¹¹⁷ However, the court was not able to conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence (in accordance with article 51 of the UN Charter) in which the very survival of a state would be at stake.¹¹⁸

12.5.4.3 Biological and chemical weapons

Two international instruments, the Biological Weapons Convention¹¹⁹ and the Geneva Gas Protocol,¹²⁰ prohibit the use of biological weapons in international armed conflicts. Given the widespread condemnation of the use of biological weapons, it is safe to say that the prohibition is also applicable to non-international armed conflicts.¹²¹ Furthermore, the United Nations General Assembly has adopted several resolutions in which it calls for strict observance by all states of the principles and objectives of the Geneva Gas Protocol.¹²²

A number of international instruments, notably the above-mentioned Geneva Gas Protocol, the Chemical Weapons Convention¹²³ and the Rome Statute of the International Criminal Court¹²⁴ prohibit the use of chemical weapons in international armed conflicts. At present, states parties to the Chemical Weapons Convention represent about 98 per cent of the global population.¹²⁵ The prohibition of the use of chemical weapons, provided for in the Chemical Weapons Convention, also applies to non-international armed conflicts. In June 2010, at the Kampala Review of the Rome Statute of the International Criminal Court Conference,¹²⁶ a resolution was adopted in terms of which article 8 of the Rome Statute is to be amended to bring under the jurisdiction of the court the war crime of employing in a *non-international* armed conflict certain poisonous weapons and asphyxiating or poisonous gases, and all analogous liquids, materials and devices.

12.5.4.4 Expanding bullets

International humanitarian law prohibits the use of bullets that expand or flatten easily in the human body.¹²⁷ The rule is informed by the norm in IHL that generally prohibits weapons that cause superfluous injury or unnecessary suffering.¹²⁸ The Hague Declaration concerning Expanding Bullets of 1899¹²⁹ was the first to provide for the prohibition of expanding bullets in international armed conflicts. The prohibition is also provided for in the Rome Statute of the International Criminal Court. Article 8 makes it a war crime to use expanding bullets in international armed conflicts.¹³⁰ The Kampala Conference on the Review of the Rome Statute of 2010 adopted a resolution to amend article 8 of the Rome Statute to make it a war crime to use expanding bullets also in non-international armed conflicts.¹³¹

12.5.4.5 Anti-personnel mines

One of the most horrific features of many post-World War II conflicts has been the use of anti-personnel mines. Not only does this type of weapon often result in serious injury to civilians, but the effects of anti-personnel mines are felt long after the conclusion of the conflict.¹³² The Ottawa

Convention of 1997¹³³ entered into force in 1999. The Convention, as well as the subsequent diplomatic conferences, aims to eliminate anti-personnel mines globally.

12.6 Protected persons and the Law of Geneva

The discussion under 12.5 above focussed on IHL and the conduct of hostilities. It was pointed out that many of the rules that can broadly be classified under ‘conduct of hostilities’ have customary status, and apply to both international and non-international armed conflicts. There are also multiple international instruments (notably the various Hague Regulations and treaties dealing with specific weapons) that are relevant for the part of IHL that affects the conduct of hostilities.

The Law of Geneva is the other important pillar of modern IHL. The Law of Geneva, which is closely associated with the work of the International Committee of the Red Cross, focuses on the victims of armed conflict. The four Geneva Conventions of 1949 and the two Additional Protocols of 1977 form the backbone of the part of IHL that is mostly concerned with the protection of victims of armed conflict (international and non-international).

It was noted under 12.2 above that there are four Geneva Conventions and two Additional Protocols dealing with the various categories of protected persons in international and non-international armed conflicts. These are:

1. wounded and sick members of armed forces in the field;
2. wounded, sick and shipwrecked members of armed forces at sea;
3. prisoners of war; and
4. civilian persons in time of war.

The four Geneva Conventions plus the Additional Protocols contain detailed provisions on the protection of the various categories of victims of armed conflict. These detailed provisions will not be reproduced here. Rather, what follows is a discussion of the structure of one of the most important enforcement mechanisms in international law – the so-called ‘grave breaches’ regime in the Geneva Conventions. In addition, the relevance and application of common article 3 of the Geneva Conventions is also discussed.

12.6.1 The grave breaches regime

The discussion of the grave breaches regime should be read with the section on war crimes (as part of the discussion of international criminal law in chapter 13 below). Breaches of the Geneva Conventions on the protection of victims of armed conflict are divided into two broad categories: the detailed and exhaustively enumerated ‘grave breaches’, on the one hand, and on the other, the other breaches that are not qualified or precisely identified.¹³⁴ The keystone of the grave breaches regime of the Law of Geneva is that any state party to the four Geneva Conventions is obliged to exercise universal jurisdiction over individuals responsible for violations of the conventions that would qualify as grave breaches.

Grave breaches are defined in the Geneva Conventions and in Protocol I. All the grave breaches, except for three breaches provided for in Additional Protocol I, are listed as war crimes in the Rome Statute of the International Criminal Court. The latter defines war crimes in the form of grave breaches as follows:

Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property under the provisions of the relevant Geneva Convention:

- (i) Wilful killing;

- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Wilfully causing great suffering, or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement;
- (viii) Taking of hostages.¹³⁵

There are three grave breaches contained in Additional Protocol I that are not provided for in the Rome Statute of the International Criminal Court, namely:

1. launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
2. unjustified delay in the repatriation of prisoners of war or civilians;
3. practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.

The basic method to determine whether conduct constitutes a grave breach can be summarised as follows:

- First, it is necessary to determine the nature of the conflict. The grave breaches regime applies only to international armed conflicts.¹³⁶
- Secondly, the protected person or property should be identified – for instance, a wounded soldier, or a prisoner of war, or a civilian.
- Thirdly, the conduct in question must be conduct listed in the exhaustive lists of grave breaches that are provided for in each of the four Conventions and in Additional Protocol I (article 50 in Convention I; article 51 in Convention II; article 130 in Convention III; article 147 in Convention IV; and article 85 in Additional Protocol I).

If the conduct can be defined as a grave breach, the enforcement regime based on universal jurisdiction of states parties to the Geneva Conventions¹³⁷ and the various enforcement regimes provided for in the statutes of international criminal tribunals become applicable.¹³⁸ The grave breaches regime is a prime example of the principle of universality in action. States parties to the Geneva Conventions are obliged to enact legislation containing the necessary criminalisation of war crimes in the form of grave breaches, and further also all necessary measures for the suppression of violations not amounting to grave breaches. Additional Protocol I furthermore provides that states must co-operate (including co-operation in the form of extradition) in order to combat serious violations of IHL effectively.¹³⁹ The principle of universality is provided for in the Geneva Conventions as follows:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.¹⁴⁰

The general view is that the grave breaches regime has acquired customary status.¹⁴¹

12.6.2 Common article 3

It was noted above that the grave breaches regime applies to international armed conflicts. However, article 3 common to all four Geneva Conventions provides for certain minimum standards that must apply during non-international armed conflicts. Developments in *international criminal law* (notably the jurisprudence of the ICTY) suggest that there is less reliance on the grave breaches regime and more reliance on common article 3 ‘as a minimum yardstick in both international and non-international armed conflict’.¹⁴² This development should be understood as a pragmatic rather than a principled movement away from the expansive protection of the grave breaches regime. At any rate, the purpose of common article 3 should be kept in mind. Common article 3 (which is a less detailed regulation) was meant to oblige states parties to non-international armed conflict to respect *at least* the most fundamental humanitarian principles of the Geneva Conventions. ‘Thus, it has been referred to as constituting a “Convention in miniature”’.¹⁴³ It is a minimum standard, not a comprehensive regime. Of course, the letter and spirit of common article 3 are (in addition to developments in customary international law) complemented and supplemented by Additional Protocol II, which provides further for IHL in non-international armed conflicts.

12.7 Enforcing the rules of IHL

The discussions above of the various rules of IHL pointed to the fact that states parties to the various international treaties incur certain obligations. Depending on the legal system of a state in question, it is generally expected that a state party will either directly apply the provisions of a treaty or will incorporate the treaty into domestic law via implementation legislation.¹⁴⁴ It was also pointed out that many of the rules of IHL have gained the status of customary international law. Many states treat customary international law as directly enforceable in domestic courts.¹⁴⁵

Three enforcement modalities of IHL are briefly considered below. Although the primary aim of the implementation of IHL is prevention (notably via the work of the International Committee of the Red Cross), it is also necessary for the effectiveness of IHL that it be enforceable, and that violations of the rules of IHL have consequences. The emphasis in terms of responsibility for violations of IHL seems to have shifted from state liability to individual criminal liability.¹⁴⁶ This is due largely to the development of international criminal law, which is applied via national law in states, as well as in international criminal tribunals like the International Criminal Court (ICC), the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

12.7.1 Enforcement at the national level

States parties to the various treaties that constitute IHL are expected to adhere to the letter and spirit of the treaties.¹⁴⁷ This normally involves the transformation or incorporation of the treaty obligations into domestic law. For instance, in South Africa, the Implementation of the Geneva Conventions Act 8 of 2012 provides for the full incorporation of the Geneva Conventions and the additional Protocols into domestic law.¹⁴⁸ It provides for the prevention and punishment of grave breaches and other breaches of the Conventions and Protocols. The Act also provides for matters like the protection of flags, emblems, designations, signs, signals, designs, wordings, identity cards,

information cards, insignia and uniforms¹⁴⁹ associated with the work of the International Committee of the Red Cross and the International Federation of the Red Cross and Red Crescent Societies.¹⁵⁰

The Implementation of the Geneva Conventions Act is not aimed at limiting, amending, repealing or otherwise altering any provision of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. The latter Act provides, *inter alia*, for the incorporation of the crimes under the Rome Statute into South African law – namely genocide, war crimes and crimes against humanity. This means that there are two statutory sources for the criminalisation of grave breaches and other war crimes in South Africa. However, it is clear that the Geneva Conventions Act is narrower in scope. It provides for universal jurisdiction over grave breaches only,¹⁵¹ whereas the Implementation of the Rome Statute incorporates the whole of article 8 (war crimes) of the Rome Statute. On this basis, South Africa can exercise universal jurisdiction over grave breaches and *other* war crimes (also war crimes committed in non-international armed conflicts).¹⁵²

12.7.2 Enforcement in international criminal tribunals

Violations of IHL are not only punished at the national level but also (and perhaps more prominently) at the international level before international criminal tribunals and courts.¹⁵³ In the aftermath of World War II, the victorious powers set up the International Military Tribunal at Nuremberg, Germany, to try the major Nazi war criminals.¹⁵⁴ With respect to war crimes, the Nuremberg Tribunal applied the norms of the 1929 Geneva Conventions (on the protection of victims of armed conflict) and the 1907 Hague Convention Respecting the Laws and Customs of War on Land.¹⁵⁵ It is interesting to note that these instruments did not contain provisions on the criminalisation of war crimes. Nevertheless, article 6 of the Nuremberg Charter provided for individual criminal responsibility for crimes against peace, violations of the laws or customs of war, and crimes against humanity.

The other post-war tribunal – for the war in the Far East – was set up by the US military in Japan. The Statute of the International Military Tribunal for the Far East¹⁵⁶ (Tokyo Tribunal), like the Nuremberg Tribunal, also provided for the prosecution of war crimes. Ultimately however, only suspects charged with crimes against peace were prosecuted before the Tokyo Tribunal. Suspected war criminals were prosecuted in a number of military courts at the national level.¹⁵⁷

After the end of the Cold War, two conflicts – in the former Yugoslavia and in Rwanda – prompted the UN Security Council to create two ad hoc tribunals for the prosecution of crimes under international law committed during these conflicts. The Statute of the International Tribunal for the Former Yugoslavia (1993)¹⁵⁸ provides for jurisdiction over grave breaches of the Geneva Conventions, as well as for violations of the laws or customs of war. The Statute of the International Tribunal for Rwanda (1994)¹⁵⁹ provides for jurisdiction over violations of article 3 common to the Geneva Conventions and of Additional Protocol II. The Rwanda Tribunal does not have jurisdiction over grave breaches since the conflict in Rwanda was essentially non-international in character.

Apart from the two ad hoc tribunals, other internationalised tribunals were also created to deal with various cases of mass human rights violations and armed conflicts. For instance, the Special Court for Sierra Leone was established by an agreement between the United Nations and the government of Sierra Leone pursuant to a Security Council resolution. It has jurisdiction, *inter alia*, over violations of article 3 common to the Geneva Conventions and of Additional Protocol II, as well as other serious violations of international humanitarian law – such as attacks against international peacekeepers, and conscripting and enlisting children under the age of 15 years into armed forces or groups or using children to participate actively in hostilities.¹⁶⁰

The world's first permanent International Criminal Court (ICC)¹⁶¹ was created by the Rome Statute of the International Criminal Court (1998).¹⁶² The Rome Statute entered into force in 2002. The ICC has jurisdiction over the crimes of genocide, crimes against humanity, and war crimes. The Rome Statute provides for jurisdiction over war crimes committed in international and non-international armed conflicts.¹⁶³ Article 8 provides for the following categories of war crimes:

- grave breaches of the Geneva Conventions;
- other serious violations of the laws and customs applicable in international armed conflict;
- serious violations of article 3 common to the four Geneva Conventions; and,
- other serious violations of the laws and customs applicable in armed conflicts not of an international character.

12.7.3 State responsibility for violations of IHL

Under international law, states can be held responsible for breaches of international obligations,¹⁶⁴ including obligations under IHL. A breach of duty on the part of states is based on the actions or omissions of state organs or of agents of the state.¹⁶⁵ For purposes of IHL, the most relevant state organs are the executive and the armed forces. In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*,¹⁶⁶ the International Court of Justice stated as follows:

The conduct of the UPDF [Uganda armed forces] as a whole is clearly attributable to Uganda, being the conduct of a State organ. According to a well-established rule of international law, which is of customary character, ‘the conduct of any organ of a State must be regarded as an act of that State’ ... In the Court’s view, by virtue of the military status and function of Ugandan soldiers in the DRC, their conduct is attributable to Uganda. The contention that the persons concerned did not act in the capacity of persons exercising governmental authority in the particular circumstances, is therefore without merit. It is furthermore irrelevant for the attribution of their conduct to Uganda whether the UPDF personnel acted contrary to the instructions given or exceeded their authority. According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces.

It is clear that there can be no question of state liability for violations of IHL, if the relevant acts or omissions by individuals and organs of state cannot be attributed to the state. Where individual acts cannot be attributed to the state, the acts can still potentially lead to individual criminal responsibility.¹⁶⁷

An aspect of attribution that is particularly relevant for IHL is the question to what extent a state can be held responsible for the actions of members of its armed forces. Article 3 of the Hague Convention (Laws and Customs of War on Land) of 1907 as well as article 91 of Additional Protocol I provide that a party to a conflict ‘shall be responsible for all acts by persons forming part of its armed forces’. Since soldiers are normally controlled by the state in a much stricter way than other organs of state, violations of IHL rules by soldiers are more easily attributed to the state in question.¹⁶⁸

The realities of modern armed conflicts require us to look at the question of attribution beyond formal categories like regular armed forces. *De facto* agents (including paramilitary and other groups acting on behalf of a state) can also violate the rules of IHL, and it then becomes important to determine whether their actions can be attributed to the relevant state. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*,¹⁶⁹ the

International Court of Justice determined that for the United States to be held responsible for the actions of armed rebels fighting against Nicaragua, it would have to be ‘proved that [the United States] had effective control of the military or paramilitary operations in the course of which the alleged violations were committed’.¹⁷⁰ Some commentators, as well as the jurisprudence of other international tribunals, seem to suggest that the test in the *Nicaragua* case is too strict: it should not be about *effective control*, but rather about whether there was *overall control* by the state over the individuals or armed groups in question.¹⁷¹

State responsibility for violations of IHL may result in demands for reparation or other countermeasures (which must be proportional to the violation in question).¹⁷²

12.8 IHL and human rights

The generally (but not uniformly) held view is that international human rights law and IHL are two distinct but related bodies of law.¹⁷³ That said, it is important to note that in a fundamental sense, these two bodies of law share the same normative foundation of respect for human dignity.¹⁷⁴ International jurisprudence also seems to favour the view that the two bodies of law are complementary. The International Court of Justice held in its advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*¹⁷⁵ that Israel’s conduct in the occupied territories should be judged in accordance with the norms of IHL and international human rights. Thus, the ICJ rejected Israel’s argument that IHL as *lex specialis* was only applicable in situations involving armed conflict and occupation.

SUGGESTED FURTHER READING

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- Y Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* 2nd ed Cambridge: Cambridge University Press (2010)
- D Fleck (ed) *The Handbook of International Humanitarian Law* 3rd ed Oxford: Oxford University Press (2013)
- L May *War Crimes and Just War* Cambridge: Cambridge University Press (2007)
- H Olásolo *Unlawful Attacks in Combat Situations: From the ICTY’s Case Law to the Rome Statute* Leiden: Brill (2008)
- S Sivakumaran *The Law of Non-International Armed Conflict* Oxford: Oxford University Press (2012)

¹ For this succinct description, see discussion of the application of IHL in the context of armed conflict and refugee law by A Teffera, available at <http://www.asylumlawdatabase.eu/en/journal/diakit%C3%A9-cjeu-interprets-concept-%E2%80%98internal-armed-conflict%E2%80%99-purpose-granting-subsidiary> accessed 1 July 2015.

² See ‘The relationship between the *jus ad bellum* and the *jus in bello*’ (para 12.3 in this chapter below). See also chapter 5 above for a general discussion on the use of force.

³ See Asser Institute Centre for International and European Law, www.asser.nl/research-consultancy/research-clusters/public-international-law/.

⁴ E Benvenisti ‘Rethinking the divide between *Jus ad Bellum* and *Jus in Bello* in warfare against nonstate actors. Essays in honour of WM Reisman: Use of force’ 34(2) *Yale Journal of International Law* (2009) 541–8.

⁵ For a brief history of humanitarianism in war since antiquity, see LC Green *The Contemporary Law of Armed Conflict* 2nd ed (1999) 20–53; on the Islamic influence on the development of IHL, see SW al-Zuhili ‘Islam and international law’ 87 (858) *International Review of the Red Cross* (June 2005).

⁶ *De Jure Belli ac Pacis*, Book III. For links to the full text of the books, visit the Peace Palace Grotius Collection, www.ppl.nl/index.php?option=com_content&view=article&id=82 accessed 14 February 2014.

⁷ H Dunant (1828–1910) *A Memory of Solferino* (English version first published in 1939, American Red Cross 1986).

⁸ The symbol of the Red Cross is basically the Swiss flag with colours reversed, in a clear sign of respect and recognition for the role that Dunant, a Swiss national, played in the formation of the modern humanitarian movement.

⁹ For a succinct overview of the diplomatic conference, see G Best ‘Making the Geneva Conventions of 1949: The view from Whitehall’ in C Swinarski (ed) *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1984) 5–15.

¹⁰ For an overview, see The Geneva Conventions of August 12 1949, International Committee of the Red Cross, Geneva.

¹¹ For more information on Additional Protocol III, see <http://www.icrc.org/eng/resources/documents/misc/emblem-keyfacts-140107.htm> accessed 15 February 2014.

¹² Statute of the International Criminal Tribunal for the Former Yugoslavia, Security Council Resolution 827 (1993) 32 *International Legal Materials* (1993) 1192. For the amended text of the Statute, see C van den Wyngaert *International Criminal Law: A Collection of International and Regional Instruments* 4th ed (2011) 73.

¹³ Statute of the International Criminal Tribunal for Rwanda, Security Council Resolution 955 (1994) *International Legal Materials* (1994) 1598. For the amended text of the statute, see Van den Wyngaert op cit 139.

¹⁴ Rome Statute of the International Criminal Court (1998) UN Doc A/CONF 183/9 37(5) *International Legal Materials* (1998) 999.

¹⁵ J-M Henckaerts and L Doswald-Beck (eds) *Customary International Humanitarian Law* Vol 1, Vol II Part 1 & Part 2 (2005).

¹⁶ For more on the Martens Clause, see HM Hensel *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (2008) 135.

¹⁷ I Brownlie *International Law and the Use of Force by States* (1963) 40–1.

¹⁸ Reproduced in AD McNair *The Law of Treaties* (1961) 234–6.

¹⁹ Kellogg-Briand Pact, art 1.

²⁰ G Kemp *Individual Criminal Liability for the International Crime of Aggression* (2010) 48–9; J Crawford *Brownlie's Principles of Public International Law* 8th ed (2012) 595.

²¹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (8 Jul 1996) ICJ Reports 1996, 226, paras 38–41. It must be pointed out that some commentators (notably Yoram Dinstein) regarded the opinion of the majority of the ICJ in this instance as a potentially dangerous application of the principle of equality between belligerents for purposes of international humanitarian law/the *jus in bello*. The fact that the court left the possibility open for states to use nuclear weapons under extreme situations of self-defence, affected the norm of proportionality and the use of certain weapons (key concepts in IHL). Nevertheless, the court did recognise and affirm the principle of equal application of *jus in bello*.

²² Y Dinstein *War Aggression and Self-Defence* 4th ed (2005) 156–63.

²³ For arguments in favour of the principle of equal application of the *jus in bello*, see Dinstein op cit 156–63.

²⁴ For an historical overview of the application of IHL to non-international armed conflict (including the development of common art 3), see ICRC *Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention I* (1995) 38–48; L Moir ‘The historical development of the application of humanitarian law in non-international armed conflicts to 1949’ 47 *International and Comparative Law Quarterly* (1998) 337–61.

²⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977). For a list of ratifications, see http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelect_ed=475 accessed 27 February 2014.

²⁶ C Byron ‘Armed conflicts: International or non-international?’ 6(1) *Journal of Conflict and Security Law* (2001) 63 at 64; *The Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), Case No IT-94-1-AR72, para 129.

²⁷ G Werle & F Jessberger *Principles of International Criminal Law* 3rd ed (2014) 397.

²⁸ *The Prosecutor v Tadic* supra, para 98; see also remarks by Christine Byron op cit 64.

²⁹ Kemp op cit 244.

³⁰ *The Prosecutor v Tadic* supra, para 126.

³¹ Article 8(2)(a) and (b) deals with war crimes committed in international armed conflict. Article 8(2)(c) and (e) deals with war crimes committed in non-international armed conflict. For a comprehensive discussion of these crimes, see K Dörmann *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2002).

³² Para 12.2 of this chapter above.

³³ Henckaerts & Doswald-Beck op cit Vol I: Rules (2005) X.

³⁴ Ibid, XXX.

³⁵ Ibid, XXX

³⁶ Ibid, 3.

³⁷ Additional Protocol I, art 50.

³⁸ Henckaerts & Doswald-Beck op cit 8.

- ³⁹ See in general the jurisprudence of the ICTY on this point, and notably ICTY, *Prosecutor v Galić*, Case No IT-98-29-T, Judgment and Opinion (5 December 2003).
- ⁴⁰ Henckaerts & Doswald-Beck op cit 11.
- ⁴¹ Rule 4, in Henckaerts & Doswald-Beck op cit 14.
- ⁴² Ibid, 17.
- ⁴³ For a brief discussion of state practice, see Henckaerts & Doswald-Beck op cit 22–3.
- ⁴⁴ For a critical discussion, see V Epps ‘Civilian casualties in modern warfare: The death of the collateral damage rule’ 41(2) *Georgia Journal of International and Comparative Law* (2013) 307.
- ⁴⁵ Henckaerts & Doswald-Beck op cit 29.
- ⁴⁶ Ibid, 29.
- ⁴⁷ See for instance the military manuals of Australia, Canada, Germany, Madagascar, the Netherlands, Spain, and the United States; comments by Henckaerts & Doswald-Beck op cit 31.
- ⁴⁸ Ibid, 32–4.
- ⁴⁹ Ibid, 40.
- ⁵⁰ See discussion by M Schmitt ‘The principle of discrimination in 21st century warfare’ 2 *Yale Human Rights & Development Law Journal* (1999) 143.
- ⁵¹ Henckaerts & Doswald-Beck op cit 43.
- ⁵² Ibid, 46. For the relationship between the element of identification (whether an object is legitimate or not) and the element of proportionality, see Green op cit 350–2.
- ⁵³ Henckaerts & Doswald-Beck op cit 49.
- ⁵⁴ Ibid, 62.
- ⁵⁵ Ibid, 51. In an era of so-called precision weaponry, armed forces are, in principle, in a much better position to limit incidental civilian casualties. Even in modern warfare, errors still occur with the resultant loss of civilian life and unnecessary damage to property. For a discussion of a modern case study, see WJ Fenrick ‘Targeting and proportionality during the NATO bombing campaign against Yugoslavia’ 12(3) *European Journal of International Law* (2001) 489.
- ⁵⁶ *Prosecutor v Kupreskic et al* (Trial Judgment), IT-95-16-T, International Criminal Tribunal for the former Yugoslavia (ICTY) (14 January 2000) para 761 & 762 (available at <http://www.refworld.org/docid/40276c634.html>) accessed 22 July 2014.
- ⁵⁷ Henckaerts & Doswald-Beck op cit 56–8.
- ⁵⁸ Ibid, 60.
- ⁵⁹ Ibid, 68.
- ⁶⁰ Ibid, 73. See also J-F Quéguiner ‘Precautions under the law governing the conduct of hostilities’ 88(864) *International Review of the Red Cross* (2006) 793.
- ⁶¹ Henckaerts & Doswald-Beck op cit 79.
- ⁶² For international armed conflicts, see Rome Statute of the International Criminal Court, art 8(2)(b)(xxiv); for non-international armed conflicts, see art 8(2)(e)(ii).
- ⁶³ Henckaerts & Doswald-Beck op cit 81.
- ⁶⁴ Ibid, 86–7. See also L London, LS Rubenstein, L Baldwin-Ragaven & A van Es ‘Dual loyalty among military health professionals: Human rights and ethics in times of armed conflict’ 15(4) *Cambridge Quarterly of Healthcare Ethics* (2006) 381.
- ⁶⁵ Henckaerts & Doswald-Beck op cit 90.
- ⁶⁶ Ibid, 105.
- ⁶⁷ For commentary, see ET Bloom ‘Protecting peacekeepers: The Convention on the Safety of United Nations and Associated Personnel’ 89(3) *American Journal of International Law* (1995) 621–31; M-C Bourloynnis-Vrailas ‘The Convention on the Safety of United Nations and Associated Personnel’ 44(3) *International and Comparative Law Quarterly* (1995) 560–90. See also the discussion under para 12.5.2.3 below.
- ⁶⁸ Henckaerts & Doswald-Beck op cit 111.
- ⁶⁹ For a discussion, see Bloom op cit 621–31. See also H Llewellyn ‘The Optional Protocol to the 1994 Convention on the Safety of United Nations and Associated Personnel’ 55(3) *International and Comparative Law Quarterly* (2006) 718–28.
- ⁷⁰ Henckaerts & Doswald-Beck op cit 112–14.
- ⁷¹ R Murphy ‘United Nations military operations and international humanitarian law: What rules apply to peacekeepers?’ 14(2) *Criminal Law Forum* (2003) 153–94, 155. See also M Zwanenburg ‘The Statute for an International Criminal Court and the United States: Peacekeepers under fire?’ 10(1) *European Journal of International Law* (1999) 124–43.

- ⁷² UN Secretary-General's Bulletin on Observance by UN forces of international humanitarian law, UN Doc ST/ SGB/1993/3.
- ⁷³ Murphy op cit 159–60.
- ⁷⁴ Ibid, 160.
- ⁷⁵ Ibid, 162–3.
- ⁷⁶ Ibid, 168.
- ⁷⁷ Ibid, 175.
- ⁷⁸ Ibid, 190–4.
- ⁷⁹ Henckaerts & Doswald-Beck op cit 115.
- ⁸⁰ Geneva Convention III of 1949, art 4(A)(4); Henckaerts & Doswald-Beck op cit 117.
- ⁸¹ Geneva Convention I, art 23; and Geneva Convention IV, art 14; Henckaerts & Doswald-Beck op cit 119.
- ⁸² Geneva Convention IV, art 15; Henckaerts & Doswald-Beck op cit 119.
- ⁸³ Henckaerts & Doswald-Beck op cit 120–1.
- ⁸⁴ Rome Statute of the ICC art 8(2)(b)(v); Statute of the International Criminal Tribunal for the Former Yugoslavia, art 3.
- ⁸⁵ For a description and comment, see MD Thurlow 'Protecting cultural property in Iraq: How American military policy comports with international law' 8 *Yale Human Rights & Development Law Journal* (2005) 153.
- ⁸⁶ Henckaerts & Doswald-Beck op cit 127.
- ⁸⁷ Ibid, 132.
- ⁸⁸ Ibid, 135.
- ⁸⁹ Ibid, 139.
- ⁹⁰ Ibid, 140–1.
- ⁹¹ Ibid, 143; A Bouvier 'Protection of the natural environment in time of armed conflict' 31(285) *International Review of the Red Cross* (1991) 567; BK Schafer 'The relationship between the international laws of armed conflict and environmental protection: The need to re-evaluate what types of conduct are permissible during hostilities' 19(2) *California Western International Law Journal* (1989) 287.
- ⁹² Rome Statute of the ICC, art 8(2)(b)(iv).
- ⁹³ I Peterson 'The natural environment in times of armed conflict: A concern for international war crimes law?' 22(2) *Leiden Journal of International Law* (2009) 325.
- ⁹⁴ Henckaerts & Doswald-Beck op cit 151.
- ⁹⁵ *Oxford Advanced Learner's Dictionary* 4th ed (1991) 1024.
- ⁹⁶ Additional Protocol I, art 40; Rome Statute of the ICC, art 8(2)(b)(xii); Henckaerts & Doswald-Beck op cit 161.
- ⁹⁷ Ibid, 164.
- ⁹⁸ Ibid, 173–5.
- ⁹⁹ Ibid, 182. For an historical perspective, see also Schafer op cit.
- ¹⁰⁰ Henckaerts & Doswald-Beck op cit 192.
- ¹⁰¹ Ibid, 193–7.
- ¹⁰² Ibid, 205–21.
- ¹⁰³ Henckaerts & Doswald-Beck op cit 221.
- ¹⁰⁴ Additional Protocol I, art 37(1). See also TA Roach 'Ruses and perfidy deception during armed conflict' 23(2) *University of Toledo Law Review* (1992) 395.
- ¹⁰⁵ Henckaerts & Doswald-Beck op cit 224.
- ¹⁰⁶ Ibid, 227.
- ¹⁰⁷ Ibid, 227–8.
- ¹⁰⁸ See para 12.1 above.
- ¹⁰⁹ Ibid, 237.
- ¹¹⁰ Additional Protocol I, art 35.
- ¹¹¹ Rome Statute of the ICC, art 8(2)(b)(xx).
- ¹¹² Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, *UN Treaty Series* Vol 2056 (2002) 211.
- ¹¹³ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III), *UN Treaty Series* Vol 1342 (1983) 137.
- ¹¹⁴ See more detailed discussion in Henckaerts & Doswald-Beck op cit 242–4.

¹¹⁵ See *ibid*, 249–50 for more detailed discussion.

¹¹⁶ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Reports 1996, 226. For comments on the Advisory Opinion, see L Doswald-Beck ‘International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons’ 37(316) *International Review of the Red Cross* (1997) 35; D Stephens ‘Human rights and armed conflict: The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case’ 4 *Yale Human Rights & Development Law Journal* (2001) 1. See also S Swart ‘A new dawn in the nuclear weapons debate: A role for Africa?’ *African Yearbook on International Humanitarian Law* (2013) 196.

¹¹⁷ *Nuclear Weapons Advisory Opinion* supra, para 95.

¹¹⁸ *Ibid*, paras 95–7.

¹¹⁹ The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1972 (text of the Convention available at <http://www.opbw.org/>).

¹²⁰ Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925 (available at <http://www.icrc.org/ihl/INTRO/280?OpenDocument>).

¹²¹ Henckaerts & Doswald-Beck op cit 257.

¹²² General Assembly Resolution 2162 B (XXI) (5 December 1966); General Assembly Resolution 2454 A (XXIII) (20 December 1968); General Assembly Resolution 2603 B (XXIV) (16 December 1969); General Assembly Resolution 2662 (XXV) (7 December 1970).

¹²³ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1993 (available at <http://www.icrc.org/ihl/INTRO/553?OpenDocument>).

¹²⁴ Rome Statute, art 8(2)(b)(xviii).

¹²⁵ For updates on international participation in the Convention, visit <http://www.opcw.org/about-opcw/member-states/status-of-participation/>.

¹²⁶ For more information on the Review Conference, and the various resolutions that were adopted (including the resolution on the crime of aggression), visit <http://www.icc-cpi.info/> accessed 18 July 2014.

¹²⁷ Henckaerts & Doswald-Beck op cit 268.

¹²⁸ See also para 12.5.4.1 in this chapter.

¹²⁹ Declaration (IV,3) concerning Expanding Bullets, The Hague, 29 July 1899 (available at <http://www.icrc.org/applie/ihl/ihl.nsf/Treaty.xsp?documentId=D528A73B322398B5C12563CD002D6716&action=openDocument>).

¹³⁰ Rome Statute, art 8(2)(b)(xix).

¹³¹ For more detail, visit <http://www.kampala.icc-cpi.info/> accessed 18 July 2014.

¹³² For a medical and humanitarian perspective, see RM Coupland & A Korver ‘Injuries from anti-personnel mines: The experience of the International Committee of the Red Cross’ 303(6816) *British Medical Journal* (1991) 1509.

¹³³ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction supra. For commentary on the Convention, see S Maslen *Commentaries on Arms Control Treaties, Volume I: The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction* (2004).

¹³⁴ For a historical discussion, see Y Sandoz ‘The history of the grave breaches regime’ 7(4) *Journal of International Criminal Justice* (2009) 657.

¹³⁵ Rome Statute, art 8(2)(a).

¹³⁶ Article 2 common to the four Geneva Conventions.

¹³⁷ For South Africa, see Implementation of the Geneva Conventions Act 8 of 2012, s 5.

¹³⁸ Notably, art 2 of the Statute of the International Criminal Tribunal for the Former Yugoslavia *International Legal Materials* (1993) 1192; Rome Statute of the ICC, art 8(2)(a).

¹³⁹ Additional Protocol I, arts 86, 88 and 89. See further LC Green *The Contemporary Law of Armed Conflict* 3rd ed (2000) 296–7.

¹⁴⁰ Geneva Convention I, art 49; Geneva Convention II, art 50; Geneva Convention III, art 129; and Geneva Convention IV, art 146.

¹⁴¹ C Kress ‘Reflections on the iudicare limb of the grave breaches regime’ 7(4) *Journal of International Criminal Justice* (2009) 789, 792; J-M Henckaerts ‘The grave breaches regime as customary international law’ 7(4) *Journal of International Criminal Justice* (2009) 683.

¹⁴² K Roberts ‘The contribution of the ICTY to the grave breaches regime’ 7(4) *Journal of International Criminal Justice* (2009) 743, 761.

- ¹⁴³ L Moir ‘Grave breaches and internal armed conflicts’ 7(4) *Journal of International Criminal Justice* (2009) 763, 763–4.
- ¹⁴⁴ H Durham & TLH McCormack (eds) *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (1999) 175–91.
- ¹⁴⁵ See for instance, s 232 of the Constitution of the Republic of South Africa, 1996.
- ¹⁴⁶ M Sassòli ‘State responsibility for violations of international humanitarian law’ 84(846) *International Review of the Red Cross* (2002) 401.
- ¹⁴⁷ See in general, Werle & Jessberger op cit 399–401.
- ¹⁴⁸ See also chapter 13 of this book.
- ¹⁴⁹ Implementation of the Geneva Conventions Act, s 14.
- ¹⁵⁰ Implementation of the Geneva Conventions Act, s 18.
- ¹⁵¹ Implementation of the Geneva Conventions Act, s 5(1).
- ¹⁵² Part 3 of Schedule 1, Implementation of the Rome Statute of the International Criminal Court Act.
- ¹⁵³ Werle & Jessberger op cit 402.
- ¹⁵⁴ Charter of the International Military Tribunal *United Nations Treaty Series* Vol 82 (1945) 279.
- ¹⁵⁵ International Military Tribunal (Nuremberg), Judgment and Sentences 41(1) *American Journal of International Law* (1947) 172.
- ¹⁵⁶ Charter of the International Military Tribunal for the Far East (1946) Special Proclamation by the Supreme Commander for the Allied Powers, as amended 26 April 1946, TIAS No 1589, reproduced in Van den Wyngaert *International Criminal Law* op cit 43.
- ¹⁵⁷ For an account of the proceedings at the Tokyo Tribunal, see BVA Röling & CF Rüter (eds) *The Tokyo Judgment* (1977).
- ¹⁵⁸ Statute of the ICTY, Security Council Res 827 (1993) on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the territory of the Former Yugoslavia *International Legal Materials* (1993) 1192.
- ¹⁵⁹ Statute of the ICTR, Security Council Res 955 establishing the International Tribunal for Rwanda *International Legal Materials* (1994) 1598.
- ¹⁶⁰ Statute of the Special Court for Sierra Leone (2002), reproduced in Van den Wyngaert op cit 307.
- ¹⁶¹ For an overview, see RS Lee (ed) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results* (1999).
- ¹⁶² Rome Statute of the International Criminal Court (1998) UN Doc A/CONF 183/9, 37(5) *International Legal Materials* (1998) 999.
- ¹⁶³ For a critique of the war crimes provisions in the Rome Statute, see A Cassese ‘The Statute of the International Criminal Court: Some preliminary reflections’ 10 *European Journal of International Law* (1999) 144.
- ¹⁶⁴ J Crawford *Brownlie’s Principles of Public International Law* 8th ed (2012) 540.
- ¹⁶⁵ Ibid, 542–3.
- ¹⁶⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports 2005, 168 at 242, available at <http://www.icj-cij.org/docket/files/116/10455.pdf>.
- ¹⁶⁷ M Sassòli op cit 404.
- ¹⁶⁸ Ibid, 406.
- ¹⁶⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) ICJ Reports 1986, 14, available at <http://www.icj-cij.org/docket/files/70/6503.pdf>.
- ¹⁷⁰ Ibid, para 115.
- ¹⁷¹ M Sassòli op cit 408–9.
- ¹⁷² For a detailed discussion of the consequences of state responsibility for international wrongful acts (such as violations of IHL rules), see Crawford op cit 566–89.
- ¹⁷³ C Droege ‘The interplay between international humanitarian law and international human rights law in situations of armed conflict’ 40 *Israel Law Review* (2007) 310; O Hathaway, R Crootof, P Levitz, H Nix, W Perdue, C Purvis & J Spiegel ‘Which law governs during armed conflict? The relationship between international humanitarian law and human rights law’ 96 *Minnesota Law Review* (2011–2012) 1883.
- ¹⁷⁴ J Dugard *International Law: A South African Perspective* 4th ed (2011) 532.
- ¹⁷⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ICJ Reports 2004, 136, available at <http://www.icj-cij.org/docket/files/131/1671.pdf>. For critical commentary on the advisory opinion, see I Scobbie ‘Uncharted(er) waters? Consequences of the Advisory Opinion on the Legal

Chapter 13

International criminal law

CHRISTOPHER GEVERS

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13.1 What is international criminal law?

Following the successful prosecution of Nazi leaders at Nuremberg after World War II, the future looked bright for international criminal law (ICL).¹ However, while the related fields of international human rights law and international humanitarian law continued to develop under the aegis of the new United Nations, ICL appeared 'dead on arrival'. In fact, one scholar concluded as much at the time.² This relative quiescence of ICL during the Cold War has been matched by the exuberance that has marked the ICL project's revival since it ended. This revival began in the early 1990s with the establishment of the two UN ad hoc tribunals for the former Yugoslavia and Rwanda,³ and peaked with the establishment of the world's first permanent International Criminal

Court in 1998, which envisioned a global system for the punishment of international crimes.⁴ In fact, a case could be made that ICL has since surpassed its related project of human rights in terms of cachet, to the extent that activists do not speak (only) of ‘human rights abuses’ but of ‘international crimes’.⁵

While there is no longer any doubt that ICL ‘exists’, there is some debate still about what it means. As Cryer et al note: ‘[t]he meaning of the phrase “international criminal law” depends on its use, but there is a plethora of definitions, not all of which are consistent’.⁶ One approach is to ask, ‘what are international crimes?’, and then define international criminal law as the prosecution of such crimes by either domestic or international (and in the future possibly regional)⁷ criminal courts. Here too there is some controversy. While most scholars agree on the ‘core’ international crimes – namely, genocide, crimes against humanity, war crimes and aggression – they differ on which other offences (if any) can be considered ‘international crimes’. Suggestions range from lists like those of Cassese and Gaeta, which include the core crimes plus torture and ‘international terrorism’,⁸ to the more ambitious, such as the list advanced by Bassiouni of no less than 28 ‘international crimes’.⁹ There is no need to resolve these debates here. As Cryer et al suggest:¹⁰

Different meanings of international criminal law have their own utility for their different purposes and there is no reason to decide upon one meaning as the ‘right’ one. Nevertheless, it is advisable from the outset to be clear about the sense in which the term is used in any particular situation.

In this chapter, the term ‘international criminal law’ is used to describe the law governing the prosecution of core international crimes by domestic or international courts. This definition is narrower in one sense than other candidates, and broader in another. It is narrower in its limited focus on core international crimes – that is, war crimes, crimes against humanity, genocide and aggression. While the philosophical basis of international crimes remains the subject of some debate, there are at least two reasons in favour of limiting the scope in this manner. First, while there is lingering doubt about the customary character of other putative international crimes, there is no doubt that the four core crimes qualify in this respect. Secondly, these four core crimes are within the subject matter of the jurisdiction of the ICC.¹¹ Thirdly, these crimes, with the exception of aggression, can be prosecuted domestically under South Africa’s Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. This ‘implementing legislation’ will form the basis of most (if not all) domestic prosecutions of international crimes in South Africa.¹²

However, this definition is broader than others in that it encompasses the prosecution of core international crimes *either by a domestic or international court*. This approach is in line with the definitions offered by a number of leading scholars.¹³ However, it differs from those scholars who define ICL as the prosecution of *international* crimes by *international* courts. Such definitions exclude from their remit the domestic prosecution of these crimes which, as will be seen, has not only been instrumental in the development of the field, but remains a key aspect of its enforcement.

13.2 The core international crimes

This chapter is concerned with the prosecution of war crimes, crimes against humanity, genocide and aggression by international and domestic courts. Therefore, before proceeding to a deeper discussion on the history and enforcement of international criminal law as defined for this chapter’s purposes, a better understanding of the four core international crimes is needed. Accordingly, the next sections provide an overview of each of these core crimes.

13.2.1 War crimes

War crimes law is unique in that it emerged out of an older body of international law – that is, international humanitarian law (IHL).¹⁴ While customary rules outlawing certain conduct during times of war have existed since time immemorial,¹⁵ conventional IHL only emerged towards the end of the nineteenth century.¹⁶ Two important milestones in this regard were the 1899 and 1907 Hague Peace Conferences.¹⁷ However, the single most important event in the codification of IHL took place in the aftermath of World War II, when the four Geneva Conventions were adopted.¹⁸ Today, these remain the most important and comprehensive codification of IHL and have been ratified by almost every state. Crucially, for the purposes of the current discussion, the 1949 Geneva Conventions introduced the ‘grave breaches’ regime, which *criminalised* serious breaches of IHL and remains the foundation of modern war crimes law.¹⁹

What all war crimes have in common, necessarily, is that they take place in times of war or, in legal terms, ‘armed conflict’. In both IHL and ICL, a distinction is made between two types of armed conflict. An *international* armed conflict takes place between two or more states, while a *non-international* armed conflict takes place between one state and a non-state armed group, or between two such groups.²⁰ Traditionally, IHL was only concerned with international armed conflicts, and had very little to say about how states conducted themselves in *non-international* armed conflicts.²¹ This distinction spilled over into war crimes law, and initially war crimes could only take place in *international* armed conflict.²² However, the distinction between the two types of conflict has lost purchase in both IHL and ICL in recent times; as far as ICL is concerned, it has largely fallen away.²³

Modern war crimes law prohibits a broad range of conduct in times of war. These include crimes against the person, crimes against property, crimes involving prohibited methods of warfare and crimes involving prohibited means of warfare.²⁴ Examples of war crimes include:

- the killing of ‘protected persons’ (such as civilians) (known as ‘wilful killing’ in international armed conflicts and ‘murder’ in non-international armed conflicts),²⁵ which is a first order war crime;
- crimes of ‘mistreatment’ committed against any person, such as torture, mutilation, biological/medical/scientific experiments, inhuman or cruel treatment, sexual violence, slavery, punishment without regular trial, hostage-taking, deportation or forcible transfer and the use of child soldiers;
- attacks on buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected;²⁶
- the use of certain methods of warfare, such as the use of excessive force²⁷ or perfidy²⁸ in *international* armed conflicts, and starvation and taking of hostages *irrespective* of the conflict;²⁹ and
- the use of certain weapons that cause unnecessary suffering (depending on the nature of the conflict).

13.2.2 Crimes against humanity

Following World War II, the victorious powers faced the dilemma of how to prosecute atrocities committed by the Nazi regime *against their own civilians* – as these were not considered to be war crimes at the time. They did so through the *introduction* of ‘crimes against humanity’. At Nuremberg, crimes against humanity were defined as ‘inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious

grounds'.³⁰ Notably, such acts had to be committed 'in connection with any crime within the jurisdiction of the tribunal', which meant that crimes against humanity could only be committed during times of armed conflict.³¹

While the central features of crimes against humanity remain the same – that is, inhuman acts committed as part of an attack against a civilian population – a number of developments have taken place since 1946 that have modified this crime significantly. First and foremost, crimes against humanity no longer have to be committed in an armed conflict; they can be committed in peace time as well.³² Secondly, the *discriminatory* aspect of the crime ('persecutions on political, racial or religious grounds') became the self-standing crime of genocide. Thirdly, the *contextual* element of the crime was refined to require that the attack against the civilian population be *widespread or systematic*.³³ Finally, the list of underlying acts has expanded considerably since Nuremberg.³⁴ The Rome Statute now contains no less than 15 underlying acts, as well as a 'catch-all' clause that criminalises 'other inhumane acts'.³⁵

The *contextual* element of crimes against humanity (an act *committed as part of a widespread or systematic attack directed against a civilian population*) is what elevates otherwise ordinary criminal acts to the levels of international crimes.³⁶ Notably, in terms of this element, an attack can *either* be widespread or systematic; it need not be both.³⁷ The term 'widespread' is generally understood to refer to the scale of the attack,³⁸ which could be achieved cumulatively or by a singular massive attack of 'extra-ordinary magnitude'.³⁹ Conversely, 'systematic' refers to the *nature* of the attacks and 'the improbability of their random occurrence'.⁴⁰ In *Akayesu*, the Trial Chamber defined 'systematic' as being 'thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources'.⁴¹ Notably, the attack need not be violent in nature.⁴²

13.2.3 Genocide

The crime of genocide involves the commission of certain 'inhuman acts'⁴³ *with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such*. The term 'genocide' (derived from the Greek word for race, 'genos', and the Latin for killing, 'caedere') was coined by Polish lawyer Raphael Lemkin to describe the Nazi crimes committed against European Jews in World War II.⁴⁴ Despite its frequent use in political and social commentary, the crime of genocide is in fact a very specific crime with an exacting legal definition that far fewer atrocities meet than are alleged to do so. What makes genocide unique as an international crime is its special intent requirement (also called genocidal intent), in terms of which the inhuman act in question must be committed with an *overarching intent to destroy a national, ethnic, racial or religious group, or a significant or substantial part thereof*. As the International Court of Justice noted in the *Genocide* case:

It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The [underlying] acts ... must be done with intent to destroy the group as such in whole or in part. The words 'as such' emphasize that intent to destroy the protected group.⁴⁵

Notably, it is *only* these four groups that are 'protected' under this crime; attempts to expand the number of 'protected groups' during the drafting of the Genocide Convention failed, as have subsequent attempts to do so. Furthermore, the aim of *destroying* 'protected groups' (or a substantial or significant part thereof)⁴⁶ must involve their *physical or biological destruction*,⁴⁷ and cannot be extended to the destruction of the group 'as a social unit'.⁴⁸

Given its historical development, the crime of genocide is sometimes considered an *aggravated* crime against humanity.⁴⁹ However, unlike crimes against humanity, the 'underlying acts' of the

crime of genocide are limited to five *listed* acts,⁵⁰ and cannot be extended to include other ‘inhuman acts’.⁵¹

13.2.4 Aggression

At Nuremberg, the crime of aggression (in short, the waging of illegal wars) was declared to be ‘the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole’.⁵² However, the broad political consensus that prevailed among the world’s most powerful nations at Nuremberg regarding the importance of punishing the crime of waging aggressive war dissipated with the onset of the Cold War. As a result, the development of the law governing international crimes over the following 40 years was not mirrored by the development of the law relating to the crime of aggression. During this period, aggression was rendered a political epithet with subsequent endeavours to reach a substantive, legal definition of aggression coming to very little.⁵³ This, in the words of one scholar, meant that ‘[t]he die had been cast in favour of politicization of aggression rather than juridicisation’.⁵⁴

Controversy over the crime of aggression also meant that states drafting the Rome Statute of the International Criminal Court in 1998 chose to include the crime with the ICC’s notional jurisdiction, but to defer its definition.⁵⁵ Finally, in 2010, states agreed on a *definition* of the crime of aggression,⁵⁶ as well as on the conditions for its prosecution.⁵⁷ However, this provision will not come into force until 2017 *at the earliest*.

Notably, the structure of the crime of aggression is unique. The collective ‘act of aggression’ (by a state) is imputed to individuals who were in positions of *de facto* or *de jure* leadership at the time of its commission; these individuals are then guilty of the *crime of aggression*. Under the Rome Statute definition, an *act of aggression* involves ‘the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations’.⁵⁸ Furthermore, any person who is ‘in a position effectively to exercise control over or to direct the political or military action of a State’, and plans, prepares, initiates or executes an *act of aggression*, is guilty of the *crime of aggression*.⁵⁹

13.3 The history of international criminal law

The history of international criminal law is both complex and contested.⁶⁰ Its reactionary nature, contested origins, and lack of unifying theory make a simple, linear rendition of its history difficult.⁶¹ Depending on how it is defined, its origins might be traced as far back as ‘antiquity’ or only to as recently as the formation of the ICC.⁶² The approach of some ICL scholars, perhaps in search of a legitimising pedigree or as an over-reaction to the perennial allegations of retrospectivity that plague the discipline, is to stretch the origins of the discipline as far back in time as is possible. The usual suspect in this regard is the international prohibition on piracy, its offenders being the original *hostis humanis generis* (enemies of all mankind).⁶³ Another candidate for distant antecedent is the nineteenth-century prohibition of slavery.

A more recent possible starting point for international criminal law is the Treaty of Versailles (1919).⁶⁴ Among its numerous provisions, the Treaty contains the first normative expression of ‘modern-day ICL’,⁶⁵ which called for the prosecution of Emperor William II of Hohenzollern ‘for a supreme offence against international morality and the sanctity of treaties’.⁶⁶ It further proclaimed ‘the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war’⁶⁷ – that is, war crimes – and called for the establishment of a ‘special tribunal … to try the accused’.⁶⁸ However, these provisions

were never used because the Emperor found sanctuary in the Netherlands, which refused to extradite him for trial. There was, however, a limited number of trials before Germany's domestic courts. The Leipzig trials, which took place in the German Supreme Court in Leipzig from 23 May to 16 July 1921, were the result of a compromise,⁶⁹ and are generally not celebrated (or even acknowledged) by international criminal lawyers. Only 12 of the over 900 accused were tried.⁷⁰

Regardless of when one begins, the centrepiece of this orthodox history is undoubtedly the trial of defeated German leaders in the aftermath of World War II at Nuremberg.⁷¹ The International Military Tribunal (IMT) at Nuremberg (established by Britain, France, the United States, and Russia under the London Agreement on 8 August 1945) imposed international criminal responsibility on members of the Nazi High Command for violations of the laws of war, crimes against the peace and crimes against humanity. The IMT indicted 24 German military and political leaders, 21 of whom were brought to trial. When judgment was handed down by the Tribunal on 30 September 1946, 12 defendants were sentenced to death, three to life imprisonment, four to extended prison sentences, and three were acquitted. The trial of a number of 'lesser' war criminals took place subsequently, also at Nuremberg, but they were held under the authority of the United States occupying command.⁷² The Control Council Law Number 10 trials 'represented a shift from the co-operative (albeit, limited) internationalism of the IMT to the local administration of justice'.⁷³ The International Military Tribunal for the Far East, established in 1946 to try the leaders of defeated Japan, and modelled on the IMT at Nuremberg, does not enjoy the same status among international criminal lawyers – perhaps rightly, given the Tribunal's absence of appropriate legal standards, which cast a shadow over its convictions.⁷⁴

However, the post-war enthusiasm for ICL was short-lived. After some initial positive developments – including the adoption of the Nuremberg Principles by the UN General Assembly in 1946,⁷⁵ the Genocide Convention in 1948 and the Geneva Conventions in 1949 (which included the 'grave breaches' regime) – the project soon fell prey to the Cold War. An immediate and significant victim was the plan to establish a *permanent* international criminal tribunal. When the Genocide Convention was adopted, the UN General Assembly passed a resolution calling on the International Law Commission (ILC) to 'study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes'.⁷⁶ However, the ILC's work stalled in 1954, primarily as a consequence of difficulties associated with the question of defining aggression.⁷⁷

Over the following decades, there was little progress made in the field of international criminal law. Notable exceptions include the adoption of the 'Apartheid Convention'⁷⁸ in 1974, which made apartheid a crime against humanity, and a few high-profile trials of Nazis by domestic courts (such as that of Adolf Eichmann in Israel and Klaus Barbie in France).

Following the Cold War, the field was revitalised. In 1989, the UN General Assembly asked the ILC to return to the question of 'establishing an international criminal court', following a proposal by Trinidad and Tobago relating to 'illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities'.⁷⁹ While the ILC was working on this latter proposal, two further developments took place that would significantly influence the establishment of an international criminal court in a number of ways – in the form of the establishment of the ICTY and ICTR by the Security Council. If Nuremberg was an imperfect beginning, then these UN-created tribunals were redemptive,⁸⁰ in the sense of being the first truly international institutions established to prosecute international crimes. The revival of the international criminal tribunal concept precipitated 'a renaissance of international criminal law, which many had thought a dead letter'.⁸¹ The establishment of the ad hoc tribunals was followed by the establishment of 'hybrid tribunals' in Sierra Leone,⁸² Cambodia,⁸³ Lebanon,⁸⁴ and East Timor,⁸⁵ which were hybrid international/national law criminal courts.⁸⁶

The ILC produced a draft statute for an ‘international criminal court’ in 1994. In response, the General Assembly passed a resolution for the establishment of an International Criminal Court⁸⁷ and established an ad hoc committee, and then later a preparatory committee, in order to comment upon and refine the text of the draft treaty.⁸⁸ Finally, the General Assembly convened the UN Diplomatic Conference of Plenipotentiaries on the Establishment of a Permanent International Criminal Court in Rome from 15 June to 17 July 1998 to negotiate and agree the final text of the treaty. As a result of these marathon efforts, 120 states adopted the Rome Statute of the International Criminal Court on 17 July 1998.⁸⁹

The Rome Statute empowers the ICC to prosecute the crimes of genocide, crimes against humanity, war crimes, and probably the crime of aggression. According to its Preamble, one of its primary purposes is to ‘establish an independent permanent International Criminal Court ..., with jurisdiction over the most serious crimes of concern to the international community as a whole’ in order to ‘put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’.⁹⁰ The reasons that so many states, with clearly divergent interests, supported the court’s establishment are complex. Certainly, the powerful rhetoric of ending impunity played an important role, as did the very effective lobbying of civil society organisations. However, this diversity of interests was not overcome entirely at Rome and remains evident in the structure of the ICC (and the role of the Security Council in particular).⁹¹ While imperfect, the Rome Statute is a remarkable product of a tense and dramatic diplomatic compromise, but ultimately left some states unsatisfied. In this regard, when considering the ICC’s establishment, it is necessary to take account of the ‘unhappy and extravagant’ objections of the United States to the court.⁹²

13.4 Enforcing international criminal law: international and domestic prosecutions

International crimes are prosecuted by both international and domestic courts. In both instances, international law and domestic law are engaged. International courts (such as the ICC) rely on states, and their domestic institutions and procedures, for the arrest of suspects, their surrender for trial and, if convicted, their imprisonment. Domestic courts enforce criminal prohibitions under international law, and often rely on international law relating to jurisdiction in order to do so (such as in universal jurisdiction cases).⁹³

However, there is a tendency to downplay, or exclude, the domestic aspects of ICL – both in terms of its history and its enforcement.⁹⁴ Historically, domestic prosecutions have featured prominently in the development of ICL. As a matter of record, for every *international* moment (Versailles, Nuremberg), there was a *domestic* counterpart (Leipzig, Control Council Law 10 trials).⁹⁵ While some might view these domestic prosecutions as necessary ‘setbacks’ in the progression towards ‘true’ international criminal law (that is, the prosecution of international crimes by international courts), in substance the very principles relied upon and enforced by international court have often been domestic in origin. While the internationalists’ centrepiece (the Nuremberg Tribunal) regarded itself as enforcing existing international law, many of these principles necessarily originated from domestic antecedents.⁹⁶ In fact, domestic prosecutions of international crimes have impacted upon the substantive aspects of the field through the development of custom – both in terms of general principles and, more importantly, the international *criminalisation* of conduct itself.

As far as enforcement is concerned, if truth be told, in between rare international moments, the enforcement of international criminal law was in principle left to domestic courts.⁹⁷ This was done

primarily through treaty provisions calling for domestic prosecutions of international crimes.⁹⁸ It is for these reasons that Jessberger notes:

International criminal justice is usually perceived as justice delivered by international courts Yet there are reasons to believe that the popular equation of international criminal justice with prosecution by international criminal courts is foreshortened, and may be misleading. In fact, the contribution of states to the enforcement of ICL is crucial History ... shows notable domestic efforts to address international crimes by means of criminal law – notable in terms of the numbers of trials and convictions as well as in terms of their significance for the development of ICL.⁹⁹

The introduction of the International Criminal Court in 1998 did nothing to change this. On the contrary, in addition to creating a permanent international institution, the Rome Statute *institutionalised* the role of domestic courts in the enforcement of ICL through the principle of complementarity.¹⁰⁰ Unlike the ad hoc tribunals, it created a preference for domestic proceedings through this principle. Notably, this ‘division of labour’ has been explicitly endorsed by the South African Constitutional Court, which noted in *S v Basson*:

[The] recognition of the principle of individual responsibility for atrocities in war as violations of the law of nations occurred during an early and relatively immature stage of the development of international law generally The recent establishment of the International Criminal Court represents the culmination of a centuries-old process of developing international humanitarian law. *It in no way deprives national courts of responsibility for trying cases involving breaches of such law which are properly brought before them in terms of national law.*¹⁰¹ [own emphasis]

As a result, since 1998, a number of states have adopted legislation to allow for the prosecution of core international crimes in domestic courts, thereby giving effect to the principle of complementarity. In order to facilitate these national prosecutions, international law has developed to allow states to exercise universal jurisdiction over individuals accused of international crimes.¹⁰² The African Union (AU) has adopted a Model Law on Universal Jurisdiction, which is designed to allow African states ‘to overcome the constraints in exercising the principle of universal jurisdiction’.¹⁰³

In summary, international criminal justice and the application and development of its principles should not be understood as being restricted to the domain of international institutions. Instead, international and national prosecutions, rather than being regarded as alternatives, should be considered to be formally distinct, yet substantively intertwined, mechanisms in pursuit of a common goal – namely, the enforcement of ICL. With this in mind, what remains of the chapter will consider both the domestic and international enforcement of ICL, beginning with the latter, and focusing on the International Criminal Court.

13.4.1 The International Criminal Court (ICC)

The establishment of the ICC in 1998 was the realisation of an idea proposed well over a century before, but one that gained significant momentum in the 1990s with the ‘revival’ of ICL.¹⁰⁴ Currently, the ICC is empowered to exercise jurisdiction over individuals who are alleged to have committed genocide, crimes against humanity or war crimes after July 2002. Today, the ICC has its seat in The Hague where it is currently pursuing prosecutions in respect of nine different ‘situations’,¹⁰⁵ having secured its first conviction in 2012.¹⁰⁶ To date, 123 states have signed up to its founding instrument – namely, the Rome Statute.

The Rome Statute performs two distinct functions. First, it sets out the structure, powers, and functions of the court in prosecuting the crimes of genocide, crimes against humanity, war crimes,

and aggression. Secondly, it establishes a co-operation regime for states parties to assist the court in fulfilling this mandate. At the heart of the Rome Statute is the principle of complementarity, in terms of which the court will only be able to admit a case before it (provided the jurisdictional bases of nationality and/or territoriality are present) if the state party concerned is unwilling or unable to prosecute the offender nationally.¹⁰⁷ This principle, reflected in articles 1 and 17, as well as the preamble to the Rome Statute, is a novel idea. Effectively, it affords states parties primary jurisdiction over ‘international crimes’ committed within their jurisdiction, and is the reverse of the ICTY and ICTR, which enjoy primacy over national legal systems. The effect of this principle is not to allow any state party to frustrate the prosecution of individuals by using their primary jurisdiction as a shield. Article 17(2) of the Rome Statute expressly prevents such a scenario and obliges states parties to prosecute offenders or else surrender them to the court so that it may do so; accordingly, the court’s ability to exercise its jurisdiction over particular suspected crimes is limited by this principle. This coercion of states parties is one of many positive knock-on effects of this principle.¹⁰⁸ The principle of complementarity represents far more than a presumption in favour of local prosecutions; rather, it ensures that the ICC reinforces the criminal justice systems of states parties at a national level, as well as relying on the broader system of international criminal justice.¹⁰⁹ The principle proceeds from the belief that national courts should be the first to act. Aside from assuaging the concerns of states over the potential usurping of their national sovereignty, the principle carries with it other important consequences, such as recognition of the need for full participation by victims, the practicality of local prosecutions, and the very real limitations of a court with potentially universal jurisdiction.

Despite promising beginnings, the relationship between African states and the ICC has soured in recent times. The reasons for this deterioration are numerous, the three most prominent being:

1. antagonism regarding cases being pursued against ‘high-profile’ Africans (first, Mr al-Bashir of the Sudan, and more recently, Kenyan politicians);
2. the ICC’s failure to pursue non-African cases; and
3. concerns regarding the perceived abuse by domestic (European) prosecutors and judges of the principle of universal jurisdiction to target other ‘high-profile’ Africans.

These, together with other concerns, have created a perception of bias on the part of the ICC, and the international criminal law project more generally.

In order for a prosecution to take place before the ICC, three preliminary hurdles must be met. First, the crime in question must be ‘within the jurisdiction’ of the ICC. Secondly, the jurisdiction of the ICC must be triggered by the prosecutor, a state party or, exceptionally, the Security Council. Finally, the case must meet the ‘admissibility’ requirements set out in the Rome Statute (chiefly, gravity and complementarity). Each will be discussed in turn.

13.4.1.1 The jurisdiction of the ICC

The term ‘jurisdiction’ is used with imprecision in the Rome Statute to cover different conceptions of the term without always distinguishing between them.¹¹⁰ In fact, three different forms of jurisdiction are present in the Rome Statute: subject-matter (*ratione materiae*) jurisdiction, temporal jurisdiction, and personal (*ratione personae*) jurisdiction. The first two forms of jurisdiction are relatively straightforward. The ICC currently has *subject-matter* jurisdiction over the crimes of genocide, war crimes and crimes against humanity. Generally speaking, the ICC has *temporal* jurisdiction only over crimes committed after 1 July 2002, the date on which the Rome Statute entered into force.¹¹¹ In addition to this, the court can only exercise jurisdiction over crimes committed in a state (or by its nationals) ‘after the entry into force of ... [the] Statute for that State’.¹¹²

These temporal limits on the ICC's jurisdiction are based on the *nullum crimen, nulla poena* principle.

The third form of 'jurisdiction' under the Rome Statute – *personal jurisdiction* – is more complex. Personal jurisdiction concerns the circumstances under which the ICC may exercise criminal jurisdiction over an individual alleged to have committed war crimes, genocide or crimes against humanity. This was one of the most divisive issues at the Rome Conference in 1998. Some states wanted the ICC to have *universal jurisdiction* over all international crimes, regardless of who commits them, or on which state's territory. This expansive jurisdictional regime was opposed by those states that sought to limit the court to prosecuting crimes only when the state concerned consents. In the end, a compromise was reached, in terms of which the ICC's personal jurisdiction is primarily consent-based – that is, the ICC has jurisdiction over the territory and nationals of *states parties*, or other states that consent on an ad hoc basis to such jurisdiction – but it can under exceptional circumstances be extended beyond these limits (by a special Security Council referral). The result is that the ICC can exercise jurisdiction over an individual in four instances:

1. if a crime is committed *on the territory* of a state party;¹¹³
2. if a crime is committed *by a national* of a state party;¹¹⁴
3. if a state that has not signed the Rome Statute consents (ad hoc) to the exercise of jurisdiction by the court over a crime committed on its territory or by its nationals;¹¹⁵ or,
4. if the United Nations Security Council 'refers' a situation where one or more of the core crimes appear to have been committed.

During the negotiation of the Rome Statute, the most divisive issue was the role envisaged for the Security Council. On the one side were 'like-minded countries' that argued for a minimal role for the Security Council. These included African states that channelled their collective efforts through the Southern African Development Community (SADC) Common Principles and the Dakar Declaration. On the other side, were the UN Security Council veto-bearing states that predictably sought a court that would be subject to Security Council control.

In the end, the Rome Statute reserved power for the Security Council to refer 'situations' to the ICC pursuant to article 13(b) of the Rome Statute, and defer situations in limited circumstances under article 16 of the Rome Statute. The Security Council's referral power has far-reaching implications as, by its operation, potentially the court has jurisdictional reach over the territory of every state in the world (whether or not it is a state party to the Rome Statute).¹¹⁶

When the Rome Statute was drafted, and even after it came into force, such Security Council referrals were considered to be unlikely, especially given the initial negative responses to the court by some P5 states (that is, the five permanent Security Council member states),¹¹⁷ specifically the United States and China. However, to date, the Security Council has already used this article on two occasions – once in respect of Darfur by way of Resolution 1593, and more recently in respect of Libya by way of Resolution 1970.

13.4.1.2 How cases come before the ICC

Jurisdiction is not the only hurdle that a case needs to clear in order to be heard by the ICC. An investigation and prosecution must first be 'triggered', and thereafter the case must pass the test of admissibility in order for the court to exercise jurisdiction.

13.4.1.2.1 Triggering the court's jurisdiction

Under the Rome Statute, the ICC's jurisdiction can 'triggered' in one of three ways:

1. *State party referrals*: The ICC's jurisdiction may be triggered by way of the 'referral' of a situation by a state party under article 14. This allows states parties to refer 'a situation in which

one or more crimes within the jurisdiction of the Court appear to have been committed’ to the prosecutor so that he or she may ‘investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes’.¹¹⁸ However, states parties may only ‘refer’ alleged core crimes committed on the territory or by the nationals of (i) a state party (including their own), or (ii) a non-state party that has consented ad hoc to the exercise of jurisdiction by the ICC.¹¹⁹ Although the Rome Statute’s drafter envisaged states referring one another to the ICC, in practice, ‘self-referrals’ have been the most common jurisdictional trigger. To date, Uganda, the Democratic Republic of the Congo, the Central African Republic and Mali have referred *crimes committed in their own territory* to the ICC for investigation and prosecution.

2. *Prosecutor-initiated investigations and prosecutions:* The prosecutor can, of her own accord, ‘trigger’ the jurisdiction of the ICC, albeit with the approval of the Pre-Trial Chamber. Under article 15, the prosecutor can exercise power ‘*proprio motu*’ to trigger an investigation ‘on the basis of information on crimes within the jurisdiction of the Court’,¹²⁰ *provided that he or she first obtains authorisation from the Pre-Trial Chamber* before proceeding with an investigation. The Pre-Trial Chamber will only sanction such an investigation if it concludes that ‘there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court’.¹²¹ Granting this power to the prosecutor was controversial during the negotiations of the Rome Statute, and some states voiced concerns about ‘rogue prosecutors’ abusing this power; as a compromise, the requirement of Pre-Trial Chamber approval was introduced. The prosecutor exercised this power for the first time in respect of the 2007 post-electoral violence in Kenya (a state party), after receiving the authorisation of the Pre-Trial Chamber in March 2009.¹²²

Security Council referrals: When the ICC exercises jurisdiction on the basis of a Security Council referral under article 13(b), then the ordinary ‘trigger’ mechanisms discussed above do not apply. Rather, article 13(b) serves both to trigger and found the court’s jurisdiction simultaneously. The Security Council has (controversially) employed this provision in two situations – Darfur (Sudan) and Libya, neither of these countries being a state party to the Rome Statute.

13.4.1.2.2 The admissibility of situations and cases

In circumstances where the ICC has jurisdiction over alleged crimes, and this jurisdiction is triggered using one of the above-mentioned mechanisms, the case may yet not proceed if it is determined to be *inadmissible*.¹²³ Unlike jurisdiction, *admissibility* is an ongoing assessment.¹²⁴ Formally, admissibility can be challenged by an interested state¹²⁵ at the preliminary stage, before the prosecutor has identified specific cases for prosecution,¹²⁶ and later on by an accused,¹²⁷ an interested state or the court itself¹²⁸ in respect of a specific prosecution.¹²⁹ Ordinarily, admissibility challenges can be brought only once and must be *before or at the commencement* of the trial itself.¹³⁰

There are three grounds upon which admissibility can be challenged by an accused or an interested State, or raised by the court:

1. *Complementarity-based admissibility challenges:* If a case already being investigated or prosecuted by a state is brought before the ICC, under article 17 it ‘shall determine that [such] a case is inadmissible’, notwithstanding that the court may otherwise have jurisdiction in respect of the case. There are, however, two exceptions to this rule: the court will not make a finding of inadmissibility if the state concerned is either unwilling¹³¹ or unable¹³² genuinely to carry out the investigation or prosecution. The principle applies equally in respect of any decision reached by a state not to proceed with a prosecution after investigating the matter.

2. *Gravity-based admissibility challenges:* The court is required to rule that a case is inadmissible where it ‘is not of sufficient gravity to justify further action by the Court’.¹³³ To

date, the prosecutor has taken a *quantitative* approach to gravity – focusing on the number of victims.¹³⁴ Heller argues that the prosecutor should rather focus on *qualitative* factors when determining the gravity of a situation, such as (i) whether the situation involves crimes that were committed systematically, as the result of a plan or policy; (ii) whether the situation involves crimes that cause ‘social alarm’ in the international community; and (iii) whether the situation involves crimes that were committed by states, instead of by rebel groups.¹³⁵

3. ‘*Non bis in idem*’ challenges: The court is required to rule that a case is inadmissible if it determines that ‘[t]he person concerned has already been tried for conduct which is the subject of the complaint’. This requirement – based on the principle of *non bis in idem* – can be waived if the trial in question was (i) undertaken ‘for the purpose of shielding the person concerned from criminal responsibility’ or (ii) was ‘not conducted independently or impartially in accordance with the norms of due process recognized by international law’.¹³⁶ This ground differs from the others in that it can only be raised in respect of a case, not a situation generally.

13.4.1.3 State co-operation under the Rome Statute

The late Judge Antonio Cassese, the first President of the ICTY, described that court as ‘a giant without arms and legs – it needs artificial limbs to walk and work’.¹³⁷ The judge was referring to the ad hoc tribunal’s lack of direct enforcement mechanisms, which meant it had to rely on the co-operation of states in order to investigate, arrest, try and sentence individuals who committed international crimes.¹³⁸ This metaphor is equally applicable to the ICC (if not more so), as it must also rely on the co-operation of states in order to ‘walk and work’.¹³⁹ As a result, states that ratify the Rome Statute accept a number of co-operation obligations.

The issue of state co-operation was a controversial one when the court’s statute was drafted in Rome in 1998; the final text strikes a delicate balance that both recognises the constraints of the court as a treaty-based mechanism (unlike ICTY/R) but also creates a progressive co-operation regime that enables the court to operate effectively. The resultant co-operation regime, contained in Part 9 of the Rome Statute, is a hybrid between a horizontal model and a vertical model of co-operation: the former involving the relatively weaker form of interstate co-operation, the latter used to describe the ‘supra-State model’ which is a more robust system of co-operation between the ad hoc tribunals and states.¹⁴⁰

Under the Rome Statute, states parties are under the following obligations in respect of co-operation:

- First of all, states are under a general obligation under article 86 to ‘cooperate fully with the Court’.
- In order to facilitate the cooperation of states, the Rome Statute requires states parties to ‘ensure that there are procedures available under their national law for all of the forms of cooperation’¹⁴¹ that are specified under the Rome Statute.
- All states parties are required to carry out arrest warrants issued by the ICC should the suspect be in their territory.¹⁴²
- In addition to this, the Rome Statute requires states parties to provide the following other forms of co-operation to the ICC in relation to its investigation and prosecution of crimes within its jurisdiction, which include:
 - the identification and whereabouts of persons or the location of items;
 - the taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the ICC;
 - the questioning of any person being investigated or prosecuted;

- the service of documents, including judicial documents;
 - facilitating the voluntary appearance of persons as witnesses or experts before the ICC;
 - the examination of places or sites, including the exhumation and examination of grave sites;
 - the execution of searches and seizures;
 - the protection of victims and witnesses and the preservation of evidence; and
 - the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture.
- Finally, after convicting and sentencing an offender, the ICC will designate the state where the term is to be served and states are requested under the Statute to ‘share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution’.¹⁴³

In the event of non-compliance by a state party with a request to co-operate from the ICC, the Court may ‘make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council’.¹⁴⁴

For its part, South Africa has established a comprehensive co-operative scheme *vis-à-vis* the ICC in its implementing legislation. The provisions relating to co-operation with the ICC can be found in Chapter 4 of the ICC Act, and provide for co-operation with the ICC in terms of arrest and surrender of persons, the provision of judicial assistance to the ICC and offences in domestic law for interference with the administration of justice. On the basis of these provisions, the Southern Africa Litigation Centre approached the North Gauteng High Court in June 2015 for an order compelling the South African authorities to arrest President Al-Bashir of Sudan, and surrender him to the ICC.¹⁴⁵ President Al-Bashir, who was in South Africa attending a Summit of Heads of State and Government of the African Union, is the subject of a 2009 arrest warrant issued by the ICC, in relation to alleged international crimes committed in Darfur, Sudan.¹⁴⁶ Despite the government’s arguments that Al-Bashir enjoyed head of state immunity, the court ordered the South African authorities ‘to take all reasonable steps to prepare to arrest President Bashir’.¹⁴⁷ However, President Al-Bashir was allowed to leave the country before the order could be given effect to.

13.4.2 The enforcement of international criminal law in South Africa

International criminal law, as it is defined here, is the prosecution of international crimes by both international and domestic courts. Despite the enthusiasm for international courts in some quarters,¹⁴⁸ domestic courts remain equally important to ICL’s stated aim of ‘ending impunity’ for international crimes (as recognised by the Rome Statute’s principle of complementarity). In order to take up this task, many states (particularly those from a common law tradition) have adopted new laws to criminalise these offences under domestic law, and to provide for their investigation and prosecution by domestic law enforcement agencies in domestic courts. A number of states (including South Africa) have chosen to combine these new legislative measures with their implementing legislation in respect of the Rome Statute (which gives effect to their obligations towards the ICC). This has led to some confusion regarding the relationship between the international and domestic prosecution of international crimes, and the role of the ICC (if any) in the latter.¹⁴⁹ However, it is important to bear in mind that the prosecution of international crimes by domestic courts, while in pursuit of the same objectives, is legally distinct from the prosecution of crimes by the ICC. In particular, the former relies on the traditional laws of state jurisdiction under international law (which have been modified by state practice in so far as ICL prosecutions are

concerned),¹⁵⁰ while the latter relies on the ICC's founding instrument, the Rome Statute of the International Criminal Court.

South Africa has over the past decade adopted some of the most progressive legislation for the prosecution of international crimes by domestic courts. First, it adopted the Implementation of the Rome Statute of the International Criminal Court Act in 2002 (the ICC Act), which created a legislative framework for the domestic prosecution of 'core' international crimes. The ICC Act not only provides for universal jurisdiction to be exercised over international crimes by South African courts, but also – in some commentators' view – discarded the diplomatic immunity of state officials accused of such crimes, despite a contemporaneous ruling by the International Court of Justice that such immunities continue to apply regardless of the crime in question.¹⁵¹ Then, in 2012, South Africa became the first country after the incorporation of the 1998 Rome Statute of the ICC to adopt implementing legislation for the various 1949 Geneva Conventions and their Protocols. The resulting Implementation of the Geneva Conventions Act 8 of 2012 grants South African courts universal jurisdiction over the 'grave breaches' of the Geneva Conventions and made novel contributions to the law relating to modes of responsibility. In addition to these legislative measures, the Constitution provides for the direct application of customary international law by South African courts,¹⁵² providing a third avenue for bringing prosecutions for international crimes.

While the current framework for prosecuting international crimes is not perfect,¹⁵³ and South Africa is yet to prosecute any individual for international crimes, the framework and recent judicial decisions place South Africa at the front of the trend towards domestic prosecutions of international crimes.

13.4.2.1 The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002

South Africa ratified the Rome Statute on 27 November 2000 and, in order to give effect to its provisions, passed the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the ICC Act).¹⁵⁴ The ICC Act has two main purposes. The first is to establish a comprehensive co-operative scheme for South Africa *vis-à-vis* the International Criminal Court, pursuant to article 88 of the Rome Statute.¹⁵⁵ Of more interest perhaps, the second aim of the ICC Act is to provide a statutory basis for *domestic* prosecution of crimes against humanity, genocide, and war crimes before a South African court, in line with the 'principle of complementarity'.¹⁵⁶ It is worth noting that South Africa was not *obliged* under the Rome Statute to create the necessary conditions for domestic prosecutions; it *elected* to do so.¹⁵⁷ Be that as it may, South Africa has elected to create a very strong regime to bring 'persons who commit such atrocities to justice ... in a court of law of the Republic in terms of its domestic laws *where possible*'.¹⁵⁸

The starting point is section 4(1) of the ICC Act, which provides that '[d]espite anything to the contrary in any other law in the Republic, any person who commits a[n] [international] crime, is guilty of an offence'.¹⁵⁹ The international crimes referred to in the Act are genocide, crimes against humanity and war crimes.¹⁶⁰ The Rome Statute's definitions of these 'core crimes' are incorporated directly into South African law through a schedule appended to the ICC Act.¹⁶¹ As discussed below, the ICC Act did not include, or incorporate, the modes of liability provided for in the Rome Statute, some of which are peculiar to international law. In order to remedy these omissions, South African courts will have to turn to analogous domestic modes of liability – such as aiding and abetting and the common purpose doctrine – when it comes to prosecutions under the Act. However, not all international modes of liability have domestic counterparts (for example, the doctrine of command responsibility).

There are four grounds upon which jurisdiction may be exercised over international crimes by South African courts under the ICC Act (2002) – namely, territoriality, nationality, passive personality and the universality principle. The first three grounds are fairly unremarkable, excepting that nationality and active personality jurisdiction may be founded on citizenship *or* if the person concerned (either the perpetrator or victim respectively) is ‘ordinarily resident in the Republic’.¹⁶² It is the fourth ground, universal jurisdiction, that will generate the most legal and political interest (and has already done so).¹⁶³

Section 4(3)(c) of the ICC Act states:

In order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits [an ICC] crime outside the territory of the Republic, is deemed to have committed that crime within the territory of the Republic if ... that person, after the commission of the crime, is present in the territory of the Republic. [own emphasis]

This provision contemplates an exercise of jurisdiction by South African courts over an international crime when none of the ‘traditional’ connecting factors – such as the nationality of the accused or victim or the location of the crimes – is present; in other words, it contemplates so-called *universal jurisdiction*.¹⁶⁴ Despite some initial confusion, the Constitutional Court recently confirmed that (i) the exercise of universal jurisdiction by states is permitted by international law, and (ii) that under the ICC Act (and international law), a suspect need not be present in South Africa in order for the police to open an investigation on the basis of universal jurisdiction.¹⁶⁵

As far as the question of immunity is concerned, the ICC Act provides that notwithstanding:

any other law to the contrary, including customary and conventional international law, the fact that a person ... is or was a head of State or government, a member of a government or parliament, an elected representative or a government official ... is neither – (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime.¹⁶⁶

Most commentators have interpreted this provision as removing personal immunity before South African courts.¹⁶⁷ Notably, while section 232 of the Constitution makes customary international law part of South African law, it does so only to the extent that it is not ‘inconsistent with the Constitution or *an Act of Parliament*’ [own emphasis]. Therefore, if the ICC Act is interpreted as removing immunity *ratione personae*, then it would do so notwithstanding the customary international law obligations on South Africa to observe it.¹⁶⁸

In terms of the procedure to be followed, the ICC Act provides that ‘[n]o prosecution may be instituted against a person accused of having committed a[n] [international] crime without the consent of the National Director [of Public Prosecutions (NDPP)]’.¹⁶⁹ If the NDPP declines to prosecute a person under the ICC Act, the Director-General for Justice and Constitutional Development must be provided with the full reasons for that decision, because he or she is then obliged to forward the decision, together with reasons, to the Registrar of the ICC in The Hague. In order to fulfil these obligations, the NPA established a ‘Priority Crimes Litigation Unit’ (PCLU), headed by a Special Director of Public Prosecutions.¹⁷⁰ The Special Director has two powers: to ‘head the Priority Crimes Litigation Unit’; and to ‘manage and direct the investigation and prosecution of crimes contemplated in the [ICC Act]’. In this way, the Unit is tasked specifically with dealing with the ICC crimes set out in the ICC Act, and the Special Director that heads the PCLU is empowered to ‘manage and direct the investigation’ of such crimes. If the PCLU opens an investigation and issues a warrant of arrest, and the suspect is arrested, then the matter will move to the prosecution stage.

The ICC Act also requires that an appropriate High Court must be designated to hear cases brought under the Act. The Act, however, does not provide any specific trial procedure or punishment regime for domestic courts, so it can be assumed that the usual trial procedure for a

criminal trial will be followed and that the court will be empowered to pass any of the sentences usually imposed.

13.4.2.2 The Implementation of the Geneva Conventions Act 8 of 2012

In 2012, Parliament adopted the Implementation of the Geneva Conventions Act 8 of 2012.¹⁷¹ It did so 60 years after South Africa acceded to the 1949 Geneva Conventions.¹⁷² According to its preamble, the Act's purpose is two-fold: (i) to enact the Geneva Conventions and Protocols additional to those Conventions into law, and (ii) to ensure the prevention and punishment of grave breaches and other breaches of the Conventions and Protocols. The first aim is accomplished by annexing the Conventions in full to the Act, and providing that '[s]ubject to the Constitution and this Act, the Conventions have the force of law in the Republic'.¹⁷³ The second aim was accomplished by creating a war crimes regime for prosecuting 'breaches' of the Geneva Conventions in South African courts, notwithstanding the fact that the 'grave breaches' regime of the 1949 Geneva Conventions and its Protocols has already *in substance* been implemented through the ICC Act.¹⁷⁴ In addition, the 'grave breaches' now form part of customary international law and therefore, by operation of section 232 of the Constitution, are already part of South African law.¹⁷⁵

The Geneva Conventions Act criminalises two categories of offences: 'grave breaches' and 'other offences'. The former category is made up of the first-order war crimes contained in the 1949 Geneva Conventions and its 1977 Protocol I.¹⁷⁶ Notably, these crimes can only be committed in an *international armed conflict* between two states.¹⁷⁷ In addition to this, the Geneva Conventions Act 2012 criminalises the contravention of any *other* provision not covered by the 'grave breaches' regime.¹⁷⁸ This 'catch-all' category of offences opens up the possibility of a second set of war crimes being prosecuted under this Act: war crimes committed in *non-international armed conflict*. This is so because included in the 'catch-all' category of offences would be common article III, which covers violations committed in 'armed conflicts not of an international character',¹⁷⁹ as well as similar provisions in Additional Protocol II.

The Geneva Conventions Act provides for differing jurisdictional regimes for these two categories of offences. Grave breaches are subject to 'universal jurisdiction'; they can be prosecuted by South African courts regardless of where they are committed.¹⁸⁰ Notably, this 'universal jurisdiction' provision differs from that found in the ICC Act discussed above in that it does not contain a so-called 'presence requirement'. In contrast, 'other offences' under the Geneva Conventions Act (including non-international war crimes) are not subject to universal jurisdiction. These offences are subject to the 'traditional' jurisdictional bases of territoriality¹⁸¹ and nationality,¹⁸² but not passive personality jurisdiction (based on the victim's nationality).

Another notable feature of the Geneva Conventions Act is the enigmatic section 7(4), which states that '[n]othing in this Act must be construed as precluding the prosecution of any person accused of having committed a breach under customary international law before this Act took effect'. While welcome in principle, the operation of this provision is potentially confusing; it confirms that prosecutions can take place in respect of crimes committed *before* the Act came into force, but it does not give any indication how this might take place. One possible avenue would be to interpret section 7(4) of the Act as a 'retrospectivity clause' that provides for the retrospective application of the *Act* until the point at which the breach in question became a breach under customary international law. This interpretation is supported by its reference to a *breach* of customary international law, a term that is particular to the Geneva Conventions. However, given the general interpretive presumption against retrospective application, such an intention would probably have been formulated in express positive terms, and not 'defensively' (as section 7(4) is).

Furthermore, this section differs considerably from the examples of such ‘retrospective application’ provisions given during the public hearings on the Act (in particular those of Canada and the United Kingdom), which the drafters were open to follow should they have wanted to provide for the retrospective application of the Act.

Another possible interpretation of section 7(4) is that this provision recognises that South African courts are empowered to prosecute customary international law crimes without implementing legislation, under customary international law – that is, the direct application of customary international law.¹⁸³

Another notable feature of the Geneva Conventions Act is that it introduces specialised modes of liability for international crimes.¹⁸⁴ First, section 5 of the Act provides for responsibility by way of *direct perpetration* of breaches of the Convention. Secondly, section 6 of the Act incorporates the doctrine of command responsibility into our law. This section provides that a ‘military superior officer’¹⁸⁵ is guilty of an offence if (i) forces under his or her effective command, authority and control (ii) commit a ‘grave breach’ or an ordinary breach¹⁸⁶ and (iii) the superior knew, or in the circumstances ought reasonably to have known, that his or her subordinates were committing such a breach,¹⁸⁷ and (iv) failed to take the necessary steps to prevent and/or punish said breach.¹⁸⁸ Section 6(1)(c) further specifies that the failure to take necessary steps means failure to ‘exercise effective command, authority and control over the forces’,¹⁸⁹ ‘take all necessary and reasonable measures within his or her power to prevent or repress the commission of any breach or offence’,¹⁹⁰ or ‘submit the commission of the breach or offence … to the competent authorities for investigation and prosecution’.¹⁹¹

13.4.2.3 The ‘direct application’ of customary international criminal law

The third avenue for prosecuting international crimes under South African law is through the ‘direct application’ of customary international law. While ‘conventional’ (that is, treaty-based) international law must generally be ‘incorporated’ into South African law by an Act of Parliament (see section 231 of the Constitution, 1996), customary international law is automatically part of South African common law ‘unless it is inconsistent with the Constitution or an Act of Parliament’ (section 232 of the Constitution, 1996). As customary international law itself criminalises certain conduct, this raises the possibility of bringing prosecutions in South African courts by the *direct application* of customary international law (without requiring a statutory criminal framework such as the ICC Act or the Geneva Conventions Act).

The ‘direct application’ of customary international law in criminal prosecutions has raised concerns among some scholars and, until recently, courts had avoided addressing this far-reaching possibility. In *S v Basson*,¹⁹² the Constitutional Court recognised the potential for ‘direct application’, although it ultimately left the question open, noting:

We have not found it necessary to consider whether customary international law could be used either as the basis in itself for a prosecution under the common law, or, alternatively, as an aid to the interpretation of section 18(2)(a) of the Riotous Assemblies Act. [own emphasis]¹⁹³

It has been suggested that the Geneva Conventions Act also supports the direct application of customary international law, albeit indirectly.¹⁹⁴ However, in its recent decision in *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another (SALC (CC))*,¹⁹⁵ the Constitutional Court explicitly endorsed the direct application of customary international law through section 232 of the Constitution, 1996, noting:

Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid[37] require states, even in the absence of binding

international treaty law, to suppress such conduct because ‘all states have an interest as they violate values that constitute the foundation of the world public order’. Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm. [own emphasis]¹⁹⁶

The court went on to extend this finding to crimes against humanity generally, finding:

In effect, torture is criminalised in South Africa under section 232 of the Constitution and the Torture Act whilst torture on the scale of crimes against humanity is criminalised under section 232 of the Constitution, the Torture Act and the ICC Act. [own emphasis]

This has far-reaching implications for the prosecution of international crimes under South African law. Through the *direct* application of customary international (criminal) law, prosecutions could be brought in respect of all customary international law crimes (including the crime of aggression).¹⁹⁷ However, this avenue places the additional burden on those seeking to prosecute an accused for a crime in breach of customary international law to prove that the crimes(s) in question were crimes under customary international law *at the relevant time*.

13.4.2.4 International criminal law in South African courts

To date, there have been no prosecutions of ‘core crimes’ by South African courts under either the ICC Act or the Geneva Conventions Act. However, the Constitutional Court has considered the prosecution of such crimes in general terms, and proceedings under the ICC Act in particular. First, in the *Basson* cases, the Constitutional Court made a number of important general statements regarding the prosecution of crimes against humanity and war crimes, as well as possible international crimes committed under apartheid. Secondly, in the recent *SALC* case, the Constitutional Court (as well as the High Court and the SCA) discussed the investigation and prosecutions of international crimes under South Africa’s ICC Act generally, and the investigation of ‘universal jurisdiction’ cases in particular. These cases have set important precedents regarding the prosecution of international crimes generally, as well as the specific provisions of the Constitution and relevant legislation that will govern future prosecutions. As such, each will be considered in turn.

13.4.2.4.1 The Basson cases

The failed prosecution of Wouter Basson¹⁹⁸ – dubbed ‘Dr Death’ by the media – has ‘a long and expensive history’.¹⁹⁹ Basson was alleged to have participated in a number of acts that may amount to international crimes, including the mass murder of South West African Peoples Organization (SWAPO) detainees in Namibia, and the assassination of members of SWAPO and the ANC in Namibia, Swaziland, Mozambique and London.²⁰⁰ In 1999, Basson was charged on 67 counts, including 229 murders, conspiracy to murder, fraud totalling R36 million, and manufacturing, possessing and dealing in drugs.²⁰¹ For reasons that are unclear,²⁰² Basson was charged with ‘ordinary’ offences under South African law and not ‘international crimes’.²⁰³ However, the serious nature of his alleged conduct, and the possibility that his acts amounted to international crimes, became relevant to the proceedings before the Constitutional Court.

Following Basson’s acquittal in April 2002 on all counts,²⁰⁴ the State appealed the decision on a number of grounds.²⁰⁵ When the Supreme Court of Appeal rejected the appeal outright on procedural grounds,²⁰⁶ the State turned to the Constitutional Court on the basis that the matter raised constitutional issues. The State enjoyed some degree of success in the Constitutional Court; the court dismissed the appeals related to bias and the bail record, but overturned the quashing of certain charges by the High Court.²⁰⁷ However, the State declined to pursue these charges against Basson.²⁰⁸

The fiasco of the Basson trial was an ignominious beginning to South Africa's domestic enforcement of international criminal law. The reasons for the State's failure are multiple. Swart argues that 'one of the reasons the state failed to successfully prosecute Basson was because it did not base its arguments on the principles of international law, in particular the principle of universal jurisdiction, in the early stages of the case'.²⁰⁹ Be that as it may, in its two decisions on the matter, the Constitutional Court made important remarks regarding the prosecution of international crimes.

In *S v Basson I*, the Constitutional Court raised the international criminal character of the allegations in support of its finding that quashing of the charges gave rise to a constitutional matter.²¹⁰ In doing so, it found that 'international law obliges the state to punish crimes against humanity and war crimes'.²¹¹ Furthermore, it found that '[i]t is ... clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes'.²¹²

In *S v Basson II*, the Constitutional Court once again relied on the nature of the crimes – as potential international crimes – to remedy a procedural defect in the State's case.²¹³ It proceeded to make a number of important findings regarding international criminal law (and international humanitarian law) generally,²¹⁴ as well as on the question of international crimes committed under apartheid.

Broadly speaking, the court found that, in so far as the enforcement of ICL is concerned, the establishment of the ICC 'in no way deprives national courts of responsibility for trying cases involving breaches of such law which are properly brought before them in terms of national law'.²¹⁵ On the obligation to prosecute such crimes, the court repeatedly cited the obligations under international law without spelling them out. The closest it came was to note that 'comity to the international community from whom the mandate was derived required South Africa to punish members of its military who committed such grave offences, contrary to the Geneva Convention and international law'.²¹⁶

As far as international crimes committed during apartheid were concerned, the court found that the 1949 Geneva Conventions are part of customary international law, and were so in the 1980s.²¹⁷ Furthermore, it found that there was no need to classify the conflict with SWAPO in Namibia because the conduct of which Basson was accused 'would in the 1980s, as before and after, have grossly transgressed even the most minimal standards of international humanitarian law'.²¹⁸ The court appeared to accept that not only did these allegations, if proven true, violate international humanitarian law, but they also would amount to war crimes.²¹⁹ This is no small finding; as noted above, not all violations of IHL amount to war crimes.

Notably, these findings of the Constitutional Court in the *Basson* cases are difficult, if not impossible, to reconcile with its previous decision in *AZAPO v the President of South Africa*.²²⁰ First, its finding in *AZAPO* (to the effect that the Geneva Conventions of 1949 and its Protocols did not apply to the conflict in South Africa) is impossible to reconcile with its subsequent findings, on two occasions, that war crimes *of the same description* were committed during that time. Secondly, it is also difficult to square the court's twin assertions in *Basson* (that crimes against humanity were committed in South Africa during apartheid and that South Africa was under an *international obligation* to prosecute such crimes) with the failure of the court in *AZAPO* even to consider such crimes.

13.4.2.4.2 The SALC cases

The *SALC* cases involve an administrative review of the decision by the National Prosecuting Authority (NPA) and the South African Police Service (SAPS) not to institute an investigation into a docket submitted to the NPA in March 2008 by the Southern Africa Litigation Centre (SALC).²²¹ The docket contained allegations of crimes against humanity committed in Zimbabwe in 2007.²²² On the basis of the docket, SALC had requested the NPA to investigate and if necessary prosecute the

perpetrators under the ICC Act. This was the first and, so far, the only occasion South African courts have had to consider the ICC Act and, although it does not involve a prosecution (yet), it nonetheless significantly altered the international criminal justice landscape in South Africa.

The case has produced three judgments: in the High Court, the Supreme Court of Appeal (SCA) and the Constitutional Court. The North Gauteng High Court handed down judgment in May 2012.²²³ In short, the court found that the State's failure to open an investigation was unlawful and unconstitutional, and ordered the SAPS to 'do the necessary expeditious and comprehensive investigation', and then for the NPA to take its decision anew.²²⁴ In November 2013, the Supreme Court of Appeal unanimously rejected an appeal by the SAPS and the NPA against the judgment of the High Court.²²⁵ The nub of the case for the SCA was the correct interpretation of section 4(3) of the ICC Act, which governs the jurisdiction of South African courts to prosecute these crimes, and the antecedent question of when the SAPS have the power to initiate an investigation of an alleged offender. The SCA rejected the SAPS argument that 'for the purposes of s 4(3)(c) a crime could not be considered to have been committed until and unless the alleged perpetrator set foot on South African soil'²²⁶ as 'patently fallacious'.²²⁷ The SCA did so by conceptually separating jurisdiction into its three constituent powers (prescriptive, adjudicative and enforcement), and found that South Africa exercises *prescriptive* jurisdiction (that is, criminalises the conduct) – by way of section 4(1) read with the definitions of 'crimes against humanity' and Part 2 of Schedule 1 of the ICC Act – 'at the time of its commission, regardless of where and by whom it was committed'.²²⁸ Having found that the conduct in question (if proven) would amount to a crime under the ICC Act *at the time of its commission*, the SCA went on to consider the 'investigative competence' of the police in relation to crimes under the ICC Act. After considering the Constitution²²⁹ and the relevant legislation,²³⁰ the SCA found that 'it is clear that the [Police] ... has the competence to initiate an investigation into conduct criminalised in terms of the Act which had been committed extra-territorially'.²³¹

In October 2014, the Constitutional Court upheld the decision of the SCA, finding that the SAPS were not *only* empowered to investigate the alleged crimes, they were under a *duty* to do so, arising from 'the Constitution read with the ICC Act' and international law.²³² The court's key findings concerned jurisdiction in international law, the 'presence requirement' under the ICC Act (and international law), and the international and constitutional obligation to investigate international crimes.

The court's findings on jurisdiction are dealt with in more detail in the chapter on 'Jurisdiction and Immunity'. However, they crucially included the court's acceptance of the legality of universal jurisdiction under international law. On the question of whether the 'presence' of a suspect is required in order for a 'universal jurisdiction' investigation to commence, the court took a slightly different approach to that of the SCA. Whereas the SCA relied directly on the distinction between the 'constituent powers' of jurisdiction, the Constitutional Court simply found that 'section 4(3) sets the jurisdictional limits of South African courts', but 'it is silent on the circumstances under which our country has the duty to investigate international crimes committed outside of our territory'.²³³ Therefore, in light of this silence, the lack of consensus among scholars about whether international law *requires* a suspect's presence (and some evidence that it does not²³⁴), and 'policy' reasons in favour of rejecting presence as a requirement,²³⁵ the court concluded that 'the exercise of universal jurisdiction, for purposes of the investigation of an international crime committed outside our territory, may occur in the absence of a suspect without offending our Constitution or international law'.²³⁶ Notably, the court avoided directly interpreting the 'presence' requirement (under section 4(3) or *perhaps* international law) by consigning it to the 'more advanced stage of criminal proceedings'²³⁷ (that is, 'prosecution' or 'trial' phase, where a 'court' is involved), and it will be left to future courts to determine when this stage commences.

The potentially most far-reaching finding by the court was that the SAPS not only has the *power* to investigate alleged international crimes, but a *duty* (or obligation) to do so under international and domestic law.²³⁸ In support of the former, the court cited (a) the Preamble of the Rome Statute (which states that ‘it is the *duty* of every State to exercise its criminal jurisdiction over those responsible for international crimes’),²³⁹ (b) treaty law,²⁴⁰ and (c) because ‘they violate values that constitute the foundation of the world public order’.²⁴¹ The question of whether there is an international obligation to prosecute international crimes under international law (and under what circumstances) is a matter of some debate among international lawyers. Previously, in *S v Basson I*,²⁴² the Constitutional Court noted that ‘international law obliges the state to punish crimes against humanity and war crimes’,²⁴³ but this statement was not without qualification.²⁴⁴ Therefore, the court’s conclusion that there is in fact an unqualified ‘international obligation to investigate international crimes’ is remarkable. As far as domestic law is concerned, the court based the obligation of the SAPS to investigate crimes against humanity on the Constitution,²⁴⁵ the South African Police Services Act 68 of 1995,²⁴⁶ the National Prosecuting Authority Act 32 of 1998²⁴⁷ and the Implementation of the ICC Act.²⁴⁸ The court pointed out further that, while the prosecuting authority has ‘a discretion to institute criminal proceedings’, the SAPS simply ‘*bears a duty*’ to investigate international crimes.²⁴⁹ Notably, according to the court, this is not a ‘territorial’ obligation to prosecute (that is, an obligation that exists only in respect of crimes committed on the state’s territory). To the contrary, the court held that not only is it engaged in respect of crimes committed abroad, but also that it ‘is most pressing in instances where those crimes are committed ... within the territory of countries that are not parties to the Rome Statute, because to do otherwise would permit impunity’.²⁵⁰

Having set out a very broad obligation on states to prosecute, the court added that ‘the universal jurisdiction to investigate international crimes is not absolute’, and proceeded to set out two limitations in this regard. The first ‘limiting principle’²⁵¹ is actually made up of two distinct principles: ‘subsidiarity’ and ‘non-intervention’. The *principle of subsidiarity* ‘requires that ordinarily there must be a *substantial and true connection between the subject-matter and the source of the jurisdiction*’.²⁵² In terms of the *principle of non-intervention*, ‘investigating international crimes committed abroad is permissible only if the country with jurisdiction is unwilling or unable to prosecute and only if the investigation is confined to the territory of the investigating state’.²⁵³ The second ‘limiting principle’ is *practicability*, which requires that a state ‘consider whether embarking on an investigation into an international crime committed elsewhere is reasonable and practicable in the circumstances of each particular case’.²⁵⁴ This, according to the court, requires considering *inter alia* (i) whether the investigation is likely to lead to a prosecution and accordingly whether the alleged perpetrators are likely to be present in South Africa on their own or through an extradition request; (ii) the geographical proximity of South Africa to the place of the crime and the likelihood of the suspects being arrested for the purpose of prosecution; (iii) the prospects of gathering evidence that is needed to satisfy the elements of a crime; and (iv) the nature and the extent of the resources required for an effective investigation.²⁵⁵

The court did not provide legal authority for these two ‘limitations’ on the exercise of universal jurisdiction, although the first is clearly inspired by the Rome Statute’s ‘principle of complementarity’. Such authority would be difficult to find in international law. For one, the Rome Statute’s ‘unwilling and unable’ test is clearly intended to guide the International Criminal Court’s proceedings and not domestic proceedings taken pursuant to the principle of complementarity. The second principle might be conceived as a limitation imposed under domestic, constitutional law (particularly in so far as the inclusion of the ‘reasonableness’ test is concerned), but the court did not lay a foundation for this conclusion. Better to assume that these are the court’s own views on

the subject, along the line of ‘policy’ guidelines. Seen as such, they represent practicable and novel guiding principles for the exercise of this potentially expansive power by the SAPS and the NPA.

The court proceeded to apply these principles to the facts of the case, and in particular the reasons given by the SAPS for not opening an investigation. In doing so, the court emphatically rejected the ‘political effects’ reason advanced by SAPS, noting:

The cornerstone of the universality principle, in general, and the Rome Statute, in particular, is to hold torturers, genocidaires, pirates and their ilk, the so-called *hostis humani generis*, the enemy of all humankind, accountable for their crimes, wherever they may have committed them or wherever they may be domiciled. An approach like the one adopted by the SAPS in the present case undermines that very cornerstone. Political inter-state tensions are, in most instances, virtually unavoidable as far as the application of universality, the Rome Statute and, in the present instance, the ICC Act is concerned.²⁵⁶

Having done so, the court concluded that the SCA decision was correct and that ‘on the facts of this case the torture allegations must be investigated by the SAPS’,²⁵⁷ adding that South Africa ‘must take up [its] rightful place in the community of nations with its concomitant obligations’, lest it becomes ‘a safe haven for those who commit crimes against humanity’.²⁵⁸

SUGGESTED FURTHER READING

C Black ‘The place of international criminal law within the context of international humanitarian law’ in P Ambach, F Bostedt, G Dawson, & S Kostas (eds) *The Protection of Non-Combatants during Armed Conflict and Safeguarding the Rights of Victims in Post-Conflict Society* Leiden: Brill Nijhoff (2015)

¹ See generally KJ Heller *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011).

² In an influential essay entitled ‘The problem of an international criminal law’, written shortly after the Nuremberg and Tokyo Tribunals when the field was in its infancy, Schwarzenberger ascribed six possible meanings to the term, and then concluded that ‘international criminal law in any true sense does not exist’ (G Schwarzenberger ‘The problem of an international criminal law’ 3(1) *Current Legal Problems* (1950) 263).

³ Established in terms of UN Security Council Resolution 827 and Resolution 955 respectively. For an overview of the ad hoc tribunals, see A Cassese (ed) *Oxford Companion to International Criminal Justice* (2009) at 354–67.

⁴ Established in terms of the 1998 Rome Statute of the International Criminal Court (the Rome Statute).

⁵ For a discussion of the effects of ICL’s rise on these related fields, see K Anderson ‘The rise of international criminal law: Intended and unintended consequences’ 20(2) *European Journal of International Law* (2009) 331. However, in recent times, some have suggested that ICL might once again be in decline. See P Akhavan ‘The rise, and fall, and rise, of international criminal justice’ 11(3) *Journal of International Criminal Justice* (2013) 527.

⁶ R Cryer, H Friman, D Robinson & E Wilmshurst *An Introduction to International Criminal Law and Procedure* (2007) 1.

⁷ See below.

⁸ See A Cassese & P Gaeta *International Criminal Law* 3rd ed (2013) 3. Cassese and Gaeta are not alone in this respect. Many scholars include torture and terrorism within the definition of international crimes. See, for example, J Dugard *International Law: A South African Perspective* (2011) 159; W Schabas *Genocide in International Law: The Crime of Crimes* (2000) 26.

⁹ C Bassiouni *International Criminal Law* Vol I 3rd ed (2008) 134.

¹⁰ Cryer et al op cit 2.

¹¹ The crime of aggression, however, cannot be prosecuted by the International Criminal Court until an amendment comes into effect, no sooner than 2017. See below at para 13.2.4.

¹² See below at para 13.4.2.1.

¹³ Cassese defines ICL as ‘a body of international rules designed both to proscribe certain categories of conduct ... and to make those persons who engage in such conduct criminally liable’ (Cassese and Gaeta *International Criminal Law* op cit 3). Similarly, Werle describes the field thus: ‘International criminal law encompasses all norms that establish, exclude or otherwise regulate responsibility for crimes under international law’ (G Werle *Principles of International Criminal Law* (2005) 25). Bassiouni suggests that ‘[w]hat is contemporarily meant by international criminal justice is the application of the principle of accountability for certain international

crimes, whether before an international or national judicial body' (C Bassiouni 'International criminal justice in historical perspective: The tension between states' interests and the pursuit of international justice' in Cassese *Oxford Companion* op cit 131).

14 See chapter 12 of this book.

15 See C af Jochnick & R Normand 'The legitimisation of violence: A critical history of the laws of war' 35 *Harvard Journal of International Law* (1994) 49. For a critical discussion of the colonial origins of IHL, see F Megret 'From "savages" to "unlawful combatants": A postcolonial look at international humanitarian law's "other"' in A Orford (ed) *International Law and its 'Others'* (2009) 265.

16 Earlier antecedents include the 1863 Lieber Code, which regulated the American Civil War; the 1856 Paris Declaration Respecting Maritime Law; and the 1874 Protocol of the Brussels Conference.

17 The results of these conferences were a number of treaties governing the means and methods of warfare, the most notable being the fourth treaty, 'Respecting the Rules and Customs of War on Land', which codified a number of IHL rules in its annex.

18 The four conventions are: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War. The Geneva Conventions were augmented by two additional protocols in 1977: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II).

19 This was not the first international treaty to criminalise breaches of IHL. The Treaty of Versailles contemplated the prosecution of 'war crimes' committed in international armed conflicts. However, these provisions were never acted upon. At the Nuremberg and Tokyo Tribunals, such crimes were successfully prosecuted.

20 While the definition of international armed conflict is well settled in international law, the definition of non-international armed conflicts remains the subject of debate. There are presently three different definitions in international law, which differ substantially. See common art 3 of the 1949 Geneva Conventions, art 1(1) of the 1977 Additional Protocol II to the Geneva Conventions, and art 8(2)(f) of the Rome Statute.

21 Stewart notes that 'the 1949 Geneva Conventions and the 1977 Protocols contain close to 600 articles, of which only Article 3 common to the 1949 Geneva Conventions and the 28 articles of Additional Protocol II apply to internal conflicts' (J Stewart *International Review of the Red Cross* (2003) 320).

22 The grave breaches regime, for example, only applies to international armed conflicts. Only when the ICTR was created in 1994 was an international tribunal granted jurisdiction over violations of common art 3 of the Geneva Conventions and Additional Protocol II. Then, in its first decision in *Tadic*, the ICTY Appeals Chamber found that the norms criminalised in non-international armed conflicts 'cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects ... , protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition on the means of warfare proscribed in international armed conflicts and ban on certain methods of conducting hostilities'. For a critique of this decision, see F Hoffmann 'The gentle humanizer of humanitarian law: Antonio Cassese and the creation of customary law in non-international armed conflicts' in C Stahn & L van den Herik (eds) *Future Perspectives on International Criminal Justice* (2010) 58–80; and ICTY, *Prosecutor v Tadic* (Separate Opinion of Judge Li on the Defence Motion for an Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 para 13. See generally, W Schabas 'Punishment of non-state actors in non-international armed conflicts' 26(4) *Fordham International Law Journal* (2003) 907.

23 See however, South Africa's Geneva Conventions Act, discussed below at para 13.4.2.2 of this chapter.

24 This taxonomy is taken from Werle op cit.

25 See Rome Statute, arts 8(2)(a)(i) and 8(2)(c)(i) respectively.

26 Attacking such buildings is a war crime under both international (art 8(2)(b)(ix)) and non-international (art 8(2)(e)(iv)) armed conflict unless these buildings can be shown to be military objectives.

27 The Rome Statute prohibits 'Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated' (art 8(2)(b)(iv)).

28 Article 8(2)(b)(vii) of the Rome Statute prohibits '[m]aking improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury'.

²⁹ See art 8(2)(a)(viii) of the Rome Statute (international armed conflict) and art 8(2)(c)(iii) of the Rome Statute (non-international armed conflict).

³⁰ Nuremberg Charter, art 6. The Statute of the Tokyo Tribunal contained a slightly modified definition of crimes against humanity so as to exclude reference to racial and religious persecution, and the term ‘any civilian population’.

³¹ Nuremberg Charter, art 6.

³² This requirement fell away shortly after the Nuremberg Tribunal. It was not included in the Control Council 10 trials.

³³ The Rome Statute also requires the attack to be ‘pursuant to a state or organisational policy’, although it is not clear that this is part of the customary international law definition of the crime.

³⁴ The Control Council Law No. 10 trials added rape, imprisonment and torture to the list. The ICTY and ICTR Statutes further supplemented it. The Rome Statute added the forced transfer of populations, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, sexual violence, enforced disappearances and the crime of apartheid.

³⁵ The underlying acts of crimes include any other inhumane act that inflicts ‘great suffering, or serious injury to body or to mental or physical health’, provided that the act is of a character or similar character to one or more of the listed underlying acts (ICC, Elements of Crimes, art 7(1)(k), Element 1).

³⁶ The same is true of the contextual element of the crime of genocide: special intent. See below.

³⁷ *The Prosecutor v Jean-Paul Akayesu* (Trial Judgment), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para 579.

³⁸ In *Akayesu*, the Trial Chamber explained: ‘The concept of “widespread” may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims’ (*ibid*, para 580).

³⁹ *The Prosecutor v Blaskic* (Trial Judgment), IT-95-14-T, International Criminal Tribunal for the Former Yugoslavia, 3 March 2000, para 206.

⁴⁰ *Prosecutor v Katanga and Chui* (Decision on the confirmation of charges) ICC-01/04-01/07-717 Pre-Trial Chamber I, para 397.

⁴¹ *Akayesu* *supra*, para 580. In addition, according to the ICTY, ‘systematicity’ requires (i) a political objective or plan, (ii) large-scale or continuous commission of crimes that are linked, (iii) use of significant public or private resources, and (iv) the implication of high-level political and/or military authorities (ICTY, *Prosecutor v Blaskic*, Case No. IT-95-14-T (Judgment) 3 March 2000, para 203).

⁴² *Akayesu* *supra*, para. 581.

⁴³ See article II of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide. In 1951, the ICJ declared that ‘the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation’. As a result, the prohibition on genocide is now considered a *jus cogens* norm of international law (ICJ, *Reservations to the Convention on the Prevention and Punishment of Genocide* (Advisory Opinion) 28 May 1951, 23).

⁴⁴ Werle op cit 109. At the time, Lemkin defined genocide as ‘actions aimed at the destruction of essential foundations of the life of a group and guided by a plan to annihilate the group’ (*ibid*, 95).

⁴⁵ *Case Concerning Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports 2007, 43, para 187. At para 189, the ICJ cautioned: ‘[S]pecific intent is ... to be distinguished from other reasons or motives the perpetrator may have. Great care must be taken in finding in the facts a sufficiently clear manifestation of that intent’.

⁴⁶ In the *Genocide* case the ICJ noted: ‘In the first place, the intent must be to destroy at least a *substantial* part of the group. That is demanded by the very nature of the crime of genocide since the object and purpose of the convention as a whole is to prevent the intentional destruction of groups, and the part targeted must be *significant* enough to have an impact on the group as a whole’ (at para 198).

⁴⁷ In *Prosecutor v Krstic*, the ICTY Appeals Chamber found that ‘the Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group’ (*The Prosecutor v Krstic* (Appeal Judgment), IT-98-33-A, International Criminal Tribunal for the former Yugoslavia, 19 April 2004, para 25).

⁴⁸ Dissenting opinion of Judge Shahabuddeen, *Prosecutor v Krstić* (Appeal Judgment) *supra*.

⁴⁹ Notably, the crime of genocide per se was not prosecuted at Nuremberg. Acts that would come to be known as genocide were prosecuted as the war crime of extermination, and the crime against humanity of persecution.

⁵⁰ These ‘inhuman acts’ are: killing members of a protected group; causing serious bodily or mental harm to members of a protected group; deliberately inflicting on a protected group conditions of life calculated to bring

about its physical destruction in whole or in part; imposing measures intended to prevent births within the protected group; or forcibly transferring children of the protected group to another group.

51 Notably, the not-yet-operational African Court of Justice and Human Rights includes a sixth underlying act in its definition of genocide: ‘acts of rape or any other form of sexual violence’ (Amended Protocol of the African Court of Justice and Human Rights, art 28B(f) (on file with author)).

52 The Charter granted the Nuremberg Tribunal the power to ‘try and punish persons who … committed “crimes against the peace”’ (Nuremberg Charter, art 6). See further MJ Glennon ‘The blank-prose crime of aggression’ 35 *Yale Journal of International Law* (2010) 71 at 74 fn 63.

53 See eg, the 1954 International Law Commission ‘Draft Code of Offences Against the Peace and Security of Mankind’ and General Assembly Resolution 3314 (1974) (adopted to give guidance to the Security Council but which made no mention of individual criminal responsibility for aggression). For an overview of the reasons for these shortcomings, see A Cassese ‘On some problematical aspects of the crime of aggression’ in T Skouteris (ed) *The Protection of the Individual in International Law: Essays in Honour of John Dugard* (2007) 115–16. See also Glennon op cit 78–81; and G Simpson *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (2007) 150.

54 MC Bassiouni ‘From Versailles to Rwanda in seventy-five years: The need to establish a Permanent International Criminal Court’ 10 *Harvard Human Rights Journal* (1997) 11.

55 Article 5(2) states: ‘The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.’

56 Based largely on General Assembly Resolution 3314 (1974).

57 The final provision contains two jurisdictional regimes for aggression: one allowing states and the Prosecutor to trigger a prosecution (art 15bis) and another allowing the Security Council to do so (art 15ter).

58 Rome Statute, art 8bis(2) (not yet entered into force).

59 Ibid, art 8bis(1). However, the *act of aggression* ‘by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations’ (ibid).

60 At the risk of triteness, when reference is made here to the history of these crimes, reference is being made to their emergence as a matter of law, not of fact. Crimes that would meet the definition of war crimes, genocide, and crimes against humanity have been perpetrated by mankind prior to and since recorded history.

61 What follows is an orthodox history of ICL. For alternative histories, see generally K Heller & G Simpson (eds) *The Hidden Histories of War Crimes Trials* (2013); and G Simpson ‘Linear law: The history of international criminal law’ in C Schwobel (ed) *Critical Approaches to International Criminal Law: An Introduction* (2014) 159.

62 For example, according to Gaeta, ‘at the international level, the criminalisation of individual conduct is a recent phenomenon that evolved in the early 1990s’, only once the threat of criminal sanction existed in the forms of the ad hoc tribunals and the ICC. Regarding criminalisation internationally, see P Gaeta ‘International criminalization of prohibited conduct’ in Cassese *Oxford Companion* op cit 63 at 65–7.

63 There are notable differences between the normative bases of piracy and the crimes of genocide, war crimes, and crimes against humanity. As Simpson notes, ‘pirates were the enemies of empire or particular states, rather than humanity’ (*Simpson Law, War and Crimes* op cit Chapter VII).

64 Signed on 28 June 1919.

65 Although war crimes were outlawed previously under customary IHL, the Treaty of Versailles was ‘the first time, the idea of individual criminal responsibility under international law was explicitly recognised in a treaty’ (Werle op cit 5). For pure ‘domestic’ prosecutions, see B van Schaack & RC Slye ‘Defining international criminal law’ *Santa Clara University School of Law Legal Studies Research Papers Series No. 07-32* (August 2001) 19.

66 Treaty of Versailles (1919), art 227.

67 Ibid, art 228.

68 Ibid, art 227. The Tribunal was to be ‘composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan’. It stated further that ‘the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality’ (Treaty of Versailles (1919) art 227).

69 As Van Schaack and Slye explain: ‘In the face of continued Allied equivocation over war crimes trials and fierce objections amongst the German public … , Germany artfully proposed hosting domestic trial before the German Supreme Court in Leipzig. The Allies, desperate to salvage some vestige of the project, agreed’ (Van Schlaak & Slye op cit 25).

⁷⁰ Ibid, 25. See also Werle op cit 4.

⁷¹ Werle notes that the Nuremberg trials ‘can be considered the “birth certificate” of international criminal law’ (Werle op cit 5).

⁷² Control Council Law No. 10, which came into force on 20 December 1945, was adopted in order to provide for the prosecution of ‘lesser offences’ than those tried at the Nuremberg Tribunal.

⁷³ Simpson op cit 37–8.

⁷⁴ Schwarzenberger op cit 31–2.

⁷⁵ United Nations ‘Affirmation of the principles of international law recognized by the Charter of the Nuremberg Tribunal’, UN Doc A/RES/1/95, 11 December 1946.

⁷⁶ General Assembly Resolution 260 (III) (9 December 1948).

⁷⁷ Schabas *The International Criminal Court* op cit 8.

⁷⁸ International Convention on the Suppression and Punishment of the Crime of Apartheid (1974), which entered into force on 18 July 1976.

⁷⁹ General Assembly Resolution 44/39 (4 December 1989). The ILC had returned to the issue in 1983, when the General Assembly invited it to continue its work on a Draft Code of Offences Against the Peace and Security of Mankind, which had also stalled in 1954. See Schabas *The International Criminal Court* op cit 9–11.

⁸⁰ In this regard, Alvarez notes: ‘There is ... widespread consensus among international lawyers that the flaws of prior proceedings at Nuremberg and Tokyo have been largely corrected and that the new ad hoc tribunals for the former Yugoslavia and Rwanda are more credible instruments of the international community in terms of their respective bases of jurisdiction, rules and procedures, bench, and bar’. (JE Alvarez ‘Crimes of states/crimes of hate: Lessons from Rwanda’ 24(2) *Yale Journal of International Law* (1999) 365 at 377).

⁸¹ Schabas *The International Criminal Court* op cit 15.

⁸² The Special Court for Sierra Leone was established by the government of Sierra Leone and the United Nations (pursuant to Security Council Resolution 1315 (2000) of 14 August 2000) to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

⁸³ The Extraordinary Chambers in the Courts of Cambodia (hereinafter the ECCC) was established pursuant to an agreement between the Royal Government of Cambodia and the United Nations to try senior members of the Khmer Rouge for serious violations of Cambodian penal law, international humanitarian law and custom, and violation of international conventions recognised by Cambodia, committed during the period between 17 April 1975 and 6 January 1979.

⁸⁴ The Special Tribunal for Lebanon (Lebanon Tribunal) was established by an agreement between the United Nations and the Lebanese Republic (pursuant to Security Council Resolution 1664 (2006) of 29 March 2006) to try those responsible for the assassination of Rafic Hariri on 14 February 2005. The tribunal also has jurisdiction over a series of other attacks in Lebanon (between 1 October 2004 and 12 December 2005) if they are proved to be connected with the Hariri assassination. Notably, the Lebanon Tribunal is based in Leidschendam in the Netherlands.

⁸⁵ The East Timor Tribunal (officially the Special Panels of the Dili District Court) was established in 2000 by the United Nations Transitional Administration in East Timor (UNTAET) to try cases of ‘serious criminal offences’, including murder, rape, and torture, which took place in East Timor in 1999.

⁸⁶ Unlike the ad hoc tribunals that were created by the Security Council, these courts are established by treaties or ‘special agreements’ or under domestic legal regimes. As Shraga notes: ‘While similar to the [ad hoc] tribunals in their organizational structure, subject-matter jurisdiction and international legitimacy, mixed tribunals are distinguished from the former by their legal status, their mixed jurisdiction and composition and their funding mechanism’ (D Shraga ‘Politics and justice: The role of the Security Council’ in Cassese *Oxford Companion* op cit 424).

⁸⁷ General Assembly Resolution 50/46 (11 December 1995).

⁸⁸ Schabas *The International Criminal Court* op cit 19–20.

⁸⁹ Seven voted against the final text, with 21 abstentions.

⁹⁰ Preamble, Rome Statute 1998 (hereafter ‘Rome Statute’).

⁹¹ The most divisive issue at Rome that continues to shape the court’s operation and undermine its acceptance among some states is the role played by the Security Council. See below.

⁹² J Crawford ‘The drafting of the Rome Statute’ in P Sands (ed) *From Nuremberg to The Hague: The Future of International Criminal Justice* (2003) 109. For a discussion of US opposition to the ICC, see W Schabas ‘United States hostility to the International Criminal Court: It’s all about the Security Council’ 15(4) *European Journal of International Law* (2004) 701–20.

⁹³ As Simpson notes: ‘It must surely now be legitimate to include extradition proceedings involving Senator Pinochet, the Belgium legislation criminalizing acts of genocide, wherever they happen to be committed, and the various legal instruments purporting to implement the new [ICC] statute into domestic law as part of any study of international criminal law. Purists may cavil but no comprehension of the field is possible without a study of a broad range of legal techniques and institutions’ (Simpson *Law, War and Crime* op cit XV).

⁹⁴ As Simpson notes: ‘For some international lawyers … [d]omestic trials, court-martials, amnesties, or political settlements are viewed, quite often, as ‘setbacks’ for international justice … The future is said to lie with international criminal courts and the supercession of the provincialism of domestic courts’ (Simpson op cit 34).

⁹⁵ See Simpson’s discussion on the so-called ‘hidden history of international criminal law’ in Simpson *Law, War and Crime* op cit 40.

⁹⁶ Notably, at a meeting of the Allied Powers prior to the creation of the Nuremberg Tribunal, Sir David Maxwell Fyfe (the UK representative) noted: ‘What we want to abolish at the trial is a discussion as to whether the acts are violations of international law or not. We declare what the international law is so that there won’t be any discussion on whether it is international law or not’ (United States, Dept of State *International Conference on Military Trials, London* (1945) 19, quoted in Schwarzenberger op cit 290). See, however, Werle op cit 11.

⁹⁷ In the absence of an international enforcement mechanism for international crimes, ‘the international community [resorted] … to the traditional institutional framework of specific treaties or treaty rules aimed at imposing on states the duty to criminalise the prohibited conducts, and organising judicial cooperation for their repression’. In this way, ‘international law was used as a tool for the coordination of the exercise of criminal jurisdiction by states’ (P Gaeta ‘Internationalization of prohibited conduct’ in Cassese *Oxford Companion* op cit 64).

⁹⁸ See Convention on the Prevention and Punishment of the Crime of Genocide (1948), art VI; First Geneva Convention, art 49; Second Geneva Convention, art 50; Third Geneva Convention, art 129; and Fourth Geneva Convention, art 146 (all 12 August 1949). In addition, Additional Protocol I, art 85(1) incorporates this provision by reference. These provisions in effect place an obligation on states parties to prosecute or extradite offenders who commit grave breaches.

⁹⁹ F Jessberger ‘International v national prosecutions of international crimes’ in Cassese *Oxford Companion* op cit 208.

¹⁰⁰ Under the Rome Statute of the International Criminal Court (Rome Statute), the ICC will only be able to admit a case before it (where the other jurisdictional bases of nationality and territoriality are present) if the state party concerned is unwilling or unable to prosecute the offender nationally. See Preamble and Rome Statute, art 17. This principle is discussed further below.

¹⁰¹ *S v Basson* 2007 (3) SA 582 (CC) para 172.

¹⁰² See R O’Keefe ‘Universal jurisdiction: Clarifying the basic concept’ 2(3) *Journal of International Criminal Justice* (2004) 735.

¹⁰³ AU Press Release Number 037/2012: ‘The African Union has a clear and unequivocal mandate to fight impunity’ (15 May 2012). Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, 30 June–1 July 2008, Doc. Assembly/AU/14 (XI), Assembly/AU/Dec. 199(XI).

¹⁰⁴ In 1872, Gustave Moynier (one of the founders of the ICRC) proposed the establishment of an international tribunal to punish violations of Geneva Convention 1864 (Gustave Moynier ‘Note sur la création d’une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève’ 11 *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Comité International (1872) 122).

¹⁰⁵ In addition, the Office of the Prosecutor is conducting preliminary examinations in a number of situations including Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea and Nigeria.

¹⁰⁶ See *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06 (14 March 2012). Mr Lubanga was convicted of the war crimes of enlisting and conscripting ‘child soldiers’, and was sentenced to 14 years’ imprisonment. In December 2014, the ICC’s Appeal Chamber confirmed the conviction and sentence of Mr Lubanga. Since then, the ICC has acquitted Mathieu Ngudjolo Chui of the charges of war crimes and crimes against humanity in December 2012 and convicted German Katanga of crimes against humanity and war crimes in March 2014. See further http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.

¹⁰⁷ See Rome Statute, art 17.

¹⁰⁸ See D Sarooshi ‘The Statute of the International Criminal Court’ 48(2) *International & Comparative Law Quarterly* (1999) 395. For a discussion of the darker side of complementarity, see K Heller ‘The shadow side of complementarity: The effect of article 17 of the Rome Statute on national due process’ 17 *Criminal Law Forum* (2006) 255.

¹⁰⁹ For a defence of the principle of complementarity in the face of recent attempts to ‘water it down’, see F Megret & MG Samson ‘Holding the line on complementarity in Libya: The case for tolerating flawed domestic trials’ 11(3) *Journal of International Criminal Justice* (2013) 571.

¹¹⁰ See generally the section on ‘Jurisdiction’, chapter 6 of this book.

¹¹¹ Rome Statute, art 11(1).

¹¹² Rome Statute, art 11(2). An exception is created in circumstances when the state concerned has made a declaration to the Registrar under art 12(3) accepting the court’s jurisdiction.

¹¹³ Under art 12(2)(a), the court may exercise its jurisdiction if ‘[t]he State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft’ is a party to the Rome Statute. In effect, this gives the ICC territorial jurisdiction over all states parties.

¹¹⁴ Similarly, under art 12(2)(b), the court may exercise its jurisdiction if ‘[t]he State of which the person accused of the crime is a national’ is a state party. In effect, this gives the ICC personal jurisdiction over all such nationals.

¹¹⁵ Article 12 of the Rome Statute makes provision also for a ‘non-state party’ to accept the exercise of the court’s jurisdiction over a crime within the subject-matter jurisdiction of the court that either took place on the territory of that state or else was committed by one of its nationals. In such circumstances, art 12(3) provides that when a non-state party accepts the court’s jurisdiction, it must do so by lodging a declaration to this effect with the Registrar. In such circumstances, the ‘accepting state’ must co-operate with the court ‘without any delay or exception in accordance with Part 9’ of the Rome Statute.

¹¹⁶ This extraordinary and controversial jurisdiction stems from the binding nature of Chapter VII Security Council resolutions upon all UN member states.

¹¹⁷ See chapter 5 of this book, especially paras 5.2.6.1 and 5.4.1.

¹¹⁸ Rome Statute, art 14(1).

¹¹⁹ According to art 14(2): ‘As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.’

¹²⁰ Article 15(1). Article 15(2) adds: ‘The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.’

¹²¹ Rome Statute, art 15(3) and (4).

¹²² ICC, *Decision Pursuant to Article 15, Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* ICC-01/09 Pre-Trial Chamber II (31 March 2010).

¹²³ The issue of admissibility is conceptually and procedurally different from that of jurisdiction. Despite this, owing to the manner in which the Rome Statute is set out, they are often confused and conflated.

¹²⁴ The previous ICC prosecutor adopted a proactive position as far as complementarity is concerned, explaining that: ‘The admissibility assessment is an on-going assessment that relates to the specific cases to be prosecuted by the Court. Once investigations have been carried out, and specific cases selected, the OTP (Office of the Prosecutor) will assess whether or not those cases are being, or have been, the subject of genuine national investigations or prosecutions. In making this assessment the OTP will respect any independent and impartial proceedings that meet the standards required by the Rome Statute’ (ICC, *Report of the Prosecutor of the ICC to the UN Security Council Pursuant to UNSCR 1593* 29 June 2005, 4).

¹²⁵ Preliminary challenges to admissibility under art 18 may be brought by any state that ‘would normally exercise jurisdiction over the crimes concerned’. In this regard, art 18 requires the prosecutor – once he or she has determined that there is a reasonable basis to initiate an investigation (either after a state referral or based on his or her *proprio motu* power) – to notify all states parties, and any other states with jurisdiction over a particular case, before beginning an investigation (Rome Statute, art 18(1)). Article 18 explicitly excludes any investigations by the prosecutor pursuant to Security Council referrals under this provision, which arguably extends also to non-state party referrals, although the text here is ambiguous.

¹²⁶ Here, a challenge can be brought under art 18 in respect of the *situation* under investigation.

¹²⁷ Under art 19, admissibility may be challenged by a person against whom a warrant of arrest or summons to appear has been issued or against whom charges have been confirmed; or by any state[s] ordinarily with jurisdiction over the case ‘on the ground that it is investigating or prosecuting the case or has investigated or prosecuted [it]’ (Rome Statute, art 19(2)(a) and (b)).

¹²⁸ Rome Statute, art 19(1).

¹²⁹ Here, challenges to admissibility must be brought under art 19 in respect of each of these specific cases. Notably these procedures differ in substance also and not merely in terms of when they are brought.

¹³⁰ Only exceptionally will they be allowed after the commencement of a trial, or subsequently with the leave of the court, but only if they are based on the *non bis in idem* (double jeopardy) principle (Rome Statute, art 19(4)).

¹³¹ Article 17(2) elaborates the factors to be considered by the court when determining whether or not a state is genuinely unwilling to prosecute a case. This includes cases where ‘[t]he proceedings were or are being undertaken ... for the purpose of shielding the person concerned from criminal responsibility’; ‘[t]here has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice’; and ‘[t]he proceedings were not or are not being conducted independently or impartially’ (Rome Statute, art 17(2)).

¹³² In determining the inability of a state, art 17(3) provides that: ‘[i]n order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.’

¹³³ Article 17(1)(d).

¹³⁴ KJ Heller ‘Situational gravity under the Rome Statute’ in C Stahn & L van den Herik (eds) *Future Perspectives in International Criminal Justice* (2010) 227.

¹³⁵ Ibid.

¹³⁶ Rome Statute, art 20(3).

¹³⁷ Address of Antonio Cassese, President of the International Criminal Tribunal for the former Yugoslavia to the General Assembly of the United Nations, 7 November 1995. See also A Cassese ‘The statute of the International Criminal Court: Some preliminary reflections’ *European Journal of International Law* (1998) 164–5.

¹³⁸ The judge continued: “And these artificial limbs are state authorities.” If the cooperation of states is not forthcoming, the ICTY cannot fulfil its functions. It has no means at its disposal to force states to cooperate with it.’

¹³⁹ The basis for the obligation on states to co-operate is a normal treaty obligation under the Rome Statute, not an elevated UN Charter obligation, unless the Security Council explicitly states otherwise in a referral to the ICC (which it has not done to date). This makes the ICC even less ‘mobile’ than the ICTY, which was established by a resolution of the UN Security Council, under Chapter VII of the Charter.

¹⁴⁰ This classification was noted by the ICTY Appeals Chamber in *Prosecutor v Blaskic*, UIT-95-14-T (3 March 2000).

¹⁴¹ Rome Statute, art 88.

¹⁴² Rome Statute, art 89(1).

¹⁴³ See Rome Statute, art 103(3)(a), as well as Rule 201 of the Rules of Procedure and Evidence.

¹⁴⁴ Rome Statute, art 87(7).

¹⁴⁵ *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402 (24 June 2015).

¹⁴⁶ The ICC Pre-Trial Chamber I issued a warrant of arrest for Omar Hassan Al-Bashir for war crimes and crimes against humanity on 4 March 2009. See *Warrant of Arrest for Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09 (4 March 2009). Following a successful appeal by the Prosecutor, the ICC issued a second warrant of arrest for genocide on 12 July 2010. See *Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09 (12 July 2010). See further C Gevers ‘Making amend(ment)s: South Africa and the International Criminal Court from 2009 to 2010’ 34(1) *South African Yearbook of International Law* (2009) 1.

¹⁴⁷ *Southern Africa Litigation Centre v Minister of Justice* supra at para 2.

¹⁴⁸ See discussion in para 13.4 above on the ‘internationalising impulse’.

¹⁴⁹ Section 5 of South Africa’s Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, for example, states that if the National Director of Public Prosecutions declines to prosecute a person under the Act, he or she must notify the Registrar of the ICC of the decision and provide full reasons for the decision.

¹⁵⁰ See chapter 6 of this book on jurisdiction.

¹⁵¹ See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, ICJ Report 2002, 3 and discussion thereof in chapter 6, under para 6.6.

¹⁵² Constitution, s 232.

¹⁵³ The two pieces of legislation are unclear, and at times contradictory, in so far as jurisdiction, definitions of crimes, modes of responsibility, immunity and the initiation of investigations are concerned. Furthermore, there

are lingering doubts over the status of customary international *criminal* law in South Africa and the potential for direct application thereof.

¹⁵⁴ For an overview, see M du Plessis ‘South Africa’s implementation of the ICC Statute: An African example’ 5(2) *Journal of International Criminal Justice* (2007) 460.

¹⁵⁵ Article 88 states: ‘States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part’.

¹⁵⁶ See preamble and art 17 of the Rome Statute of the International Criminal Court (2002).

¹⁵⁷ Contrary to what is often suggested, ‘complementarity’ does not entail an *obligation* for states to prosecute crimes domestically. Complementarity is in fact a principle of *admissibility* that prevents the ICC from hearing a case when states are dealing with the matter. Nor does the Rome Statute contain such an obligation. Notwithstanding, commentators continue to suggest such and, more recently, the Supreme Court of Appeal agreed: ‘By way of its enactment of the ICC Act, the South African legislature complied with its *obligations as a State Party to the Rome Statute to take measures at national level and to ensure national criminal jurisdiction over the crimes set out in the Rome Statute*’, [own emphasis] (*National Commissioner of the South African Police Service and Another v Southern African Human Rights Litigation Centre and Another* 2014 (2) SA 42 (SCA) para 43).

¹⁵⁸ ICC Act, preamble. Section 3(d) of the Act defines as one of its objects the enabling of, ‘as far as possible and in accordance with the principle of complementarity … , the national prosecuting authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances’.

¹⁵⁹ This provision establishes the prescriptive jurisdiction over such crimes, notably without reference to territory.

¹⁶⁰ ICC Act, s 1.

¹⁶¹ ICC Act, Schedule 1. While the ICC Act incorporates the definitions of these crimes into South African domestic law, neither the ICC Act nor Schedule 1 refers specifically to the ICC elements of crimes. There is nothing, however, to prevent a South African court from having regard to these were it to be involved in the domestic prosecution of an ICC offence. Notably, s 2 of the ICC Act states that South African courts must consider and, where appropriate, apply ‘conventional international law, and in particular the [Rome] Statute’.

¹⁶² Section 4(3)(b) and (d) of the ICC Act respectively. It is also worth pointing out that South Africa does not routinely exercise such jurisdiction.

¹⁶³ One might point out that the fourth ground (universal jurisdiction) subsumes the others, making them somewhat superfluous.

¹⁶⁴ According to The Princeton Principles on Universal Jurisdiction (2001), ‘universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction’ (The Princeton Principles on Universal Jurisdiction (2001), Principle 1(1)). A preferred definition is that offered by O’Keefe, who defines it as ‘the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct’ (O’Keefe op cit 745).

¹⁶⁵ See chapter 6 of this book on jurisdiction, and in particular, the discussion of *National Commissioner of Police v Southern African Human Rights Litigation Centre & Another* 2015 (1) SA 315 (CC) in para 13.4.2.3 below.

¹⁶⁶ ICC Act, s 4(2)(a).

¹⁶⁷ See J Dugard & G Abraham ‘Public international law’ *Annual Survey of South African Law* (2002) 140 at 166.

¹⁶⁸ See chapter 6 of this book on jurisdiction and chapter 10 of this book on immunity.

¹⁶⁹ ICC Act, s 5(1).

¹⁷⁰ Appointed in terms of National Prosecuting Authority Act 32 of 1998, s 13(1)(c).

¹⁷¹ Hereafter referred to as ‘the Geneva Conventions Act’ or ‘the Act’. For an overview, see C Gevers, M du Plessis & A Wallis ‘Sixty years in the making, better late than never? The Implementation of the Geneva Conventions Act’ *African Yearbook on International Humanitarian Law* (2012) 185.

¹⁷² South Africa acceded to the four 1949 Geneva Conventions in 1952, and the 1977 Additional Protocols on 21 November 1995. For a discussion of South Africa’s reasons for not implementing the Conventions sooner, see Gevers et al op cit 185–6.

¹⁷³ Geneva Conventions Act, s 4(1).

¹⁷⁴ The grave breaches regime served as the basis for art 8(2)(a) and (c) of the Rome Statute.

¹⁷⁵ See below.

¹⁷⁶ According to the Act, a ‘grave breach’ means a breach referred to in art 50 of the First Convention, art 51 of the Second Convention, art 130 of the Third Convention, art 147 of the Fourth Convention, or art 11 or 85 of Protocol I (Geneva Conventions Act, s 5(2)). Notably, when Additional Protocol I was drafted, it was decided that breaches of its provisions would not attract criminal liability.

¹⁷⁷ Or, foreign occupation. See common art II of the 1949 Conventions and art 1 of Additional Protocol I (1977).

¹⁷⁸ Section 5(3) states that ‘[a]ny person who within the Republic contravenes or fails to comply with a provision of the Conventions not covered by subsection (2), is guilty of an offence’.

¹⁷⁹ See *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Judgment on Merits), ICJ Reports 1986, 14 at para 218.

¹⁸⁰ Section 5(1) of the Act states that ‘[a]ny person who, whether within or outside the Republic, commits a grave breach of the Conventions, is guilty of an offence’ [own emphasis]. Section 7(1) states: ‘Any court in the Republic may try a person for any offence under this Act in the same manner as if the offence had been committed in the area of jurisdiction of that court, notwithstanding that the act or omission to which the charge relates was committed outside the Republic’ [own emphasis].

¹⁸¹ Section 5(3) states: ‘Any person who within the Republic contravenes or fails to comply with a provision of the Conventions not covered by subsection (2), is guilty of an offence’ [own emphasis].

¹⁸² Section 5(4) states: ‘Any citizen of the Republic who outside the Republic contravenes or fails to comply with a provision of the Conventions not covered by subsection (2), is guilty of an offence’ [own emphasis]. The Act does not, unlike the ICC Act, extend its nationality jurisdiction to persons ‘ordinarily resident’ in the Republic. See ICC Act, s 4(3)(b).

¹⁸³ See below.

¹⁸⁴ In this respect, the Geneva Conventions Act goes further than the ICC Act, but not as far as the Rome Statute proper.

¹⁸⁵ Notably, the term ‘military superior officer’ includes a military superior officer and a person holding a superior civil position. Geneva Conventions Act, s 6(4)(a) and (b).

¹⁸⁶ Geneva Conventions Act, s 6(1)(a).

¹⁸⁷ Geneva Conventions Act, s 6(1)(b).

¹⁸⁸ Geneva Conventions Act, s 6(1)(c).

¹⁸⁹ Geneva Conventions Act, s 6(1)(c)(i).

¹⁹⁰ Geneva Conventions Act, s 6(1)(c)(ii).

¹⁹¹ Geneva Conventions Act, s 6(1)(c)(iii). See further Gevers, Du Plessis & Wallis op cit 185.

¹⁹² 2007 (3) SA 582 (CC) (‘Basson CC II’).

¹⁹³ Ibid, at footnote 147.

¹⁹⁴ Briefly, the Act states: ‘[n]othing in this Act must be construed as precluding the prosecution of any person accused of having committed a breach under customary international law before this Act took effect’ (s 7(4)). Textually, a plain reading of the text of s 7(4), which refers to the ‘prosecution of any person accused of having committed a breach under customary international law’, supports this interpretation. Furthermore, this provision could be interpreted as heading off any suggestion that the Geneva Conventions Act limits or curtails the prosecution of war crimes under some other piece of legislation or the common law. The only other relevant legislation is the ICC Act. However, in so far as this Act is concerned, this interpretation is both unnecessary (nothing in the Act suggests it is meant to limit other prosecutions) and redundant (this issue is already addressed in the Geneva Conventions Act, which notes that its provisions ‘must not be construed as *limiting, amending, repealing or otherwise altering* any provision of the [ICC Act]’ (s 19, Geneva Conventions Act). Only common law remains for such prosecutions, or more specifically ‘customary international law … as the basis in itself for a prosecution under the common law’. See further Gevers, Du Plessis & Wallis op cit.

¹⁹⁵ 2015 (1) SA 315 (CC).

¹⁹⁶ Ibid, para 37.

¹⁹⁷ In a South African context, this raises interesting possibilities given the suggestion in *S v Basson* that both war crimes and crimes against humanity were committed under apartheid.

¹⁹⁸ Basson, a cardiologist and the personal physician of former Prime Minister PW Botha, worked in a division of the South African Defence Force (the SADF) called the Civil Co-operation Bureau and headed the apartheid government’s top-secret chemical and biological weapons programme (‘Project Coast’).

¹⁹⁹ M Swart ‘The Wouter Basson prosecution: The closest South Africa came to Nuremberg?’ 68(1) *Heidelberg Journal of International Law* (2008) 209. Swart notes: ‘It is estimated that over a period of ten years (commencing from the time of his arrest in 1997) the state spent R125 million on the trial’ (ibid, 210).

²⁰⁰ Ibid, 211.

²⁰¹ Ibid, 210.

²⁰² One explanation offered at the time was that ‘international criminal law [was] … still too “exotic” for South African lawyers’ (Swart ‘The Wouter Basson prosecution’ op cit 213). Another explanation is that there was no statutory framework in place at the time incorporating these crimes into South African law.

²⁰³ With respect to the acts committed abroad, Basson was charged with conspiring *in South Africa* to commit such acts as South African courts were unable to exercise jurisdiction directly over such crimes. The situation would have been different had Basson been charged with international crimes that are subject to ‘universal jurisdiction’. See chapter 6 of this book on jurisdiction.

²⁰⁴ The trial was a fiasco from the outset. At the beginning of the trial, the presiding judge quashed six charges of conspiring to commit serious crimes, mainly murder, beyond the borders of South Africa (in England, Mozambique, Swaziland and Namibia) on the basis that the provision upon which they were based did not apply to offences committed outside the Republic. See *S v Basson II*, para 188. Then, three months in, the State applied unsuccessfully for the recusal of the presiding officer, Judge Hartzenberg, on the grounds that he was biased and had prejudged important issues in the case. Remarkably, the judgment, which is more than 1 000 pages long, is not reported.

²⁰⁵ This included allegations of bias on the part of the judge (and his failure to recuse himself), the judge’s refusal to admit the respondent’s bail record into evidence and the merits of the decision to quash the conspiracy charges at the outset of the trial.

²⁰⁶ See *S v Basson* 2004 (1) SA 246 (SCA).

²⁰⁷ *S v Basson II*, at para 260: ‘In all the circumstances, we conclude that the SCA should have granted the application for condonation and the petition for leave to appeal, upheld the question of law in favour of the state, set aside the order of the High Court upholding the exception and replaced it with an order dismissing the exception. The effect of this conclusion is that the indictment previously quashed, stands. It is up to the state to decide whether to put the accused on trial on the same indictment or on an amended indictment. Should the state decide to do so, the question of the right of Dr Basson to be tried within a reasonable time and the question of double jeopardy will have to be determined by the trial court, in the first instance.’

²⁰⁸ According to the National Prosecuting Authority, the reason for not pursuing the charges was that they ‘could be met by a defence of *autrefois acquit* because of the overlap between these charges and a charge on which Basson [was] … tried for and convicted’ (International Center for Transitional Justice, ‘Transitional Justice in the News’, 31 October 2005). However, the Constitutional Court had already noted that Basson would ‘not be able to raise the plea of *autrefois acquit* [in respect of the quashed charges] as there was no acquittal on the merits in respect of the … charges’, and added, ‘The accused did not plead to these charges and was therefore never in jeopardy of conviction upon them’ (*S v Basson II*, para 256). See however, para 169.

²⁰⁹ Swart ‘The Wouter Basson prosecution’ op cit 210.

²¹⁰ *S v Basson* 2005 (1) SA 171 (CC) (*Basson CC I*) at para 35. In this regard, Sachs noted in his separate concurring decision in *S v Basson I* (at para 111): ‘Issues which in another context might appear to be purely technical concerning the interpretation of a statute or the powers of a court on appeal, in my view, take on profoundly constitutional dimensions in the context of war crimes.’

²¹¹ *Ibid*, para 37.

²¹² *Ibid*, para 37. The court went on to note: ‘We do not have all the details before us but it does appear that the crimes for which the accused was charged may well fall within the terms of this international law obligation. In the circumstances, it may constitute an added obligation upon the state. We conclude therefore that the question of the quashing of the charges in this case also raises a constitutional matter.’ Sachs went on to note that ‘if the allegations contained in counts 31 and 61 could be proved, it would be difficult to argue that, accepting Cassese’s definition, they did not constitute war crimes’ (para 123).

²¹³ This time it was to overturn the SCA’s decision not to condone the State’s defective papers, as well as its refusal to consider the appeal on the quashing of the charges, as the order of the High Court did not amount to an acquittal or conviction of the accused.

²¹⁴ In respect of the latter, it noted that the distinction between international and non-international ‘has become more and more blurred and international legal rules … increasingly … regulate internal armed conflict’ (para 175).

²¹⁵ *S v Basson II* supra, para 172.

²¹⁶ *S v Basson II* supra, para 229. It appears to have avoided the question intentionally, noting at fn 147 that ‘[f]or the purposes of this case it is not necessary to enter into controversies surrounding the existence of universal jurisdiction for crimes against humanity and war crimes, and a concomitant duty to prosecute’.

²¹⁷ *S v Basson II* supra, para 177.

²¹⁸ The court specifically cited common art 3 of the Geneva Conventions as setting ‘minimum rules applicable to international and non-international conflicts’ (*S v Basson II* supra, para 178).

²¹⁹ The court noted: ‘As was pointed out at Nuremberg, crimes against international law are committed by people, not by abstract entities, so that only by punishing individuals who commit such crimes can the provisions of international law be enforced. Given the nature of the charges, the SCA should have given appropriate weight and attention to these considerations, even in the absence of any argument on these issues by the state. Given the extreme gravity of the charges and the powerful national and international need to have these issues properly adjudicated, particularly in the light of the international consensus on the normative desirability of prosecuting war criminals, only the most compelling reasons would have justified the SCA in exercising its discretion to refuse to rule on the charges’ (*S v Basson II* supra, para 184).

²²⁰ *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 672 (CC).

²²¹ The decision was challenged under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and the principle of legality.

²²² The docket contained evidence of acts of torture committed in Zimbabwe following a raid on Harvest House – the headquarters of the opposition Movement for Democratic Change – on 28 March 2007. The docket further alleged that the torture was *systematic*, and took place as part of *an attack against the civilian population, pursuant to a State policy*: the hallmarks of crimes against humanity (see Rome Statute, art 7). The docket named senior security and government officials that it alleged bore individual criminal responsibility for these crimes under the doctrine of superior responsibility (see Rome Statute, art 28(b)). According to the docket, these individuals frequented South Africa regularly on both official and personal business. On this basis, SALC requested the NDPP to investigate, and if necessary prosecute, these crimes under s 4 of the ICC Act on the basis of universal jurisdiction.

²²³ See *Southern Africa Litigation Centre and Another v National Director of Public Prosecutions and Others* (2012) 10 BCLR 1089 (GNP). For a discussion of the judgment, see G Werle & C Bornkamm ‘Torture in Zimbabwe under scrutiny in South Africa: The judgment of the North Gauteng High Court in *SALC v National Director of Public Prosecutions*’ 11(3) *Journal of International Criminal Justice* (2013) 659 and C Gevers ‘Southern Africa Litigation Centre & Another v National Director of Public Prosecutions & Others’ 130(2) *South African Law Journal* (2013) 293.

²²⁴ More specifically, the court found that the decision taken by the NPA in ‘refusing and/or failing to accede to the First Applicant’s request that an investigation be initiated under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, into acts of torture as crimes against humanity committed by certain named perpetrators in Zimbabwe’ was unlawful, inconsistent with the Constitution and therefore invalid (para 33.1). In light of ‘South Africa’s international law obligations as recognised by the Constitution’, the court ordered the police’s ‘Priority Investigation Unit’ (in cooperation with the NPA) to ‘do the necessary expeditious and comprehensive investigation of the crimes alleged in the torture docket’ (para 33.5). Having done so, the National Prosecuting Authority must then decide whether or not to institute a prosecution.

²²⁵ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2014 (2) SA 42 (SCA) (SALC (SCA)). C Gevers ‘National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre’ *South African Journal of Criminal Justice* (2013).

²²⁶ SALC (SCA) supra, para 50.

²²⁷ Ibid, para 51.

²²⁸ Ibid.

²²⁹ See s 205(3).

²³⁰ The South African Police Services Act 68 of 1995 and the National Prosecuting Authority Act 32 of 1998.

²³¹ SALC (SCA) supra, para 55. The court was quick to add however, that ‘the exercise of *enforcement* jurisdiction is limited to within a state’s own territory’, and therefore ‘the competence to investigate only persists within South Africa’s borders, absent the consent or co-operation of foreign states’.

²³² SALC (CC) supra, para 55.

²³³ Ibid, para 43.

²³⁴ The Constitutional Court cited a 2005 resolution of the Institut de Droit Internationale and the Rome Statute’s separation of the investigation and prosecution phases of criminal proceedings (SALC (CC) supra, para 46).

²³⁵ Ibid, paras 48–9.

²³⁶ Ibid, para 47.

²³⁷ Ibid, para 47.

²³⁸ SALC (CC) supra, para 55. It is worth noting that in its judgment the court uses the terms ‘duty’ and ‘obligation’ interchangeably – which is somewhat confusing at times and not beyond reproach.

²³⁹ SALC (CC) supra, paras 31–2.

²⁴⁰ According to the court, ‘along with genocide and war crimes, there is an international treaty law obligation to prosecute torture’ (*SALC (CC)*, para 38 [citing *inter alia* arts 1, 2, 4 and 6 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948); arts 49, 50, 129 and 146 of the four Geneva Conventions (1949) respectively; and arts 4, 5 and 7 of the Convention against Torture]).

²⁴¹ *SALC (CC)* supra, para 37 [citing Dugard et al *International Law: A South African Perspective* 4 ed (2011) at 157].

²⁴² 2005 (1) SA 171 (CC).

²⁴³ *SALC (CC)* supra, para 37.

²⁴⁴ See Gevers ‘*SALC v NDPP*’ op cit 299, noting: ‘[I]n the aftermath of *Basson* the obligation on South Africa to prosecute international crimes (as recognised by our courts) was both tentative and possibly territorially limited.’

²⁴⁵ Constitution, s 205.

²⁴⁶ Sections 16(1), 16(2)(iA), 17C(1) & 17D(1)(a).

²⁴⁷ Sections 13(1)(c), 24(3) & 24(7).

²⁴⁸ Item 1(f) of Part 2, Schedule 1.

²⁴⁹ *SALC (CC)* supra, para 56.

²⁵⁰ Ibid, para 32.

²⁵¹ Ibid, para 63.

²⁵² Ibid, para 61 [own emphasis].

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Ibid, para 64.

²⁵⁶ Ibid, para 74.

²⁵⁷ Ibid, para 80.

²⁵⁸ Ibid.

Chapter 14

International trade and sustainable development

OLIVER C. RUPPEL

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14.1 Introduction

This chapter outlines how sustainable development is integrated into the legal framework of the World Trade Organisation (WTO). This is tackled first by looking at how the trade and environment nexus has developed in the history of the WTO, and how it is reflected in different WTO agreements and disputes addressed by the WTO's Dispute Settlement Body (DSB). Thereafter, the special relationship between international trade and climate change is discussed. A brief summary follows on how the WTO promotes sustainable development by taking account of particular needs of developing countries. However, it is not only trade law and policy that integrates the concept of

sustainable development into its legal and policy framework. International environmental law and policy also contain provisions relevant for the interplay between trade and environment. Some interactions between multilateral environmental agreements (MEAs) and the world trading system are thus sketched before looking at the importance of sustainable development in regional and preferential trade.

14.2 Origins and basic concepts of international trade law and the WTO

The world trading system with the institutional framework as it functions today can be traced back to the end of World War II when the disastrous effects of the worldwide economic depression of the 1930s and trade battles had to be overcome.¹ Difficulties of currency exchange, protectionist tariffs and truculent international trade policies were motivation to convene a meeting in Bretton Woods, New Hampshire in July 1944. The aim was to create a new international monetary system and an international organisation to oversee that system.

Leaders of the Allied countries, particularly the United States and Britain, suggested a post-war multilateral trading system based on consensual decision making and co-operation to negotiate lower customs duties and the reduction or elimination of other trade barriers and to stimulate expansion in world trade. The Bretton Woods Conference envisaged three pillars to build an economic structure:

1. the International Monetary Fund, tasked with maintaining exchange stability and creating a stable climate for international trade by harmonising its members' monetary policies and which would be able to provide temporary financial assistance to countries encountering difficulties with their balance of payments;
2. the International Bank for Reconstruction and Development, which is today part of the World Bank Group and which was designed to improve the capacity of countries to trade by lending money to impoverished and war-ravaged countries for reconstruction and development projects; and
3. an international organisation to develop and co-ordinate international trade (today the World Trade Organization, the WTO).

After the United Nations (UN) was founded in 1945, multilateral trade negotiations were conducted within the framework of the UN Economic and Social Council. In 1946, this council adopted a resolution in favour of forming the International Trade Organization (ITO). Furthermore it was decided to prepare a multilateral treaty containing general principles of trade (the General Agreement on Tariffs and Trade, GATT), and schedules of tariff reductions.

While the work on the GATT and the tariff schedules was completed by the end of 1947, the ITO in fact never materialised. Through adoption of the Protocol of Provisional Application, the GATT and its tariff schedules came into force on 1 January 1948. In the absence of an international organisation for trade, the majority of world trade between 1948 and 1994 was undertaken under the legal framework of GATT. Rules for a multilateral trading system have been developed under GATT through a series (or rounds) of trade negotiations. The last GATT round, known as the Uruguay Round in the period from 1986 to 1994, led to the establishment of the WTO. Unlike the World Bank Group and the International Monetary Fund, which are specialised agencies under the United Nations, the WTO is not a part of the UN family but is a fully independent international organisation.²

Today, the WTO with its 161 members⁵ sees itself primarily as a forum for governments where international trade agreements are negotiated. The WTO provides a system of trade rules covering goods, services and intellectual property, as well as a legal and institutional framework for the implementation and monitoring of these agreements, and a venue for settling disputes arising from the interpretation and application of WTO agreements. Administering WTO trade agreements, monitoring national trade policies, providing technical assistance and training for developing countries and co-operating with other

- negotiating the reduction or elimination of obstacles to trade (import tariffs and other barriers to trade) and agreeing on rules governing the conduct of international trade (such as anti-dumping, subsidies and product standards);
- administering and monitoring the application of the WTO's agreed rules for trade in goods and services, and trade-related intellectual property rights;
- monitoring and reviewing the trade policies of members, as well as ensuring transparency of regional and bilateral trade agreements;
- settling disputes among members regarding the interpretation and application of the agreements;
- building the capacity of developing countries' government officials in international trade matters;
- assisting the process of accession of some 30 countries who are not yet members of the organisation;
- conducting economic research and collecting and disseminating trade data in support of the WTO's other main activities; and
- explaining to and educating the public about the WTO, its mission and its activities.

According to the Preamble to the Agreement Establishing the WTO, the multilateral trading system is a vehicle through which parties wish to attain higher living standards; ensure full employment; ensure a large and steadily growing volume of real income and effective demand; and expand the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development. Main instruments to achieve the WTO objectives include the reduction of tariff barriers and other barriers to trade and the elimination of discriminatory treatment in international trade relations, and thus the rejection of the use of protectionism.

The concept of non-discrimination is at the core of the trading system. It consists of two fundamental principles – namely, the most-favoured-nation (MFN) principle and the principle of national treatment (NT). The MFN principle entails that WTO members may in principle not treat one WTO trading partner less favourably than any other country. According to the NT principle, once a product, service or item of intellectual property has entered the market, it should be treated in the same way as a domestically sourced like product, service or item of intellectual property.

Besides the guarantee of non-discriminatory treatment by and among members, the WTO's founding and guiding principles remain the pursuit of open borders and a commitment to transparency in the conduct of its activities. The WTO asserts that the opening of national markets to international trade, with justifiable exceptions or with adequate flexibilities, will encourage and contribute to sustainable development, improve people's welfare, reduce poverty, and foster peace and stability. At the same time, such market opening must be accompanied by sound domestic and international policies that contribute to economic growth and development according to each member's needs and aspirations.⁶

14.3 Sustainable development and international trade

It is with good reason that the developments in the fields of trade and sustainable development have gained pace in the past years, both in legal theory and in practice.⁷ Arguably, every major contemporary topic relevant in international co-operation is directly or indirectly linked to at least one of the fields discussed in this chapter. This is due to the broad nature of the concept of sustainable development, which has been defined in the 1987 Report of the World Commission on Environment and Development as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’⁸ Sustainable development is thus composed of a variety of interrelated aspects, including economic and social development and environmental protection. The interrelationship between international trade, the environment and development is complex. On the one hand, general principles in these fields should, and in fact largely do, mutually support each other. Conversely, conflicts can arise in the application and realisation of each of the aforementioned range of subjects; these complicate implementation and enforcement of the law.

The triangular debate on economic growth, environmental protection and social development⁹ has special significance for developing countries. These nations are striving for higher economic growth after developed countries have already depleted resources and indulged in environmentally harmful practices in past centuries in order to achieve their unprecedented high standards of living. Developing countries are increasingly demanding a general but differentiated responsibility. In this respect, many seek open trade with the ‘developed north’ to stimulate economic growth, yet with the caveats of adequate compensation, a grace period, or more lenient standards for adopting environmentally restraining policies that were not in place during the industrialisation of developed nations.¹⁰

The *trade*-centred perspective is based on the perception that trade creates the wealth that increases human well-being. According to this perspective, trade can be good for the environment, as it creates wealth that can be used for environmental improvement. The efficiency gains from trade can mean fewer resources are used and less waste produced. Increased economic growth leads to more environmental protection and a higher standard of living. The exchange of goods introduces new technologies and improves existing ones, enabling environmental advancements (such as reduced emissions) and saving raw materials and natural resources.

The *environment*-centred perspective argues that the global environment represents a higher order than trade, and that the status quo seriously threatens the earth’s ecosystems. From this point of view, the wealth created by trade will not necessarily result in environmental improvements. On the contrary, trade liberalisation is deemed to cause greater harm than good, by encouraging demand for the import/export of cheap natural resources from particular areas of the world. This often leads to misallocation or over-harvesting of natural resources, which causes increased environmental degradation. In response to this argument, developing countries seek to protect themselves against ‘costly’ environmental demands from the ‘developed north’.

The *development*-centred perspective focuses on the peculiarities of developing countries, emphasising that developing countries’ top priority should be to reduce poverty. Openness to trade and investment may be a key way to do this, by increasing exports, although the link between trade liberalisation and economic growth is not automatic. One challenge confronting developing countries is that developed countries protect their industries with subsidies (financial contributions by a government or public body), special trade rules and tariff systems that support domestic production and employment. At the same time, they create barriers to trade that disadvantage exporters in developing countries. Considering that, in the past, developed countries caused most of the global environmental problems that exist today, through their largely unregulated

industrialisation, demands that developing countries comply with the environmental standards of developed countries are unfair, particularly if they are not accompanied by technical or financial assistance.

Possible conflicts among the competing ideals of environmental protection, economic growth and sustainable development, and the need to search for a balance, have been addressed by several legal instruments. For instance, Principle 11 of the 1972 Stockholm Declaration states that:

[t]he environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organisations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.

Since the 1992 UN Conference on Environment and Development in Rio de Janeiro, the principle of sustainable development has influenced a broad spectrum of international instruments, both legal and non-legal. The principle aims at embracing and balancing ecology, economy, conservation and utilisation and has become a worldwide governing political *leitmotif* for the environment and development.¹¹ It can be broadly understood as characterising: the close link between the policy goals of economic and social development, and those of environmental protection; the qualification of environmental protection as an integral part of any developmental measure (and vice versa); and the long-term perspective of both policy goals, that is the states' intergenerational responsibility.¹² These matters are further expanded upon in chapter 16 below.

Far more than any unconditional investment and development aid, trade can prove to be the catalyst, given favourable conditions, in uplifting millions of people from poverty. Developing countries could gain disproportionately from further global trade reform but it is widely acknowledged that a level playing field does not yet exist to the required extent. Developing countries still face numerous hurdles, including high tariffs on certain export products, and subsidised competition created when foreign imports (competing directly with an established domestic product) are cheaper due to benefits received from public funds. Nevertheless, the participation of developing countries in the global trading system is the most effective way of encouraging sustainable development and helping to alleviate poverty.

The importance of a harmonised interplay between trade and sustainable development is well reflected in the sustainable development goals (SDGs) that have been proposed by the UN Open Working Group¹³ and which are universally applicable (to all countries, not just developing nations and emerging economies). These include the following goals pertinent to strengthening the means of implementation and revitalising the global partnership for sustainable development:

17.10 Promote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the World Trade Organization, including through the conclusion of negotiations within its Doha Development Agenda

17.11 Significantly increase the exports of developing countries, in particular with a view to doubling the least developed countries' share of global exports by 2020

17.12 Realize timely implementation of duty-free and quota-free market access on a lasting basis for all least developed countries, consistent with World Trade Organization decisions, including through ensuring that preferential rules of origin applicable to imports from least developed countries are transparent and simple, and contribute to facilitating market access.

14.4 Sustainable development under the legal framework of the WTO

In the first place, the WTO is concerned with reducing trade barriers and eliminating discriminatory treatment in international trade. However, nowadays world trade law is also framed by the concept of sustainable development. Although environmental issues have not been negotiated as a separate topic during the Uruguay Round, the agreement establishing the WTO (unlike the GATT) has anchored the objective of sustainable development and the need to protect and preserve the environment within its Preamble:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.¹⁴

Although this statement in the Preamble is more of a policy goal than a binding principle, it has significant weight in decision making and dispute resolution and can make an important difference to the agreement's operation in practice. The importance of the citation of sustainable development in the Preamble has, for example, been highlighted by the WTO's Appellate Body in the so-called Shrimp–Turtle Case.¹⁵ Nowadays, world trade order is *de facto* closely related to international environmental policy and its institutions. Environmental degradation and pollution are largely induced by economic activities and international trade flows.

But what is the WTO's relationship to the environment? At first glance, the WTO provides a forum for negotiating agreements aimed at reducing obstacles to international trade and ensuring a level playing field for all, thus contributing to economic growth and development.¹⁶ The WTO is not an environmental protection agency. So far, its competence in the field of trade and environment is limited to trade policies and to the trade-related aspects of environmental policies that have a significant effect on trade. However, in addressing the link between trade and environment, the two fields can complement each other. Overall, the GATT/WTO rules already provide significant scope for members to adopt national environmental protection policies. The right of governments to protect the environment is confirmed by WTO agreements under certain conditions. This is regulated by way of exceptions that allow governments under certain conditions to implement policies to protect the environment but which affect trade. Trade liberalisation for developing country exports, along with financial incentives and technology transfers, are necessary to help developing countries generate the necessary resources to protect the environment and work towards sustainable development. Improved co-ordination on trade- and environment-related issues at the national level between trade and environmental officials, as well as increased co-ordination at the international level, could enhance mutual support between the trade and environmental regimes.

14.4.1 The WTO and the environment

Although the WTO's primary mandate is to promote trade, not protect the environment, the first paragraph of the Marrakesh Agreement establishing the WTO refers explicitly to the objective of sustainable development, aspiring both to protect and preserve the environment and enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.¹⁷ Consequently, the interface between trade and environment is well reflected in the different instruments of the WTO's legal system as is outlined in the next section.

14.4.1.1 Relevant agreements

Many of the agreements that have been concluded under the WTO's auspices contain provisions that are directly or indirectly pertinent to trade, the environment and sustainable development.

Table 14.1 WTO agreements

Agreement
The General Agreement on Tariffs and Trade (GATT)
The Agreement on Agriculture
The Agreement on Sanitary and Phytosanitary Measures (SPS)
The Agreement on Technical Barriers to Trade (TBT)
The Agreement on Subsidies and Countervailing Measures (SCM)
The General Agreement on Trade in Services (GATS)
The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
Agreement on Environmental Goods

14.4.1.1.1 The General Agreement on Tariffs and Trade (GATT)

The General Agreement on Tariffs and Trade (GATT) covers international trade in goods. This agreement was signed in 1947 and aimed at a reduction of tariffs and other trade barriers. The GATT developed rules for a multilateral trading system through a series of trade negotiations or rounds. The last GATT round (known as the Uruguay Round) lasted from 1986 to 1994 and led to the establishment of the WTO in 1995.

The Uruguay Round of Multilateral Trade Negotiations was concluded with the adoption of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. This Final Act includes the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement).

Although the GATT in its 1947 structure has disappeared, most of the 1947 GATT rules and disciplines are retained and incorporated into the GATT 1994. Tariffs and other trade barriers have been subject to negotiations during several rounds of negotiations. Eight rounds of negotiations have been concluded to date. The latest round, the Doha Round, started in 2001 but has not yet been concluded.

The workings of the GATT agreement are the responsibility of the Council for Trade in Goods (Goods Council), which is made up of representatives from all WTO member countries.

GATT 1994's articles I and III deal with non-discrimination. One component of the principles of non-discrimination is the MFN clause.¹⁸ It provides that WTO members are bound to treat the products of other members no less favourably than the products of any other country. No country may give special trading advantages to another, or discriminate against it. This means that all members are on an equal footing, and all share the benefits of any move towards lowering trade barriers. The MFN principle ensures that developing countries and others with little economic leverage are able to benefit freely from the best trading conditions, whenever and wherever they are negotiated. Another principle of non-discrimination within the GATT is the NT principle.¹⁹ It provides that once goods have entered a market, they must be treated no less favourably than equivalent domestically produced goods. Non-discrimination is one of the main principles on which the multilateral trading system is founded. It aims to secure predictable access to markets, protect

the economically weak from the more powerful, and guarantee consumer choice.²⁰ Non-discrimination in terms of environmental concerns prevents the abuse of environmental policies and their use as disguised restrictions on international trade.

However, the concept of non-discrimination is not absolute. Non-discrimination rules may be in conflict with important societal values and interests (such as national security, economic development, the protection of public health, or the environment). The WTO therefore provides for a number of exceptions from the principle of non-discrimination for certain trade-restrictive legislation or measures that would otherwise be inconsistent with WTO law. The broad field of exceptions can be subdivided into the following categories: general exceptions, security exceptions, economic emergency exceptions and regional trade exceptions. With regard to international trade and sustainable development, the general exceptions under article XX of the GATT 1994, as well as regional trade exceptions as laid down in article XXIV of the GATT 1994, are of major importance.

Within the group of *regional trade exceptions*, countries can be denied trading advantages on the basis that they are not members of a regional trade arrangement within which the members grant each other trading advantages and privileges. Such behaviour can be justified according to article XXIV:5 of the GATT. This article excludes customs unions and bilateral or regional free-trade areas from compliance with WTO disciplines under certain conditions. To be excused from compliance, a trade measure²¹ that is introduced upon the formation of a customs union, a free trade area or an interim agreement must fully meet the requirements of article XXIV sub-paragraphs 8(a) and 5(a). For a measure otherwise inconsistent with the GATT to be justified under article XXIV, it is furthermore required that, if it were not for the introduction of the measure at issue, the formation of the customs union or free trade area would be prevented.²²

In terms of environmental matters, article XX (granting *general exceptions* from the principle of non-discrimination) is most important. Article XX(b) stipulates measures that are necessary to protect human, animal or plant life and health, while article XX(g) sets out regulations pertaining to the conservation of exhaustible natural resources. WTO members may be exempted from GATT rules in specific instances. However, measures must be necessary (this is the ‘necessity test’).²³ If the conditions set by article XX are fulfilled, they must still pass the test of the introductory clause (*chapeau*) of article XX. According to the *chapeau*, measures may not be pronounced as arbitrary and unjustifiable discrimination between countries where the same conditions prevail and they may not constitute a disguised restriction on international trade.

The GATT’s article XI contains the principle of general elimination of quantitative restrictions (measures that limit the quantity of a product that may be imported or exported). The rationale for this provision is that such volume-based measures are considered to be more economically distorting than are price-based measures such as tariffs and taxes. A violation of Article XI has been claimed in the context of a number of environment-related disputes in which countries had imposed bans (quantitative restrictions) on the import of certain products and argued that the restrictions would be justified according to Article XI:II(c) allowing for import restrictions on any agricultural or fisheries product, necessary to the enforcement of governmental measures which operate to restrict production of the domestic product or for certain other purposes; the provision therefore has relevance for trade and environment-related discussions.

The GATT rules provide significant scope for members to adopt national environmental protection policies. WTO members are free to adopt national environmental protection policies, provided that they do not discriminate between imported, and domestically produced, like products (the NT principle), or between like products imported from different trading partners (the MFN clause).

14.4.1.1.2 The Agreement on Agriculture

The Agreement on Agriculture was negotiated during the 1986–1994 Uruguay Round, and is a significant first step towards fairer competition and a less distorted agricultural sector. WTO-member governments agreed to improve market access and reduce trade-distorting subsidies in agriculture. The agreement seeks to reform trade in agricultural products and provides the basis for market-oriented policies. In its Preamble, the agreement reiterates the commitment of members to reform agriculture in a manner that protects the environment. Under specific conditions, environmental programmes may be exempt from cuts in subsidies. Domestic support measures with minimal impact on trade (known as green box policies) are excluded from reduction commitments.²⁴ These include expenditures under environmental programmes that meet certain conditions. The exemption enables members to capture environmental externalities.²⁵

14.4.1.1.3 The Agreement on Sanitary and Phytosanitary Measures (SPS)

Broadly speaking, the Agreement on Sanitary and Phytosanitary Measures (the SPS) focuses on ensuring that a country's consumers are supplied with food that is safe to eat. In line with the general principle of non-discrimination, it also wishes to ensure that strict health and safety regulations are not used as an excuse to protect domestic producers.²⁶ The SPS objectives aim to protect human and animal life from risks arising from additives, contaminants, toxins or disease-causing organisms in their food, beverages and feedstuffs. The agreement covers a range of measures that are taken by countries to ensure the safety of these items, and for the protection of countries from the spread of pests or diseases. It also recognises the right of members to adopt SPS measures, but stipulates that they must be based on a risk assessment; should be applied only to the extent necessary to protect human, animal or plant life or health; and should not arbitrarily or unjustifiably discriminate between countries where similar conditions prevail.

14.4.1.1.4 The Agreement on Technical Barriers to Trade (TBT)

The Agreement on Technical Barriers to Trade (the TBT) deals with product and industrial standards. It attempts to ensure that regulations, standards, testing, and certification procedures do not create unnecessary obstacles to trade. Technical regulations and product standards may vary from country to country. Having many different regulations and standards not only complicates systems for producers and exporters, but if regulations are set arbitrarily, they could be used as an excuse for protectionism. The TBT thus aims to avoid unnecessary obstacles to trade through uniformity measures. Product specifications (known as technical regulations and standards), whether mandatory or voluntary, as well as procedures to assess compliance with those specifications (known as conformity assessment procedures), should not create unnecessary obstacles to trade. Article 2.2 provides for legitimate objectives whereby countries can pursue the protection of human health or safety; the protection of animal or plant life; and the protection of the environment.

14.4.1.1.5 The Agreement on Subsidies and Countervailing Measures (SCM)

The Agreement on Subsidies and Countervailing Measures (the SCM) controls the use of subsidies – that is, financial contributions by a government or public body that confer a benefit. At the same time, it regulates the actions that countries can take to counter the effects of subsidies. The SCM

applies to non-agricultural products, and in terms of the agreement, a country can use the WTO's dispute-settlement procedure to seek the withdrawal of a subsidy or the removal of its adverse effects. Alternatively, the country can launch its own investigation and ultimately charge extra duty ('countervailing duty') on subsidised imports that are found to be undermining domestic producers.²⁷ The agreement allows for subsidies up to 20 per cent of firms' cost for adapting to new environmental laws. Certain subsidies, referred to as 'non-actionable', are generally allowed. Article 8, on non-actionable subsidies, made direct reference to the environment. Among the non-actionable subsidies that were provided for under that article were subsidies used to promote the adaptation of existing facilities to new environmental requirements.²⁸ This provision was intended to allow members to capture positive environmental externalities when they arose, but it expired in its entirety at the end of 1999.

14.4.1.1.6 The General Agreement on Trade in Services (GATS)

The General Agreement on Trade in Services (the GATS) is among the WTO's most important agreements. The accord, which came into force in January 1995, is the only set of multilateral rules covering international trade in services. The GATS sets the framework within which companies and individuals can operate. It has two parts – namely, the *framework agreement*, containing the general rules and disciplines; and the *national schedules*, which list individual countries' specific commitments on access to their domestic markets by foreign suppliers.

The GATS contains a general exceptions clause in article XIV, similar to that in article XX of the GATT. In addressing environmental concerns, the GATS allows WTO members to maintain GATS-inconsistent policy measures, if this is necessary to protect human, animal or plant life or health.²⁹ However, this must not result in arbitrary or unjustifiable discrimination and may not constitute disguised restriction on international trade. The *chapeau* in article XIV of the GATS is identical to that of the GATT's article XX. Subsequent to the negotiations of the Uruguay Round, a list classifying services by sector was annexed to the GATS: drainage services, waste disposal services, health services, and others were categorised under the environmental service sector.

14.4.1.1.7 The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) introduced intellectual property rules into the multilateral trading system for the first time. Ideas and knowledge are an increasingly important part of trade. Most of the value of new medicines and other advanced technology products lies in the amount of invention, innovation, research, design and testing involved.

Films, music recordings, books, computer software and on-line services are bought and sold because of the information and creativity they contain, not because of the plastic, metal or paper used to make them. Many products previously traded as low-technology commodities now contain a higher proportion of invention and design in their value – for example, brand-named clothing or new varieties of plants. Creators can be given the right to prevent others from using their inventions, designs or other creations and can use that right to negotiate payment in return for others using them. These are intellectual property rights, and they take a number of forms. For example, books, paintings and films are under copyright; inventions can be patented; and brand names and product logos can be registered as trademarks. Governments and parliaments have given creators these rights as incentives to produce ideas that will benefit society as a whole.

The extent of protection and enforcement of intellectual property rights has varied widely around the world. As intellectual property became more important in trade, so these differences became a source of tension in international economic relations. New internationally agreed trade rules for intellectual property rights were seen as a way to introduce more order and predictability, and for disputes to be settled more systematically.³⁰ The TRIPS provides that patents are available for inventions in all fields of technology. However, it also regulates the permissible exceptions in article 27. Again, environmental protection is woven into this WTO agreement as an exception to free trade. Governments can refuse to issue patents that threaten human, animal or plant life or health, or that risk serious damage to the environment. In the case of the TRIPS, the only condition imposed for an exception is that exclusions from patentability are not based only on the prohibition of exploitation under national laws. Furthermore, the expected damage to the environment must be serious in nature in so far as environmental harm in general is not sufficient for justifying an exception in terms of the TRIPS. Also relevant for environmental protection as new technologies develop are the TRIPS provisions on access to and transfer of technology, especially to least-developed countries.

The TRIPS agreement is one of the WTO agreements that is subject to debate in terms of the relationship between trade and environment in general. Much of the debate centres upon the interrelationship between biological diversity and the protection of intellectual property rights, as they are connected in several respects. The coexistence of the TRIPS Agreement and the Convention on Biological Diversity (CBD) is a critical issue, and it is argued that the two legal texts contain contradictions that must be reconciled.³¹ The contradictions relate to the different approaches of the two regimes with regard to patents, biodiversity and traditional knowledge. Article 27 of the TRIPS is at the centre of the debate. While the TRIPS approach is that biological resources are subject to private intellectual property rights, the CBD is founded on the principle that local communities generate and are dependent on biodiversity and should continue to benefit from it. Accordingly, the CBD provides a legal basis for developing countries to demand a share of benefits, while this is not the case under the TRIPS. Specifically, Article 15(7) of the CBD obliges parties to take necessary measures to promote fair and equitable sharing of benefits arising from the commercial and other utilisation of genetic resources and traditional knowledge. One further issue of controversy is the lack of provisions in the TRIPS Agreement for prior informed consent. In contrast, the CBD in article 15(5) requires the prior informed consent of the country of origin, and requires the approval and involvement of local communities in so far as access to biological resources is concerned.

14.4.1.1.8 In the pipeline: Agreement on Environmental Goods

In July 2014, 14 WTO members, accounting for almost 90 per cent of world trade in environmental goods, launched plurilateral negotiations for an Environmental Goods Agreement. The negotiations relate to promoting trade and investment that are needed to protect the environment, and to developing and disseminating relevant technologies.

The first phase of the negotiations aims to eliminate tariffs or customs duties on a range of environmental goods. The next phase could address the bureaucratic or legal issues that could cause hindrances to trade and environmental services.³² The talks aim at securing a tariff-cutting deal on selected environmental goods, and they build on a list³³ of specific environmental goods put together by countries of the Asia-Pacific Economic Cooperation forum. Included are goods such as wind turbines, air quality monitors and solar panels. Meanwhile, several participating countries have presented indicative lists of product nominations related to cleaner and renewable energy, as well as energy efficiency, among others. The talks on an Agreement on Environmental Goods are

ongoing and the outcomes remain to be seen. In any event, the talks will contribute to the movement of sustainable development and environmental concerns towards the centre of discourse among WTO members.

14.4.1.2 Relevant bodies

A number of bodies have been established under the WTO to implement its mandate in relation to environmental issues. These are discussed below.

14.4.1.2.1 The Committee on Trade and Development

The Committee on Trade and Development is the main WTO body working on matters relating to developing countries. The mandate of the Committee is wide ranging and includes work on how provisions favouring developing countries are being implemented, guidelines for technical co-operation, increased participation of developing countries in the trading system, and the position of least-developed countries.

The Generalized System of Preferences programme (in which developed countries lower their trade barriers preferentially for products from developing countries) is handled by the Committee. So are preferential arrangements among developing countries, such as MERCOSUR (the Southern Common Market in Latin America), the Common Market for Eastern and Southern Africa (COMESA), and the ASEAN Free Trade Area (AFTA).

A Subcommittee on Least-Developed Countries has been established under the Committee to examine periodically the implementation of special provisions favouring least-developed countries in the WTO agreements, and to focus on technical co-operation and ways of integrating least-developed countries into the multilateral trading system.

14.4.1.2.2 The Committee on Trade and Environment

The WTO's Committee on Trade and Environment (the CTE) was established in 1994 by the Marrakesh ministerial Decision on Trade and Environment and has brought issues related to sustainable development and the environment into the mainstream of WTO work.³⁴ As a subsidiary body of the General Council of the WTO, the CTE is responsible for implementing the mandate it was given by the Decision on Trade and Environment. The CTE meets several times a year and membership is open to all WTO members. Observer governments and observers from intergovernmental organisations are invited to participate in CTE meetings. Originally, the CTE was endowed with the broad mandate 'to identify the relationship between trade measures and environmental measures in order to promote sustainable development' and 'to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system'.³⁵

The CTE was *inter alia* mandated to discuss:

- the links between the multilateral trading system and MEAs;
- relations between the WTO and taxes applied for environmental protection;
- relations between the WTO system and prescriptions established for environmental purposes with regard to products, norms, technical regulations and prescriptions on packaging, labelling and recycling;
- provisions of the WTO relating to the transparency of trade measures applied to the environment and environmental measures that have an impact on trade;

- the interrelationship between dispute settlement mechanisms established by MEAs and those provided by the multilateral trading system;
- the effects of environmental measures on market access;
- services;
- intellectual property; and
- the matter of export of prohibited products.

Some of the 10 items contained in the original work programme are subject to the current round of negotiations.³⁶ Considering its mandates and the items of its work programme, the CTE is an important institution in the search for a balance between the respective interests of trade and environment in general, and, more particularly, between the legal implications of the trading system and multilateral environmental agreements.

14.4.1.2.3 The WTO's Dispute Settlement Body

The Dispute Settlement Body (the DSB) is the WTO's judicial body. Under the forerunner of the WTO, the old GATT, a procedure for settling disputes existed. However, it had no fixed timetables, and rulings could only be adopted by consensus, so that a single objection could block the ruling. More structured procedures were introduced with the Uruguay Round agreement. Today, procedures have clearly defined stages and respective timelines, and rulings are automatically adopted unless there is a consensus on rejecting a ruling.

The dispute settlement mechanism of the WTO, one of the pillars of the multilateral trading system, is governed by articles XXII and XXIII of the GATT, and the Dispute Settlement Understanding (the DSU). In simplified terms, the full dispute settlement process can be subdivided into four phases.³⁷ The process begins with consultations between the countries in dispute. If consultations fail, the process enters the second stage, being the panel stage. Panels consist of three or five experts from different countries who examine the evidence and issue a report. The report becomes the DSB's ruling or recommendation unless a consensus rejects it. The third stage of the dispute settlement process is an appeal to the Appellate Body, if requested by one or both parties to the dispute. The relevant appeals report has to be accepted or rejected by the DSB. The final stage is that of adoption and implementation of the DSB's rulings and recommendations. As of 15 September 2014, 482 disputes had been brought to the WTO.³⁸ The majority of cases relate to the European Union (as a complainant in 93 cases, and as a respondent in 79 cases) and the United States (as a complainant in 107 cases, and as a respondent in 121 cases).

The involvement of developing countries in WTO-related cases accounts for over 40 per cent of the cases. However, it is mostly the large Asian and Latin-American developing countries that make use of the dispute settlement process. African countries have been respondents in eight cases only (Egypt and South Africa, each in four cases), and no African country has so far initiated proceedings in terms of the DSU.³⁹ The participation as third party is slightly higher, as 18 African countries have participated in proceedings in that capacity.⁴⁰

The reasons for Africa's minor role in the proceedings under the DSU are manifold.⁴¹ Although Africa's share in world trade is growing,⁴² its share (2.8 per cent of world exports and 2.5 per cent of world imports in the decade from 2000 to 2010)⁴³ is still small compared to that of other regions. With a narrow range of primary export products (mainly fuels and mining products),⁴⁴ it is understandable that the participation of African countries in the dispute settlement system is currently limited.⁴⁵ Further reasons for Africa's limited participation in litigation in terms of the DSU are the agreements granting preferential access to key trade markets, such as the Lomé

Conventions and the Cotonou Agreement; the European Partnership Agreements (EPAs); and the United States' African Growth and Opportunity Act (AGOA), since it is very likely that without such preferential access to certain markets, more African countries would make use of WTO dispute settlement procedures in order to contend successfully for market access. African priorities at this stage are focused on market access negotiations rather than on taking disputes to the WTO's judicial body. However, it is predictable that the African share of world trade will increase, and thus there may be a need to resolve disputes that arise. With increasing economic development and regional integration strengthening the position of African economies, combined with a growing base of legal expertise in trade-related issues, the participation of African countries in the dispute settlement system will undoubtedly increase.

14.4.1.3 Environmental exceptions to GATT

As has been sketched above, environmental concerns within the legal framework of the WTO are primarily dealt with as exceptions to basic WTO rules. Relevant provisions, similarly anchored within GATS, are contained in GATT article XX, which deals with general exceptions. Exceptions to the rules of trade liberalisation, market access and non-discrimination ensure that members are allowed to adopt measures or trade-restrictive legislation that focuses on the protection and promotion of other societal values. Environmental concerns play a prominent role in the system of general exceptions, which is well reflected in the various disputes that have been brought to the WTO's Dispute Settlement Body, as will be outlined below.

Article XX of the GATT 1994 provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- ...
(b) necessary to protect human, animal or plant life or health;
...
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

If a measure has been found to be inconsistent with other GATT rules, such as the MFN-clause in article I:1 of the GATT 1994, article XX can be invoked to justify the measure that is otherwise inconsistent with WTO rules. The measure can be justified under specific conditions only if (the 'two-tier test'):

1. the measure at issue must come under one or another exception as listed in article XX(a) to (j); and
2. the measure must satisfy the requirements imposed by the opening clauses of article XX (the '*chapeau*').⁴⁶

Environment-related exceptions in article XX are contained in article XX(b), which covers measures related to the protection of human, animal or plant life or health, and thus covers public health policy measures as well as environmental policy measures. However, for a measure to be justified, it is not sufficient to establish the existence of risks to the environment in general. Rather, the specific existence of risks to animal or plant life or health has to be established. A further requirement in terms of article XX(b) is that of 'necessity'. In determining whether a measure is necessary to protect human, animal or plant life or health, all relevant factors need to be considered, including the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective and its trade restrictiveness. Furthermore, the party seeking

justification for the measure must establish that there is no less trade-restrictive alternative to achieve the measure's objective.⁴⁷

Article XX(g) contains further environment-related exceptions. Measures otherwise inconsistent with GATT rules can be justified provided that the measure at issue relates to the conservation of exhaustible natural resources, which includes living and non-living resources.⁴⁸ Furthermore, a close and real relationship between the policy objective and the measure at issue must exist,⁴⁹ and the measure at issue must be made effective in conjunction with restrictions on domestic production or consumption. This does not mean that imported and domestic products must be treated identically, but rather an even-handedness is required in the imposition of restrictions in the name of conservation.⁵⁰

According to the *chapeau* of article XX, measures may not constitute arbitrary and unjustifiable discrimination between countries where the same conditions prevail and they may not constitute a disguised restriction on international trade. In order to avoid applying measures provisionally justified under article XX(a) to (g) in a way that would constitute a misuse of the exceptions of article XX, the *chapeau* of article XX requires that there must be a balance between the right of a member to invoke an exception and the substantive rights of other members under the GATT 1994.

The application of a measure can be considered to be *arbitrary* if it is applied in a rigid and inflexible manner and without considering the difference in conditions between countries.⁵¹ The application of a measure can be considered to be *unjustifiable* if the resulting *discrimination* has been foreseen and was not merely inadvertent or unavoidable. In particular, a measure is unjustifiable if a member has failed to make efforts to negotiate a multilateral solution prior to applying the unilateral measure or when there is no rational connection between the reasons given for the discrimination and the objective of the measure.⁵² The *chapeau* of article XX furthermore stipulates that the measure at issue may not constitute a *disguised restriction* on international trade. This is considered to be the case if compliance with the measure at issue is factually only a disguise to conceal the pursuit of trade-restrictive objectives.⁵³

The disputes sketched below show that the Appellate Body has not given a narrow interpretation to article XX but has rather emphasised the importance of a balance between trade liberalisation, market access and non-discrimination on the one hand, and other societal values referred to in article XX on the other.⁵⁴

14.4.1.4 Selected relevant disputes

Environment-related trade matters have been subject to WTO jurisprudence since the WTO was established. From a cross-section of this jurisprudence, it can be stated as a very general assumption that WTO rules do not necessarily take precedence over environmental concerns. Some of the environment-related trade matters that have been brought before the GATT/WTO dispute settlement mechanism are discussed below.

14.4.1.4.1 United States – Prohibition of Imports of Tuna and Tuna Products from Canada (1982)⁵⁵

An import prohibition was introduced by the United States after Canada had seized 19 fishing vessels and arrested US fishermen for harvesting albacore tuna without authorisation from the Canadian government, in waters considered by Canada to be under its jurisdiction. The United States did not recognise this jurisdiction and introduced an import prohibition in retaliation against Canada under the United States Fishery Conservation and Management Act of 1976.⁵⁶

The GATT Panel found that the import prohibition was contrary to the GATT's article XI:1 (which deals with the elimination of quantitative restrictions) and was not justified under either article XI:2 (which under certain conditions allows for import restrictions on agricultural or

fisheries product necessary to the enforcement of governmental measures), or article XX(g) (one of the general exceptions relating to the conservation of exhaustible natural resources).

14.4.1.4.2 Canada – Measures Affecting Exports of Unprocessed Herring and Salmon (1988)⁵⁷

Under the 1970 Canadian Fisheries Act,⁵⁸ Canada maintained regulations prohibiting the exportation or sale for export of certain unprocessed herring and salmon. The US complained that these measures were inconsistent with the GATT's article XI. Canada argued that these export restrictions were part of a system of fishery resource management aimed at preserving fish stocks, and therefore were justified in terms of article XX(g).

The Panel found that the measures maintained by Canada were contrary to the GATT's article XI:1 and were justified by neither article XI:2(b), nor by article XX(g).

14.4.1.4.3 United States – Restrictions on Imports of Tuna (Mexico) (1991, not adopted)⁵⁹

The US Marine Mammal Protection Act (the MMPA) of 1972⁶⁰ provided for a general prohibition of the ‘taking’ and importation into the United States of marine mammals, except when explicitly authorised. It governed, in particular, the taking of marine mammals incidental to harvesting yellowfin tuna in the Eastern Tropical Pacific Ocean (the ETP), an area where dolphins are known to swim above schools of tuna. The MMPA prohibits the importation of commercial fish, or products from fish, that have been caught with commercial fishing technology that results in the incidental killing or serious injury of ocean mammals in excess of US standards. In particular, the prohibition applied to the importation of yellowfin tuna harvested with purse-seine nets in the ETP (via a ‘primary nation embargo’) unless the appropriate US authorities could establish that the government of the harvesting country had a programme regulating the taking of marine mammals comparable to that of the US, and the average rate of incidental catches of marine mammals by vessels of the harvesting nation was comparable to the average rate of US vessels. The average incidental catch rate (in terms of dolphins killed each time in the purse-seine nets) for that country’s tuna fleet was not to exceed 1.25 times the average taking rate of US vessels during the same period. Imports of tuna from countries purchasing tuna from a country subject to the primary nation embargo were also prohibited (via an ‘intermediary nation embargo’).

Mexico claimed that the import prohibition on yellowfin tuna and tuna products was inconsistent with articles XI, XIII and III of the GATT. The United States requested the Panel to find that the direct embargo was consistent with article III, or alternatively, was covered by article XX(b) and (g). The United States also argued that the intermediary nation embargo was consistent with article III and was justified by paragraphs (b), (d) and (g) of article XX, because the tuna were caught in a manner harmful to dolphins.

The Panel found that the import prohibition in terms of both the direct and the intermediary embargoes did not constitute internal regulations within the meaning of article III. They were also inconsistent with article XI: 1, and were not justified by paragraphs (b) and (g) of article XX. Moreover, the intermediary embargo was not justified in terms of article XX(d). The Panel deemed that allowing the American import measures – that is, the import prohibition – would undermine the multilateral trading system.

14.4.1.4.4 United States – Standards for Reformulated and Conventional Gasoline (1996)⁶¹

Following the 1990 amendment to the Clean Air Act, the US Environmental Protection Agency (the EPA) promulgated the Gasoline Rule on the composition and emissions effects of gasoline, in order to reduce air pollution in the United States. The Gasoline Rule permitted only gasoline of a specified cleanliness (reformulated gasoline) to be sold to consumers in the most polluted areas of

the country. In the rest of the country, only gasoline no less clean than that sold in the base year of 1990 ('conventional gasoline') could be sold. The Gasoline Rule applied to all US refiners, blenders and importers of gasoline. It required any domestic refiner that was in operation for at least six months in 1990 to establish an individual refinery baseline that represented the quality of gasoline produced by that refiner in 1990. The EPA also established a statutory baseline, intended to reflect average US 1990 gasoline quality. The statutory baseline was assigned to those refiners that had not been in operation for at least six months in 1990, and to importers and blenders of gasoline. Compliance with the baselines was measured on an average annual basis.

Venezuela and Brazil claimed that the Gasoline Rule was inconsistent, *inter alia*, with the GATT's article III, and was not covered by article XX. The United States argued that the Gasoline Rule was consistent with article III, and in any event, was justified under the exceptions contained in paragraphs (b), (g) and (d) of article XX.

The Panel found that the Gasoline Rule was inconsistent with article III, and could not be justified under paragraphs (b), (d) or (g). On appeal against the Panel's findings on article XX(g), the Appellate Body found that the baseline establishment rules contained in the Gasoline Rule fell within the terms of article XX(g), but failed to meet the requirements of the *chapeau* of article XX.

14.4.1.4.5 Chile – Measures Affecting the Transit and Importing of Swordfish (WTO/ITLOS 2000)⁶²

Swordfish migrate through the waters of the Pacific Ocean. During their extensive journeys, they cross jurisdictional boundaries. For a decade from 1990, the European Community (the EC) and Chile were engaged in a controversial dispute over swordfish fisheries in the South Pacific and resorted to different international law regimes to support their positions. At issue has been the prohibition of the unloading of swordfish in Chilean ports according to article 165 of the Chilean Fishery Law.⁶³ Under Chilean legislation, the EC's fishing vessels operating in the South East Pacific were not allowed to unload their swordfish in Chilean ports either to land them for warehousing or to trans-ship them onto other vessels. According to the EC, this made transit through Chile's ports *de facto* impossible for swordfish. It was argued by the EC, *inter alia*, that Chile's measures were inconsistent with articles V and XI of the GATT 1994.

In April 2000, the EC decided to request consultations with Chile at the WTO's DSB, while Chile opted to bring a case before the International Tribunal for the Law of the Sea (the ITLOS) in December 2000.

At the WTO proceedings on 19 April 2000, the EC requested consultations with Chile and asserted that its fishing vessels operating in the South East Pacific were not allowed, under Chilean legislation, to unload their swordfish in Chilean ports. As a result, the EC considered that Chile made transit for swordfish through its ports impossible. The EC claimed that the above-mentioned measures were inconsistent with GATT 1994, and in particular articles V and XI. On 12 December 2000, the DSB established a panel, further to the request of the EC. In March 2001, the EC and Chile agreed to suspend the process for the constitution of the panel. This agreement was reiterated in November 2003.

On 28 May 2010, the European Union and Chile informed the DSB that they had unconditionally agreed that neither party should exercise any further procedural right accruing to it under the DSU and they would notify the DSB of any mutually agreed solution to the matters once such mutually agreed solution had been ratified.

The case at the ITLOS was similarly discontinued by agreement of the parties in 2009.

14.4.1.4.6 United States – Import Prohibition of Certain Shrimp and Shrimp Products (Initial Phase 1998)⁶⁴

To date, seven species of sea turtle have been identified in the world. They spend their lives at sea, where they migrate between foraging and nesting grounds. Sea turtles have been adversely affected by human activity, either directly (exploitation of their meat, shells and eggs), or indirectly (incidental capture in fisheries, destruction of their habitats, and pollution of the oceans).

In early 1997, India, Malaysia, Pakistan and Thailand brought a joint complaint against a ban imposed by the United States on the importation of certain shrimp and shrimp products. The US Endangered Species Act of 1973 (the ESA) listed as endangered or threatened the five species of sea turtles that occur in US waters, and prohibited their take within the United States, in its territorial sea and the high seas. Pursuant to the ESA, the United States required that its shrimp trawlers use ‘turtle excluder devices’ (TEDs) in their nets when fishing in areas where there was a significant likelihood of encountering sea turtles. Section 609 of Public Law 101–102, enacted in 1989 by the United States, provided, *inter alia*, that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the United States unless the harvesting nation was certified as having a regulatory programme and an incidental take rate comparable to that of the United States, or that the particular fishing environment of the harvesting nation did not pose a threat to sea turtles. In practice, countries having any of the five species of sea turtles within their jurisdiction and harvesting shrimp with mechanical means had to impose requirements on their fishermen comparable to those borne by US shrimpers (essentially the use of TEDs at all times) if they wanted to be certified and to export shrimp products to the United States.

The GATT Panel considered that the ban imposed by the United States was inconsistent with article XI and could not be justified under article XX. The Appellate Body found that the measure in question qualified for provisional justification under article XX(g), but failed to meet the requirements of the *chapeau* of article XX, and, therefore, was not justified under article XX of GATT 1994.

14.4.1.4.7 United States – Import Prohibition of Certain Shrimp and Shrimp Products (Implementation Phase 2001)⁶⁵

Malaysia introduced an action pursuant to article 21.5 of the DSU, arguing that the United States had not properly implemented the findings of the Appellate Body in the shrimp/turtle dispute described above. The implementation dispute revolved around a difference of interpretation between Malaysia and the United States on the findings of the Appellate Body.

In Malaysia’s view, a proper implementation of the findings would involve a complete lifting of the US ban on shrimps. The United States disagreed, arguing that it had not been requested to do so, but simply had to revisit its application of the ban. In order to implement the recommendations and rulings of the Appellate Body, the United States had issued Revised Guidelines for the Implementation of Section 609 of Public Law 101–162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations (the Revised Guidelines). These guidelines replaced the ones issued in April 1996, which were part of the original measure in dispute. The Revised Guidelines set forth new criteria for the certification of shrimp exporters. Malaysia claimed that section 609, as applied, continued to violate article XI:1 and that the United States was not entitled to impose any prohibition in the absence of an international agreement allowing it to do so. The United States did not contest that implementation of the measure was incompatible with article XI:1, but argued that it was justified under article XX(g). It argued that the Revised Guidelines remedied all the inconsistencies that had been identified by the Appellate Body under the *chapeau* of article XX.

The Implementation Panel concluded that the protection of migratory species was best achieved through international co-operation. However, it found that the Appellate Body had instructed the United States to negotiate (not necessarily to conclude) an international agreement for the protection of sea turtles with the parties to the dispute. The Panel found that the United States had indeed made

serious *bona fide* efforts to negotiate such an agreement, and ruled in favour of the United States. Malaysia subsequently appealed against the findings of the Implementation Panel. It argued that the Panel had erred in concluding that the measure no longer constituted a means of ‘arbitrary or unjustifiable discrimination’ under article XX. Malaysia asserted that the United States should have ‘negotiated and concluded’ an international agreement on the protection and conservation of sea turtles before imposing the import prohibition. The Appellate Body upheld the Implementation Panel’s finding and rejected Malaysia’s contention of ‘arbitrary and unjustifiable discrimination’ under the *chapeau* of article XX.

14.4.1.4.8 Brazil – Measures Affecting Imports of Retreaded Tyres (2007)⁶⁶

On 20 June 2005, the EC requested consultations with Brazil regarding its imposition of measures that adversely affected exports of retreaded tyres from the EC to the Brazilian market. The EC challenged the ban as a violation of WTO rules, whereas Brazil claimed that the imports of retreaded tyres led to a faster accumulation of waste tyres. In turn, this created health and environmental hazards by providing breeding grounds for mosquito-borne diseases such as dengue fever, yellow fever, and malaria, and by causing tyre fires that were difficult to control. Brazil argued further that it was not only costly to collect waste tyres scattered in its vast territory, but also technologically impossible to dispose of waste tyres without negative environmental consequences. Brazil thus defended the measure as necessary to protect health and the environment.

The Panel held that, although the ban was necessary to protect health and the environment, it was applied in a WTO-inconsistent manner because Brazil failed to enforce a similar ban on used tyre imports. Thus, the Panel decision effectively directed Brazil to impose further trade restrictions so as to advance its environmental objective. The measures at issue addressed by the EC included: Brazil’s imposition of an import ban on retreaded tyres; Brazil’s adoption of a set of measures banning the importation of used tyres, which are sometimes applied against imports of retreaded tyres, despite the fact that these are not used tyres; Brazil’s imposition of a fine of 400 BRL per unit on the importation, as well as the marketing, transportation, storage, keeping or keeping in deposit or warehouses of imported, but not domestically retreaded tyres; and Brazil’s exemption of retreaded tyres imported from other MERCOSUR⁶⁷ countries under the import ban, as well as from the above-mentioned financial penalties, in response to the ruling of a MERCOSUR panel established at the request of Uruguay.

The EC considered that the foregoing measures were inconsistent with Brazil’s obligations under articles I:1, III:4, XI:1 and XIII:1 of GATT 1994, while Brazil justified the foregoing by articles XX(b) and (d), and XXIV of GATT 1994.

In conclusion, the Panel found that Brazil’s import prohibition on retreaded tyres, and the fines imposed by Brazil on the importation, marketing, transportation, storage, keeping or warehousing of retreaded tyres, were inconsistent with article XI:1. The Appellate Body upheld the Panel’s finding that the import ban was provisionally justified as necessary within the meaning of article XX(b), stating that none of the less trade-restrictive alternatives suggested by the EC constituted reasonably available alternatives to the import ban.

The Appellate Body reversed the Panel’s findings that the MERCOSUR exemption and imports of used tyres through court injunctions would not result in the import ban being applied in a manner that constituted arbitrary discrimination, and would lead to unjustifiable discrimination and a disguised restriction on international trade only to the extent that they result in import volumes that would significantly undermine the achievement of the objective of the import ban. The Appellate Body determined that the assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure, and found that the MERCOSUR exemption,

as well as the imports of used tyres under court injunctions, had resulted in the import ban being applied in a manner that constituted arbitrary or unjustifiable discrimination and a disguised restriction on international trade within the meaning of the *chapeau* of article XX. The Appellate Body thus upheld, albeit for different reasons, the Panel's findings that the import ban was not justified under article XX. Having found that the import ban could not be justified by article XX(b), the Panel also found that the fines could not be justified under article XX(d), since they did not fall within the scope of measures that were designed to secure compliance with laws or regulations that are themselves inconsistent with some provision of the GATT.

14.4.1.4.9 China – Measures Related to the Exportation of Various Raw Materials⁶⁸

Initiated by a request for consultations by the United States on 23 June 2009,⁶⁹ this case deals with China's restraints on the export from China of various forms of raw materials. The consultations were joined by Canada,⁷⁰ the EC,⁷¹ Mexico⁷² and Turkey.⁷³ This dispute deals with certain measures imposed by China affecting the exportation of certain forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorous and zinc. China is a leading producer of each of these raw materials, which are used to produce everyday items as well as technology products. Four types of export restraints imposed on the different raw materials at issue were challenged – namely, export duties, export quotas, minimum export price requirements, and export licensing requirements.

The DSB established a panel and Argentina, Brazil, Canada, Chile, Colombia, Ecuador, the EU, India, Japan, Korea, Mexico, Norway, Chinese Taipei, Turkey and Saudi Arabia reserved their third-party rights. The United States considered that China was in violation of articles VIII, X, and XI of GATT 1994, and several provisions of the Protocol on the Accession of the People's Republic of China (the Accession Protocol) by imposing temporary duties on exports of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc and by furthermore subjecting exports of yellow phosphorus to a duty in excess of the *ad valorem* rate listed for Item No 11 in Annex 6 to the Accession Protocol. The EU claimed that China had violated the obligation assumed under the note to Annex 6 to consult 'with other affected WTO Members prior to the imposition' of the export duties on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and certain forms of zinc.

Article XX of GATT 1994 and, in particular, its provisions relating to environmental matters, play a major role in this case. China⁷⁴ argued, *inter alia*, that the export duty applied to fluorspar was justified, pursuant to article XX(g), because it is a measure relating to the conservation of an exhaustible non-renewable mineral resource, and is applied in conjunction with restrictions on domestic production and consumption. The export duties applied to coke, magnesium metal, and manganese metal are justified, pursuant to article XX(b), because they are necessary for the protection of human, animal, and plant life or health by virtue of their contribution to the reduction of the polluting and energy-intensive production of coke, magnesium metal, and manganese metal.

On 5 July 2011, the Panel⁷⁵ ruled in favour of the claimants and found that the wording of the Accession Protocol did not allow China to use the general exceptions in article XX of GATT 1994 to justify its WTO-inconsistent export duties, and that even if China were able to rely on certain exceptions available in the WTO rules to justify its export duties, it had not complied with the requirements of those exceptions. The Panel recommended that China bring its export duty and export quota measures into conformity with its WTO obligations such that the series of measures do not operate to bring about a WTO-inconsistent result.

Upon appeal, the Appellate Body⁷⁶ upheld the Panel's finding that there is no basis in China's Accession Protocol to allow the application of article XX of GATT 1994 to China's obligations

under Paragraph 11.3 of the Accession Protocol. The Appellate Body report and the Panel report, as modified by the Appellate Body report, were adopted by the DSB⁷⁷ and China informed the DSB of its intention to implement the rulings and recommendations.

14.4.1.4.10 China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum⁷⁸

On 13 March 2012, the US,⁷⁹ Japan⁸⁰ and the EU⁸¹ requested consultations with China under the WTO's dispute settlement system. Canada has also requested to join the consultations.⁸² The case deals with China's restrictions on the export of various forms of rare earths,⁸³ as well as tungsten and molybdenum. Rare earths feature unique magnetic, heat-resistant and phosphorescence properties and are used, inter alia, to produce highly efficient magnets, phosphors, optical and battery materials. These materials are key components of products such as helicopter blades; wind-power turbines; energy-efficient light bulbs; motors for electric and hybrid vehicles; flat screens and displays; hard drives; medical equipment; and many others. Although reserves of rare earth elements are dispersed throughout the world with China holding only 50 per cent of the world's reserves, China has a near-monopoly position with more than 97 per cent of the world's rare earth production.⁸⁴ The country has curbed output and exports since 2009 to conserve mining resources and protect the environment. The complaint related to China's restrictions in the form of export duties; export quotas; minimum export price requirements; export licensing requirements; and additional requirements and procedures in connection with the administration of the quantitative restrictions. The complainants claimed that China's measures were inconsistent with articles VII, VIII, X and XI of GATT 1994 and several provisions of China's Protocol of Accession. It is argued that China administers export restrictions on various forms of rare earths, tungsten, and molybdenum, and that the requirements and procedures in connection with these export restrictions are administered in a manner that is not uniform, impartial, reasonable, or transparent.

On 29 August 2014, the DSB adopted the Panel and Appellate Body reports, which found that China's export restrictions on rare earths, tungsten and molybdenum were in breach of China's WTO obligations and were not justified under the GATT exceptions.

14.4.2 The WTO and developing countries

Helping developing and least-developed countries secure a share in the growth of international trade commensurate with the needs of their economic development has steadily gained importance in recent years. Developing and least-developed country members can gain access to a range of special provisions and assistance contained in the rules of the WTO – in general, referred to as special and differential treatment. The WTO provides no explicit definition as to which country is considered to be a developing country. The status of a member as a developing country is to a large extent based on self-selection and members announce whether they consider themselves developing countries. In some cases, the developing country status is part of the accession negotiations.⁸⁵ Least-developed countries, being those that have been designated as such by the United Nations,⁸⁶ benefit from additional special and differential treatment.

Altogether, over two-thirds of WTO members are developing and least-developed countries. In recent years, they have participated more actively and efficiently in WTO negotiations and decision making. In the course of recent negotiations, developing countries, including least-developed countries, have been able to make their voice heard and their concerns considered.⁸⁷ Developing countries are represented in several (sometimes overlapping) negotiating groups, such as the African group or the group of least-developed countries. These groups aim to speak with one voice using a single co-ordinator or negotiating team and have gained in influence in WTO negotiations and decision making. The standard procedure for decision-making in the WTO is based on consensus. Under WTO rules, this means that 'the body concerned shall be deemed to have decided

by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision'.⁸⁸ Where consensus is not possible, the WTO agreement allows for taking decisions by voting on the basis of one country, one vote, and with a vote being won with a majority of the votes cast. This, however, is implemented only exceptionally.

There is a broad variety of provisions granting special and differential treatment to developing countries.⁸⁹ The General Agreement on Tariffs and Trade (GATT), for example, has a special section on Trade and Development. In general terms, the WTO framework includes provisions allowing developed countries to treat developing countries more favourably than other WTO members, and provisions granting extra time for developing countries to fulfil their commitments under certain WTO agreements. Other provisions are designed to increase developing countries' trading opportunities through greater market access, or require WTO members to safeguard the interests of developing countries when adopting domestic or international legislation. Moreover, provisions on technical assistance for developing countries are part of WTO efforts in favour of developing countries. Legal assistance and training of government and other officials are special fields of support to developing countries. In sum, it can be stated that the WTO's legal framework contains numerous provisions for special and differential treatment for developing countries. Technical support forms an important pillar for dealing with the special needs of developing countries.

Concerns have been raised with regard to the effectiveness of the numerous provisions on special and differential treatment for developing countries, which have been considered as best-endeavour provisions that are not enforceable.⁹⁰ Nevertheless, some of the developing countries do play an increasingly important and active role in the WTO as they become more important in the global economy. Integrating developing economies into the global trading system is an important and controversially discussed issue at multilateral trade negotiations, and remains one of the challenges facing the WTO. As to the challenges between sustainable development and trade, these are notably driven by advanced economies as well as civil society. For the time being, developing countries are wary of potential agreements on trade and the environment. The on-going negotiations on climate change are exemplary in this regard.

A very important factor in the current discussions on development, and on special and differential treatment in the WTO, is the Doha Development Round of negotiations. It was officially launched at the WTO's Fourth Ministerial Conference in Doha, Qatar, in November 2001 and is currently at a crossroads. One fundamental objective of the Doha Development Agenda is to improve the trading prospects of developing countries. Although its future remains uncertain owing to controversies among members on many items on the agenda, one major step forward was the Bali Package concluded at the Ninth Ministerial Conference of the WTO in December 2013. The main issues of this conference included measures to support least-developed WTO member countries and a review mechanism for the special and differential treatment provisions applicable to least-developed countries and developing countries in all WTO agreements. Part II of the Bali Package relates to the work under the Doha Development Agenda. With regard to development and least-developed country issues, Part II of the Bali Package includes, among others, preferential rules of origin for least-developed countries; duty-free and quota-free market access for least-developed countries; and a monitoring mechanism on special and differential treatment. These are important achievements with regard to the Doha Development Round. However, an enormous amount remains to be accomplished (especially an encompassing agreement on agriculture) and the implementation of decisions remains a major challenge. As it is likely that some issues, and in particular the issue of agriculture, are not going to be resolved in the current round, the focus of attention is shifting to mega-regional trading arrangements.

It is hoped that the outcomes of the ongoing Doha negotiations will reflect the beneficial role that world trade could play in sustainable development and the reduction of poverty. A key objective of the ongoing round of WTO negotiations is to assist developing countries more fully in reaping the benefits of international trade. The liberalisation of agriculture, in particular, is hoped to provide significant benefits to developing countries. Trade can be a powerful source of economic growth. But trade liberalisation is not automatically or always associated with economic growth, let alone poverty reduction or sustainable development.

14.5 Climate change and world trade law⁹¹

As a general message from the recently published Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), there is no doubt that we live in a world altered by climate change – one of the greatest challenges of the twenty-first century. Climate change poses risks to human and natural systems and has the potential to impose additional pressures on various aspects of human security.⁹² The risks and impacts related to climate change can be reduced by improving society in ways that decrease its vulnerability and lower the overall risk level (adaptation), and by reducing the amount of climate change that occurs (mitigation).

Developing global strategies for the sustainability of ecosystems in the face of human-induced impacts will be one of humankind's greatest tasks, requiring new and intensive research efforts. It will pose many challenges to international law and global governance. A strong legal framework embedded in more effective global institutions will be required in future. International law, politics and social sciences – traditionally viewed as separate academic disciplines – need to become part of a more integrated, coherent, interdisciplinary and holistic interplay if they are to get a grip on climate change, arguably the most significant challenge of our time.

Environmental threats such as climate change have the potential to impose additional pressures on various aspects of human security. Intersecting with each other, these pressures include water stress and threats to land use and food security, health security, and environmentally induced migration, among others. Adverse climate events not only deepen poverty vulnerability in developing countries,⁹³ they impact on all aspects of human security either directly or indirectly.

Ultimately, environmental damage may significantly affect economic growth and hamper sustainable development.⁹⁴ For example, climate extremes exert substantial stress on low-income populations in particular. The poor are most vulnerable to multiple dimensions of climate change such as heat waves, sea-level rise, the destruction of coastal zones and water shortages due to drought.⁹⁵

The international trade regime under the World Trade Organization (WTO) is also strongly related to the international climate change regime. In fact, both regimes recognise that climate change may provide opportunities as well as challenges for international development.⁹⁶ The WTO is a remarkable example of institutional evolution and its dispute settlement system is as effective as it is impartial. However, similar to the international climate change negotiations, the Doha Development Round of multilateral trade negotiations have been complex and without sufficient success so far. Both negotiation processes seem to lack the necessary consensus of the parties involved. The only difference between the two negotiation processes lies in the fact that our climate cannot wait for lengthy negotiations as they are taking place in the case of the Doha Development Round.⁹⁷

With regard to the persistence of global poverty and socio-economic inequalities, international trade rules often allow affluent countries to continue to protect their markets with tariffs, quotas, anti-dumping duties, export credits and huge subsidies to domestic producers. This is at the expense of potential agricultural and textile exports from developing countries.⁹⁸ International trade should therefore be considered as a means to an end, but not as the end in itself. An effective international

trade regime must first and foremost be friendly to the environment, poverty reduction and sustainable development.⁹⁹ Increasing awareness of the negative effects of climate change, and continuing communication among international institutions, as well as public dialogue, necessarily lead to rethinking and eventually to the adjustment of traditional frameworks. These also lead to fruitful discussions – for example, on new trade and climate-change-related measures, such as carbon labelling or similar standards or regulations on the imposition of border carbon adjustments, which impose border taxes on the embodied carbon of imported goods, set at the level of equivalent domestic taxes.¹⁰⁰

Since the global village, with international trade as a foundation, has become a reality, it is commendable that the ‘trade versus environment’ debate has shifted towards the concept of mutual supportiveness between trade and environment, or trade and climate change, respectively, even though at first glance it may appear to be a forced marriage.

World trade law ‘can both constrain and enable climate action’.¹⁰¹ It has the potential to promote community goals, namely the enhancement of economic development. However, a closer look at world trade law:

sadly shows that accordingly solidarity is poorly implemented. The flaw is not in WTO law itself: WTO law allows developed countries to act in favour of developing countries. But developed countries can choose not to implement relevant exceptions and too often implement them poorly.¹⁰²

Moreover, both the policy-making and academic communities have been focusing on the role of the WTO.¹⁰³ There has been much discussion on the ways in which the WTO exerts a negative influence on climate law and policy. This includes its potential ‘chilling’ effect on climate treaties, referring to the fact that parties to the climate regime have refrained from adopting multilateral trade measures (for instance, against non-compliers or non-parties).¹⁰⁴ While WTO law may thus seem to constrain climate ambitions, attention has increasingly shifted to ways in which the organisation might contribute to climate change mitigation. One of these options is to pursue the reduction of fossil fuel subsidies,¹⁰⁵ as called for by the G20 in 2010.¹⁰⁶

14.6 Multilateral environmental agreements and the multilateral trading system

International environmental treaties (or multilateral environmental agreements (MEAs) as they are commonly known) regulate the relationships between states pertaining to the environment. Generally, the first objective of any MEA is the protection and conservation of the environment. International trade agreements focus on the exchange of goods, services and capital across international borders. That there is a *de facto* close link between trade and the environment can be seen from the respective legal documents. Environmental agreements contain trade measures, and trade agreements provide for environmental protection measures, as has been sketched in the previous section. This close relationship, and the call for the mutual supportiveness of trade and environment agreements with a view to achieving sustainable development, are emphasised in Chapter 2 of Agenda 21 (the action plan flowing from the 1992 UN Conference on Environment and Development held in Rio de Janeiro, Brazil), and in various environmental and trade agreements.

Different trade measures are provided for in the MEAs. These are implemented to protect the environment and have an impact on international trade flows. The most direct of these measures is a prohibition or restriction on trade in certain goods or products. Trade measures may be imposed

in different forms, such as import or export licences; product standards; labelling; certification systems; notification procedures; and taxes or subsidies. By applying trade measures, environmental agreements typically either aim to control and monitor trade activities with regard to the over-exploitation of natural resources, or to combat trade activities that are considered to be sources of pollution.

The 1973 Convention on International Trade in Endangered Species (CITES), for example, contains several trade measures to control trade in species that are in danger of extinction or that might become endangered. The species to which the trade measures are applicable are specified in the Annexes to CITES. Trade measures here include export and import licences, quotas and certificates on the country of origin.¹⁰⁷

The 2000 Cartagena Protocol on Biosafety, agreed upon by the parties to the 1992 Convention on Biological Diversity, is another important example of an MEA with an impact on international trade flows. The Protocol provides specific steps that states may take to regulate trade in genetically modified organisms (GMOs) in order to ensure the safety of international transfers and the use of any living GMOs resulting from biotechnology. Transboundary movements of GMOs may have adverse effects on the conservation of biological diversity. The import of living GMOs may thus be restricted as part of a detailed risk management procedure as outlined in article 16 of the Protocol. The Protocol establishes trade control measures based on a compulsory procedure of notification by the exporting country (article 8 of the Protocol).¹⁰⁸

The 1985 Vienna Convention for Protection of the Stratosphere was developed as a framework convention establishing general objectives and a basis for co-operation on ozone layer protection. In order to achieve the elimination of the production of ozone-depleting substances, the 1987 Montreal Protocol on Substances that Deplete the Stratospheric Ozone Layer established trade restriction measures. Certain substances are listed in the Annexes to the Protocol as ozone-depleting, and all trade in those substances is generally banned between parties and non-parties (article 4 of the Protocol). Bans may also be implemented against parties as part of the Protocol's non-compliance procedure according to article 8 of the Protocol.¹⁰⁹

Whereas the 1992 UNFCCC does not provide for specific trade measures, the 1997 Kyoto Protocol contains more detailed obligations relating to the reduction of greenhouse gases. It provides for trade-affecting techniques such as tax impositions on CO₂ emissions, the adoption of certain treatment or emission rules for greenhouse gas emissions not covered by the Montreal Protocol, and the elimination of subsidies adversely affecting the objective of the UNFCCC (article 2 of the Kyoto Protocol).

Aiming to protect human health and the environment against the adverse effects that may result from the production and management of hazardous wastes, the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (the Basel Convention) contains trade measures establishing a notification and consent procedure for any envisaged transboundary movement of hazardous and other wastes. The Basel Convention acknowledges the sovereign right of states to ban the entry of hazardous wastes into their territories (Preamble of the Convention), and contains obligations concerning transport, disposal, packaging and labelling (article 4 of the Convention). Parties may only export a hazardous waste to another party that has not banned its import and that gives written consent to the import (article 6 of the Convention). In general, parties may not import from or export to a non-party. Parties are also obliged to prevent the import or export of hazardous wastes if there is an indication that the wastes will not be treated in an environmentally sound manner at their destination (Preamble and article 4 of the Convention).

The above examples of trade measures in MEAs show that measures generally designed to protect the environment may have a direct impact on the freedom of international trade. Although the provisions in the trade and environment agreements respectively should mutually complement each other according to Agenda 21 and many other international rules, it is possible that MEAs and trade agreements address the same issues differently, resulting in conflicts arising between the two fields of international law. In such instances, disputes may be resolved according to the procedures described in the relevant MEA. However, disputes on trade measures in MEAs could also be taken to the WTO's DSB, especially if the party affected by the trade measure is not a party to the MEA, but is a member of the WTO. So far, MEAs have not been challenged directly under the WTO's DSU.¹¹⁰ However, conflicts may arise between WTO rules and trade restrictions provided for in MEAs where these restrictions are used by a party to the MEA against a non-party to the MEA, and where both parties are members of the WTO. In such cases, the MFN and NT principles, as well as provisions on eliminating quantitative restrictions, may potentially be infringed.¹¹¹ Neither the WTO's legal framework, nor the wording of MEAs, claim to be hierarchically superior to the other. On the contrary, the concept of mutual supportiveness of trade and environment agreements is emphasised by both regimes, without offering an express solution to possible conflicts resulting from the coexistence of trade and environment agreements.

Generally, in the case of a conflict between MEA provisions and WTO rules, the rules of treaty interpretation under the Vienna Convention on the Law of Treaties, and the general rules of interpretation, would have to be applied to determine which rules will take precedence over others.¹¹² So far, trade measures in MEAs have not been the centre of attention of international trade proceedings. However, WTO members may choose to take a case relating to trade measures in MEAs to the DSB of the WTO. Included in the Doha Development Agenda, and thus subject to ongoing negotiations, is the task of clarifying the relationship between trade measures in MEAs and WTO rules. The responsibility for this task has been given to the WTO's Committee on Trade and Environment.

14.7 Regional and preferential trade and sustainable development

The furtherance of economic development, regional integration, and the reduction of poverty go hand in hand.¹¹³ The interrelationship has become closer over the past few years owing to increasing discussions in the world community on these issues, especially in the context of environmental challenges such as climate change. Yet, many regional integration processes around the world still face obstacles and challenges.¹¹⁴ The fear of losing state autonomy, the fear of losing national identity, socio-economic disparity among members, historical disagreement, lack of vision, and unwillingness to share resources are some of the obstacles that present themselves with regard to regional integration.¹¹⁵

After the collapse of the competition between market-driven and state-commanded economies, developing countries seem to have only one option for modernisation and development. Liberal democracy does not seem to have any serious competitors. Given this monolithic economic and political framework, it is not easy to determine where sustainable economic development fits in.¹¹⁶ The same applies to the question on the relationship between market, development and well-being, and the influence that economic development can have on the alleviation of poverty. Economic development is not always concomitant with greater welfare of the average individual, just as the growth of the gross national product (GNP) is not a sufficient indicator with which to measure the level of security and the quality of life of people.

After all, it is a sad reality that about half of all human beings still live in severe poverty and about a quarter live in extreme or life-threatening poverty.¹¹⁷ One major reason that poverty is still so prominent today is that ‘affluent societies are not merely helping too little, but also harming too much.’¹¹⁸ The principle of common but differentiated responsibilities (a cornerstone of the international climate change regime and explicitly referred to in the UNFCCC and the Kyoto Protocol) is meant to address this disparity. The transboundary nature of climate change has environmental and developmental repercussions for all countries. The differentiation of responsibilities, however, should support even greater efforts in future,¹¹⁹ especially in view of the ongoing ‘disparity between the human and the economic magnitude of world poverty’ and ‘the enormous extent of economic inequality in the world today’.¹²⁰ About 60 per cent of the world’s population holds less than 2 per cent of global wealth, in contrast to the top 1 per cent of the world’s population, who hold 40 per cent of global wealth.¹²¹ ‘Because of these enormous inequalities, we are now at the point where the world is easily rich enough in aggregate to abolish all poverty. We are simply choosing to prioritize other ends instead.’¹²² Sustainable economic development therefore depends on equity:

In the analysis of the causes of and solutions to climate change, the quality of the equity commons and the governance rules that protect and enhance it are key elements in crafting a viable international agreement on future emissions allocation and burden-sharing of emissions mitigation and climate adaptation costs. More broadly, equity – together with so many of the public goods that provide the foundation for environmental sustainability and sustainable development – is vulnerable. Deliberate policies in favor of increasing equity over time not only improve social welfare, but also act to shore up the foundations for the equity commons of the future, by establishing and strengthening rules for its governance.¹²³

14.7.1 The role of regional integration for sustainable development

The most comprehensive partnership agreement between developing countries and the EU, the Cotonou Partnership Agreement, was concluded for a 20-year period from 2000 to 2020. Having reference to this partnership agreement, the Commission of the European Communities proposed to define regional integration as ‘the process of overcoming, by common accord, political, physical, economic and social barriers that divide countries from their neighbours, and of collaborating in the management of shared resources and regional commons’.¹²⁴ The process of regional integration is thus characterised by arrangements for enhancing co-operation through regional rules and institutions entered into by states of the same region.

Regional integration is a ‘path towards gradually liberalising the trade of developing countries and integrating them into the world economy’.¹²⁵ Regional integration is thus an essential precondition not only for economic growth, but also for more effective regional environmental policy because the environment knows no national boundaries. At first glance, it appears that the promotion and protection of the environment is not within the focal range of a regional economic community. However, environment-related matters do in fact play a vital role in various aspects of regional integration. The relationship between environmental protection and economic development has become closer over the past few years owing to increasing discussions in the world community on the issue. This connection can be seen as a two-way relationship in so far as economic development is obliged to respect the environment in a democratic society. Conversely, environmental protection can be given more effect through economic growth and the resulting increased availability of resources, reduction of poverty and higher standard of living. Here the Principle of Sustainable Development comes into play. This principle aims at embracing and

balancing ecology, economy, conservation and utilisation. It is the governing political *leitmotif* for environment and development and can be broadly understood as a concept that is characterised by:

- (i) the links between the policy goals of economic and social development and environmental protection;
- (ii) the qualification of environmental protection as an integral part of any developmental measure, and vice versa; and
- (iii) the long term perspective of both policy goals, that is the States' inter-generational responsibility.¹²⁶

Many developing countries, especially in Africa, are endowed with natural resources, fisheries, and minerals. Environmental challenges include, *inter alia*, climate change, land degradation, poor land use and land management, over-exploitation of natural resources, water scarcity and loss of biodiversity. In this regard, poverty and challenges of governance often collide with different interests in society and political pressures.¹²⁷ In the words of the former executive Director of the United Nations Environmental Programme (UNEP), Klaus Töpfer, 'sustainable development cannot be achieved unless laws governing society, the economy, and our relationship with the Earth connect with our deepest values and are put into practice internationally and domestically.'¹²⁸

The role that regional integration can play in meeting environmental challenges such as climate change is multifaceted. For example, the stimulation of growth and income levels potentially enables nations to generate additional resources to address environmental issues more effectively.¹²⁹

Regional integration furthermore provides an opportunity to enhance political stability by establishing regional organisations that play a greater role in defusing conflicts within and between countries and in promoting human rights. In terms of climate-change-related matters, such organisations are of the utmost relevance, especially when it comes to climate-change-related disaster management and environmentally induced migration. In this context, regional integration may serve as a tool to maintain political stability by building trust, enhancing understanding between groups and deepening interdependence.

Regional co-operation, including knowledge and technology transfer, in environmental matters is another important link between regional integration and environmental protection. Such co-operation can address further related challenges of a transnational dimension, such as food security, biodiversity, natural resources, and disease and pest control. One example in this regard is the considerable hydroelectric, solar and wind energy potential that exist in Southern Africa. Since many African countries share relevant resources, such as cross-border river basins, a regional approach is best suited to attract respective investment.

In December 2013, WTO members concluded negotiations on a Trade Facilitation Agreement at the Bali Ministerial Conference, as part of a wider 'Bali Package'. Since then, WTO members have undertaken a legal review of the text. In line with the decision adopted in Bali, WTO members adopted on 27 November 2014 a Protocol of Amendment to insert the new Agreement into Annex 1A of the WTO Agreement. The Trade Facilitation Agreement will enter into force once two-thirds of members have completed their domestic ratification process. The Trade Facilitation Agreement contains provisions for expediting the movement, release and clearance of goods, including goods in transit. It also sets out measures for effective co-operation between customs and other appropriate authorities on trade facilitation and customs compliance issues. It further contains provisions for technical assistance and capacity building in this area.

The Trade Facilitation Agreement has three sections:

1. **Section I** contains provisions for expediting the movement, release and clearance of goods, including goods in transit. It clarifies and improves the relevant articles (V, VIII and X) of the

General Agreement on Tariffs and Trade (GATT) 1994. It also sets out provisions for customs co-operation.

2. **Section II** contains special and differential treatment (SDT) provisions that allow developing and least-developed countries (LDCs) to determine when they will implement individual provisions of the Agreement and to identify provisions that they will only be able to implement upon receipt of technical assistance and support for capacity building.

3. **Section III** contains provisions that establish a permanent committee on trade facilitation at the WTO and require members to have a national committee to facilitate domestic co-ordination and implementation of the provisions of the Agreement.

The Trade Facilitation Agreement is expected to provide significant advantages for developing countries to couple intra-regional trade with infrastructure development efforts and to boost considerable growth potential that has so far largely remained untapped in Africa.¹³⁰

14.7.2 Major regional trade agreements and sustainable development

Regional trade agreements (RTAs) are reciprocal trade agreements between two or more partners and entered into in order to liberalise trade between countries in a specified area or region.¹³¹ RTAs can be plurilateral or bilateral in nature, the latter being in the majority. Within the system of the WTO, regional trade agreements constitute one of the groups of exceptions and allow members to adopt measures that would otherwise not be consistent with WTO provisions, provided that they are in the pursuit of economic integration among a group of WTO members. Two broad categories of RTA can be distinguished:

1. free trade agreements (FTAs) as defined by the GATT's article XXIV 8(b); and
2. customs unions (CUs) as defined by the GATT's article XXIV 8(a).

In simplified terms, CUs specify tariffs to be the same for all member governments contractually, while FTAs leave future external trade policy to the discretion of each signatory.¹³²

With regard to RTAs, the WTO has established a transparency mechanism according to which the WTO is to be notified by members as early as possible about RTAs or negotiations thereof according to the GATT's article XXIV, article V 7(a), or paragraph 4(a) of the enabling clause, respectively. As of January 2014, the WTO had received notifications of 583 RTAs, of which 377 were in force.¹³³

Globally, among the best-known RTAs are the European Union (EU); the European Free Trade Association (EFTA); the North American Free Trade Agreement (NAFTA); the Southern Common Market (MERCOSUR), and the Association of Southeast Asian Nations (ASEAN). The following RTAs are of particular relevance for Africa: the Southern African Development Community (SADC); the Southern African Customs Union (SACU);¹³⁴ the Common Market for Eastern and Southern Africa (COMESA); the Economic Community of West African States (ECOWAS); and the East African Community (EAC). Furthermore, various RTA relations with non-African RTAs exist, such as the EFTA-SACU free trade agreement. Other preferential trade agreements include, among others, the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP). It has been argued that such mega-regional agreements present a more efficient way to promote sustainable development than the multilateral trading platform.¹³⁵ Concerns about the multilateral trading system are growing and developing countries are particularly dissatisfied with the progress of the WTO. Reasons behind the growing frustration include the fact that most of the promises of the Uruguay Round agreement to expand global trade (especially in the areas of agriculture, textiles and services) have not materialised. Furthermore, the large number of

participants in the multilateral trading system has been blamed for some rigidity in the system; and with particular regard to sensitive issues such as agriculture or textiles, some countries use regional networks as an alternative to expand their markets as they find it easier to negotiate on a bilateral or regional level.

RTAs can bring about economic benefits by reducing barriers to trade and investment between participating parties. They can open markets faster than would otherwise be possible through the WTO and can build on the commitments already agreed to in the WTO. The concept of sustainable development does play a role in all RTAs to a certain extent and such agreements have a great potential to strengthen sustainable development. The way in which sustainable development is integrated into the legal framework of RTAs varies.

The most common way is at the level of preambular statements. These will often state that the agreements should be implemented with a view towards promoting sustainable development, or that economic growth must occur within the bounds of sustainable development. Such statements are not technically legally binding, but can play an important role in treaty interpretation. Sometimes RTAs identify sustainable development as an area of co-operation or even include operational provisions – such as in the form of substantive labour standards or an environmental clause, or by allowing sanitary and phytosanitary exceptions. Another means to integrate economic, social and environmental concerns in RTAs can be the use of impact assessment tools – such as environmental impact assessments, which consider the wider effects of trade policies and aim to ensure that trade and development decisions result from processes that promote sustainability and public participation.¹³⁶

14.7.3 Trade, environment and sustainable development in BRICS

As a group of leading emerging economies, the BRICS partnership consisting of Brazil, the Russian Federation, India, China and South Africa has embarked on new policy pathways to exploit potential and new opportunities for economic and sustainable development.¹³⁷ BRICS is gaining in international importance not only because its land area is more than a quarter of that of the world, and because almost half of the world's population lives in its territories, but also because of its ever-growing share in the world economy. Economic development is at the heart of the aims of the BRICS partnership; and sustainable development and environmental protection have been on the agenda of BRICS since its formal inception in 2009.¹³⁸ BRICS considers itself to be 'a platform for dialogue and co-operation amongst countries that represent 43 per cent of the world's population, for the promotion of peace, security and development in a multi-polar, inter-dependent and increasingly complex, globalising world'.¹³⁹

Since 2009, annually and on a rotational basis, BRIC and later BRICS nations have held summits where the heads of state, as well as ministers and key business people, come together. The first BRIC Summit was held in 2009 in Yekaterinburg, Russia; and the second took place in Brasília, Brazil, in 2010. In 2010, South Africa received a formal invitation from China to join the partnership. From 2011, BRIC became BRICS,¹⁴⁰ and with South Africa joining the partnership, its commitments suddenly also became relevant for the entire African continent – at least indirectly.¹⁴¹ Since South Africa's inclusion, three further BRICS summits have been held: 2011 in Sanya, China; 2012 in New Delhi, India; and 2013 in Durban, South Africa. BRICS is emerging as an intergovernmental network and functions on agenda-setting, consensus-building,¹⁴² policy co-ordination¹⁴³ and as a platform for knowledge production and information exchange. So far, BRICS consists of five states with no founding document (formal charter or treaty). This means that there is no formal structure, voting procedure or central secretariat. So far, BRICS decisions are not

legally binding, nor does BRICS have a dispute settlement procedure or mechanism in place. However, BRICS countries, by signing the Sanya declaration, have committed themselves:

to assure that the BRICS countries will continue to enjoy strong and sustained economic growth supported by our increased cooperation in economic, finance and trade matters, which will contribute to the long-term steady, sound and balanced growth of the world economy.¹⁴⁴

BRICS is generally committed to supporting the strong, open, rules-based multilateral trading system embodied in the World Trade Organization (WTO), and the successful, comprehensive and balanced conclusion of the Doha Development Round.¹⁴⁵ BRICS states have emphasised their strong commitment to enhancing sustainable development by also focusing on environmental protection. BRICS states have affirmed their commitment to the implementation of the United Nations Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity, among others. The Delhi Declaration states that ‘sustainable development should be the main paradigm in environmental issues, as well as for economic and social strategies’.¹⁴⁶ It is noteworthy that the Delhi Declaration spells out the commitment of the BRICS states towards environmental protection and respective multilateral environmental agreements, and the commitment towards the achievement of the Millennium Development Goals, but the Declaration is also very clear regarding the responsibilities of developed nations and the need for them to ensure that growth in non-developed countries is not affected.¹⁴⁷

The Sanya Declaration refers to environmental matters, with climate change leading the way; climate change is considered to be ‘one of the global threats challenging the livelihood of communities and countries’.¹⁴⁸ In this regard, and highlighting the principle of equity and common but differentiated responsibilities, BRICS leaders have committed themselves ‘to work towards a comprehensive, balanced and binding outcome to strengthen the implementation of the United Nations Framework Convention on Climate Change and its Kyoto Protocol’¹⁴⁹ and to enhance ‘practical cooperation in adapting our economy and society to climate change’.¹⁵⁰ Moreover, co-operation has been envisaged in order to ‘reach new political commitment and achieve positive and practical results in areas of economic growth, social development and environmental protection under the framework of sustainable development’.¹⁵¹

With the fourth BRICS Declaration signed in New Delhi in March 2012, BRICS states have declared that they ‘are ready to work with the international community to implement its decisions in accordance with the principles of equity and common but differentiated responsibilities and respective capabilities’.¹⁵² With regard to climate change, it was laid down that BRICS states are:

fully committed to playing our part in the global fight against climate change and will contribute to the global effort in dealing with climate change issues through sustainable and inclusive growth and not by capping development. We emphasise that developed country Parties to the UNFCCC shall provide enhanced financial, technology and capacity-building support for the preparation and implementation of nationally appropriate mitigation actions of developing countries.¹⁵³

BRICS provides a new climate for development striving to build a harmonious world of lasting peace and common prosperity. This was reiterated in the 2013 eThekwi Declaration,¹⁵⁴ in which BRICS leaders also reaffirmed their support for integration processes in Africa in order to foster development and poverty eradication on the continent. In the eThekwi Declaration, BRICS ‘reaffirmed its commitment to the promotion of international law, multilateralism and the central role of the United Nations’. The discussions also reflected a growing intra-BRICS solidarity, as well as the shared goal of contributing positively to global peace, stability, development and co-

operation ‘based on an inclusive approach of shared solidarity and co-operation towards all nations and peoples’.¹⁵⁵ In the eThekwi Declaration, BRICS leaders acknowledged climate change as being ‘one of the greatest challenges and threats towards achieving sustainable development’¹⁵⁶ and included in the eThekwi Action Plan an undertaking to hold a consultative meeting of BRICS senior officials in the margins of relevant sustainable development, environment and climate-related international fora, where appropriate.

In July 2014, the 6th BRICS Summit was held in Fortaleza, Brazil under the theme *Inclusive Growth: Sustainable Solutions*. The Summit produced various outcomes, including the Fortaleza Declaration and Action Plan, the Agreement on the New Development Bank, the Treaty for the Establishment of a BRICS Contingent Reserve Arrangement (CRA), agreements among BRICS Development Banks and Export Credit Insurance Agencies, and a Cooperation Agreement on Innovation.¹⁵⁷

The most noteworthy of these decisions is probably the Agreement on the New Development Bank (NDB), which received much international attention. The purpose of the Bank has been defined as the mobilisation of resources for infrastructure and sustainable development projects in BRICS and other emerging economies and developing countries, complementing the existing efforts of multilateral and regional financial institutions for global growth and development.¹⁵⁸ The New Development Bank has an initial subscribed capital of US\$ 50 billion (equally distributed among the founding members) and an initial authorised capital of US\$ 100 billion.¹⁵⁹ The NDB will have its headquarters in Shanghai, China. Concurrently with the headquarters, the NDB Africa Regional Center will be established in South Africa.¹⁶⁰

Further to the above-mentioned agreements, the BRICS partnership envisages intensified co-operation in many fields as can be read from the Fortaleza Declaration. Proposals have, for example, been made for a ‘BRICS Economic Cooperation Strategy’ and a ‘Framework of BRICS Closer Economic Partnership’ envisaging an intensification of intra-BRICS economic, trade and investment co-operation. BRICS countries have furthermore emphasised the need for stronger intra-BRICS dialogue with a view to promoting international exchange and co-operation and to foster innovation, research and development.

For development in Africa, the BRICS partnership plays an important role, which the following figures illustrate: over the last two decades, the share of BRICS in global trade has increased significantly. While in 1990, BRICS accounted for 3 per cent of global trade, the share of BRICS accounted for 19 per cent of global exports and 16 per cent of global imports of goods and services in 2011.¹⁶¹ BRICS countries now constitute the largest trading partners of Africa ‘with trade expected to reach more than US \$500 billion by 2015, with 60 per cent from China’.¹⁶² The largest increase in foreign direct investment (FDI) to Africa in recent years has come from the BRICS countries (FDI flows to Africa from India, China and Brazil have risen from 18 per cent of the total in 1995–1999 to 21 per cent in 2000–2008).¹⁶³

No BRICS country is an Organization for Economic Co-operation and Development (OECD) member. More than ever before, non-OECD member economies seem to be transforming into world economic forces in the global economy. At the same time, BRICS is fast emerging as the new source of global economic development. BRICS countries are forming an increasingly influential network with a growing impact on international political and economic governance. The co-operation of BRICS members with one another and with African nations provides enormous potential for development in the future. Wherever it is in its best interest, China attaches ever-increasing importance to BRICS and its African relations for economic and other reasons. South Africa is interested in support for its African agenda, through which it hopes, inter alia, to foster the

growth of infrastructure on the continent, as well as to promote development that will advance governance, peace and security on the continent.

SUGGESTED FURTHER READING

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¹ For more details, see C VanGrasstek *The History and Future of the World Trade Organization* 3rd ed (2013) 43.

² For a basic understanding of the fundamental principles of the WTO, see WTO *Understanding the WTO* 5th ed (2015), and https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf accessed 15 April 2015. Comprehensive textbooks on the law of the WTO include P van den Bossche & W Zdouc *The Law and Policy of the World Trade Organization* 3rd ed (2013); and M Matsushita, TJ Schoenbaum & PC Mavroidis *The World Trade Organisation – Law, Practice and Policy* 2nd ed (2006).

³ As at 26 April 2015. international organisations are further functions of the WTO.⁴ More specifically, the WTO's main activities are:⁵

⁴ See art III of the Agreement Establishing the WTO.

⁵ See 'Understanding the WTO: What we do', http://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm accessed 30 January 2014.

⁶ See http://www.wto.org/english/thewto_e/whatis_e.htm.

⁷ This contribution is a consolidated and updated version of previous publications by the author on the subjects at hand, including: OC Ruppel 'Trade, environment and sustainable development' in OC Ruppel & KG Ruppel-Schlichting (eds) *Environmental Law and Policy in Namibia* 2nd ed (2013) 421–69; OC Ruppel 'International trade law and the environment' in J Glazewski (ed) *Environmental Law in South Africa* (2013) ch 4. For further reading, see A Goyal *The WTO and International Environmental Law: Towards Conciliation* (2006); The United Nations Environment Programme (UNEP), Division of Technology, Industry and Economics, Economics and Trade Branch and the International Institute for Sustainable Development (IISD) *Environment and Trade: A Handbook* 2nd ed (2005); and L Feris 'Trade and the environment' in HA Strydom & ND King (eds) *Fuggle & Rabie's Environmental Management in South Africa* 2nd ed (2009) 269–93.

⁸ The World Commission on Environment and Development *Our Common Future* (1987).

⁹ For a detailed discussion, see UNEP *Handbook* op cit 3–7.

¹⁰ Goyal op cit 11.

¹¹ U Beyerlin 'Sustainable development' in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (2009).

¹² U Beyerlin 'The concept of sustainable development' in R Wolfrum (ed) *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (1996) 95–121.

¹³ UN Open Working Group Proposal for Sustainable Development Goals, <https://sustainabledevelopment.un.org/content/documents/1579SDGs%20Proposal.pdf> accessed 17 February 2015.

¹⁴ World Trade Organization (WTO) Preamble, available at https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/preamble_e.pdf accessed 30 January 2014.

¹⁵ WT/DS58 Appellate Body Report, adopted on 21 November 2001, https://www.wto.org/english/tratop_e/dispu_e/58abr.pdf. This case is sketched below in the subsection on relevant WTO disputes.

¹⁶ WTO *Understanding the WTO* op cit 10; VanGrasstek op cit 3; Van den Bossche & Zdouc op cit 84; B Hoekman 'The WTO: Functions and basic principles' in B Hoekman, A Mattoo & P English (eds) *Development, Trade, and the WTO: A Handbook* (2002) 41.

17 Legal text on the Agreement Establishing the World Trade Organisation available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf accessed 30 January 2014.

18 Article I of the GATT.

19 Article III of the GATT.

20 On the trade and environment debate, see also http://www.wto.org/english/tratop_e/envir_e/envt_intro_e.htm accessed 30 January 2014.

21 Trade measures are measures implemented by governments that are trade restrictive (eg, border measures, typically tariffs and quotas, and behind-the-border measures, including for example regulatory measures, subsidies, taxation and localisation measures) or trade liberalising (eg, lowered export taxes, suspension of customs tariff duties). Trade measures can be temporary or permanent in nature. Examples of trade measures include anti-dumping measures (such as provisional measures, price undertakings or definitive anti-dumping duties against dumping in order to defend domestic industries), countervailing measures (duties on subsidised imports) and safeguarding measures (emergency measures in the form of customs duties or quantitative restrictions temporarily to protect a domestic industry).

22 For a detailed discussion, see Van den Bossche & Zdouc op cit 648–62.

23 For a detailed discussion on this, see Goyal op cit 132.

24 Annex 2.

25 In the agricultural context, subsidies are widely considered to be trade distorting, and, in some instances, to be the cause of environmental degradation. It has been suggested by environmentalists that multilateral trade rules should incorporate greater flexibility for providing subsidies to encourage activities or technologies that have a beneficial impact on the environment.

26 See WTO ‘Sanitary and phytosanitary measures’, available at http://www.wto.org/english/tratop_e/spse/spse_e.htm accessed 30 January 2014.

27 See WTO ‘Subsidies and countervailing measures’, available at http://www.wto.org/english/tratop_e/scme/scme_e.htm accessed 28 January 2014.

28 Article 8.2(c).

29 Article XIV(b).

30 See WTO ‘Intellectual property: protection and enforcement’, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm accessed 30 January 2014.

31 See Goyal op cit 259.

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37 For more details, see Van den Bossche & Zdouc op cit 156–314.

38 See WTO Dispute Settlement Body ‘Overview of the state of play of WTO disputes Annual Report’ (2014) Addendum (WT/DSB/64/Add.1).

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- ⁵¹ See United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998, para 177.
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- ⁵³ European Communities – Measures Affecting Asbestos and Asbestos Containing Products, Panel Report, WT/DS135/R, adopted 5 April 2001, para 8.236.
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- ⁵⁵ L/5198-29S/91 Panel Report adopted on 22 February 1982. See http://www.wto.org/english/tratop_e/dispu_e/80tuna.pdf accessed 30 January 2014.
- ⁵⁶ United States Public Law 94–265.
- ⁵⁷ L/6268-35S/98 Panel Report adopted on 22 March 1988 http://www.wto.org/english/tratop_e/dispu_e/87hersal.pdf accessed 30 January 2014.
- ⁵⁸ R.S.C. 1970, c. F–14.
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¹⁴³ For eg, on climate change, the countries are committed to finding sustainable outcomes; see para 22 of the Sanya Declaration *supra*.

¹⁴⁴ Sanya Declaration, para 13.

¹⁴⁵ Sanya Declaration, para 26.

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¹⁵¹ Sanya Declaration, para 23.

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¹⁵⁴ 2013 Durban 5th BRICS summit eThekwini Declaration and Action Plan, <http://www.brics5.co.za/fifth-brics-summit-declaration-and-action-plan/> accessed 24 November 2013.

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Chapter 15

Protection of international investments: selected contemporary aspects

OLIVER C. RUPPEL

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15.1 Introduction

Foreign investment can have a positive impact on the economy of a state in terms of development, which can affect trade and other sectors in different ways. Benefits for the host state include the provision of employment opportunities, the inflow of money into the region, and the availability of advanced technology for the exploitation of natural resources.¹

Many African countries have understood the necessity for improving the continent's image and for offering increased incentive-oriented and institutional support structures to foreign investors. Such '(n)ational efforts to improve the investment climate of African economies further benefit from regional arrangements, such as the East African Community (EAC), the Southern African Development Community (SADC)' and others.²

Africa as an investment destination remains one of the least developed regions in the world. Potential investors have to be prepared for such obstacles as underdeveloped market institutions, a shortage of skilled workers, constraints on business competition and weak governance. These are further aggravated by geographical fragmentation and poorly developed infrastructure.³ In the worst cases, they may even have to deal with severe environmental degradation, social disruption, violence and civil war.⁴

In contrast to its relatively weak economic performance, Africa is endowed with the world's highest concentrations of natural resources. However, natural resource investments are often very capital-intensive with standardised processes only creating modest spillover benefits for local labour and technologies.⁵ It is regrettable that African governments often refrain from initiating necessary political and economic reforms like investment in human capital and infrastructure, institutional reforms, structural diversification and technology accumulation, all crucial for an employment-intensive and inclusive growth.⁶ Other negative side-effects of the over-reliance on the export of raw materials include vulnerability to the vitality of the international commodity markets, possible misallocation of revenue incomes in governmental budgets, corruption, environmental degradation and sometimes even violent conflicts.⁷

In light of the aforementioned problems, foreign investment and the development of investment law is of utmost importance to the development of the African continent.

15.2 Foreign investments

International investment law concerns the direct, indirect, or portfolio investment of foreign property abroad, and involves the capital exporting state (known as the home state), the capital importing state (known as the host state) and the private foreign investor.⁸ Foreign investment usually involves the transfer of tangible or intangible assets from one country to another for the purpose of using them in the latter country to generate wealth while under the total or partial control of the asset owner.⁹ According to article 25(1) of the ICSID¹⁰ Convention, a key jurisdictional requirement is that a dispute must arise ‘directly’ out of an investment. Although it does not define the term ‘investment’,¹¹ ICSID requires four conditions to be present for an activity to constitute an investment: a contribution of money, or asset of economic value; a certain duration; an element of risk; and a contribution to the host state’s development. The case law in which the criteria for an ‘investment’ are discussed is wide-ranging and far from consistent; the discussion is far from being concluded.¹²

Different agreements contain different definitions of what activities can be considered as an investment. Of the different forms of foreign investment, the most common forms are foreign direct investment (FDI), portfolio investment, joint venture, and production-sharing investment. The Organization for Economic Co-operation and Development (OECD) defines FDI as:

The objective of establishing a lasting interest by a resident enterprise in one economy (direct investment) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor.¹³

The ‘lasting interest’ referred to implies that a long-term relationship should be in existence between the enterprise in one country and a resident in an economy different from that of the direct investor.¹⁴ The resident with the interest in investing is the direct investor, while the enterprise that is referred to in the above definition is the direct investment enterprise that is situated in the host state.¹⁵

Attracting FDI should be at the top of the agenda for most developing countries; in addition to capital inflows, it offers the potential to create new jobs and bring new technology, marketing techniques and management skills.¹⁶ The reasons for foreign direct investment are manifold. While some companies use FDI to produce the same or similar goods abroad to access new markets (horizontal FDI), other companies try to take advantage of the host countries’ business environment (vertical FDI).¹⁷ For example, gains may be had from outsourcing labour-intensive production to low-wage countries, or access may be gained to certain raw materials, information or technology.¹⁸ Other reasons for companies to invest abroad include the need to minimise or diversify risks, the integration of operations of a multi-stage production process, the protection or use of non-transferable knowledge, the protection of and capitalising on reputation, the avoidance of tariffs and quotas, and finally exchange rate considerations.

FDI is one of the common forms of investment that foreign investors use when investing in another country. Another is portfolio investment, which is normally the movement of money to buy shares in a company that is formed, or that functions, in another country.¹⁹ Thus, foreign portfolio investment often has to do with investing in the stock market. Foreign portfolio investment can help promote the development of equity markets, as well as help to strengthen domestic capital markets, increase the liquidity of domestic capital markets, and develop market efficiency.²⁰

The joint venture is a form of investment that consists of a collaborative arrangement between two or more businesses to achieve a particular objective.²¹ Many forms of joint ventures exist in

different jurisdictions. Two common examples relate to the partnership joint venture, and the corporate joint venture.

Another form of investment is the production-sharing agreement based on the concept that the ownership of natural resources always rests in the state, and that the state alone has the right to dispose of same.²⁵ This reflects the principle of permanent sovereignty over natural resources as set out by the United Nations General Assembly Resolution of 1962.²⁶ In terms of this principle – for example, where there is a prospect of finding oil – the state retains ownership of the natural resource but grants a licence for exploration to the foreign corporation in terms of which the latter has a right to a share of the production, while bearing the risk of exploration.²⁷ Such an agreement benefits both the foreign investor and the state concerned; the state retains ownership over the resource, thus strengthening its sovereignty over the natural resources that are present in its territory.

15.3 International investment protection

Since foreign investments benefit a host state, governments have an incentive to put in place the standard of investor protection required by international law, and should simultaneously accord foreign investors an opportunity to make use of such laws when rights are violated. Doing so not only makes the investments of foreign investors in the host state secure, but also increases the likelihood of more foreign investors in the future.²⁸ The host state should thus treat foreign investors in accordance with both national and international rules and principles.²⁹ In doing so, the host state should optimally try to maintain a balance between protecting foreign investors and protecting its own interests. The latter include the local market, the local investors, and the immediate environment.³⁰

Foreign investments are protected by means of international investment agreements (IIAs) and customary international law.³¹ When analysing the formal sources of investment law, one must investigate a concurrence of international and domestic law. Concurrence does not necessarily mean that international and domestic investment law are hierarchically related. On the contrary, they should be understood as being cumulatively applicable, meaning that investment tribunals, depending on the investment instrument applied (treaty or contract), must ‘consider domestic and international law concurrently, without setting a hierarchy between these bodies of law’.³²

International investment law is not organised around a multilateral treaty or a central organisation such as the United Nations (UN) or the World Trade Organization (WTO). Rather, it is governed by public international law and domestic investment law under an array of bilateral investment treaties (BITs), regional trade and investment agreements (RTIAs), free trade agreements (FTAs) and other multilateral treaties. Jurisdiction over international investment law is *inter alia* derived from contracts, treaties and insurance schemes falling under arbitral institutions such as the International Centre for the Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL) as well as domestic courts. Unlike the Dispute Settlement Body and its Appellate Body at the WTO, there is no uniform body of adjudication.³³ In the absence of a central authority or constitutional setting, international investment law has emerged more organically and perhaps also accidentally into a separate field of the law, oscillating between neighbouring, relating and at times overlapping regimes – including diplomatic protection, international arbitration, property law, contract law, international trade law, and even human rights.³⁴

Although there is no specific international legal framework governing international investment law, the sources of international law (in terms of article 38(1) of the Statute of the International

Court of Justice (ICJ)³² are applicable to international foreign investment law and can be used to protect foreign investors and their investments. In addition, some ways of treating and protecting foreign investors have become part of customary international law over time, with various institutions (such as the World Bank Group)³³ devising guidelines for the treatment of foreign investors.³⁴

Although other principles of international law, such as state responsibility, diplomatic protection, and the minimum standard for the treatment of aliens, all dealt with in previous chapters, can also be used to protect foreign investors, the focus here is on treaty protection as a source of international law.

15.4 Investment treaties

International investment agreements can take the form of either bilateral (BITs) or of multilateral investment agreements (MIAs). BITs came about as agreed-upon sets of rules between signatory states and were intended to clarify the legal standards that would regulate the foreign investments made between them, based on the presumption that the host state's domestic legal system might not provide sufficient protection for the investment.³⁵ BITs can thus be seen as agreements between two states, and they are often compared to MIAs. The former tend to establish an equal legal status between the two signatory states concerned since it is within the contemplation of their provisions that either party may invest under the same conditions in the other's territory. BITs, which allow states to make specific commitments to each other depending on the investments involved, are often reciprocal in nature, with the same standards applying to both states concerned. As a result, BITs are often concluded in preference to MIAs.

A BIT is intended to determine, and to protect, the rights and obligations of foreign investors identified with the states that are party to the agreement.³⁶ The protection concerned is accorded to the nationals of the member states and includes both natural persons and legal persons, such as corporations and companies. With regard to legal persons, nationality can be determined in terms of the place of incorporation (attribution to the state under whose law the company has been established), in terms of the seat (the place of the central management of the legal entity) or in terms of the nature of control that is exerted by the nationals of a state that is party to the BIT (nationality of a company is allocated on the state of the shareholders who own a majority or substantial proportion of its shares).³⁷ The objectives of BITs may include promoting the effective use of economic resources; promoting and protecting investments; improving living standards; stimulating the flow of capital and technology; increasing the amount of economic development of the contracting parties; and facilitating economic co-operation between the two countries.³⁸

Regional trade and investment agreements (RTIAs) feature interesting dynamics in the treatment of foreign investment within regional economic arrangements (that is, NAFTA chapter 11). By granting investment liberalisation benefits preferentially (to regional allies), states may retain a higher level of control to align economic activities in their territories with policies underpinning public matters of economic, social and environmental significance.³⁹

According to the UN Resolution on Permanent Sovereignty over Natural Resources (1962), foreign investment agreements that are freely entered into by sovereign states should be observed in good faith. This is because, once they are entered into, investment agreements become part of the national law of a state, with the same legally binding effect that other national laws have. Thus, a BIT can be a legal basis for the making of claims by foreign investors, if there is an alleged violation of the provisions that are contained therein.

As no real international regime exists in relation to rules and guidelines on foreign investment, they are often differently interpreted by different tribunals. This is particularly evident in terms of FET and expropriation claims. Nevertheless, although the legal structures of the international investment regimes appear highly fragmented, with over 3 000 BITs, there are emerging tendencies towards greater harmonisation and coherence.⁴⁰

Although the contents of BITs differ, they normally contain provisions that guarantee some form of treatment of the foreign investors involved. Such provisions may include fair and equitable treatment (FET), national treatment (NT), and full protection and security.⁴¹ In addition, a provision on dispute settlement is commonly included in a BIT. BITs typically cover the following areas: scope and definition of investment; admission and establishment; NT; most-favoured-nation (MFN) treatment; FET; compensation in the event of expropriation or damage to the investment; guarantees of the free transfer of funds; and dispute settlement mechanisms. In this chapter, only the provisions relating to the treatment and protection of foreign investors that are common to investment treaties will be discussed below – namely NT, MFN treatment and FET, as well as provisions relating to full protection and security, unlawful expropriation, and dispute settlement.

15.4.1 Most favoured nation (MFN)

The MFN treatment in respect of foreign investment requires the host state to treat a foreign investor (and its investments) no less favourably than investors and investments from other states.⁴² In other words, an MFN provision seeks to ensure equality of competitive opportunities among foreign investors and their investments.⁴³ Any benefit that accrues from favourable treatment of one foreign investor should be given to foreign investors from third states. This means that a host state that gives advantages, such as tax exemptions, to one foreign investor, should give the same advantage to all other foreign investors. This principle seeks to prevent discrimination among foreign investors operating in the host state.

An exception to the MFN treatment standard are privileges, or benefits, that investors in the host state enjoy as a result of their membership of a free trade agreement (FTA), a customs union, an economic or monetary union, or any regional or international agreement or organisation.⁴⁴ Just as a state belonging to a customs union or FTA gives more favourable commitments to other FTA states parties, it is, likewise, supposed to give the same commitments to foreign investors in its territory, even when they are not parties to the FTA.⁴⁵ An exception to the MFN principle will exclude a benefit arising from an agreement from applying to a foreign investor. For instance, a BIT may allow a state party belonging to an international agreement to give special privileges to investors from states belonging to the same agreement, and to exclude those privileges from investors from the state with which it concluded the BIT in question.⁴⁶ To promote transparency, the host state is typically required to provide a list of such agreements to the foreign investor, or to identify them in a BIT.

Tribunals differ significantly in the assessment of violations of MFN treatment obligations.⁴⁷ In particular, the case of *Maffezini v Spain*⁴⁸ has prompted considerable debate on the advantages and disadvantages of MFN to dispute settlement issues.

15.4.2 National treatment (NT)

The NT standard requires the host state to treat foreign investors no less favourably than it does its domestic investors. This means that the host state should accord foreign investors in its territory the same standard of treatment that it accords its local investors, granting them the same privileges, if

any, as its nationals enjoy.⁴⁹ Such treatment pertains at the minimum, to the use, the enjoyment, the management, the disposal and the maintenance of the investments involved. In addition, the treatment should not be different when enacting and applying laws and regulations by the host state.⁵⁰ The purpose of the NT standard is to prevent the host state from discriminating between foreign and local investors, at least from the time that the foreign investor is admitted into the territory of the host state. For instance, a host state is not allowed to tax domestically owned companies, or investors, differently from foreign-owned ones. Such a measure would give domestic investors a competitive advantage over foreign investors. The NT standard ensures that foreign investors, and their investments, are treated comparably to investors from the host state. Thus, states are free to set their own standards, and regulations, as long as they are applied without regard to nationality.

Any allegation that a measure is inconsistent with the NT commitment usually requires the answering of three questions. The first pertains to whether the domestic and foreign investors and/or their investments are in like circumstances.⁵¹ However, not all arbitral tribunals conduct a ‘like circumstances’ analysis. Some refuse to do so on grounds that IIAs often do not include ‘like circumstances’ language and should therefore not be interpreted in the same manner as WTO treaties.⁵²

The second question pertains to whether the foreign investor, or investment, has received less favourable treatment than the domestic investor or investment that is in like circumstances. The third question is whether there is a legitimate government policy justifying treating the investor, and/or investment, as being not in like circumstances.⁵³ The first issue limits the NT obligation to situations where the investors are properly compared.⁵⁴ For example, the sector, the goods produced, and the equipment used in manufacturing can be used to determine whether the investors are in like circumstances. The ‘like circumstances’ can be used as a standard to assess whether domestic and foreign investors are seen to be equal. If the answer to the first question is in the affirmative, then one proceeds to the second question regarding whether the treatment involved is less favourable. ‘No less favourable’ treatment has been interpreted to mean treatment that is ‘equivalent to, not better or worse than, the best treatment accorded to the comparator’.⁵⁵ If the treatment is no less favourable than that which is given to the domestic investor, then the measure is consistent with the NT standard. However, if the treatment of the foreign investor is less favourable than that of a domestic investor, then the third question is raised, which is whether there is justification for treating foreign investors, in like circumstances to those of the domestic investors, less favourably than the latter. This question relates to exceptions to the NT standard.

An exception that has become common practice is the use of a negative list of sectors. This is a list of sectors in which only domestic investors can invest, with foreign investors excluded from such investment.⁵⁶ The NT standard is thus not applicable to such sectors, if it is so stated in a treaty, or in any investment law. Such a situation promotes transparency and predictability, because foreign investors are then informed of exactly where the standard applies. Other exceptions to the NT standard can be based on policies and laws that are enacted to protect national security, public interest, public health, and the environment.⁵⁷ Depending on national circumstances, laws and policies such as those that aim to promote the rights of women, or the rights of previously disadvantaged domestic groups, can be classified so that they are not perceived as violating the standard involved. For instance, article 3 of the 1998 treaty between the Czech Republic and South Africa guarantees National Treatment and Most-Favoured Nation Treatment for foreign investors, but:

shall not be construed so as to oblige one Party to extend to the investors of the other the benefit of any treatment, preference or privilege which may be extended by the Former Party by virtue of (...) any law or other measure the purpose of which is to promote the

achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, previously disadvantaged by unfair discrimination.⁵⁸

Exceptions to the NT standard could differ from one another, depending on the NT provision of the specific BIT that governs foreign investments.

15.4.3 Fair and equitable treatment (FET)

The importance of the standard is reaffirmed by the *Oil Platforms* case between Iran and the United States that appeared before the ICJ and in which the court stated that the standard was well known in terms of international investment protection.⁵⁹ What constitutes FET is not clear, and depends on the circumstances of each case. However, the minimum requirement is that the host state shall, at the very least, avoid subjecting the foreign investor to arbitrary, or fraudulent, treatment that would constitute lack of due process or denial of justice. In addition, notions of transparency and of the legitimate expectations of the foreign investor are also included in the principle.⁶⁰ Legitimate expectations, in the context of foreign investment, refers to expectations based on an assurance that is made to the foreign investor by the host state. This is a contested area of jurisprudence,⁶¹ as it is frustratingly unclear how specific the commitment must be and whether it must be made directly and specifically to a particular foreign investor.

Since FET is not clearly defined, it is up to the court or tribunal deciding a matter concerning a claim in terms of the standard to interpret it.⁶² This has led to different interpretations by different courts, and, as a result, there is uncertainty with regards to the standard. This is one reason that the FET is controversial; there is still no precise meaning that can be applied uniformly. Different courts have interpreted it differently. Below is one attempt:

While the exact content of this standard is not clear, the Tribunal understands it to require an ‘international minimum standard’ that is separate from domestic law, but that is, indeed, a minimum standard. Acts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards or even subjective bad faith.⁶³

In addition to the content of the standard being recognised as lacking in clarity, what is clear is that the FET standard is quite different from that of domestic laws. Most domestic laws also prohibit bad faith behaviour by governments, which has led many authors to suggest that the FET standard is simply a re-articulation of the denial of justice standard in international law. While most domestic laws actually do require procedural fairness ‘on paper’, the FET standard is included in international investment treaties.

The tribunal in *Genin v Estonia*⁶⁴ tried to determine what constitutes the violation of the standard, with a wilful neglect of duty or bad faith being indications that a violation has occurred. In addition, it was stated that the host state should not subject foreign investors to arbitrary, or fraudulent treatment, as doing so would result in undue process of law, and in the denial of justice. Denial of justice and undue process, would for instance, be recognised as occurring in a case where the foreign investor is not given a fair trial – for example, where a local court was chosen to hear the matter.⁶⁵

15.4.4 Full protection and security

The protection and security standard can be traced back to customary international law and the rules governing the treatment of aliens.⁶⁶ The full protection and security principle puts an obligation on a state to take measures to protect foreign investors, and their investments, against any negative

effects in the host state.⁶⁷ The purpose of this standard was, traditionally, to protect the foreign investor against the perpetration of physical violence.⁶⁸ However, the standard was later extended to non-physical harm and protection, such as legal protection. This standard now includes both legal and physical forms of security.⁶⁹ Tribunals have observed that the terms are capable of covering non-physical harms,⁷⁰ and that the Vienna Convention on the Law of Treaties did not restrict the standard to physical protection alone. In addition, other tribunals have gone further, asserting that the language implies the state's guarantee of stability within a secure physical, commercial and legal environment.⁷¹

Full protection and security, in terms of the wording, is a due diligence standard,⁷² dealing with questions of state responsibility and liability questions.⁷³ It has to do with the host state making sure that it protects foreign investors, and their investments, from threat of violence. Dangers can take the form of physical harm, or violence that is perpetrated on, or towards the investor, or damage to his or her investments, such as property. What is required by the standard is for the host state to give the same protection to foreign investors as it does to its own investors. Thus, the standard that is required to be maintained, in terms of the protection of foreign investors, is no higher than that which is offered to local investors. Such a requirement reflects the NT standard of non-discrimination as well. The practice has been to include the full protection and security standard under the fair and equitable treatment provision.⁷⁴ In fact, there is an inevitable overlap between protection and security and the FET standard.⁷⁵

15.4.5 Expropriation

Expropriation, in the context of foreign investment, is the taking by a host state of, in whole, or part, a foreign private investment that falls within its territory, or the taking of measures that have similar effects.⁷⁶ The taking of property can be direct or indirect. Direct expropriation refers to the physical deprivation of the use and enjoyment of property of a foreign investor, whereas indirect expropriation has to do with depriving the foreign investor of the benefit of the investment, even though he or she may retain ownership of the property.⁷⁷ The property concerned includes both physical and intellectual property. For instance, depriving a foreign investor of the use of trademarks can also constitute indirect expropriation because the foreign investor will then be deprived of a way in which to earn recognition, or to receive financial benefit.⁷⁸ The expropriation of one or more major national resources, as part of a general programme of social, or economic reform, is referred as nationalisation.⁷⁹

Different forms of expropriation measures and intentions exist.⁸⁰ Investment treaties usually contain clauses prohibiting the arbitrary expropriation, or the nationalisation of assets. Article 17(2) of the Universal Declaration on Human Rights 1948 (UDHR) clearly states that no one can be deprived of his property, making expropriation a human rights issue as well. In addition, the 1962 General Assembly Resolution on Permanent Sovereignty over Natural Resources, which gives every state the inalienable right freely to use and dispose of its wealth and natural resources, provides that expropriation or nationalisation must be 'based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign' and that the owner is to be paid appropriate compensation.⁸¹ Such a regulatory measure is also reflected in article 2(c) of the 1974 Charter of Economic Rights and Duties of States,⁸² which requires appropriate expropriation payment to be made when expropriation or nationalisation takes place.

A provision for compensation for expropriation has been included in the constitutions of various countries, including the Constitution of South Africa. Section 25 of the 1996 South African

Constitution also prohibits the expropriation of property, except if it is done in terms of a law of general application, for the public interest, or for a public purpose, and subject to the payment of compensation.⁸³

Expropriation is only lawful if it is non-discriminatory, if it is carried out for a public purpose, and if it is carried out in accordance with the due process of the law, with prompt, adequate and effective compensation being provided.⁸⁴ There is, as yet, no precise definition of ‘public purpose’. The meaning of the term often remains open to interpretation, and possibly depends on the circumstances of each case.⁸⁵ For example, the expropriation of property in terms of post-colonial policies designed to end the economic domination by the nationals of the former colonial powers may be regarded as being undertaken for a public purpose.⁸⁶ The use of ‘public purpose’ can, for example, be derived from laws of affirmative action, law reforms, or from black economic empowerment policies.⁸⁷ Thus, expropriating property for the use of a private person in one state may be considered not to be for a public purpose, whereas in another state, it may be seen as being for such a purpose.⁸⁸ The same may apply in terms of the requirement of non-discrimination, which prohibits expropriation or nationalisation based on the consideration of race.

The due process of law requirement means that the expropriation should be lawful, and that it should follow the set procedures. This requires the application of administrative justice by the administrative bodies concerned. The principles of natural justice are applicable in determining whether the administrative bodies, or officials, involved acted fairly and reasonably. This requires, *inter alia*, that consultations should be undertaken with the owner; that he or she should be informed of the decision to expropriate within a reasonable time; and an opportunity to be heard should be given if the owner wishes to challenge the decision to expropriate. The compensation must be appropriate, which is said to be the case if it is prompt, adequate and effective. In terms of part IV of the World Bank Guidelines on the Treatment of Foreign Direct Investment, ‘prompt’ means that the payment of compensation occurs without delay, and ‘effective’ means that the payment is made in a convertible currency that is regarded as usable in terms of the IMF, or in a currency that is acceptable to the investor.

Compensation is, in fact, one of the conditions of an expropriation to be in conformity with a state’s international obligations.⁸⁹ ‘Losses in international investment matters can be valued in a variety of ways.’⁹⁰ Normally compensation is ‘adequate’ if it is based on the fair market value of the property taken, as determined before the time at which the expropriation occurred.⁹¹ However, this has also been contested – for instance in the South African case of *PJ Du Toit v Minister of Transport*.⁹² In its judgment of 8 September 2005, the South African Constitutional Court held as follows:⁹³

Section 25 (3) indeed does not give market value a central role. Viewed in the context of our social and political history, questions of expropriation and compensation are matters of acute socio-economic concern and could not have been left to be determined solely by market forces.⁹⁴

15.5 Settling investment disputes

Provisions regarding dispute settlement are important in protecting investors when their rights are violated. In the absence of access to a means of settling disputes, the rules discussed would be less effective than they might otherwise be. There are different methods of settling disputes – namely, mediation, conciliation, negotiation, litigation, and arbitration. Parties involved may choose to use the method that best suits their needs. This will depend *inter alia* on the nature of the case, the complexity of the issues involved, the enforcement of awards, and the familiarisation with the rules

concerned. Employing a diplomatic way to solve disputes is often advised so as to keep a good relationship between host state and foreign investor, with an eye on future investments. Settlement negotiations tend to be preferred by both investors and host states. Where no negotiated settlement is possible, the most-preferred method for settling investment disputes is arbitration.

The advantages associated with the use of alternative dispute resolution (ADR) methods⁹⁵ include the flexibility of party autonomy, the confidentiality of the proceedings, and the finality of the decision.⁹⁶ Although the parties may choose any tribunal, or international court, to adjudicate on the matter, the International Centre for the Settlement of Investment Disputes (ICSID) is a specialised institutional and procedural framework that deals with the settling of investment disputes.⁹⁷ The Centre was established in terms of the Washington Convention on the Settlement of Investment Disputes.⁹⁸

While other arbitral tribunals are either private or ad hoc bodies, the ICSID has the status of being an international institution. The Centre is sponsored by the World Bank under its mandate to promote private foreign investment for development purposes. Because it provides legal security and predictability for foreign investors, the ICSID is often chosen for the settlement of foreign investors' disputes.

On the question of its jurisdiction, the ICSID determinations apply to investment disputes arising between a contracting state and a national of another contracting state. Thus, such determinations do not apply to disputes arising between two contracting states alone, or between private parties alone, or between a national and his or her own state.⁹⁹ Unlike other dispute resolution mechanisms, the ICSID does not provide for a compulsory system of conflict resolution. However, in terms of article 25 of the ICSID Convention, contracting states and nationals should specifically give their consent in writing for a dispute to be settled by the ICSID; mere ratification of the Convention alone is not enough to constitute consent. Consent can be given in a BIT, in a foreign investment code by a contracting state, or in respect of a specific dispute.¹⁰⁰ In addition, foreign investors can also express their consent by accepting the offer from the host state to use the ICSID in the case where a dispute arises. Parties that are not members of the ICSID may also make use of the ICSID's additional facility, which was created in 1978, and which is available in cases where one party is neither a contracting state nor a national of a contracting state.¹⁰¹ An ICSID additional facility arbitration proceeding is governed by the ICSID Additional Facility Rules, the ICSID Arbitration (Additional Facility) Rules, and the Administrative and Financial Regulations.

Two types of conflict resolution are available in terms of the ICSID – namely, conciliation and arbitration. Any party may request that the possibility of conciliation be considered by a conciliation commission. The commission, which has the function of clarifying the issues involved, can assist in bringing about a mutually acceptable settlement, although its recommendations are regarded as non-binding.¹⁰² The commission may consist either of a single conciliator, or of an uneven number of conciliators, with the process concerned being conducted in terms of the ICSID and Conciliation Rules.¹⁰³ If arbitration is required, the parties need to make a written request for an arbitration tribunal to be appointed. According to article 37 of the ICSID, the tribunal may consist of a single arbitrator, or of an uneven number of arbitrators, appointed by the parties, or by the Secretary-General of the ICSID if the parties involved do not agree on the arbitrators. The arbitration procedure is conducted in accordance with the Convention and the Arbitration Rules.

ICSID awards are binding, and are not subject to appeal. However, a party may request the interpretation of an award, or the revision or annulment of an award on the grounds that the tribunal was not properly constituted, that there was corruption involved, or that the tribunal exceeded its powers.¹⁰⁴ All states that are signatories to the ICSID Convention agree to recognise, and to enforce, the awards concerned to the same extent that they would if they were final judgments of their

national courts.¹⁰⁵ Thus, resorting to the ICSID for dispute settlement, and for the protection of foreign investors, as far as international laws are concerned, might be more efficient, given that its decisions are equivalent to the final judgments made in the national courts of all ICSID contracting states parties. In addition, article 42(1) of the ICSID Convention requires the tribunal involved to apply the law of the contracting state party to the dispute, and to the rules of international law, thus also recognising the state's domestic laws.¹⁰⁶ The ICSID also assists with the organisation of tribunals; it administers the funds that are necessary to cover the costs of the proceedings; and it produces publications that contribute to the understanding of international investment laws.¹⁰⁷

In addition to the ICSID, there are also other arbitral institutions used to settle investment disputes, including the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).¹⁰⁸

15.6 Investment law on the African continent

The African Union (AU) consisting of 54 African states does not have a specific strategy document focusing on investments. But within the framework of the AU, the New Partnership for Africa's Development (NEPAD) has been created. NEPAD is an economic development programme that aims to provide an overarching vision and policy framework for accelerating economic co-operation and integration among African countries. In its framework document, NEPAD specifically recognises the importance of increasing investments to Africa as an essential component for a sustainable long-term approach to fulfil the international development goals, and particularly the goal of reducing by half the proportion of Africans living in poverty.¹⁰⁹ NEPAD prioritises specific areas and envisages certain actions that are deemed to be important to attract investments. Thus, NEPAD has mainly an enabling function contributing to the creation of a positive investment climate on the African continent as a whole.

Most African regional economic communities (RECs)¹¹⁰ have developed regional investment promotion measures. These measures (such as regional investment policies or treaties, regional investment promotion agencies and investment forums)¹¹¹ aim primarily at promoting market-friendly policies and regional integration, which can ultimately lead to improvements in the productivity of investments.¹¹² RECs and regional trade agreements (RTAs) can co-ordinate national infrastructure plans within a regional framework or can create continental energy markets, which contribute to a positive investment climate.

Investment is a prerequisite for the development component of sustainable development.¹¹³ Development in Africa *inter alia* requires substantial investment in new technologies, processes and services. Given that the private sector is the major source of investment worldwide, a favourable investment climate in Africa is also essential for increased investment. Various factors, including poor governance, institutional failures, macroeconomic policy imperfections and inadequate infrastructure, as well as rampant corruption, bureaucratic red tape, weak legal systems and a lack of transparency in government departments, all lead to an unfavourable investment climate. Innovative solutions and technologies can, however, only be implemented if there are adequate conditions for inclusive investment, leveraging private-sector resources and seizing opportunities for innovation.¹¹⁴ Many of the key risks for private-sector investors are linked to political and/or regulatory instabilities. These barriers include insecurity of property rights, lack of knowledge of legal systems, currency risks and the instability and uncertainty of the regulatory and policy environment – including, for example, the longevity of incentive programmes.

The World Bank's *Doing Business* report by analysing the favourability of a state's business climate ranks economies on the basis of nine parameters: starting a business; dealing with construction permits; registering property; getting credit; protecting investors; paying taxes; trading across borders; enforcing contracts; and closing a business. In the past five years, about 85 per cent of the world's economies have made it easier for local entrepreneurs to operate by improving business regulation. However, the rankings for 185 countries in 2012 reveal that of the 33 countries classified as low-income economies, only two fall within the rankings from 50 to 100. Of these 33 low-income countries, 17 rank among the last 50 of the 185 countries. Of the 50 lowest-ranking countries, 32 are in Africa. When comparing the World Bank's African Ease of Doing Business rankings of 2011 with the previous year, one can see that 10 African countries were ranked the same as in 2010, 24 were downgraded and 17 obtained a higher ranking as a result of policy reforms and initiatives that had a positive impact on the investment climate. The aforementioned illustrates that although it remains difficult for Africa to attract foreign capital and mobilise adequate and sustained levels of domestic private investment, some African countries have made progress and could achieve higher levels of investment.

Mobilising investment in Africa requires political commitment to overcome substantial barriers at various levels. To facilitate new markets requires adequate regulatory frameworks (international, regional and national) in order to give investors the necessary confidence.¹¹⁵ The national state has to balance the interests of attracting (and securing) international investment while promoting peace and security for its population. The most appropriate approach for achieving both these goals is adherence to and promotion of the rule of law while creating incentive structures for investors to act sustainably and to respect national social development goals, empowerment policies, labour standards and human rights.

15.7 National investment legislation in South Africa

Sound national legislation is the foundation on which to attract foreign investment. Each national state has the power to regulate FDI and to provide domestic incentive schemes in order to attract FDI. These measures include, among others, tax incentives, economic processing zones, investment promotion agencies, and investment climate assessments next to a general good-policy framework.¹¹⁶ However, international investment flows are also regulated by arrangements that are multilateral or regional (whether plurilateral or bilateral) in nature. The main instruments governing FDI flows remain bilateral investment treaties (BITs) and double taxation treaties (DTT).

This section now considers the investment legislation framework in place in South Africa, as one example of how national investment legislation may be structured.

South Africa is part of BRICS, a group of emerging economies comprising Brazil, Russia, India, China and South Africa.¹¹⁷ South Africa is also a member, *inter alia*, of the following agreements and organisations: SADC, the Southern African Customs Union (SACU), the SACU-USA Trade, Investment and Cooperation Agreement (TIDCA), the SADC Protocol on Finance and Investment, and the WTO. Although South Africa is not a member of the ICSID Convention, it has made use of the ICSID Additional Facility Rules to settle investment disputes.¹¹⁸

South Africa, one of the strongest economic players on the African continent, has a relatively good investment environment, with an efficient physical infrastructure of roads, and rail and air transport, a well-developed communications network that is supported by relatively reliable electricity supplies, and a substantial financial support structure for companies established in the country. In 2013, South Africa was ranked 41 out of 189 countries in the world in terms of ease of

doing business by the World Bank and 10th in terms of protecting foreign investors.¹¹⁹ In sub-Saharan Africa, South Africa is ranked third out of 47 countries in terms of ease of doing business, and first in terms of providing investor protection. Nevertheless, South Africa currently lacks specific domestic legislation geared towards protecting foreign investors, which means that foreign investors in South Africa have to rely on the Constitution, and on other national laws, for protection and standards of treatment in the conduct of their investment.

In South Africa, international law is only considered to be part of national law when it is incorporated into Acts of Parliament. South Africa follows the dualist approach, in that it requires the incorporation or the transformation, of international law, or agreements, into national law in order for it to be applicable. Section 231(2) of the 1996 Constitution stipulates: ‘An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of the Provinces, unless it is an agreement referred to in subsection (3).’

The Constitution further requires the enactment of national law to give effect to an international agreement.¹²⁰ Thus, international law is recognised as law in South Africa upon its incorporation into domestic law. The so-called ‘international-law-friendly’ clauses play an important role in overcoming any obstacles in regard to incorporation.¹²¹

During the apartheid era, South Africa entered into very few BITs. After 1994, the government entered into a flurry of BITs with developed countries, principally European countries that were keen to support its transition back into the community of nations and with a view to encouraging foreign investment in the new South Africa.¹²²

Section 2 of the 1996 Constitution provides that the Constitution is the supreme law in South Africa, making any law that is inconsistent with it invalid. In addition, the principles of non-discrimination and equality (which are embraced in the NT and MFN treatment) are also to be promoted in terms of section 9 of the Constitution. Equality, in terms of the Constitution, includes the full enjoyment of rights and freedoms, and the right to equal protection. Thus, foreign investors in South Africa are guaranteed protection of their rights by the Constitution. To promote equality, section 9(2) of the Constitution requires legislation and the taking of other measures to protect or advance those who have been disadvantaged by unfair discrimination. Such a requirement comes from South Africa’s background of apartheid laws, which discriminated against persons on the basis of race.

Consequently, the Broad-Based Black Economic Empowerment (B-BBEE) Act of 2003 was enacted. The Act was intended, *inter alia*, to promote the achievement of the constitutional right to equality, to increase broad-based effective participation in the economy and to promote a higher growth rate through the increased employment of and more equitable income distribution among black people.¹²³ In terms of section 1 of the Act, African, Indian and coloured people are all considered to be black people. Empowerment consists in giving preferential treatment to black South Africans by means *inter alia* of increasing the number of black people that manage, own, and control enterprises and productive assets, by facilitating the ownership and management of enterprises and productive assets, by achieving equitable representation in all occupational categories, and by engaging in preferential procurement and investment in enterprises that are owned, or managed, by black people.¹²⁴ In terms of section 11 of the Act, the Minister must issue a strategy for B-BBEE providing for an approach to the empowerment measures that are to be taken by the state, and by all its organs, by public and private entities, by non-governmental organisations, and by local communities. This places an obligation on the above-mentioned entities and organisations to take B-BBEE into account. The Act is seen as a mechanism for promoting equality in terms of section 2(2) of the Constitution.

Apart from the B-BBEE Act, there is also the Preferential Procurement Policy Framework Act (PPPFA) of 2000 enacted in terms of section 217 of the Constitution. This Act specifies the need to implement a procurement policy providing for categories of preference in the allocation of contracts, as well as for the protection or advancement, of persons, or categories of persons who have been disadvantaged by unfair discrimination.¹²⁵ The PPPFA stipulates that the government should take into account a preference point system that prescribes functionality, price, and reconstruction development programme goals when assessing contracts in procurement.¹²⁶ Thus the PPPFA also supports the black economic empowerment goals.

In addition, the National Empowerment Fund Act of 1998 was enacted to promote and to facilitate black economic equality and transformation. The objectives of this Act are inter alia to foster and support business ventures pioneered and run by black enterprises, to improve the universal understanding of equity ownership among black people, to contribute to the creation of employment opportunities, and to provide black people with opportunities to acquire shares in private business enterprises.¹²⁷ The Act thus supports B-BBEE. It affects the NT principle because it allows government, under certain circumstances, to discriminate between domestic and foreign investors, by granting an exception to the NT standard.

Section 25 of the Constitution provides for the right to property and prevents arbitrary deprivation of property – that is, unlawful expropriation. The requirements for lawful expropriation are that it should be done in terms of a law of general application, for a public purpose, or in the public interest, and subject to compensation. In addition, section 25(3) sets out what to consider when determining value for compensation, including, among others, conditions, the current use and market value of the property, and the purpose of the expropriation. The Expropriation Act 63 of 1975 deals with the expropriation of property for public purpose, which power is vested in the Minister of Public Works. The Act clearly sets out the procedures to be followed in the expropriation process, from the inspection of the property to be expropriated, through the notification that the property is to be expropriated and the making of the offer, to the payment of compensation.¹²⁸ In addition, section 12 provides for how compensation should be determined. This not only facilitates the payment of compensation, but also helps to ensure that fair and adequate compensation is offered, since there are guidelines to follow. The US Department of State in its 2014 Investment Climate Statement relating to South Africa summarises as follows:

The Expropriation Act 63 of 1975 and the Expropriation Act Amendment of 1992 entitles the government to expropriate private property for reasons of public necessity or utility. The decision is an administrative one. Compensation should be the fair market value of the property as agreed between the buyer and seller, or determined by the court, as per section 25 of the Constitution (...). In March 2014, the Parliament passed the Restitution of Land Rights Amendment Bill, which reopens the window for persons or communities disposed of their land after 1913, due to past discriminatory laws and policies to lodge claims for their properties.¹²⁹

In 2015, the Expropriation Bill was submitted to Parliament.¹³⁰ The Bill proposes a ban on land ownership of agricultural land by foreigners.

15.7.1 The Promotion and Protection of Investment Bill

In November 2013, the Promotion and Protection of Investment Bill, which was to apply to all investors, was published in the *Government Gazette*. Despite public comments submitted to the government by the end of January 2014, so far, there have been no further developments on the Bill. A revised Bill may be expected during the course of 2015.

The purpose of the Promotion and Protection of Investment Bill is to promote, and to protect, investment and to ensure the equal treatment of foreign investors, and of South African citizens who are subject to the applicable legislation.¹³¹ In addition, the Bill seeks to achieve several balances between the rights and obligations of investors.¹³² According to the Department of Trade and Industry, the Bill also attempts to redress the balance between the needs of foreign investors and the government's right to implement policy.¹³³

In the preamble to the Bill, objectives are set out. What is prominent with regard to the protection of foreign investors is, *inter alia*, the provision of a sound legislative framework for the protection and promotion of investments, and the commitment to maintaining an open and transparent environment for investment on a non-discriminatory basis, with an emphasis on rights pertaining to access to justice. With regard to the application of the Bill, section 4(2) follows an approach that is recommended by the SADC Drafting Committee. This includes a list of measures the government can take, notwithstanding the Act. The measures involved include, *inter alia*, any existing taxation and legislative measures, and any government procurement processes, as well as any existing or future customs union, free trade area, international agreement, and subsidies or grants from the government. Provision is also made for exceptions to the principles that are entrenched in the investment laws, such as NT and MFN treatment.

Section 5 of the Bill stipulates that protection for investors applies to investors, and to investments that have been made in accordance with the applicable law, and that are acquired, and used, in the expectation of being used for, and that are used for, economic or business purposes.¹³⁴ In addition, the protection of foreign investments is subject to applicable domestic laws and international agreements.

NT is guaranteed in section 6 of the Bill. Foreign investors, and their investments, and returns, are to be treated no less favourably than the way in which the state treats South Africans in like circumstances. In addition, foreign investors are accorded the NT by being allowed to engage in activities of foreign investment in the state, thus preventing discrimination in terms of restraint of trade.¹³⁵ Section 6(4) of the Bill gives guidelines on determining what 'like circumstances' means, which is to be determined on a case-by-case basis, taking into account the effect that the foreign investment has on the state, the sector in which the foreign investment is made, the aim of any measure relating to foreign investment, and other factors.

With regard to security, the Bill provides for the equal protection of all investors, thereby reflecting the NT principle. However, a limitation on this right is apparent in section 7(1), which specifies that the security involved is subject to available resources and capacity. What is to be considered in determining whether the state has the capacity and the available resources to accord security to investors will be up to interpretation, as provided for in section 2, since the Bill is not clear on this issue. Unless there are well-articulated guidelines on what is to be considered in determining the capacity of the state and the availability of resources, this section may be used by the state to escape liability, even in circumstances where it should be liable. The Bill also provides remedies for investors who suffer losses or damages as a result of war, armed conflict, and revolt. In addition, investors who suffer losses from the requisitioning or destruction of their property by the authorities of the state, where these were unnecessary, will be given either restitution or appropriate compensation.¹³⁶

The provision on expropriation provides for expropriation to take place in terms of three requirements common to customary international law, although two more requirements are added – namely, that expropriation be in accordance with the Constitution, and in terms of a law of general application. Section 8(2) contains a list of acts that do not amount to expropriation, but which include measures that, when taken by the state, have indirect adverse impacts on the economic value

of an investment. The measures concerned are aimed at protecting public welfare objectives with respect to the issue of compulsory licences granted in relation to intellectual property rights and include measures resulting in deprivation of property, but where the state does not acquire ownership of the asset(s) concerned. The problem that arises from this section, however, is that such acts are not limited to those listed in the section and thus there is room for the state to add more acts. Notwithstanding the question whether the state can reasonably be expected to list all possible future types of non-compensable *bona fide* regulatory actions, such a provision allows for possible abuse, since the state has the power to make laws and regulations in its own territory. Even though it can affect foreign investors, a measure that has an indirectly adverse impact on the economic value of an investment is not regarded as expropriation in terms of the Bill.

Compensation is to be given by reflecting an equitable balance between the public interest and the interests of those affected by the expropriation. Circumstances that need to be taken into account in determining an equitable balance include the current use of the investment, the history of the acquisition, the use and market value of the investment, and the purpose of the expropriation.¹³⁷ The market value to be considered is taken immediately before the expropriation has taken place, and includes the amount of interest that is charged, based on the national banking system. An investor affected by expropriation has a right to review by a competent court.¹³⁸ Section 10 contains a provision that affirms the government's sovereign right to take measures to regulate the public interest. The measures that can be taken to uphold the rights, the values, and the principles contained in the Constitution, as well as to redress historical, economic, and social inequalities, to promote and preserve cultural heritage, and to restore international peace and security are enumerated in a list.

In terms of section 11, a foreign investor has to approach the Department of Trade and Industry, or any other competent authority, to facilitate dispute settlement resolution; hence, it is the Minister who regulates the procedures for the settlement of disputes.¹³⁹ Nevertheless, an investor is not barred from approaching any court, tribunal or statutory body to resolve an investment dispute. In addition, an investor has the option to submit a dispute to arbitration in terms of the South African Arbitration Act 42 of 1965. The provision on dispute settlement does not provide that foreign investors have the opportunity to submit their dispute to international arbitration because it only provides for arbitration in accordance with national legislation.

If the Promotion and Protection of Investment Bill is enacted into law, it may open the room for other legislation limiting foreign ownership. However, with reference to NT non-conforming measures under a state party's law existing at the time that a BIT enters into force, the SADC Model BIT recommends the inclusion of a provision that any amendment or modification after the BIT is concluded should not decrease the conforming measure involved. This limits the government's power to amend any existing law limiting the rights of foreign investors, which seems much more in line with article 1 of the SADC Protocol on Finance and Investment, which explicitly places an obligation on states parties to create a favourable investment regime in the region.

15.7.2 Claims and cases

The implications of entering into investment treaties did not receive scrutiny until the South African government found itself on the receiving end of a first serious claim in 2007 in the *Piero Foresti v Republic of South Africa* case.¹⁴⁰ This case, which came before the ICSID, concerned the broad-based black economic empowerment (BBBEE) provisions of the Mineral and Petroleum Resources Development Act (MPRDA) 28 of 2002 in combination with the Mining Charter. Various European investors claimed that South Africa had violated its obligations under two BITs¹⁴¹ by passing post-

apartheid legislation ‘designed to ameliorate social conditions experienced by historically marginalized South Africans,’ which changed private ownership of mineral resources into a public licensing system that required companies to meet black empowerment objectives. The claimants argued that the MPRDA violated the FET and NT standards. The case was dismissed after the claimants explicitly sought a discontinuation of the arbitral proceedings. Although they had not been provided with full relief for their alleged injuries, pursuant to an agreement between the Department of Mineral Resources and the operating companies, South Africa granted the claimants’ operating companies new order mineral rights without requiring them to sell 26 per cent of their shares to historically disadvantaged South Africans. Instead, pursuant to the agreement, the operating companies were deemed to have complied with the Mining Charter, by making a 21 per cent beneficiation offset (in the making of processing, and adding value to, quarried stone in South Africa), and by providing a 5 per cent employee ownership programme for the employees of the operating companies involved. Although the parties concerned reached an agreement, this case shows how government policies can affect the rights of foreign investors. A negative aspect of such legislation is that it often applies retrospectively, thus affecting foreign investors who are already operating in the Republic, and, therefore, violating BITs.

The MPRDA and the application of section 25 of the Constitution was also considered by the Constitutional Court in 2013 in *Agri SA v Minister for Minerals and Energy*.¹⁴² The judgment provides a brief background to the development of South African law regarding the exploitation of mineral rights, culminating in the MPRDA.

In another matter, a Swiss national successfully instituted arbitration proceedings under the UNCITRAL Arbitration Rules, in relation to an alleged breach of the Switzerland-South Africa investment protection treaty. In terms of the Rules, South Africa was to provide protection and security to foreign investors from Switzerland who conducted their business in South Africa. The foreign investor alleged that his property was vandalised and poached. It was alleged that South Africa had failed to provide adequate protection and security for an investment game farm, a conference centre and a hotel that belonged to the Swiss national. The Republic of South Africa was found to be in violation in regard to the full protection and security provision, and it was found to be liable in terms of the Switzerland- South Africa BIT.

15.7.3 The end of BITs?

Although the Promotion and Protection of Investment Bill has not been enacted yet, there is little doubt that South Africa is now shifting away from its use of BITs over many years towards investment regulation through domestic laws. Consequently, no new BITs are expected to be concluded and those that have already been entered into¹⁴³ will neither be extended nor renewed once they are terminated on the agreed date. The reasons for the decision to cancel BITs, and the justifications involved, include, inter alia, that the existing BITs hamper government policies.¹⁴⁴

Several BITs between South Africa and other countries have already been terminated.¹⁴⁵ This has raised concerns, especially among foreign investors who are from states that are currently party to BITs, as well as potential foreign investors. The concern is that foreign investors will not be accorded the same standard of protection that they would have been given under the provisions of BITs.¹⁴⁶ BITs have had the advantage (for investors in particular) of being individually negotiated in a way that suited the mutual interests of the parties concerned.¹⁴⁷ The Federal Republic of Germany, for example, has expressed disappointment over the cancellation of BITs and would have preferred for the continuation of BITs with the South African government.¹⁴⁸

The adjusted standard of protection offered by the Draft Bill is evident for example in the BIT concluded between South Africa and Canada, which, unlike the Bill, explicitly provides for the FET and MFN treatments. In addition, the parties concerned made specific commitments in the BIT. For instance, they agreed that either of the parties might require the majority of the board of directors or the members of specific committees to be from specific countries, provided that such a requirement did not materially impair the investor's ability to exercise control over the investment.¹⁴⁹ Specific commitments are also seen in article 3(3)(c) of the BIT, which provides for the NT and MFN not to apply to treatment pursuant to BITs and to multilateral agreements concluded by contracting states that relate inter alia to aviation, maritime matters, and financial services.

The possibility for contracting states to make specific commitments to investors, depending on their needs and policy considerations, is one of the reasons that BITs are concluded – something that foreign investors will not be able to achieve under the Draft Investment Bill. The expropriation provision in the Bill also differs from that in the BITs concluded by South Africa. For example, article 6 of the BIT concluded with the Netherlands stipulates that '[n]either Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with (...)'.

In terms of the South Africa-Canada BIT, measures having an effect equivalent to nationalisation or expropriation are also prohibited. These expressions are not used in the Bill. In addition, some of the measures introduced in section 8 of the Bill do not amount to acts of expropriation but may be in violation of the BITs because they could deprive an investor of their investment indirectly or may have an effect equivalent to nationalisation or expropriation. An example is a measure that has an indirect adverse impact on the economic value of investment but which, in terms of section 8(2) of the Bill, does not amount to expropriation. In contrast, in terms of the BITs, such a measure would constitute expropriation. This means that under the Bill, investors will most probably not be able to claim for compensation on this basis. Moreover, international arbitration is not expressly provided for under the Draft Bill, although under the BIT, there is the option of using the ICSID, under the ICSID Additional Facility and under the UNCITRAL Rules used in the settlement of disputes.¹⁵⁰ Whether or not this is a positive development depends inter alia upon whether one thinks arbitral tribunals have done a good job of drawing the line between compensable expropriation and non-compensable government regulation in the right place, and also whether one thinks that it is a good idea for states to reserve to themselves and their own law-making bodies the ability to draw the line in the right place.

Lastly, BITs are an important guarantee of protection for investors because they are reciprocal in nature. The fact that BITs cannot be amended unilaterally (by one party only) is also a form of guarantee for investors. In contrast, domestic legislation is subject to the unilateral amendment by the government with the approval of Parliament, and this can impact the level of protection that is offered to investors. From a foreign investor's perspective, the mere adoption of domestic legislation to replace bilateral treaties in itself diminishes the degree of protection afforded by it. A typical concern to foreign investors is that their assets could be expropriated by appropriation, confiscation and nationalisation. Foreign investors remember with concern the 2005 Zimbabwean Constitutional Amendment (No 17) Act, which allowed the government to seize or expropriate farmland without compensation, and barred courts from adjudicating over legal challenges filed by dispossessed and aggrieved farmers. Section 2(2) of the Amendment Act provides that:

All agricultural land – [a description is given here of such agricultural land identified by the government] ... is acquired by and vested in the State with full title therein (...); and (...) no compensation shall be payable for land referred to in Paragraph (a) except for any improvements effected on such land before it was acquired.

The practical implications of the 2005 Zimbabwean Amendment Act resulted in farm seizures; approximately 4 000 farmers were forcibly ejected from their properties with no compensation being paid for the land.¹⁵¹ This chain of events took place despite the fact that Zimbabwe had BITs in place with a number of countries, which raises the question whether BITs can make a significant difference once a government has decided to expropriate.

The South African government has claimed that the new Bill creates an effective legal framework equivalent to that provided in terminated BITs. However, it remains to be seen whether the Draft Investment Bill offers a level of protection comparable to that which foreign investors were accorded in terms of BITs.¹⁵²

SUGGESTED FURTHER READING

- M Bungenberg, J Griebel, S Hobe, A Reinisch & YI Kim (eds) *International Investment Law* Nomos (2015)
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¹ OC Ruppel & F Shifotoka ‘Foreign direct investment protection for improved energy security in southern Africa: The examples of SADC and Namibia’ in OC Ruppel & B Althusmann (eds) *Perspectives on Energy Security and Renewable Energies in Sub-Saharan Africa: Practical Opportunities and Regulatory Challenges* (2015) 161 at 163.

² LM Marafa *Africa’s Business and Development Relationship with China: Seeking Moral and Capital Values of the Last Economic Frontier* (2009) 13.

³ HG Broadman *Africa’s Silk Road* (2007) 92.

⁴ A Habiyaremye ‘Chinafrique, Africom, and African natural resources: A modern scramble for Africa’ 12(1) *The Whitehead Journal of Diplomacy and International Relations* (2011) 79.

⁵ MA Pigato ‘The Foreign Direct Investment Environment in Africa’ African Region Working Paper Series No 15 (April 2001) 3, www.worldbank.org/afr/wps/wp15.pdf accessed 28 August 2014.

⁶ Deutsche Bank Research *China’s commodity hunger: implications for Africa and Latin America* (2006) 12 http://www.dbresearch.com/PROD/DBR_INTERNET_DE-PROD/PROD0000000000199956.pdf accessed 28 August 2014.

⁷ Habiyaremye op cit 84-5.

⁸ A Qureshi & A Ziegler *International Economic Law* 3rd ed (2011) 490.

⁹ M Sornarajah *The International Law on Foreign Investment* 3rd ed (2010) 8.

¹⁰ International Centre for the Settlement of Investment Disputes (ICSID).

¹¹ But see JA Bischoff & R Happ ‘The notion of investment’ in Bungenberg et al op cit 543.

¹² Cf *Consortium RFCC v Morocco* ICSID Case No. ARB/00/6, Decision on Jurisdiction (11 July 1997) para 43; *Salini Costruttori SpA and Italstrade SpA v Morocco* ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001); *Autopista Concesionada de Venezuela C.A. v Venezuela*, ICSID Case No ARB/00/5, Decision on Jurisdiction (27 September 2001); *Joy Mining Machinery Limited v Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction (6 August 2004) para 53; *Helan International Hotels A/S v Egypt*, ICSID Case No ARB/05/19, Decision on Jurisdiction (17 October 2006) para 77; *Phoenix Action Limited v Czech Republic*, ICSID Case No ARB/06/5 (15 April 2009); *Immaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine*, ICSID Case No Arb/08/8, Decision on Jurisdiction (8 March 2010).

¹³ OECD *OECD Benchmark Definition of Foreign Direct Investment 2008* 4th ed (2009) 48, <http://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf> accessed 13 August 2014.

¹⁴ M Duce & B de España *Definitions of Foreign Direct Investment (FDI): A Methodological Note* (2003) 2, available at <https://www.bis.org/publ/cgfs22bde3.pdf> accessed 15 September 2014.

¹⁵ Ibid.

¹⁶ Broadman op cit 152.

¹⁷ IA Moosa *Foreign Direct Investment: Theory, Evidence and Practice* (2000) 4.

¹⁸ Ibid.

¹⁹ Sornarajah op cit 116.

²⁰ K Evans *Foreign Portfolio and Direct Investment: Complementarity, Differences, and Integration* OECD Global Forum on International Investment: Attracting Foreign and Direct Investment for Development, Shanghai (5-6 December 2002) 2, available at <http://www.oecd.org/investment/investmentfordevelopment/2764407.pdf> accessed 1 November 2014.

²¹ Or to participate in a project that may be more successfully pursued by pooling resources or technology. See Sornarajah op cit 116.

²² Sornarajah op cit 118.

²³ United Nations General Assembly Resolution on permanent sovereignty over natural resources 1803 (XVII) of 1962.

²⁴ Ibid.

²⁵ In an increasingly globalised world, a country's competitiveness depends on how it is perceived by its trading partners; cf UBUNTU 'Global perceptions key to competitiveness and foreign investment' in 7 UBUNTU *South Africa's Public Diplomacy in Action* (2014) 60.

²⁶ C Utz *Guide to Protecting Foreign Investment* (2009) 17.

²⁷ 'Given that the private sector is a major source of investment, a favorable investment climate is essential for increased investment. Key risks for investors are predominantly linked to political and/or regulatory instabilities. Mobilising investment therefore requires political commitment to overcome substantial barriers at various levels to give investors the necessary confidence. National states have to balance the interest of attracting (and securing) international investment while promoting peace and security for their population.' Taken from the Inaugural Presentation by OC Ruppel at the Training Workshop on Bilateral Investment Treaties and Arbitration, held by the African Institute for International Law, Mount Meru Hotel, Arusha, Tanzania, 16 February 2015.

²⁸ B Schoebener 'Outlook on the development in public international law and the law relating to aliens' in M Bungenberg, J Griebel, S Hobe, A Reinisch & Y-I Kim (eds) *International Investment Law* (2015) 65.

²⁹ F Griesel 'The sources of foreign investment law' in Z Douglas, J Pauwelyn & JE Viñuales (eds) *The Foundations of International Investment Law: Bringing Theory into Practice* (2014) 215.

³⁰ J Pauwelyn 'Rational design or accidental evolution? The emergence of international investment law' in Douglas et al op cit 14.

³¹ For further references, see Pauwelyn op cit 15; M Parparinskis 'Analogies and other regimes of international law' in Douglas et al op cit 73 ff.

³² Article 38(1) states: '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 recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'

³³ See Worldbank Guidelines on the Treatment of Foreign Direct Investment (1992); AP Newcombe & L Paradell *Law and Practice of Investment Treaties: Standards of Treatment* (2009) 49.

³⁴ J Sanford & A Weiss *International Monetary Fund: Organization, Functions, and Role in the International Economy* CRS Report for Congress (2004).

³⁵ R Dolzer *The Impact of International Investment Treaties on Domestic Administrative Law* (2007).

³⁶ Qureshi & Ziegler op cit 498.

³⁷ Ibid, 500.

³⁸ See for instance preambles of the Namibia-Spain and Namibia-Netherlands BITs.

³⁹ A Falsafi 'Regional trade and investment agreements: Liberalizing investment in a preferential climate' 36(1) *Syracuse Journal of International Law & Commerce* (2008) 43.

⁴⁰ Cf SW Schill *The Multilateralisation of International Investment Law* (2009) xiv; AM Johnston & MJ Trebilcock 'Fragmentation in international trade law: Insights from the global investment regime' 12(4) *World Trade Review* (2013) 621.

⁴¹ R Dolzer & C Schreuer *Principles of International Investment Law* 2nd ed (2012) 22.

⁴² Sornarajah op cit 203.

⁴³ JP Meltzer 'Investments' in S Lester & B Mercurio *Bilateral and Regional Trade Agreements: Commentary and Analysis* (2009) 215 at 234.

⁴⁴ See article 3 (1) of the Botswana-Germany BIT for this example: 'Neither Contracting State shall subject investments in its territory owned or controlled by nationals or companies of the other Contracting State to treatment less favourable than it accords to investments of its own nationals or companies of any third State.'

⁴⁵ Meltzer op cit 235.

- ⁴⁶ Sornarajah op cit 205.
- ⁴⁷ For more details on the application of MFN in investment practice, see A Reinisch ‘Most favoured nation treatment’ in Bungenberg et al op cit 819–45.
- ⁴⁸ *Emilio Augustin Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decisions on Jurisdiction (25 January 2000).
- ⁴⁹ A clear case dealing with *de facto* discrimination is *Marvin Feldman v Mexico*, ICSID Case No ARB(AF) 99/1, Award (8 November 2010).
- ⁵⁰ ET Laryea ‘Rules for entrenching economic dominance by developed countries: Examples in international trade and investment laws’ in ET Laryea, N Madolo N & F Sucker (eds) *International Economic Law: The Voices of Africa* (2012) 90–109, 95.
- ⁵¹ Meltzer op cit 227.
- ⁵² Cf for instance, the comparisons made in the Mexican cigarette taxes cases (*Feldman*) and the cut flowers taxes versus petroleum taxes in *Occidental Exploration and Production Co v Republic of Ecuador*, LCIA Case No UN 3467, Final Award (1 July 2004).
- ⁵³ Meltzer op cit 227.
- ⁵⁴ Ibid, 228.
- ⁵⁵ *Pope & Talbot Inc v The Government of Canada*, UNCITRAL NAFTA Ch 11 Arbitral Tribunal (Interim Award 26 June 2000) (Award of 10 April 2001) paras 41–2.
- ⁵⁶ Sornarajah op cit 203.
- ⁵⁷ Ibid.
- ⁵⁸ Czech-SA BIT, art 3(3)(c).
- ⁵⁹ *Oil Platforms (Islamic Republic of Iran v United States of America)* ICJ Reports 2003, 161 available at <http://www.icj-cij.org/docket/sum=634&code=op&p1=3&p2=3&case=90&p3=5> accessed 20 October 2014.
- ⁶⁰ Sornarajah op cit 204.
- ⁶¹ Cf *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentina*, ICSID Case No ARB/03/19 and *AWG Group v Argentina* (joint cases), Decision on Liability (30 July 2010); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Inter Aguas Servicios Integrales del Agua S.A. v Argentina*, ICSID Case No ARB/03/17, Decision on Liability (30 July 2010).
- ⁶² Not surprisingly, FET is dealt with extensively in the literature on international investment law; for further references see M Jacob & SW Schill ‘Fair and equitable treatment: Content, practice, method’ in Bungenberg et al op cit (2015) 700.
- ⁶³ *Genin and Others v Estonia* Award (2002) 17 ICSID Rev-FILJ 395, para 50. In this case, there was an allegation that the revocation of a banking licence by the exercise of a regulatory council violated the standard as included in the BIT between the United States and Estonia.
- ⁶⁴ Supra.
- ⁶⁵ Cf *Loewen Group Inc and Raymond L Loewen v USA*, ICSID Case No ARB(AF)/98/3 (NAFTA), Award (26 June 2003) paras 134–6.
- ⁶⁶ RA Lorz ‘Protection and security (including the NAFTA approach)’ in Bungenberg et al op cit 764.
- ⁶⁷ Dolzer & Schreuer op cit 57.
- ⁶⁸ Ibid.
- ⁶⁹ *National Grid PLC v Argentina* Case 1:09-cv-00248-RBW, Award, 187–89 (UNCITRAL Arb Trib 2008) as cited by GK Forster ‘Recovering “protection and security”: The treaty standard’s obscure origins, forgotten meaning, and key current significance’ 45(4) *Vanderbilt Journal of Transnational Law* (2012) 1095 at 1107 fn 42.
- ⁷⁰ Many tribunals have made substantial efforts to interpret protection and security standards in light of the Vienna Convention on the Law of Treaties (VCLT) such as happened in *Asian Agricultural Products Ltd (AAPL) v Sri Lanka* ICSID Case No ARB/87/3, Final Award (27 June 1990).
- ⁷¹ *Biwater Gauff (Tanz) Ltd v United Republic of Tanzania* ICSID Case No ARB/05/22 Award 729 (24 July 2008).
- ⁷² *American Manufacturing and Trading Inc v Zaire* ICSID Case No ARB/93/1, Award (21 February 1997).
- ⁷³ *Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award (27 June 1990).
- ⁷⁴ Cf *Occidental Exploration and Production Co v The Republic of Ecuador*, LCIA Case No UN 3467, Final Award (1 July 2004); *Azurix Corp. v The Argentina Republic* ICSID Case No ARB/01/12, Award (14 July 2006).
- ⁷⁵ Lorz op cit 786.

⁷⁶ See part IV (1) of the World Bank Guidelines on the Treatment of Foreign Direct Investment (1992), which explains what constitutes expropriation. See <http://www.italaw.com/documents/WorldBank.pdf>.

⁷⁷ With regard to indirect expropriation see *Middle East Cement Shipping and Handling CO SA v Arab Republic of Egypt* ICSID Case No ARB/99/6 (2002) para 107 and *Metalclad v Mexico* (2000) 5 ICSID Reports 209; (2001) 40 ILM 55 available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC542_En&caseId=C155.

⁷⁸ Cf for instance, PD Isakoff ‘Defining the scope of indirect expropriation for international investment’ 3(2) *Global Business Law Review* 189 (2013).

⁷⁹ J Crawford *Brownlie’s Principles of Public International Law* 8th ed (2012) 624.

⁸⁰ For a detailed discussion of those different measures (ie direct and indirect expropriations; *de facto* and creeping expropriations and measures having equivalent effect) and intentions, see U Kriebaum ‘Expropriation’ in Bungenberg et al 970–1016.

⁸¹ Permanent Sovereignty over Natural Resources, General Assembly Resolution 1803 (XVII), 17 UN GAOR Supp (No 17) 15, UN Doc. A/5217 (1962).

⁸² Article 2(c) provides that ‘[e]very State has the right to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means’; See also General Assembly Resolution 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50.

⁸³ Cf *First National Bank of SA Limited t/a Wesbank v The Commissioner for the South African Revenue Services and Another* 2001 (7) BCLR 715 (C); 2001 (3) SA 310 (C), No. 47 sq. ‘[57] In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If section 25 is applied to this wide genus of interference, “deprivation” would encompass all species thereof and “expropriation” would apply only to a narrower species of interference . . . [58] Viewed from this perspective section 25(1) deals with all “property” and all deprivations (including expropriations). If the deprivation infringes (limits) section 25(1) and cannot be justified under section 36 that is the end of the matter. The provision is unconstitutional.’

⁸⁴ Ibid, 622, 623.

⁸⁵ *Amoco International Finance Corp. v Iran*, 15 Iran-US CTR 189 at para 145.

⁸⁶ Sornarajah op cit 409.

⁸⁷ Not all tribunals will agree; cf also *Piero Foresti, et al v Republic of South Africa*, ICSID Case No ARB(AF)/07/1, Award (4 August 2010).

⁸⁸ For further references, see U Kriebaum ‘Expropriation’ in Bungenberg et al op cit 1018.

⁸⁹ I Marboe ‘Restitution, damages and compensation’ in Bungenberg et al op cit 1033.

⁹⁰ RE Walck ‘Methods of valuing losses’ in Bungenberg et al op cit 1045.

⁹¹ Cf NAFTA art 1110 (2); art 8(B) of the IISD Model International Agreement on the Investment for Sustainable Development (2005).

⁹² *Du Toit v Minister of Transport* (CCT 22/04) [2005]; ZACC 9; 2005(11) BCLR 1053 (CC); 2006(1) SA 297 (CC) (8 September 2005)

⁹³ At para 36.

⁹⁴ Also see HP Schneider ‘Assessment of the Promotion and Protection Investment Bill (PPIB) from 1 November 2013 (*Government Gazette* No. 36995) from a constitutional law perspective’ Southern African-German Chamber of Commerce and Industry (SAGCC), 12 January 2014.

⁹⁵ On the advantages of making use of ADR Methods, see JK Schaefer ‘Dispute resolution’ in Bungenberg et al op cit 1191.

⁹⁶ GB Born *International Commercial Arbitration* Vol I (2009) 71–90.

⁹⁷ Cf *Biwater Gauff (Tanz) Ltd v United Republic of Tanzania* ARB/05/22 ICSID 2008; *Bernardus Henricus Funnekotter v The Republic of Zimbabwe* ARB/05/06 ICSID 2009; *American Manufacturing and Trading Inc v The Republic of Zaire* ARB/93/1 ICSID (21 February 1997).

⁹⁸ Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965, (1966) 575 UNTS 160; (1965) 4 *International Legal Materials* 532.

⁹⁹ *Tokios Tokelès v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction and Dissent (29 April 2004).

¹⁰⁰ ICSID Convention, art 25.

- ¹⁰¹ Qureshi & Ziegler op cit 426.
- ¹⁰² ICSID Convention, art 34.
- ¹⁰³ ICSID Convention, art 29.
- ¹⁰⁴ ICSID Convention, art 52.
- ¹⁰⁵ ICSID Convention, art 54(1).
- ¹⁰⁶ In practice, however, tribunals usually do not apply a state's domestic law. They rather eschew it in favour of applying international law.
- ¹⁰⁷ JC Hatchondo & L Martinez 'Legal protection to foreign investors' 97(2) FRB *Richmond Economic Quarterly* (2011) 175 at 180.
- ¹⁰⁸ See Schaefer op cit 1186.
- ¹⁰⁹ NEPAD, *NEPAD Framework Document* available at <http://www.nepad.org/nepad/knowledge/doc/1767/nepad-framework-document> accessed 2 October 2014.
- ¹¹⁰ In the Abuja Treaty (which established the African Economic Community), regional economic communities are seen as the 'building blocks' or the basis for the African integration. At the seventh ordinary session of the AU's Assembly of Heads of State and Government in Banjul, The Gambia, in July 2006, the AU officially recognised eight such communities. Alphabetically listed, these are as follows: The Arab Maghreb Union (AMU); the Community of Sahel-Saharan States (CEN-SAD); the Common Market for Eastern and Southern Africa (COMESA); the East African Community (EAC); the Economic Community of Central African States (ECCAS); the Economic Community of West African States (ECOWAS); the Intergovernmental Authority on Development (IGAD); and the Southern African Development Community (SADC). For more information, see OC Ruppel 'Regional economic communities and human rights in East and southern Africa' in A Bösl & J Diescho (eds) *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (2009) 275–318.
- ¹¹¹ See UNECA 'Assessing regional integration in Africa I', available at www.uneca.org/publications/assessing-regional-integration-africa-i; SADC Protocol on Finance and Investment Annex 1 (2006), available at <http://www.sadc.int/documents-publications/show/1009> 28 September 2014.
- ¹¹² R Schiere & A Rugamba 'China and regional integration as drivers of structural transformation in Africa' International Centre for Trade and Sustainable Development (ICTSD): *Bridges Africa* Vol 2(6) 9 September 2013, available at <http://www.ictsd.org/bridges-news/bridges-africa/news/china-and-regional-integration-drivers-of-structural>.
- ¹¹³ JE Vinuales 'Investment law and sustainable development: The environment breaks into investment disputes' in Bungenberg et al op cit 1715.
- ¹¹⁴ See OC Ruppel & C Luedemann 'Climate finance: Mobilising private sector finance for mitigation and adaptation' Institute for Security Studies: Situation Report (May 2013), available at http://www.issafrica.org/uploads/SitRep2013_6May.pdf accessed 17 November 2014.
- ¹¹⁵ OC Ruppel 'Regional integration: The future of African foreign and domestic politics' at the Regional Network Meeting for African Diplomats, Addis Ababa, Ethiopia, 26 April 2015.
- ¹¹⁶ Broadman op cit 153.
- ¹¹⁷ C Elkemann & OC Ruppel 'Chinese foreign direct investment into Africa in the context of BRICS and Sino-African bilateral investment treaties' 13(4) *Richmond Journal of Global Law and Business* (2015) 593.
- ¹¹⁸ DW Butler 'Changing South African perceptions regarding BITs, investment arbitration and ICSID' Conference Paper for the 18th Annual IBA ICSID Arbitration Day 27 February 2015 at Washington DC, Panel II.
- ¹¹⁹ World Bank Group: Doing Business *Economy Rankings* (June 2014), available at <http://www.doingbusiness.org/rankings> accessed 13 October 2014.
- ¹²⁰ Section 231(4), however, provides that unless it is inconsistent with the Constitution or an Act of Parliament, self-executive provisions in an international agreement will be applicable upon approval of Parliament and do not need an Act to be enacted in order to become part of South African law.
- ¹²¹ Section 39(1) of the Constitution provides that when interpreting the Bill of Rights, a court '(b) must consider international law; and (c) may consider foreign law'; s 232 provides that '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament;' and s 233 provides that '[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'
- ¹²² 'An Agreement for the Promotion and Protection of Investment was signed with the United Kingdom on 20 September 1994. The UK treaty was the first of a succession of investment agreements concluded during the early mandate of the ANC government. In 1995, seven agreements were signed – with Canada, Cuba, France, Germany, Korea, the Netherlands and Switzerland – while additional negotiations were also pursued ... The raft

of investment treaties entered into represented an important element of a wider policy to open the country to greater foreign investment, as part of the Growth, Employment and Redistribution strategy (GEAR) ... in the lead-up to the first multi-racial elections in 1994, there was a concerted effort by the ANC to assure foreign investors that they would not be subjected to expropriation or nationalisation and that they would be free to repatriate profits and dividends. While the new government was eager to assure foreign investors that their investments would be safe, South Africa's decision to conclude vast numbers of investment treaties was not particularly anomalous in a global sense' (LE Peterson 'South Africa's bilateral investment treaties: Implications for development and human rights' *Dialogue on Globalization Occasional Papers* No 26 Geneva (2006) 35 available at www.fes-globalization.org/publications/FES_OCP26_Peterson_SA_BITs.pdf).

123 Preamble of the B-BBEE Act 53 of 2003.

124 See s 1 of the Act on the meaning of black economic empowerment.

125 Section 217(2) of the Constitution.

126 DTI Department of Trade and Industry (RSA) Deloitte *South Africa: Investor's Handbook 2012/2013* (2013), 118 available at <http://www.dti.gov.za/publications.jsp?year=2013&subthemeid=> accessed 5 June 2014.

127 Ibid, 120.

128 Sections 6–11 of the Expropriation Act, 1975.

129 See US Department of State, 2014 Investment Climate Statement – South Africa, available at <http://www.state.gov/e/eb/rls/othr/ics/2014/229007.htm> accessed 23 May 2015.

130 Bill published in *Government Gazette* No. 38418 of 26 January 2015.

131 Section 3(2) & (b) of the proposed Bill.

132 Anonymous Bill provides 'robust protection' for investors, (2013) SAnews.gov.za available at http://www.southafrica.info/business/investing/regulations/protection-bill-051113.htm#.Uwia8T_GeoM accessed 17 October 2014.

133 DTI Notice 1087 of 2013.

134 Section 5(1).

135 Section 6(3).

136 Section 7(3).

137 Section 8(3)(a), (b) & (c).

138 Section 8(4).

139 Section 11(2).

140 *Piero Foresti et al v Republic of South Africa* ICSID Case No ARB(AF)/07/1.

141 The Italy-RSA BIT and the Belgo-Luxembourg-RSA BIT respectively.

142 2013 (4) SA 1 (CC), [2013] ZACC 9. Agri SA is a non-profit company that represents the interests of commercial farmers. Four *amici curiae* were admitted, including the Centre for Applied Legal Studies (CALS). See the judgment, para 6.

143 DTI indicated that Government will 'only conclude new BITs where there are compelling reasons' to do so.

144 Anonymous Bill provides 'robust protection' for investors, (2013) available at http://www.southafrica.info/business/investing/regulations/protection-bill-051113.htm#.Uwia8T_GeoM accessed 8 October 2014.

145 'South Africa has allowed the BITs of Netherlands, Spain, Luxembourg and Belgium and Germany to expire' (US Department of State, 2014 Investment Climate Statement. Bureau of Economic and Business Affairs South Africa para 14, available at <http://www.state.gov/e/eb/rls/othr/ics/2014/229007.htm> accessed 23 May 2015).

146 See among others 'Swiss regret end of South African investment accord' (November 2013) Swiss Foreign Ministry; available at <http://www.swissinfo.ch/eng/swiss-regret-end-of-south-african-investment-accord/37250556>.

147 Sornarajah op cit 183.

148 German Missions in South Africa, Lesotho and Swaziland 'South Africa renounces the Bilateral Investment Promotion and Protection Treaty with the Federal Republic of Germany' (October 2013) available at http://www.southafrica.diplo.de/Vertretung/suedafrika/en/_pr/_Embassy/2013/4thQ/10-InvestmentTreaty.html accessed 15 November 2014.

149 See art 5 (1)(b) of the South Africa-Canada BIT.

150 The South Africa-Netherlands BIT also provides for the FET and MFN treatment in art 3 and for international arbitration in art 9. In addition to the ICSID and arbitration in terms of the UNCITRAL Rules, it also provides the option to use the International Chamber of Commerce (ICC) Arbitration Rules.

¹⁵¹ For more information, see OC Ruppel ‘The case of Mike Campbell and the paralysation of the SADC Tribunal’ in ET Laryea, N Madolo & T Sucker (eds) *International Economic Law Voices of Africa* (2012) 165–83; OC Ruppel ‘SADC land issues before the SADC Tribunal – A case for human rights?’ in B Chigara (ed) *Southern Africa Development Community Land Issues. Towards a New, Sustainable Land Relations Policy* (2012) 89–120; OC Ruppel ‘The Southern African Development Community (SADC) and its tribunal: Reflections on regional economic communities’ potential impact on human rights protection’ 2 *Verfassung und Recht in Übersee* (2009) 173–86; OC Ruppel ‘The SADC tribunal, regional integration and human rights: Major challenges, legal dimensions and some comparative aspects from the European legal order’ 2 *Recht in Afrika* (2009) 213–38; and OC Ruppel & F-X Bangamwabo ‘The SADC Tribunal: A Legal analysis of its mandate and role in regional integration’ in A Bösl, W Breydenbach, T Hartzenberg, C McCarthy & K Schade (eds) *Monitoring Regional Integration in Southern Africa Yearbook* Vol 8 (2008) 179–221.

¹⁵² The revised text of the Promotion and Protection of Investment Bill (B18-2015), was only presented in September 2015, text available at http://www.parliament.gov.za/live/commonrepository/Processed/20150908/609997_1.pdf, last accessed 18 October 2015. Although further changes on the revised Bill could not be worked into this chapter, due to the progressed editorial process, the revised Bill was again received with skepticism. Cf. EU Chamber of Commerce and Industry in Southern Africa warns, ‘this bill won’t protect or promote investment’. The EU Chamber of Commerce stated that the ‘withdrawal of SA’s BITs with EU member states has already sent an alarming message to the EU business community’, see <http://www.politicsweb.co.za/news-and-analysis/this-bill-wont-protect-or-promote-investment--eu-c>, accessed 18 October 2015. A DTI document dated 22 September 2015 indicated further changes to the Bill, which was supposedly renamed Protection of Investment Bill, cf. https://www.thedti.gov.za/parliament/2015/Investmen%20 Bill_220915.pdf, accessed 18 October 2015.

Chapter 16

Legal protection of the environment

WERNER SCHOLTZ

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16.1 Introduction

This chapter deals with the subject of international environmental law, which means the discussion focuses on the body of international law that specifically addresses the protection of the environment. The brevity of the chapter cannot do justice to the complex and comprehensive nature of current international environmental law. Hence, this chapter provides a mere introduction to some of the most important and acute aspects of international environmental law and aims to entice the reader to engage with this subject in more depth through further research. This chapter is divided into three major parts. In the first, a discussion on the history and origin of international environmental law provides the reader not only with contextual knowledge on the development of international environmental law, but also with an understanding of its current nature.

The link between the environment and development in the context of sustainable development is covered in the second part, which will focus on international environmental law and sustainable development, including the most prominent principles underlying sustainable development. These principles have a major influence on the development, implementation and interpretation of international environmental law and a full understanding of the subject is not possible without them.

The third part of the chapter deals with some of the key issues and challenges in international environmental law and briefly identifies the most prominent issues and general instruments of relevance. Thus, freshwater resources, ozone depletion and climate change, waste and hazardous substances as well as biological diversity receive attention. Furthermore, the issue of state responsibility and liability concludes the discussion on key issues in order to place the reader in a position to reflect on the consequences of breaches of international law obligations.

Lastly, the chapter introduces the manner in which the African Union as a regional organisation regulates environmental matters pursuant to the objectives of the international environmental law agenda.

16.2 Key developments in the formation of international environmental law

International environmental law is a relatively new branch of international law and can be traced back to the 1960s, although treaties relating to environmental protection were already known in the nineteenth century.¹ However, those early treaties were mostly bilateral agreements concerning

fisheries, the use of watercourses by riparian states or the protection of wild birds. The specific nature of global environmental challenges requires the rapid and flexible development of law. This has resulted in the resort to innovative approaches in international environmental law. In this context, ‘soft law’ has contributed to the development of international environmental law.³ The following discussion therefore provides a brief overview of the progressive development of modern international environmental law in order to illuminate the origins of this subject.

16.2.1 Stockholm and the first set of common principles

An important milestone for the development of environmental law was the well-known international *Trail Smelter* arbitral award of March 1941 between Canada and the United States. The case arose out of damage caused in the United States to private crops, trees and pasture land by wind-borne fumes originating from a privately owned smelting plant in Canada.³ There it was held that:

under the principles of international law as well as the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or to the properties or persons therein, when the case is of serious consequence and the injury established by clear and convincing evidence.⁴

This principle of a duty-based limitation on territorial sovereignty over activities within national jurisdiction or control was confirmed by the ICJ in the *Corfu Channel* case, albeit in a context that was unrelated to the environment. This matter involved the legal duty Albania had at the time and in the circumstances to warn foreign warships about the presence of sea mines in Albanian coastal waters, in response to which the court invoked the obligation of every state ‘not to allow knowingly its territory to be used for acts contrary to the rights of other States’.⁵

Conflicting interests of riparian states were the subject matter of the 1963 *Lac Lanoux Arbitration* case between Spain and France, in which an international arbitral tribunal found that the upper riparian state may only make use of its right to water utilisation in so far as no serious harm to the lower riparian state is caused by the alteration of the water course.⁶

In addition to the above sporadic developments, the search for a set of common principles to guide the actions of governments for the protection and improvement of the human environment began in earnest in the 1960s. Mounting evidence in respect of the continuing and accelerating impairment of the quality of the environment prompted the UN General Assembly in 1968 to convene a United Nations conference on the human environment.⁷ With this initiative, the Assembly wanted to provide ‘a framework for comprehensive consideration within the United Nations of the problems of the human environment in order to focus the attention of Governments and public opinion on the importance and urgency of this question’.⁸ This led to the landmark UN Conference on the Human Environment, held in Stockholm in 1972, which was the first major conference on international environmental issues and a turning point in the development of international environmental governance. The outcome of the conference resulted in a catalogue of 26 non-binding principles and an action plan comprising 109 recommendations.⁹

Principle 1 of the Stockholm Declaration affirms the anthropocentric approach to the protection of the environment in declaring that:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

The innovative human rights perspective in this principle has had a noteworthy influence on subsequent developments in national and international environmental law. Several other principles

recognise the interdependency between economic development and the environment. Principle 8 illustrates this by stating:

Economic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.

Principle 9 confirms that environmental deficiencies caused by underdevelopment must be rectified via the pursuit of accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic efforts of developing countries. In the same vein, the Stockholm Declaration takes cognisance of the political and economic divide between the North ('developed states') and the South ('developing states') in Principles 10, 11 and 12 by drawing attention to the potentially negative impact of economic and policy factors on the development needs of developing countries. This is especially clear from the new conceptual approach in article 11, which resulted in the emergence of the concept of sustainable development – dealt with later on in greater detail. Principle 11 reads as follows:

The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all.

Another major outcome of the Stockholm Declaration is Principle 21, which confirms a rule of general international law – namely, that a state's sovereign *right* to exploit its own resources in accordance with its own environmental policies remains subject to the *duty* (responsibility) to ensure that activities within the state's *jurisdiction* or *control* do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction. This is a clear and further recognition of the rule established in the *Trail Smelter* arbitration referred to earlier. In the *Nuclear Weapons* case, the ICJ confirmed the rule's customary law status.¹⁰ The phrase 'or of areas beyond the limits of national jurisdiction' may be interpreted to cover areas referred to as the 'common heritage of mankind'. This is dealt with later on in this chapter.

Another, equally important outcome of the Stockholm conference was the establishment in December 1972 of the United Nations Environment Programme (UNEP), which is responsible for assessing environmental conditions and trends worldwide and for developing international and national environmental instruments.¹¹

16.2.2 Rio and the interdependence of development and the environment

In the years following the Stockholm Declaration, other global initiatives have emerged, further contributing to the development of a growing body of international environmental principles. Such principles have found their way into the treaty-making process eventually to determine the nature and scope of obligations that states parties have increasingly assumed by means of multilateral environmental agreements since the 1970s. The initiatives, to which only cursory reference can be made, include:

- the 1980 World Conservation Strategy by the IUCN, WWF and UNEP, which has influenced policies and international legal developments on sustainable development, and was revisited in 1991 as the Caring for the Earth Strategy;
- the 1982 World Charter for Nature, a non-binding instrument adopted by the General Assembly¹² and which pursues the protection of nature as an end in itself; and

- the 1987 Brundtland Report, endorsing an expanded role for sustainable development¹³ at the UN level and emphasising the relationship between peace, security, development and the environment among a range of important issues.

These and other developments paved the way for a follow-up to the Stockholm conference. In 1992, the United Nations Conference on Environment and Development took place in Rio de Janeiro in order to produce a set of three non-binding instruments with a view to establishing a new and equitable partnership for the protection of the environment on the basis of what was achieved at Stockholm. The instruments were adopted in the form of:

- the Declaration on Environment and Development, presenting states with a catalogue of 27 principles and strongly influenced by the concept of sustainable development;
- the Statement of Forest Principles with rather weak and vague formulations relating to forest management and conservation; and
- an agenda (Agenda 21) that contained a political plan of action for the implementation of the Rio Declaration.

The other significance of the Rio event is that it provided a platform for states to append their signatures to two key multilateral environmental agreements negotiated in the same year as Rio – namely, the United Nations Convention on Climate Change (UNFCCC), and the Convention on Biological Diversity, an opportunity seized upon by 150 states as well as by the European Community.

However, Rio was also significant for other reasons. One was certainly the surfacing of the long-simmering North-South conflict on the ecological concerns of the community of states and how to deal with them. At the heart of this divide was the stance taken by developing countries in forcing the argument that pollution of the environment was primarily a consequence of industrialisation in developed countries. Therefore, developing countries should not bear the responsibility and the main burden for taking corrective action should fall on the countries of the developed world. If not, the much-needed social and economic development in the underdeveloped societies of the South would face insurmountable obstacles and cause them to remain in a state of underdevelopment.¹⁴

This manifestation of the economic development debate between the North and the South in the context of protecting the environment has its deeper roots in the economic self-determination movement of the 1950s and 1960s. In 1952, the UN General Assembly had placed on its agenda the need for encouraging underdeveloped countries in the proper use and exploitation of their natural wealth and resources in the interest of their own progress and development. This was formulated as a ‘right’ of all peoples and made part and parcel of the sovereignty of states.¹⁵ A decade later, the Assembly adopted its Declaration on Permanent Sovereignty over Natural Resources confirming this sovereignty as a ‘basic constituent of the right to self-determination’ and an ‘inalienable right of all states’.¹⁶ In the 1970s, this developed into a political programme for the establishment of a new economic order,¹⁷ which led, *inter alia*, to the adoption by the General Assembly in 1974 of the Charter of Economic Rights and Duties of States.¹⁸

What the developing world aimed at achieving with the idea of a new international economic order was an improvement in the terms of international trade, an increase in development assistance, more beneficial access to modern technology, tariff reductions and a solution to the developing world’s debt crisis – in short, a revision of the international economic order in favour of the developing world to overcome (what these countries perceived as) the injustices in the international legal system. So, when the question of sustainable development entered the debate at Rio, the sentiments of the underdeveloped countries of the South were re-awakened and became

symptomatic of the North-South divide on the further development of international environmental norms and standards.¹⁹

Addressing this reality took up large sections of Agenda 21. It was necessary to overcome confrontation and to foster a climate of genuine co-operation and solidarity in order to secure a concerted effort by the international community to work towards the common goal of ensuring that development was not pursued at the expense of the environment, and to avoid differences becoming an excuse for inaction. To bring this message home, the text of Agenda 21 is written for an interdependent community of states that has made sustainable development a priority concern. But ample space is also allocated for the sentiments that have developed under the banner of the new international economic order and one can hardly miss the familiar references to ‘the need for a substantial flow of new and additional financial resources to developing countries’, or that ‘special attention must be paid to economies in transition’, that there is a need for a more ‘efficient and equitable world economy’, for an ‘open, equitable, and non-discriminatory multilateral trading system’ and for ‘improved market access for developing countries’.²⁰

The 27 principles adopted by the Rio Declaration on Environment and Development contain principles that are fundamental for the promotion of sustainable development. These principles include integration (principle 4), public participation (principle 10), the precautionary approach (principle 15), the right to development (principle 3), common but differentiated responsibilities (CBDR) (principle 7) and the polluter pays (principle 16). Several of these principles have been incorporated in subsequent multilateral environmental agreements (MEAs).

Subsequent to the Rio Conference, the World Summit on Sustainable Development (WSSD) was held in Johannesburg in 2002. The WSSD adopted the Johannesburg Declaration on Sustainable Development²¹ and the Johannesburg Plan of Implementation,²² both of which reiterate the principles embodied in the Rio Declaration. An interesting outcome of the WSSD was the announcement of ‘public-private partnerships’(PPPs).²³ These PPPs entail that state and non-state actors join forces towards sustainable development. Hence, a ‘Consolidated List of Partnerships for Sustainable Development’ was adopted. A partnership database was established in 2004 to be administered by the Commission on Sustainable Development (CSD).

16.2.3 Post-Rio developments

The 2000 Millennium Assembly of the United Nations, which occasioned a debate on United Nations renewal and reform,²⁴ was also the opportune moment for a bid to renew and redirect efforts at achieving the sustainable development and other objectives of the Rio conference. Consequently, the United Nations Millennium Declaration,²⁵ the outcome document of the Millennium Assembly, included in its vision for the future several passages on natural resource management and sustainable development.

In the first instance, respect for nature and the sustainable management of all living species and natural resources were considered as fundamental values essential for international relations in the twenty-first century.²⁶ This is linked to three objectives in the outcome document – namely, economic development and poverty eradication, protection of the environment and meeting the special needs of Africa. As far as protection of the environment was concerned, support for the Rio principles on sustainable development, including those spelled out in Agenda 21, was reaffirmed; and for Africa, special measures were pledged for poverty eradication and sustainable development – including debt cancellation, improved market access, increased flows in direct foreign investment and technology transfer. In short, the whole scheme on which the new international economic order of the 1970s centred was supported.

It is now clear that the Rio principles and Agenda 21 have acquired the status of a blueprint for state action and that any renegotiation of these principles has been strongly discouraged.²⁷ Moreover, this blueprint and its further implementation also formed the very basis for the work assigned to the ten-year review of progress made since 1992 and undertaken by the 2002 WSSD in Johannesburg.²⁸ However, the Summit's declaration on sustainable development and its implementation plan have not articulated new principles or policies and are mostly seen as a reconfirmation and reiteration of the Rio principles. That this restatement of the same thing has outlived its purpose should be clear from the following commentary:

[I]t is doubtful whether the world needs more grand statements of environmental policy or even reiteration of existing policy: what is needed is implementation of the Rio instruments and more progress towards the goals already agreed. From this perspective it is the continued failure of states to grapple seriously with the implications of climate change and loss of biodiversity which adds most to the perception that environmental issues have once again become peripheral concerns of global governance.²⁹

Expectations were high that Rio+20, which took place 20 years after the initial United Nations Conference on Environment and Development, would produce visionary thinking in order to make sustainable development work. While the outcome document³⁰ of this event contains the familiar voluminous sections on 'reiterating' and 'reaffirming' what has already been agreed on in the past, it has broken new ground in the area of international environmental governance. As a result, agreement was reached to strengthen the role of UNEP, to improve co-operation between the different UN agencies and to replace the Commission for Sustainable Development with a high-level intergovernmental political forum to monitor progress with the implementation of sustainable development. The meetings of the High-Level Political Forum on Sustainable Development will be convened under the auspices of the General Assembly and ECOSOC.³¹ The Commission was an outcome of Agenda 21 and established as a subsidiary body of ECOSOC to function as a diplomatic forum for continued negotiations on matters pertaining to sustainable development. As such, its role was limited to policy recommendations and nothing came of its review functions with regard to the implementation of Agenda 21.³²

In terms of the Rio+20 outcome document (*The Future We Want*), the new forum is mandated to conduct regular reviews and to follow up on the implementation of sustainable development goals as well as on strengthening the science-policy interface by bringing together dispersed information and assessments.³³

Another outcome of Rio+20 was the launching of a process for the establishment of Sustainable Development Goals (SDGs),³⁴ in pursuit of which countries:

resolve to establish an inclusive and transparent intergovernmental process on sustainable development goals that is open to all stakeholders, with a view to developing global sustainable development goals to be agreed by the General Assembly. For that purpose a working group shall be constituted no later than at the opening of the sixty-seventh session of the UN General Assembly in November 2012.³⁵

Hence, the Open Working Group was established to prepare a proposal on SDGs.³⁶

In addition to institutional reform, the issue of a 'green economy' was a focal area of Rio+20.³⁷ The debates on the transition to a green economy were overshadowed by the divide between developing and developed countries. Developing states demand financial compensation from developed countries for investment in activities that promote sustainable development.

The outcome of the Rio+20 Conference is criticised for the fact that it does not make provision for any binding targets and deadlines.³⁸ However, it is hailed as a victory for developing states since

the outcome document affirms poverty eradication as the primary sustainable development challenge.³⁹

16.3 Actors in international environmental law

This section focuses on the actors of global environmental governance who are responsible for the development and implementation of international environmental law. Biermann is of the view that global environmental governance ‘departs from traditional state centred politics’ (states and international organisations) to a ‘multi-actor governance system’ that includes non-governmental organisations (such as networks of scientists, activist groups, and business associations).⁴⁰ The participation of non-state actors in global environmental governance does not change the fact that states remain the primary actors in international environmental law. However, changes in the international legal system have prompted changes concerning the role of states in international environmental law.

The development of international environmental law has witnessed a remarkable proliferation of NGOs that are active in the creation, implementation and enforcement of international environmental law.⁴¹ The important role of NGOs in relation to international environmental law was confirmed by the broad participation of NGOs during the Rio Conference. Section III of Agenda 21 includes a chapter titled ‘Strengthening the Role of Non-Governmental Organisations: Partners for Sustainable Development’. Various MEAs accord NGOs observer status at meetings. Article 7(6) of the UNFCCC and article 15(6) of the 1989 Basel Convention on Transboundary Transport of Hazardous Waste constitute examples of this trend. Hence, NGOs have an opportunity to influence the negotiation process of treaty regimes⁴² by identifying issues of relevance and by serving as ‘agenda setters’. They furthermore act as ‘conscience keepers’ and mobilise pressure where action is needed. NGOs do not only play a role in the setting of standards in international treaties but also in the enforcement, implementation and monitoring of standards. Lastly, they may also provide scientific and technical expertise concerning environmental matters to relevant parties.

Although the increasing role of non-state actors, such as NGOs and international organisations, has eroded the importance of states in particular as authors of international environmental law,⁴³ it does not detract from the fact that states are still the primary actors in the conclusion of treaties as well as in the generation of customary international law.⁴⁴ However, current international law discourse is concerned with the further development of legal personality in order to accommodate the proliferation of non-state actors that are not international organisations. It is in this context that Trindade has suggested that the inclusion of the common concern of humankind/mankind in the preambles of the UNFCCC and Convention on Biological Diversity (CBD) may serve as an indication that ‘mankind’ is an emerging subject of international law.⁴⁵ It is, however, difficult to consider future generations to be (partial or full) subjects of current international law with the capacity to possess international rights and/or duties.

International organisations are also actors in international environmental law and enjoy legal personality. Currently, no UN specialised agency has primary responsibility for the global environment. Several agencies have contributed to the development of international environmental law. Examples of such agencies include the Food and Agriculture Organization (FAO), the World Health Organization (WHO) and the International Maritime Organization (IMO). However, as already indicated, UNEP is the primary UN institution dealing with environmental matters.

In the context of the various shortcomings of the global environmental governance framework, suggestions have been made to establish a Global Environmental Organization (GEO).⁴⁶ Several

proposals may be distinguished in this regard, such as the proposal to upgrade UNEP to a specialised agency (such as the International Labour Organization), the establishment of an environmental organisation similar to the World Trade Organization or the erection of a supranational organisation with enforcement powers. Although critics agree that UNEP needs to be more effective, scepticism prevails as to whether the aforementioned proposals may address the weaknesses of international environmental governance.

The High-Level Political Forum on Sustainable Development, which replaced the Commission on Sustainable Development (CSD), is also an attempt to improve global environmental governance. The High-Level Political Forum is to provide ‘leadership, guidance and recommendations for sustainable development, follow up and review progress in the implementation of sustainable development commitments’ and ‘enhance the integration of the three dimensions of sustainable development’.⁴⁷

MEAs often create international regimes that are capable of dynamic development in response to global environmental challenges. Instrumental in this regard is the establishment of permanent autonomous regulatory bodies.⁴⁸ Such a body is referred to as a conference of the parties (COP) and is responsible for the further development of the treaty regime and for the treaty regime’s effective implementation. A COP is composed of treaty parties and meets on an annual or biannual basis. The UNFCCC, for instance, has evolved in a progressive regulatory regime with regular COP meetings, COP decisions and a binding protocol.

COPs fulfil an important role in relation to the amendment of treaties, protocols and annexes. However, uncertainty exists concerning the exact legal nature of COP decisions. In general,⁴⁹ COP decisions are non-binding in nature. Article 18 of the Kyoto Protocol, for example, authorises the first COP (which serves as the meeting of the parties (MOP) under the Kyoto Protocol) to approve compliance procedures and mechanisms, but requires any procedures and mechanisms entailing binding consequences to be adopted by an amendment to the Protocol, which requires formal acceptance by the parties in accordance with the relevant treaty. Thus, a COP decision that amends a treaty or annex is just the first step in the process of amendment. This does not detract from the impressive influence that COPs have in relation to the progressive normative and institutional development of legal regimes, of which the climate change regime is a good example.⁵⁰

MEAs also frequently designate secretariats, or a decision is left to the COP to establish a secretariat. Some MEAs have secretariats within existing international institutions, such as UNEP. Secretariats are primarily responsible for administrative functions but also exercise functions such as preparing draft decisions for COPs, providing technical assistance to parties or disseminating and receiving reports on implementation.⁵¹ MEAs or COPs also establish subsidiary organs that are concerned with the provision of scientific advice, technology transfer and financial assistance.⁵²

16.4 Sustainable development and international environmental law

Sustainable development is the single most important concept in international environmental law in ‘the sense that the whole of international environmental law has to be developed further under an overall sustainable development umbrella’.⁵³ The classic definition of sustainable development is development that ‘meets the needs of the present without compromising the ability of future generations to meet their own needs’.⁵⁴

The exact meaning and legal status of sustainable development has been a focal point of academic discourse and remains unclear to this day. It seems unlikely that sustainable development

can be viewed as a legal obligation, but as Birnie et al aptly indicate, ‘it does represent a policy which can influence the outcome of cases, the interpretation of treaties, and the practice of states and international organizations, and may lead to significant changes and developments in the existing law’.⁵⁵ Handl argues that ‘sustainable development is likely to be subject to mutually incompatible interpretive claims, and may remain a source of confusion rather than of enlightenment as regards specific legal implications’.⁵⁶

The primary reason for the latter statement lies in the fact that sustainable development is an attempt to reconcile the right to pursue economic development, which is an attribute of permanent sovereignty, with the protection of the environment. This is also evident from Principle 3 of the Rio Declaration, which states that the ‘right to development’ ‘should be fulfilled so as equitably to meet the developmental and environmental needs of present and future generations’. The relative character of the competing interests of environmental protection and economic development ensures that one of the main attractions of sustainable development is ‘that both sides in any legal argument will be able to rely on it’.⁵⁷

Sands and Peel identify four elements of the concept of sustainable development: intergenerational equity, intragenerational equity, sustainable use and the principle of integration.⁵⁸ It is important to reflect on these elements in order to gain an understanding of sustainable development.

16.4.1 Intergenerational equity

The most comprehensive and important scholarly contribution on the legal discourse pertaining to intergenerational equity has been made by Edith Brown Weiss.⁵⁹ In general, she argues that every generation has the duty to pass the planet on in no worse a condition than it has been received in, as well as to provide access to its resources and benefits; and every generation has a duty to repair the damage done by previous generations where these generations failed to adhere to the first duty.⁶⁰ Weiss argues that intergenerational equity is part of the fabric of international law.⁶¹ Evidence for this statement may be found in international instruments⁶² and international law jurisprudence. Judge Weeramantry alluded to intergenerational equity *inter alia* in the *Nuclear Test* case in stating: ‘The case before the Court raises ... the principle of intergenerational equity – an important and rapidly developing principle of contemporary environmental law’.⁶³

It is indeed true that various international environmental law regimes are concerned with the interests of future generations. This, however, does not provide support for the argument of Brown Weiss that future generations have been endowed with justiciable rights in international law.⁶⁴ Representation of future generations before international courts has not been developed and no case exists of the express recognition of the rights of future generations by an international court. The reason for this may be found in the fact that only states and international institutions are in general competent parties in international litigation. It is not impossible to represent future generations in national legal systems. This will depend on the specific aspects of the domestic jurisdiction as was illustrated by the decision of the Supreme Court of the Philippines where plaintiffs challenged the granting of timber licences on behalf of themselves and future generations and were accorded standing.⁶⁵

Intergenerational equity as an element of sustainable development is not as simplistic as it seems and its complex dimension arises in relation to the implementation of the notion. The relationship between current and (faceless) future generations is unclear and it is difficult to see why current generations should make sacrifices for future generations.⁶⁶ Thus, it is difficult to apply equity between current generations and an abstract group (future generations). Intergenerational equity

further requires current generations to make assumptions about the interests of unknown future generations.⁶⁷ In order to make these assumptions, current generations will use their own interests as a point of departure, which may not be to the benefit of future generations. Thus, this theory does not really reconcile the balancing of burdens and benefits between generations in a clear and concrete manner.

16.4.2 Intragenerational equity

The primary focus on future generations may also result in a deviation from the dire need for equity in a world scarred by unfairness between constituent parts of the current generation. The gap between the ‘haves’ and ‘have-nots’ requires urgent attention in order to ensure that current generations bestow an equitable world upon future generations.⁶⁸ Hence, intragenerational equity constitutes an important element of sustainable development and is not merely an extension of intergenerational equity or an incidental matter. As such, it is an important component of international environmental law. Differential treatment in international environmental law constitutes an important mechanism to pursue intragenerational equity.

16.4.3 The principle of integration

Principle 4 of the Rio Declaration provides that ‘environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it’. This principle of integration is the most ‘fundamental and operationally significant’ element of sustainable development.⁶⁹ It is indicative of an initial understanding of the need to integrate environmental protection into economic development. The arbitral tribunal in the *Iron Rhine* case stated that Principle 4 of the Rio Declaration is regarded as a ‘principle of general international law’ and that the integration of appropriate environmental measures in the design and implementation of economic development activities is a requirement of international law.⁷⁰ However, a current understanding of integration views all three components – social, economic and environmental – as integral elements.

Integration is evident in various international instruments. For example, the preamble of the UNFCCC affirms the importance of integration in stating that:

[R]esponses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty.⁷¹

Another important consequence of integration is that it may affect other areas of law due to the link between economic, social and environmental issues. International trade constitutes an example of the impact of the integration of environmental considerations.⁷² As Voigt aptly states, ‘fields of international law once thought to be isolated and concerned with their own domain are becoming interlinked’.⁷³

16.4.4 Sustainable use

Subsequent to Rio, the terms ‘sustainable use’ or ‘sustainable utilisation’ have been expressly included in various international instruments. Article 2 of the Convention on Biological Diversity defines ‘sustainable use’ as ‘use ... in a way and at a rate that does not lead to long- term decline

of biological diversity'. The principle of sustainable use is also reflected in article 2 of the UNFCCC, which aims to 'allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner'. However, the principle of sustainable use is also common to concepts such as conservation,⁷⁴ sustainable management,⁷⁵ maximum sustainable yield⁷⁶ and optimum sustainable productivity.⁷⁷ It is questionable whether the principle of sustainable use has acquired the status of international customary law.⁷⁸ However, it seems that a general obligation to ensure conservation and sustainable use exists in relation to the high seas, the deep seabed, Antarctica and the moon.

Recent discourse indicates that although sustainable development is an important concept for the facilitation of key normative developments, it is inadequate to host a move to the next phase of implementation of strategic priorities.⁷⁹ The major advantage of the sustainable development concept is that it was vague enough to bring all stakeholders to the negotiating table, and it reconciled the opposing interests of economic development and environment. However, this strength has turned into a weakness. Thus, Viñuales points out that sustainable development is no longer capable of guiding global environmental governance since it is ill-suited to the taking of clear stances where there are trade-offs between environmental, social and economic considerations. The dominance of economic considerations is the reason that economic growth mostly trumps environmental interests.

16.5 Principles underlying sustainable development

The Rio Declaration contains several 'fundamental principles for the achievement of sustainable development'.⁸⁰ It is important first to understand the nature of principles in international environmental law. Thereafter, a brief analysis of the most prominent principles in the Rio Declaration will follow. The nature of principles in general may be clarified in relation to the distinction between rules and principles. According to Dworkin, the distinction between rules and principles lies in the fact that rules apply in an all-or-nothing fashion, while principles do not.⁸¹ Principles have a certain 'weight' and conflicting principles must be weighed and balanced against one another. Accordingly, conflicting principles could all have legal validity with some having more weight than others. This is not the case with rules; in the instance of conflicting rules, only one can prevail. Thus, in international environmental law, principles have a normative quality; they guide states in future rule negotiations and also inform the interpretation and application of existing rules.⁸² Principles therefore have legal consequences, but they do not prescribe a specific state's behaviour; rather they influence the decision making of states.⁸³

16.5.1 The common but differentiated responsibilities principle (CBDR)

Principle 7 of the Rio Declaration provides that:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

Hence, various environmental treaties reflect the CBDR principle.⁸⁴ For example, article 3(1) of the UNFCCC includes the common but differentiated responsibilities and respective capabilities principle (CBDRRC) as one of the leading principles of the international climate change regime.⁸⁵ The CBDR consists of two components. Firstly, it concerns the common responsibility of states for the protection of the environment. Secondly, it concerns the acknowledgement of difference in circumstances, such as the different contribution of states to an environmental problem, and the different ability to address the threat.⁸⁶ The differential responsibility is translated into differential obligations for states. The CBDR clearly reflects the essence of differential treatment in international environmental law.⁸⁷ Accordingly, it is the objective of CBDR to promote substantive equality in the international arena.

Differential treatment has three main objectives. It aims to:

1. achieve substantive equality;
2. facilitate co-operation among states; and
3. provide incentives to some states for the implementation of their obligations.⁸⁸

Differentiation between developed and developing countries takes many forms in international environmental law.⁸⁹ Provisions may differentiate with respect to:

- central obligations included in the treaty, such as emission targets;⁹⁰
- implementation, such as delayed compliance schedules;⁹¹ and
- the granting of assistance,⁹² such as financial and technological assistance.⁹³

The emergence of ‘advanced developing economies’, such as China, and their increasing contribution to the emission of greenhouse gases, has resulted in a growing support for the suggestion that there should be differentiation among developing countries as well in relation to quantitative emission reduction commitments.⁹⁴

However, disagreement exists concerning the content and nature of the CBDR principle. The disagreement revolves around the historic responsibility of developed states for global environmental degradation and the question whether CBDR is primarily based on differing contributions to global environmental degradation (responsibility)⁹⁵ or different levels of development (respective capabilities).⁹⁶ The legal status of this principle is also a point of contention. The majority of scholars, however, agree that CBDR has not acquired the status of customary international law.⁹⁷

16.5.2 Precautionary principle

Principle 15 of the Rio Declaration states that:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

In the post-Rio era, the precautionary principle/approach has been included in several MEAs⁹⁸ and has also been referred to by international courts.⁹⁹ This leads to the question whether the principle has become part of customary international law.¹⁰⁰ This is a complex issue and doubt exists whether this principle could be classified as having such a legal status, which would impose a duty on states to act in a specific manner.¹⁰¹ Hence, the exact definition and implications of the precautionary principle/approach are under dispute. However, several core elements of this principle have been

identified by commentators.¹⁰² In essence, the precautionary principle/approach entails that the absence of scientific certainty must not be used as an excuse to postpone action. However, various questions remain. What does ‘full scientific certainty’ entail and should it relate to the cause of the harm or the probability of occurrence? What are the concrete measures that need to be taken in response to the threat? This makes it difficult to accord to the principle the status of a customary rule of law. It is, however, not implausible for a more concrete precautionary rule to emerge through the inclusion of the principle in treaties.

16.5.3 Principle of prevention and of permanent sovereignty over natural resources

Principle 2 of the Rio Declaration is relevant here and reads as follows:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 2 has two parts. The first deals with permanent sovereignty over natural resources and the second with the prevention and/or minimisation of damage to the environment (prevention principle).

Initially, permanent sovereignty was advocated by developing states as an important mechanism to overcome economic disparities and to curtail colonialist interference in the economic affairs of newly independent states.¹⁰³ This resulted in the adoption in 1962 of UN General Assembly Resolution 1803, which proclaimed ‘The right of peoples and nations to permanent sovereignty over their natural wealth and resources’.¹⁰⁴ Then, in 1974, there followed the Declaration on the Establishment of a New International Economic Order¹⁰⁵ and the Charter of Economic Rights and Duties of States,¹⁰⁶ both reaffirming the permanent sovereignty over the natural resources principle. This can be seen as part of the drive by developing countries, who have gained numerical majority in the United Nations, to restructure the legal order of the world economy and to regulate foreign investment in a manner more aligned to the needs of the developing world.¹⁰⁷ Subsequently, several other treaties have referred to permanent sovereignty. The preamble of the UNFCCC, for instance, recalls that states have the sovereign right to exploit their own resources.¹⁰⁸

Since its genesis in the post-war era, the principle of sovereignty over natural resources has evolved from a rights-based focus to a recognition that duties also emanate from permanent sovereignty.¹⁰⁹ The development of international environmental law and the prominence of sustainable development as the *leitmotif* of international environmental law have had a profound impact on the interpretation of permanent sovereignty.¹¹⁰ Principle 2 of the Rio Declaration affirms the importance of permanent sovereignty by referring to the ‘right to exploit … pursuant to their own environmental and developmental policies’. Furthermore, the interdependence of states has resulted in the increasing emergence of international legal regimes for the co-operative management of natural resources pursuant to sustainable development.¹¹¹ Thus, the need for concerted global action based on notions such as the common concern of humankind/mankind has become an important aspect of the management of resources.¹¹² This phenomenon has also resulted in changes to the notion of permanent sovereignty.¹¹³ The existence of the common concern of humankind¹¹⁴ seems to imply that permanent sovereignty should be exercised for the benefit of humankind, which consists of current and future generations.¹¹⁵

The second part of principle 2 also alludes to the duty to respect other states' sovereignty over their natural resources. This means that states should not use their natural resources to such an extent as to cause transboundary harm.

The second part is closely related to the 'principle of prevention'. The ICJ made it clear in the *Pulp Mills* case that the preventive principle, in the transboundary context, obliges a state 'to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State'.¹¹⁶ It was also found that the 'principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory'.¹¹⁷ In the transboundary context, the preventive principle is more than a principle. Rather, it is a customary international law obligation.¹¹⁸

The obligation to take appropriate measures to minimise or prevent the risk of significant harm entails that states need to take measures for the identification of risks. This 'implies the need for States to review their obligations of prevention in a continuous manner to keep abreast of the advances in scientific knowledge'.¹¹⁹ Thus, it is clear that the precautionary principle has influenced the scope of the preventive duty of states. However, it is important to bear in mind that the threshold for prevention and precaution differs. The principle of prevention is applicable where the damage likely to occur is significant, whereas the precautionary principle is triggered in the instance of serious or irreversible damage. Furthermore, the scope of the preventive obligation has expanded from its application to transboundary harm towards the requirement to protect the global commons and other areas beyond national jurisdiction, such as the global atmosphere. Thus, the preventive obligation operates *erga omnes* and not merely in a bilateral manner.¹²⁰

It is now accepted law that the requirement to undertake environmental impact assessments constitutes an important element in preventing transboundary harm from hazardous activities. This requirement is expressed as follows in Principle 17 of the Rio Declaration:

Environmental impact assessment as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

In the *Pulp Mills* case, the ICJ was of the view that the practice of undertaking environmental impact assessments:

has gained so much acceptance amongst States that it may now be considered a requirement under general international law ... where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.¹²¹

16.5.4 Polluter pays principle

In terms of principle 16 of the Rio Declaration:

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

The wording of principle 16 is indicative of the fact that the polluter pays principle does not apply between states at the international level.¹²² It has a steering effect on private actors in the domestic sphere. However, the exact meaning and interpretation of the principle is still ambiguous.¹²³ The practical implication of the principle is that it allocates the costs of preventive or remedial measures to a polluter through, *inter alia*, taxes, levies, subsidies and liability laws.

16.6 Key issues in international environmental law

The breadth and complexity of environmental law makes it impossible to discuss every topical issue in a comprehensive manner. Hence, the next section chooses a sample of some of the most pressing issues in international environmental law today and discusses them with reference to the relevant regulatory instruments. The exclusion of certain issues in the following discussion should not be viewed as an indication of the insignificance of any issue.

16.6.1 Freshwater resources

Freshwater scarcity is one of the major challenges of the modern world. Approximately 663 million people do not have access to an improved drinking water source and 2.4 billion lack access to improved sanitation.¹²⁴ Causes of the current crisis include environmental degradation and overexploitation. Historically, international water law has not been concerned with environmental considerations but has rather focused on rules and principles pertaining to water allocation in international watercourses between upstream and downstream users. However, recently developments have occurred that have made international water law more responsive to sustainability and ecological considerations in particular. States have advanced four theories for the use of freshwater resources – namely, absolute territorial sovereignty (free use of water within the territory of a state without any consideration of downstream or contiguous states); absolute territorial integrity (which gives the lower riparian state the right of a full flow of natural quality); limited territorial integrity (free usage as long as it does not prejudice co-riparian states); and equitable use.¹²⁵

Equitable use enjoys the most support and is included in the UN Convention on the Law of the Non-Navigational Uses of International Watercourses of 1997,¹²⁶ which provides: ‘Watercourse states shall in their respective territories utilise an international watercourse in an equitable and reasonable manner’.¹²⁷ The precise meaning of ‘equitable and reasonable’ depends on the balancing of relevant factors in the circumstances of individual cases. Hence, article 6 of the UN Watercourses Convention identifies non-exhaustive factors relevant for the determination of equitable and reasonable utilisation. The Convention will enter into force after 35 ratifications have been deposited.¹²⁸ However, at the time of writing, this requirement had not been met.¹²⁹ It is interesting to note that article 7 contains an obligation not to cause significant harm. The relationship between equitable utilisation and pollution control and the protection of the environment is the most controversial issue in relation to freshwater resources. Article 10(2) states that in the event of a conflict between uses of an international watercourse, it shall be resolved with reference to articles 5 to 7, with special regard being given to the requirements of vital human needs. The reference to vital human needs invokes the human rights dimension of freshwater access for drinking, sanitation and nutrition.¹³⁰ South Africa signed the Convention in 1997.¹³¹

Article 3 makes provision for the adoption of watercourse agreements at a regional level. The Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System of 1987 and the Protocol on Shared Watercourse Systems in the Southern Africa Development Community of 2003 constitute examples of regional agreements that follow a comprehensive approach to environmental considerations in Africa. The SADC Protocol aims to address the sustainable development of Southern Africa’s watercourses. Hence, the objectives of the Protocol include: the establishment of shared watercourse agreements and institutions for the management of shared watercourses; the sustainable, equitable and reasonable utilisation of shared watercourses; the promotion of environmentally sound development and management of shared

watercourses as well as the harmonisation of legislation and policy in relation to shared watercourses.¹³²

Another important international water law convention is the UNECE¹³³ Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 1992. This convention was initially negotiated as a regional instrument, but amendments¹³⁴ to the Convention now allow for the accession of all UN member states. The amendments make the UNECE Convention a global instrument, which means that in future two international treaties will regulate transboundary watercourses. Although differences exist between the UN Watercourses Convention and the UNECE Water Convention, the two Conventions may in future function in a complementary manner.¹³⁵ The UNECE Convention is generally more detailed than the UN Watercourses Convention, whereas the latter Convention provides more guidance on the factors relevant for the determination of ‘equitable and reasonable utilisation’. The UNECE Convention contains an array of provisions that relate to environmental protection. Under article 2, parties must take all appropriate measures to ‘prevent, control and reduce pollution of waters causing or likely to cause transboundary impact’; to ensure that transboundary water is used with the aim *inter alia* of environmental protection; and to ensure the reasonable and equitable utilisation of transboundary waters. According to article 2(5), parties have to consider the precautionary principle, polluter pays principle and intergenerational equity. Article 3 obliges parties to adopt legal, administrative, economic, financial and technical measures to prevent, control and reduce transboundary water pollution.

Another important development in the context of international water law is the establishment of the ILC Draft Articles on the Law of Transboundary Aquifers of 2008, which deals with the protection and management of groundwater resources. The Draft Articles contain several interesting provisions. Article 3, for example, affirms the sovereignty of each aquifer state ‘over the portion of a transboundary aquifer or aquifer system located within its territory’. The Draft Articles also include the principle of equitable and reasonable utilisation in article 4, the obligation not to cause significant harm in article 6, and an obligation to co-operate under article 7. Article 10 provides for the protection of ecosystems and article 12 relates to the prevention, reduction and control of pollution. Article 12 refers to the precautionary approach. It would be interesting to see whether the Draft Articles may prompt the negotiation of a subsequent binding instrument dealing with groundwater resources.

16.6.2 Ozone depletion and climate change

UNEP initiated the Vienna Convention for the Protection of the Ozone Layer of 1985 in response to the emergence of scientific evidence that ozone depletion required regulation through international law. South Africa ratified the Convention in 1995. The Convention is a framework convention characterised by vague and broad language. The Convention does not require states parties to take concrete measures to reduce ozone-depleting substances but requires further action in the form of a substantial protocol in order to establish an effective ozone protection regime.¹³⁶ Thus, in 1987, states adopted the Montreal Protocol on Substances that Deplete the Ozone Layer. The Protocol provides for targets for the reduction and elimination of the consumption and production of a range of ozone-depleting substances. Article 2 includes a complex scheme of control measures, while article 4 provides for the use of trade measures in order to ban trade between certain groups of countries.¹³⁷

The Protocol includes a range of differential treatment provisions in order to cater for the special needs of developing states. Article 5, for instance, delays compliance with the control measures in

article 2 for developing countries whose consumption of the controlled substances in Annex A is less than 0.3 kilograms *per capita* by 10 years. In addition, article 10 establishes a multilateral fund that aims to assist developing states falling under the purview of article 5 to comply with the control measures under article 2. It is the purpose of article 10 to facilitate technical co-operation and the transfer of technology. Article 8 serves as the basis for an innovative ‘soft non-compliance’ procedure whereby an implementation committee may consider submissions with a view to ensuring an amicable solution of an issue. The committee may issue a report with steps, such as financial, technical or training assistance, in order to fulfil compliance.¹³⁸ South Africa adopted the Montreal Protocol in 1990. In general, it seems that the Montreal Protocol has achieved considerable success and that with the full implementation of the Protocol’s commitments, the ozone layer can return to pre-1980 levels by 2050–2075.¹³⁹

The single most important challenge to international law in the twenty-first century is climate change. The International Panel on Climate Change already made it clear in 2007¹⁴⁰ that climate change is most probably due to the increase in human-induced greenhouse gas emissions and the Fifth Assessment Report affirms that the ‘[h]uman influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history’.¹⁴¹ Climate change is threatening humanity’s basic elements of life such as access to water, food production, health and the use of land and the environment. It is viewed as a truly global issue, because the location of greenhouse gas emissions is relatively unimportant for climate change effects. Moreover, the impacts of climate change are not evenly distributed since the poorest states and their citizens are most vulnerable to the effects of climate change while some states may even benefit from a change in the earth’s climate.

General Assembly Resolution 45/212 of 1990 initiated negotiations for a multilateral treaty on climate change. These were concluded in 1992 with the adoption of the UNFCCC. The ultimate objective of the Convention is to ‘achieve … stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’.¹⁴² In the achievement of the objectives of the Convention, the parties are to be guided by various ‘principles’ that include the common but differentiated responsibilities and respective capabilities principle (CBDPRC),¹⁴³ the special circumstances/vulnerabilities principle,¹⁴⁴ the precautionary approach,¹⁴⁵ sustainable development,¹⁴⁶ and the promotion of mutual support and coherence between the international and climate change regimes.¹⁴⁷ Apart from having an important role in relation to the interpretation and implementation of the Convention, the principles must be taken into account in good faith in the negotiations by the COP.¹⁴⁸

Article 4 deals with the commitments of parties and is based on the CBDPRC principle. The developed country parties and the parties ‘undergoing the process of transition to a market economy’ listed in Annex I are required to adopt national policies to mitigate climate change, whereas developing parties have less onerous commitments – such as establishing national inventories of anthropogenic emissions by sources. In terms of article 4(3), the developed country parties listed in Annex II are required to provide ‘new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations’. The Convention establishes an important institutional structure to ensure and improve compliance. The structure comprises the COP, secretariat, subsidiary bodies and a financial mechanism.¹⁴⁹

The Berlin Mandate,¹⁵⁰ adopted during the first COP, resulted in the negotiation of the Kyoto Protocol of 1997. The Protocol entered into force on 16 February 2005 after Russia ratified the Protocol. The Protocol contains quantitative emission restrictions for industrialised states¹⁵¹ in relation to greenhouse gases listed in Annex A. Article 3(1) aims to ensure a reduction of overall emissions of greenhouse gases by at least 5 per cent below 1990 levels in the commitment period

2008–2012. Furthermore, the Protocol made provision for three flexibility mechanisms¹⁵² by which parties may reduce emissions. According to article 3(3) and (4), in meeting their emission reduction commitments, parties may take into account land use, land-use change and forestry activities undertaken since 1990 and which have resulted in the removal of greenhouse gases.

The COP has a supervisory role in relation to the implementation of the Convention and Protocol.¹⁵³ The COP receives scientific advice from the subsidiary bodies for science and technology (SBSTA) and implementation (SBI) in order to assess and review the implementation of the Convention and Protocol.¹⁵⁴ The subsidiary bodies, in conjunction with the COP, also consider national reports in terms of article 12 of the Convention and article 7 of the Protocol. An in-depth review process conducted by a team of experts is undertaken prior to the consideration of national reports in order to ‘provide a thorough and comprehensive technical assessment of all aspects of the implementation by a Party of this Protocol’.¹⁵⁵ In the event of non-compliance with state party obligations, the climate-change regime contains mechanisms to address this. The multilateral consultative process makes provision for a dispute avoidance procedure that is of an advisory nature. In terms of this non-judicial process, measures may be recommended to facilitate compliance and implementation.¹⁵⁶

Furthermore, article 14 of the Convention and article 19 of the Protocol make provision for dispute settlement by any peaceful means such as negotiation, conciliation or judicial settlement. Lastly, article 18 provides for the negotiation of a non-compliance procedure. Consequently, decisions reached as part of the Marrakesh Accords adopted by the first meeting of the parties to the Protocol (MOP) cater for a non-compliance mechanism consisting of a facilitative and enforcement branch, which has been operational since 2006.¹⁵⁷

Since 1997, a comprehensive negotiation process has focused on the operationalisation of the Kyoto Protocol as well as the future of a post-2012 climate regime through the regular COP/MOP meetings. For instance, at COP 13/MOP 3 held in Bali, the parties agreed to the ‘Bali Roadmap’, which provided for a ‘two-track’ process towards COP 15 in Copenhagen in 2009, which consists of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) and the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA).¹⁵⁸ The AWG-LCA was responsible for a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term co-operative action beyond 2012 in order to reach an agreed outcome at COP 15, whereas AWG-KP had to discuss future commitments for industrialised states under the Protocol.

The Copenhagen Conference (COP 15) constituted a deadline to resolve questions concerning the post-2012 climate regime. The Conference, however, could not meet such high expectations and instead resulted in a political agreement (the Copenhagen Accord of 18 December 2009).¹⁵⁹ However, the Cancún Agreements of 2010¹⁶⁰ took note of the mitigation targets of the Copenhagen Accord pledges.¹⁶¹

Subsequently, the Durban Platform of 2011 launched a new round of negotiations aimed at the establishment of ‘a protocol, another legal instrument or an agreed outcome with legal force’ by 2015, applicable to all parties for the period from 2020 onwards.¹⁶² Although the recent conference of the parties (COP) in Doha in 2012 secured a second commitment period for the Kyoto Protocol, substantial progress was not made concerning the architecture of a post-2020 agreement and mitigation and financing commitments.¹⁶³

However, the Doha Conference is noteworthy in that it marked the first time that the importance of addressing loss and damage associated with the adverse effects of climate change, especially in developing states, was affirmed in a decision of a COP.¹⁶⁴ Hence, it was decided to establish at COP 19 an international mechanism that would address loss and damage in developing countries that are

particularly vulnerable to the consequences of climate change. The Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts was accordingly established at COP 19. This mechanism established the groundwork for further action that needs to be undertaken in order to address loss and damage.

Furthermore, it was decided that the Ad Hoc Working Group on the Durban Platform for Enhanced Action would elaborate elements for a draft negotiating text and parties were invited to initiate preparations for their ‘intended nationally determined contributions’ (INDCs).¹⁶⁵ INDCs are intended to be the primary communication by parties of the national measures that they will take to address climate change. Parties deliberated further on the manner in which INDCs must be presented and assessed during COP 20 in Lima. They agreed that countries should provide information in relation to their proposed contributions, which:

may include quantifiable information on the reference point (including, as appropriate, a base year), time frames and/or periods for implementation, scope and coverage, planning processes, assumptions and methodological approaches including those for estimating and accounting for anthropogenic greenhouse gas emissions ... and how it contributes towards achieving the objective of the Convention as set out in its Article 2.¹⁶⁶

This process lays the groundwork for the deliberations of COP 21 in Paris. At the time of the publication of this chapter, progress had been made with a draft negotiating text in advance of the deadline for the conclusion of a new agreement.¹⁶⁷ It is hoped that parties will exhibit political commitment in order to ensure the conclusion of a new comprehensive internationally binding climate change agreement.

16.6.3 Waste and hazardous substances

The dramatic increase in recent decades in the volume and different types of waste and hazardous substances has a detrimental effect on the environment. The transboundary movement of waste – in particular, the illegal exportation of waste from developed to developing countries – has resulted in the development of international rules concerning wastes and hazardous substances.¹⁶⁸ Hence, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted during 1989 in order to regulate the international disposal of waste in an environmentally sound manner. The Convention provides for a limited prohibition of the transboundary movement of waste, in particular to developing states.¹⁶⁹ The Convention also requires the prior informed consent of importing states where the import of certain wastes are not prohibited.¹⁷⁰ Article 4(2) contains obligations concerning the generation and adequate disposal of wastes. Article 4(3) determines that the states parties ‘consider that illegal traffic in hazardous waste or other waste is criminal’. Article 4(5) also ensures that exports to and imports from non-parties is not permissible. Article 8 creates a duty of re-import in the event that the transboundary movement of waste cannot be completed in accordance with the terms of the contract.

Under article 12 of the Convention, the Basel Protocol on Liability and Compensation of 1999 was adopted in order to regulate liability and compensation for damages caused by accidental spills of hazardous wastes during export, import, or disposal. During COP 2, states parties adopted Decision II/2, which prohibits transboundary movement of hazardous waste destined for final disposal from OECD to non-OECD states, and phases out (by 31 December 1993) other transboundary movements destined for recycling or recovery purposes.¹⁷¹ Thus, the ‘Basel Ban’ was incorporated in the Convention through an amendment at the COP 3.¹⁷² Legal debate concerning the interpretation of article 17(5)¹⁷³ has resulted in disagreement concerning the question whether the

controversial amendment ('Basel Ban') has entered into force. Authority currently suggests that the amendment has not yet entered into force.¹⁷⁴

In reaction to the Koko incident,¹⁷⁵ the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa of 1991 was adopted in order to prohibit all imports of hazardous wastes into Africa from non-African Union countries.¹⁷⁶ However, the Convention does allow for certain transboundary movements of hazardous wastes between African states.

The increase in the use of chemicals and pesticides has given rise to an international trade in hazardous substances. The risks involved in the use of toxic chemicals have led to the adoption of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade of 1988, as well as the Stockholm Convention on Persistent Organic Pollutants of 2001. Thus, the Rotterdam Convention is applicable to 'banned or severely restricted chemicals' and 'severely hazardous pesticide formulations'.¹⁷⁷ Articles 10 and 11 make provision for the prior informed consent procedure in relation to chemicals listed in Annex III. Furthermore, article 3(1)(a) of the Stockholm Convention requires parties to adopt measures to eliminate the intentional production, use, import and export of chemicals listed in Annex A. Chemicals listed in Annex B are subject to several restrictions.¹⁷⁸ Article 3(3) requires parties to take measures to prevent the production and use of new pesticides or industrial chemicals that exhibit the characteristics of persistent organic pollutants (POPs) as specified in Annex D. Furthermore, the Convention includes provisions on the safe handling of existing stockpiles.¹⁷⁹ The POPs Convention also includes provisions on the reduction of emissions of unintentionally produced POPs.¹⁸⁰

16.6.4 Biological diversity

Scientific consensus shows that human activities are leading to biodiversity loss at an alarming rate.¹⁸¹ The most important international instrument for the protection of biological diversity is the Convention on Biological Diversity of 1992 (CBD).¹⁸² Article 2 of the CBD defines biological diversity as 'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems'. Furthermore, the preamble of the CBD recognises the 'intrinsic value' of biological diversity and designates its conservation as a common concern of humankind. The CBD also explicitly recognises state sovereignty over natural resources.¹⁸³

The CBD has three objectives:

1. the conservation of biological diversity;
2. the sustainable use of its components; and
3. the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources.¹⁸⁴

Thus, the Convention includes a range of measures that need to be undertaken by parties in relation to the conservation of biological diversity.¹⁸⁵ Furthermore, article 10 contains various obligations in relation to the sustainable use of biological resources. In relation to the third objective, access¹⁸⁶ to genetic resources of a host country is to be on the basis of 'mutually agreed terms'¹⁸⁷ and subject to prior informed consent.¹⁸⁸ The benefits arising from the utilisation of genetic resources must be shared in a fair and equitable way.¹⁸⁹ Articles 16–19 deal with access to and transfer of technology in different instances.¹⁹⁰ The transfer of technology should take place on the basis of 'fair and most

favourable terms' and in other cases on 'mutually agreed terms'. Article 16(2) subjects access and transfer to intellectual property rights.¹⁹¹ Article 16(4) requires that countries ensure that the 'private sector facilitates access to, joint development and transfer of technology'.

The vagueness and controversy concerning articles 15 and 16 resulted in the adoption of the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation during COP 6 in 2002.¹⁹² These guidelines are not legally binding but provide substance to the concepts of prior informed consent and mutually agreed terms. The guidelines, among others, make provision for the conclusion of material transfer agreements to give effect to article 15. During COP 10, states parties adopted a protocol to the Convention on Biological Diversity of 2010 – the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation (Nagoya Protocol) – in order to provide a binding instrument that elaborates on the access and benefit-sharing regime.¹⁹³

Article 19(3) refers to the consideration by the COP of the need for a protocol 'in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology'. Accordingly, the Cartagena Protocol on Biosafety of 2000 was adopted. The scope of the Protocol is limited to the transboundary movement, transit, handling and use of all living modified organisms.¹⁹⁴ The preamble reaffirms the precautionary approach and several provisions reflect this affirmation.¹⁹⁵ Furthermore, the Protocol makes provision for an advance information agreement procedure to ensure that countries can make informed decisions prior to agreeing to the import of living modified organisms in their territories.¹⁹⁶ The Protocol also establishes a Biosafety Clearing House to facilitate the exchange of information on living modified organisms and to assist countries in the implementation of the Protocol.¹⁹⁷

16.6.5 State responsibility and liability

A distinction may be made between state responsibility and state liability although the terms are sometimes used interchangeably. State responsibility relates to an internationally wrongful act and has been dealt with in chapter 4, whereas liability is often used in the context of environmental damage caused by lawful activities that may also include the civil liability of non-state actors, as is clear from a range of international instruments.¹⁹⁸

Environmental damages flowing from a breach of an international obligation may give rise to the international responsibility of the state responsible for the breach. However, for several reasons, this form of responsibility is not frequently used by states in international environmental law – such as the preference for co-operation rather than confrontation in international environmental law. Moreover, some forms of environmental damage may not be easily recoverable under the international law rules on state responsibility. Take for instance, climate change effects and other negative impacts on matters of common concern such as the global climate system.

As should be clear from the discussion in chapter 4, international law on state responsibility is largely based on bilateral relations as regards cause and effect – that is, between the state responsible for the breach of an international law obligation, and the injured state claiming reparations. In climate change matters, one is confronted with a multitude of causes affecting the global environment, in which all states have an interest, and which may render the cause and effect rule for responsibility inapplicable. This explains why MEAs often resort to specific treaty-based enforcement and compliance mechanisms based on co-operation and negotiation among the states parties.

For purposes of this chapter, a few select developments and issues peculiar to environmental law will be dealt with. At a more general level, it may be noted that the issue of liability and

compensation for environmental harm was already noted at the time of the Stockholm and Rio Declarations. For instance, Principle 22 of the Stockholm Declaration declares:

States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

This is reiterated in Principle 13 of the Rio Declaration, which urges states to comply with this duty in an ‘expeditious and more determined manner’. However, the most noteworthy developments in this regard have occurred at the level of the International Law Commission (ILC). In 2001, the ILC adopted the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.¹⁹⁹ Although, strictly speaking, the Draft Articles are not dealing with liability but ‘with the concept of prevention in the context of authorisation and regulation of hazardous activities which pose a significant risk of transboundary harm’,²⁰⁰ it is nevertheless made clear that prevention, which may either be a procedure or a duty, has relevance for the ‘phase prior to the situation where significant harm or damage might actually occur, requiring States concerned to invoke remedial or compensatory measures, which often involve issues concerning liability’.²⁰¹

The emphasis in the Draft Articles on the duty to prevent is informed by a number of factors: first, because compensation as a remedy for harm often cannot restore the situation to the way it was before the harmful accident or event; secondly, prevention is all the more required as knowledge about the operation of the hazardous activity and the risks involved increases over time; and thirdly, from a legal point of view, an enhanced ability to establish the causal link between the activity and the harm makes it imperative for those in control of the activity to take all necessary steps to prevent the harm from occurring.²⁰²

To act preventively in these circumstances involves an obligation of *due diligence* – a standard against which the conduct of the state of origin²⁰³ is measured. The due diligence obligation is not an obligation of result but of conduct, which means that the state of origin is not expected to guarantee that the harm will not occur. What is required, however, is that the state of origin must show that it has exerted its best efforts in taking the preventive measures that are appropriate for and proportional to the degree of risk of transboundary harm in the circumstances.²⁰⁴ In the following paragraph, the Draft Articles address the main elements of the due diligence obligation:

The main elements of the obligation of due diligence involved in the duty of prevention could be thus stated: the degree of care in question is that expected of a good Government. It should possess a legal system and sufficient resources to maintain an adequate administrative apparatus to control and monitor the activities. It is, however, understood that the degree of care expected of a State with a well- developed economy and human and material resources and with highly evolved systems and structures of governance is different from States which are not so well placed. Even in the latter case, vigilance, employment of infrastructure and monitoring of hazardous activities in the territory of the State, which is a natural attribute of any Government, are expected.²⁰⁵

As far as the scope of the Draft Articles is concerned, article 1 limits application to activities not prohibited by international law and which involve a risk of causing *significant* transboundary harm. The first criterion in this provision – namely ‘activities not prohibited by international law’ – is adopted by the Draft Articles to separate state responsibility from international liability.²⁰⁶ From an ordinary state responsibility perspective, the breach of the duty to prevent, which enjoys customary law status,²⁰⁷ and the international law rules on state responsibility²⁰⁸ may render the state of origin responsible for damages caused on the territory of another state, provided that the harm is of a significant nature. In this instance, the breach of the duty to prevent – for instance, by failing to exercise sufficient regulatory control over the hazardous activity – constitutes a wrongful act under the rules of state responsibility. But a state, or even private actors, may also incur international

liability for significant transboundary harm – whether or not the harm resulted from the breach of an international law obligation. This will be the case, for instance, where secondary consequences, such as health problems associated with contaminated water have occurred. Here, civil liability, for which the state or a private entity may be responsible, is, for purposes of remedying the harm, unrelated to the breach of the obligation and may even relate to activities that are entirely lawful.²⁰⁹

In this case, the private operator carries the primary responsibility for remedying the harm. Liability may be joint and several, fault-based or risk-based (strict liability). In the latter instance, liability results from the activity's inherent danger – the risk it creates – and the operator's negligence, or not, is immaterial. International law may also provide for a secondary responsibility to provide a remedy, which will rest on the state of origin. This is usually the case where the source of the harm is uncertain or the private operator is not in a financial position to cover the damages. To cater for such eventualities, it is not uncommon to require that insurance or other financial guarantees be provided. This may be illustrated with reference to some examples.

Article 6 of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal requires that an exporting state party, or the generator or exporter of hazardous wastes, notifies other states in advance of the movement of the wastes over their territories. Under article 4 of the 1999 Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, the notifying entity (article 6) remains strictly liable for damages until the disposer of the wastes has taken possession of the wastes. Article 4(6) of the Protocol also provides for joint and several liability by stating that '[if] two or more persons are liable according to [Article 4], the claimant shall have the right to seek full compensation for the damage from any or all of the persons liable'. In addition to strict liability, the Basel Protocol also provides for fault-based liability in article 5 by assigning liability for damage to any person where that person, in causing the damage, has acted wrongfully, recklessly or negligently. Moreover, any person who may incur liability under article 4 of the Basel Protocol, is obligated by article 14 of the Basel Protocol to establish and maintain insurance, bonds or other financial guarantees covering their liability.

Another example can be taken from the supplementary protocols to the 1992 Biodiversity Convention referred to earlier. In 2000, the Cartagena Protocol on Biosafety was adopted with the objective of ensuring that adequate levels of protection are in place for preventing adverse consequences for biological diversity resulting from the development, transfer, handling and use of living modified organisms (LMOs). Article 27 of this protocol gave the COP, acting as the MOP under the Protocol, the authority to develop international rules and procedures for liability and redress for damage resulting from the transboundary movement of LMOs. In 2010, the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety was adopted. This provided for a civil liability regime in article 12. Under this provision, states parties are given a choice whether to continue applying their existing national law on civil liability or to develop civil law liability specific for the purpose of the Supplementary Protocol and for co-use with the existing civil law regime. If the development option is chosen, the civil liability regime must cover at least the following elements: damage; standard of liability (strict or fault-based liability); channelling of liability; and the right to bring claims (*locus standi*). Article 11 of the Supplementary Protocol makes it clear that the civil liability regime does not affect the rights and obligations of states under the rules of general international law applicable to the responsibility of states for internationally wrongful acts.

It must be noted that article 12 does not create an international civil liability regime but leaves it to the individual states parties to decide on the course of action. Although this allows for flexibility in domestic implementation and regulation in accordance with national particularities, it may also lead to conflicting approaches to liability that could undermine confidence in the liability regime

as such. This approach also left the expectations of the developing countries, as recipients of LMOs, unanswered, which led to a clear North-South divide on the need for a binding civil liability regime in the Supplementary Protocol. What developing countries hoped for were provisions on liability that would instil confidence in the technology behind LMOs and assist them in countering criticism from their populations on the potentially harmful consequences of importing LMOs. This was all the more important in view of the fact that developing countries are the most lacking in the technology to assess and manage risk and hence the capacity to act preventively and with precaution.²¹⁰

Fears about encouraging perceptions – by including a treaty-based transboundary liability regime – that the technology currently used could be hazardous, as well as uncertainty about the extent of their exposure to liability, moved the LMO-exporting countries to resist a proper transboundary liability regime and to opt instead for the argument that the ordinary international law rules on state responsibility provide adequate remedies.²¹¹ Divisions of this nature are not uncommon in treaty negotiations and compromises must be made for the process to be constructive. This is what article 12 tries to achieve.

The further criterion of ‘significant transboundary harm’ in article 1 of the Draft Articles ‘refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact’.²¹² Hence, the threshold is determined by the combined effect of ‘risk’ and ‘harm’. It is acknowledged that the term ‘significant’ is not without ambiguity and as the Draft Articles point out, a determination must be made in accordance with the factual considerations in each case. In any event, the harm, which ‘must be susceptible of being measured by factual and objective standards’ must ‘lead to a real detrimental effect on matters such as ... human health, industry, property, environment or agriculture in other States’.²¹³

Central to the preventive duty of states in article 3 is the obligation in article 6 to have in place a system for the prior authorisation of any activity that may cause significant transboundary harm. Non-compliance with the authorisation obliges the authorising state to take appropriate action, including the termination of the authorisation. Prior authorisation under the Draft Articles must be based on an assessment of the possible transboundary harm, including any environmental impact assessment.²¹⁴ Implementation of the Draft Articles is also dependent upon a number of other obligations of the state of origin and the state likely to be affected. These include the duty to co-operate in good faith (article 4); the duty to notify and inform about the risk of significant transboundary harm (article 8); the duty to consult on preventive measures (article 9); the duty to exchange information (article 12); the duty to provide the public with relevant information relating to harmful activities (article 13); and the duty to settle disputes by peaceful means (article 19).

An issue related to the level of environmental damage that will give rise to liability (‘significant transboundary harm’) is the question of what would constitute environmental damage. Various approaches are followed in defining environmental damage and a few examples will suffice. During its 58th session in 2006, the International Law Commission adopted its Draft Principles on the Allocation of Loss for Transboundary Harm.²¹⁵ In Principle 2, we find the following definition:

For the purposes of the present draft principles:

- (a) ‘damage’ means significant damage caused to persons, property or the environment; and includes:
 - (i) loss of life or personal injury;
 - (ii) loss of, or damage to, property, including property which forms part of the cultural heritage;
 - (iii) loss or damage by impairment of the environment;
 - (iv) the costs of reasonable measures of reinstatement of the property, or environment, including natural resources;

(v) the costs of reasonable response measures.

Article 2(2)(b) of the Nagoya-Kuala Lumpur Supplementary Protocol referred to above follows the following broad approach in article 2(2)(b):

'Damage' means an adverse effect on the conservation and sustainable use of biological diversity, taking also into account risks to human health, that:

Is measurable or otherwise observable taking into account, wherever available, scientifically-established baselines recognized by a competent authority that takes into account any other human induced variation and natural variation; and is significant as set out in paragraph 3 below.

And in the 1992 International Convention on Civil Liability for Oil Pollution Damage, 'pollution damage' is defined in article 1(6) as:

- (a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, ... provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;**
- (b) the costs of preventive measures and further loss or damage caused by preventive measures.**

A further illustration is UN Security Council Resolution 687 (1991), which was adopted pursuant to Iraq's military invasion and occupation of Kuwait, which caused widespread environmental damage and depletion of natural resources in Kuwait. The resolution made it clear that Iraq was 'liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait'.²¹⁶ To settle the claims against the government of Iraq, the resolution also established a claims commission comprising several panels, one of which, Panel F4, was made responsible for environmental claims.

Following the wording of the resolution, the question arose for the commission as to what would constitute 'direct environmental damage' for which Iraq could be held liable. Underlying this question is the legal issue of the (direct) causal link between the military activities and the environmental damage caused during the armed conflict. However, instead of specifically addressing this issue, the commission's governing council opted for a list of acts or events that may be recognised as direct environmental damage and the depletion of resources. This includes losses or expenses resulting from:²¹⁷

- (a) Abatement and prevention of environmental damage, including expenses directly relating to fighting oil well fires and stemming the flow of oil in coastal and international waters; (b) Reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment; (c) Reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment; (d) Reasonable monitoring of public health and performing medical screenings for the purposes of investigation and combating increased health risks as a result of the environmental damage; and (e) Depletion of or damage to natural resources.**

The categories did not prevent the Panel from following a broad approach to the admission of claims, which made it possible for the Panel to entertain a wide range of claims – including reduced crop yields; temporary loss of rangeland resources resulting from the presence of refugees on the land; medical treatment and health facilities for refugees; monitoring of incidences of cancer; salination and depletion of ground water resulting from the presence of refugees; loss of terrestrial,

marine and coastal resources; treatment of injuries from mines and ordnance; post-traumatic stress disorder; and losses in ecological services.²¹⁸

The work of the commission and its governing council has not resulted in a definition of ‘environmental damage’ and ‘depletion of natural resources’. In 1996, a UNEP Working Group Report on Liability and Compensation for Environmental Damage Arising from Military Activities suggested that environmental damage could be defined as:

A change which has a measurable adverse impact on the quality of a particular environment or any of its components including its use and non-use values and its ability to support and sustain an acceptable quality of life and a viable ecological balance.²¹⁹

And the depletion of natural resources is referred to as ‘the destruction of natural resource assets which occur in their natural state ... and which have a primarily commercial use or commercial value rather than a non-commercial use and value’.²²⁰

The above overview illustrates the various concepts and approaches to environmental damage. Most of these instruments have been developed in an ad hoc manner under the auspices of various international organisations and bodies and are limited to specific areas and discrete issues. The result of this piecemeal process is a largely fragmented network that fails adequately to address many of the complex legal issues that the subject raises.

16.7 The African Union and the environment

The African continent suffers from numerous environmental challenges including, among others, deforestation, desertification, the loss of soil fertility, loss of biodiversity, the effects of climate change, and water pollution.²²¹ Furthermore, the African continent is characterised by grinding poverty, illiteracy, malnutrition and inadequate water supply and sanitation, as well as poor health. The 25 bottom-ranked nations of the United Nations Human Development Report of 2003 are all from Africa. In general, African states face environmental problems of poverty and need sustainable development in order to alleviate poverty and address environmental degradation.²²²

The African Union (AU) was established in 2000 by the AU Constitutive Act to confront the various challenges that the continent faces.²²³ The objectives of the AU are to accelerate political and socio-economic integration;²²⁴ promote human and peoples’ rights;²²⁵ and promote sustainable development²²⁶ and ‘co-operation in all fields of human activity to raise the living standards of African peoples’.²²⁷ To this end, the OAU and AU adopted various instruments concerning environmental protection and conservation, which constitute the regional African normative environmental law framework.

This section of the discussion provides a brief overview of the institutional aspects of the AU. Furthermore, the prominence of sustainable development in the normative framework of the AU receives attention. Lastly, the vulnerability of the African continent necessitates brief remarks concerning the response of the AU to this environmental challenge.

16.7.1 Institutional aspects: a brief overview

A thorough understanding of AU environmental law necessitates a few brief remarks concerning the institutional framework of the AU in relation to the protection of the environment and the pursuit of sustainable development. The AU Assembly has adopted several decisions, declarations and

resolutions relating to the environment. One noteworthy example is the development of a common continental position on climate change.²²⁸

Another institution worth mentioning is the Executive Council. According to article 13 of the AU Constitutive Act, the Executive Council's role is to co-ordinate and take decisions on policies in areas of common interest, which include energy, industry, mineral resources, water resources and environmental protection. The Council may delegate its functions and powers to any of the Specialised Technical Committees provided for in article 14, which are inter alia responsible for the co-ordination and harmonisation of projects and programmes of the AU.²²⁹ Article 14 makes provision for the establishment of the Committee on Industry, Science and Technology, Energy, Natural Resources and Environment.²³⁰ The Executive Council has to date also dealt with environmental issues, such as biosafety;²³¹ ecosystem approaches pertaining to fisheries management plans;²³² climate change adaptation;²³³ desertification²³⁴ and the management of natural resources.²³⁵ In practice, the Council's decisions have not had a major impact on the development of AU regional law because the Council in general confirms, endorses or supports initiatives undertaken by other institutions.

The African Ministerial Conference on the Environment (AMCEN) was established in December 1985 by the United Nations Environment Programme (UNEP) and it is expected that AMCEN will ultimately become a Specialized Technical Committee (STC) of the AU Commission.²³⁶ Its mandate includes, among others, to provide advocacy for environmental protection in Africa. Since its creation, it has fulfilled several roles, such as the development of common positions pursuant to negotiations of international environmental treaties and capacity building in the field of environmental governance. AMCEN has played an important role in the African response to climate change.

In addition, several institutions were established with the formal adoption of the New Partnership for Africa's Development (NEPAD) Strategic Framework in July 2001.²³⁷ The NEPAD Secretariat is, for instance, responsible for co-ordinating and facilitating the preparation and implementation of the NEPAD Environment Action Plan (EAP) and the Sub-Regional Environmental Action Plans (SREAPs).

16.7.2 Sustainable development and the African Union

NEPAD provides a framework for development on the African continent and aims to pursue sustainable growth and development.²³⁸ As such, NEPAD constitutes a 'blueprint' for the sustainable development of Africa. Furthermore, the NEPAD Programme for Action identifies the conditions for sustainable development as peace and security, economic and political governance, and sub-regional and regional approaches to development.²³⁹ Several other AU instruments affirm the central role of sustainable development on the African continent. This is evident from the Constitutive Act of the African Union (CAAU), which includes sustainable development as one of its core objectives,²⁴⁰ and article 58(2) of the Abuja Treaty,²⁴¹ which states that measures taken pursuant to subparagraph 1²⁴² should lead to the three elements of sustainable development.²⁴³

Furthermore, the African Convention on the Conservation of Nature and Natural Resources of 1968 links environmental concerns and developmental interests. This Convention constitutes the first regional attempt to address environmental concerns in Africa.²⁴⁴ The fundamental principle of the Convention commits member states 'to adopt the measures to ensure conservation, utilization and development of soil, water, flora and fauna resources in accordance with scientific principles and with due regard to the best interests of the people'.²⁴⁵ Subsequent international developments

prompted the AU to revise the Convention, which resulted in the 2003 adoption of a revised version during the second ordinary session of the Assembly of Heads and States of Government in Maputo.

The Preamble of the African Convention on the Conservation of Nature and Natural Resources of 2003 (Revised Version)²⁴⁶ reiterates its aim to include ‘elements related to sustainable development’. The Revised Version embodies a comprehensive environmental protection regime as it deals with an array of environmental issues – such as the prevention of land degradation,²⁴⁷ the conservation and management of water resources,²⁴⁸ the protection, conservation and management of vegetation cover,²⁴⁹ the maintenance and enhancement of plant and animal genetic diversity,²⁵⁰ the protection of species and the regulation of the trade in species,²⁵¹ the establishment and maintenance of conservation areas,²⁵² and the protection of the environment during military and hostile activities.²⁵³ The Convention establishes a conference of the parties (COP) as the main decision-making body of the Convention.²⁵⁴ The COP is responsible for the development and adoption of compliance mechanisms, rules and procedures and it is therefore an important enforcement and compliance mechanism. This is in line with the establishment of institutional arrangements in terms of MEAs in international environmental law.

It is interesting to note that article III of the African Convention contains ‘principles’ by which parties are to be guided in achieving the objectives of the treaty and implementing its provisions. The first two principles mirror articles 22 and 24 of the African Charter on Human and People’s Rights (Banjul Charter). The inclusion of these rights may imply that non-compliance with the provisions of the Convention may also result in a contravention of the Banjul Charter and hence provide an opportunity for invoking the remedies of the latter instrument. Article 24 of the Banjul Charter reads that ‘[a]ll peoples shall have the right to a general satisfactory environment favourable to their development’, whereas article 22 encapsulates the right to development.²⁵⁵

The oft-cited *SERAC* case provided the AU Commission on Human and People’s Rights with the opportunity to interpret article 24.²⁵⁶ The Commission stated that article 24 requires a government ‘to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources’.²⁵⁷ The Commission also declared that articles 16 and 24 imply the following obligations: to order, or at a minimum to permit, independent scientific monitoring of threatened environments; to require and publish environmental and social impact studies prior to major industrial developments; to provide information to communities exposed to hazardous materials and activities; and to provide meaningful opportunities to be heard and to participate in development decisions.²⁵⁸ In relation to the potential tension between the right to development and the right to a satisfactory environment, it has previously been pointed out that:

[t]he Banjul Charter provides an example of the embodiment of an explicit relationship between the need for economic development, environmental considerations, the human rights framework and sustainable development. The Charter also presents an illustration of the progressive balancing of environmental objectives against economic development in the context of the needs of developing and least developed states.²⁵⁹

The Protocol (to the African Charter on Human and Peoples’ Rights) on the Rights of Women in Africa of 2003 reiterates the importance of sustainable development as article 18 includes a right for women to a healthy and sustainable environment and article 19 incorporates a right to sustainable development for women.

16.7.3 Climate change

Africa is one of the continents most vulnerable to the consequences of climate change. It is particularly sub-Saharan Africa that faces a number of climate-related challenges. Climate variability and change will have a significant effect on: access to and demand for water, the agricultural sector, the use of energy, the health sector, coastal zones, tourism, settlements and infrastructure, as well as aquatic and terrestrial ecosystems.²⁶⁰

The Copenhagen Accord²⁶¹ recognises the vulnerability of Africa as a geographical region; it states that:

enhanced action and international cooperation on adaptation is urgently required to ensure the implementation of the Convention by enabling and supporting the implementation of adaptation actions aimed at reducing vulnerability and building resilience in developing countries, especially in those that are particularly vulnerable, especially least developed countries, small island developing States and Africa.²⁶²

As a result, funding for adaptation ‘will be prioritized for the most vulnerable developing countries, such as the least developed countries, small island developing States and Africa’.²⁶³

The Environmental Initiative of the NEPAD Framework Document of 2001 targets global warming as one of the eight sub-themes for priority interventions.²⁶⁴ In addition to its Action Plan, NEPAD’s Climate Change and Natural Resource Management Programme plays a co-ordinating and advocacy role to promote regional and national programmes aimed at combating climate change.²⁶⁵ Although the African normative framework does not explicitly regulate the issue of climate change, several of the previously discussed instruments may deal with climate change in an indirect manner.²⁶⁶ It is especially the Banjul Charter that may be useful in this regard. The African human rights framework, in particular article 24, may strengthen environmental protection and address the dire consequences of climate change.²⁶⁷ The central position that sustainable development occupies in the African normative framework makes it imperative to address climate change since the consequences of climate change constitute an obstacle to the promotion of sustainable development. Thus, climate change is an issue of vital importance for African states and it is necessary to harness opportunities that the climate change regime offers towards international adaptation support and assistance. Hence, the African Union (AU) as a regional organisation has responded to climate change through the development of a common African position on climate change, which aims to facilitate the unitary voice of the African continent pertaining to negotiations.

Pursuant to this initiative, the Eighth Ordinary session of the AU Assembly instructed members and Regional Economic Communities (RECs) to integrate climate change into their respective development programmes.²⁶⁸ The Twelfth Session of the Assembly in 2009 approved the Algiers Declaration on Climate Change, which was to serve as the basis for the common position of African states on climate change matters.²⁶⁹ Furthermore, the Assembly approved the decision that a single delegation should represent African states.²⁷⁰ Subsequently, the Thirteenth Ordinary Session established the Conference of African Heads of State and Government on Climate Change (CAHOSCC) to represent the African continent at international climate change negotiations.²⁷¹

It is also important to note the valuable contribution of the African Ministerial Conference on the Environment (AMCEN) to the further development of the African common position on climate change. During the third special session of the AMCEN held in Nairobi on 29 May 2009, Ministers adopted the Nairobi Declaration on the African Process for Combating Climate Change.²⁷² The objectives of the Nairobi Declaration are to develop a comprehensive framework of African climate change programmes, and to define Africa’s common negotiating position. Thus, the Nairobi Declaration updated the Algiers declaration²⁷³ and represented the African common position on

climate change.²⁷⁴ This document is based on the pillars of the Bali Action Plan – namely, adaptation, mitigation, financing and technology transfer.

The Nairobi Declaration encapsulates the shared vision of Africa concerning climate change, which emphasises that a climate regime must be ‘inclusive, fair and effective’.²⁷⁵ The common position on climate change has since formed the basis for the advancement of African interests during the international climate change negotiations. Subsequently, African states have continued to use the common position during the meetings of UNFCCC COPs.²⁷⁶ The agreement on a common position on climate change in Africa was therefore indeed a critical step taken towards responding to climate change in the region.

The Nairobi Declaration also served as an impetus for the development of a comprehensive framework of African climate change programmes. These programmes include: the Climate for Development in Africa programme (ClimDev-Africa), which enhances the use of climate information for development while also supporting adaptation to climate change;²⁷⁷ the African Monitoring of the Environment for Sustainable Development (AMESD) project, which uses satellite-based technology to monitor environmental change;²⁷⁸ the Great Green Wall for the Sahara Initiative, which helps to prevent land degradation in the Sahel and Sahara;²⁷⁹ and lastly, a disaster risk reduction programme.

A discussion of AU environmental law necessitates a brief reflection on sub-regional environmental law. SADC is one of the important RECs. It constitutes a building block for the achievement of continental integration and is most relevant for the current discussion. Environmental protection occupies a central position in the SADC Treaty; article 5(1) affirms that the aims of SADC are *inter alia* to pursue development and economic growth,²⁸⁰ as well as the sustainable use of natural resources and the effective protection of the environment.²⁸¹ Furthermore, article 21(1) reads that ‘Member States shall cooperate in all areas necessary’. One of the agreed areas of cooperation is ‘natural resources and environment’.²⁸² Article 22 of the SADC Treaty determines that member states shall conclude protocols as may be necessary in each area of co-operation. The protocols will determine the objectives and scope of, and institutional mechanisms for, co-operation and integration. Accordingly, member states have concluded protocols dealing with among others shared watercourses,²⁸³ the optimal use of energy,²⁸⁴ mining,²⁸⁵ wildlife,²⁸⁶ fisheries²⁸⁷ and forests.²⁸⁸

The important, albeit non-binding, Regional Indicative Strategic Development Plan (RISDP)²⁸⁹ also affirms the importance of environmental protection since it designates ‘environment and sustainable development’ as a priority intervention area of the RISDP.²⁹⁰ The overall goal of the environmental intervention is to ‘ensure the equitable and sustainable use of the environment and natural resources for the benefit of present and future generations’.²⁹¹

An appraisal of AU and SADC environmental law indicates that although progressive and novel provisions characterise the normative frameworks, a lack of implementation hinders an effective pursuit of continental environmental protection. The low level of political commitment to regional integration and the rule of law²⁹² do not bode well for the pursuit of environmental protection through AU law.

16.8 Outlook and future of international environmental law

This chapter has indicated that international environmental law faces several challenges. A fundamental question is whether the concept of sustainable development is suitable to respond to

the urgency of global environmental challenges and whether the political will and commitment exist to pursue global environmental protection. The slow progress that has been made with climate change negotiations during recent COPs and the unwillingness of certain states to make concrete commitments do not bode well for the well-being of humankind. Innovation is required in order to avoid a catastrophe.

It is especially in the context of climate change that the relationship between international environmental law and other areas of law may provide innovative solutions to the shortcomings of this subject. Most notably, the link between international environmental law and human rights law²⁹³ has generated considerable scholarship, and most recently lawyers have devoted attention to the utility of viewing environmental degradation through the paradigm of environmental security.²⁹⁴ The requirement for innovative legal solutions will present fertile ground for future research. However, one of the main problems with international environmental law relates to its basic tenets. States still cling to traditional perceptions of sovereignty and national interest, which impairs universal co-operation and an effective response to major challenges such as climate change.²⁹⁵ The current global environmental crisis requires a legal response that leads to the effective implementation of measures that respond to the common concern. This will continue to be a major challenge of international environmental law in the twenty-first century.

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- ² For a discussion, see G Palmer ‘New ways to make international environmental law’ 86(2) *American Journal of International Law* (1992) 259; and P-M Dupuy ‘Soft law and the international law of the environment’ 21(2) *Michigan Journal of International Law* (1990–1991) 420–35. See also chapter 2 of this book on sources.
- ³ 1949 3 RIAA 1903. See also RM Bratspies & RA Miller *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (2006).
- ⁴ *Trail Smelter* *supra* 1965.
- ⁵ *Corfu Channel (UK and Northern Ireland v Albania)* 1949 ICJ Reports 1949, 4 *et seq.*
- ⁶ *Lac Lanoux Arbitration* 24 ILR (1957) 101.
- ⁷ General Assembly Resolution 2398(XXIII) (3 December 1968).
- ⁸ *Ibid*, preamble.
- ⁹ 11 *International Legal Materials* (1972) 1416.
- ¹⁰ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Reports 1996, 241 para 29.
- ¹¹ UNGA Resolution 2997 (15 December 1972).
- ¹² General Assembly Resolution 37/7 (28 October 1982).
- ¹³ This report, the outcome of the work done by the World Commission on Environment and Development, established by the General Assembly in 1983, became known for its characterisation of sustainable development as ‘development … that meets the needs of the present without compromising the ability of future generations to meet their own needs’.
- ¹⁴ See also MA Drumble ‘Northern economic obligation, southern moral entitlement, and international environmental governance’ 27 *Columbia Journal of Environmental Law* (2002) 363.
- ¹⁵ General Assembly Resolution 626 (VII) (21 December 1952).
- ¹⁶ General Assembly Resolution 1803(XVII) (14 December 1962).
- ¹⁷ See General Assembly Resolution 3201 (S-VI) (1 May 1974).
- ¹⁸ General Assembly Resolution 3281 (XXIX) (12 December 1974).
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- ²⁰ See Agenda 21, chs 1 and 2.
- ²¹ Report of the World Summit on Sustainable Development, Johannesburg, (2002) UN Doc A/CONF 199/20 I *et seq.*
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- ²³ JM Witte & C Streck ‘Introduction’ in T Benner, JM Witte & C Streck (eds) *Progress or Peril? Networks and Partnerships in Global Environmental Governance, The Post-Johannesburg Agenda* (2003) 1, 2.
- ²⁴ See General Assembly Resolution 53/202 (12 February 1999).
- ²⁵ General Assembly Resolution 55/2 (18 September 2000).
- ²⁶ *Ibid*, para 6.
- ²⁷ See especially General Assembly Resolution 55/199 (5 February 2001), preamble.
- ²⁸ For the outcome of the Summit, see UN Doc A/Conf.199/20 (2002).
- ²⁹ Birnie et al *op cit* at 53.
- ³⁰ General Assembly Resolution 66/288 *The Future We Want* (27 July 2012).
- ³¹ See General Assembly Resolution 67/290 *Format and Organisational Aspects of the High-Level Political Forum on Sustainable Development* (31 July 2013).
- ³² See Birnie et al *op cit* at 63, 64.
- ³³ *The Future We Want* *supra*, paras 84, 85.
- ³⁴ *Ibid*, paras 245–51.
- ³⁵ *Ibid*, para 248.
- ³⁶ See UN Sustainable Development Knowledge Platform ‘Open Working Group proposal for Sustainable Development goals’ (2015), available at <https://sustainabledevelopment.un.org/owg.html>.
- ³⁷ *The Future We Want* *supra*, paras 56–74.
- ³⁸ For an analysis, see R Cléménçon ‘Welcome to the anthropocene Rio+20 and the meaning of sustainable development’ 21(3) *The Journal of Environment and Development* (2012) 311–38.
- ³⁹ *Ibid*, 316.
- ⁴⁰ F Biermann ‘Global environmental governance: Conceptualisation and examples’ Global Governance Working Paper No. 12, November 2004, 10–11, available at www.glogov.org, accessed 1 December 2013.
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43 T Marauhn 'Changing role of the state' in D Bodansky, J Brunnée & E Hey (eds) *The Oxford Handbook of International Environmental Law* (2008) 727.

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46 See F Biermann & S Bauer *A World Environmental Organisation: Solution or Threat for Effective International Environmental Governance* (2005).

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50 L Rajamani 'From Berlin to Bali and beyond: Killing Kyoto softly' 57(4) *International & Comparative Law Quarterly* (2008) 909, 914 *et seq.*

51 See art 8 of the UNFCCC.

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54 Report of the World Commission on Environment and Development *Our Common Future* (1987) ch 2.

55 Birnie et al op cit 127.

56 G Handl 'Sustainable development: General rules versus specific obligations' in W Lang (ed) *Sustainable Development and International Law* (1995) 35 at 39.

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58 Sands & Peel op cit at 206–7.

59 EB Weiss *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (1989). For a critical analysis of the work of Weiss, see PA Barresi 'Beyond fairness to future generations: An intragenerational alternative to intergenerational equity in the international environmental arena' 11(1) *Tulane Environmental Law Journal* (1997) 59–88.

60 Weiss op cit 24.

61 Ibid, 85.

62 Principles 1 and 2 of the Stockholm Declaration. Intergenerational equity is also prominent in the 1992 Rio Declaration: 'The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations' (Principle 3). As early as 1946, reference was made to safeguarding whale stocks for 'future generations' in the International Whaling Convention for the Regulation of Whaling. Article 3(1) includes this notion as a principle.

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⁷⁰ *Iron Rhine Railway (IJzeren Rijn) (Belgium v Netherlands)* Arbitration 2005 paras 59, 243, available at www.pca-cpa.org.

⁷¹ UNFCCC preambular, para 21.

⁷² The WTO Appellate Body in the *Shrimp-Turtle* case noted that the concept of sustainable development included in the preamble to the WTO Agreement ‘has been generally accepted as integrating economic and social development and environmental protection’ (*United States: Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (12 October 1998) para 129).

⁷³ Voigt op cit 38.

⁷⁴ Article 2 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995. Article 2 also refers to sustainable use.

⁷⁵ Articles 2, 3, 10(4), 11, 17 and 19 of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994) refers to ‘sustainable use’, ‘sustainable management’, ‘conservation’ and ‘efficient use’.

⁷⁶ United Nations Convention on the Law of the Sea (1982), art 61.

⁷⁷ World Charter for Nature (1982), para I 4.

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⁷⁹ JE Viñuales ‘The rise and fall of sustainable development’ 22 *Review of European Community & International Environmental Law* (2013) 3–13.

⁸⁰ General Assembly Resolution 48/190 (21 December 1993), preamble para 1.

⁸¹ R Dworkin *Taking Rights Seriously* (1977) 22 *et seq.*

⁸² U Beyerlin & T Marauhn *International Environmental Law* (2011) 37.

⁸³ Ibid.

⁸⁴ For a discussion of the CBDR principle, see W Scholtz ‘Different countries, one environment: A critical southern discourse on the common but differentiated responsibilities principle’ *South African Yearbook of International Law* (2008) 113; and CD Stone ‘Common but differentiated responsibilities in international law’ 98 *American Journal of International Law* (2004) 276.

⁸⁵ This provision states: ‘The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof’.

⁸⁶ Article 2(2) of the Vienna Convention for the Protection of the Ozone Layer states that parties shall undertake certain obligations ‘in accordance with the means at their disposal and their capabilities’.

⁸⁷ P Cullet ‘Differential treatment in international law: Towards a new paradigm of inter-state relations’ 10(3) *European Journal of International Law* (1999) 549 at 577. See also M-C Cordonier Segger et al ‘Prospects for principles of international sustainable development law after the WSSD: Common but differentiated responsibilities, precaution and participation’ 12(1) *Review of European Community & International Environmental Law* (2003) 56.

⁸⁸ Cullet op cit at 552.

⁸⁹ See D French ‘Developing states and international environmental law: The importance of differentiated responsibilities’ 49(1) *International & Comparative Law Quarterly* (2000) 35–60; L Rajamani *Differential Treatment in International Environmental Law* (2006).

⁹⁰ Kyoto Protocol, art 31.

⁹¹ UNFCCC, art 12(5).

⁹² UNFCCC, arts 4(3) and 4(5).

⁹³ Rajamani *Differential Treatment* op cit at 93.

⁹⁴ See J Pauwelyn ‘The end of differential treatment for developing countries? Lessons from the trade and climate change regimes’ 22(1) *Review of European Community & International Environmental Law* (2013) 29–41; D Farber ‘Beyond the North-South dichotomy in international climate law: The distinctive adaptation responsibilities of the emerging economies’ 22(1) *Review of European Community & International Environmental Law* (2013) 42–53.

⁹⁵ International Law Association, International Committee on Legal Aspects of Sustainable Development, Report of the Sixty-Sixth Conference (1995) 116.

⁹⁶ B Kellersmann *Die Gemeinsame, Aber Differenzierte Verantwortlichkeit Von Industriestaaten und Entwicklungsländern Für Den Schutz Der Globalen Umwelt* (2000) 335.

⁹⁷ See Birnie et al op cit at 135.

⁹⁸ Examples include: preambular para 5 of the Vienna Convention for the Protection of the Ozone Layer of 1985; preambular para 8 of the Montreal Protocol on Substances that Deplete the Ozone Layer of 1987; preambular para 9 of the CBD and arts 1, 10(6) and 11(8) of the Cartagena Protocol on Biosafety of 2000. Article 3(3) of the UNFCCC incorporates precaution as one of the guiding principles of the international climate change regime.

⁹⁹ *Southern Bluefin Tuna Cases (Australia v Japan; New Zealand v Japan)* (Provisional Measures, Order of 27 August 1999) ITLOS cases nos 3 and 4, paras 79 *et seq.*

¹⁰⁰ A Trouwborst ‘The precautionary principle and the ecosystem approach in international law: Differences, similarities and linkages’ 18(1) *Review of European Community & International Environmental Law* (2009) 26. See also A Trouwborst *Precautionary Rights and Duties of States* (2006).

¹⁰¹ The WTO Appellate Body found that the legal status of the precautionary principle is unclear. See *EC Measures Concerning Meat and Meat Products* WT/DS26/AB/R, WT/DS48/AB/R of 16 January 1998, paras 120–25.

¹⁰² J Cameron & J Abouchar ‘The status of the precautionary principle in international law’ in D Freestone & E Hey (eds) *The Precautionary Principle and International Law: The Challenge of Implementation* (1996) 45.

¹⁰³ N Schrijver *Sovereignty over Natural Resources: Balancing Rights and Duties* (1997) ch 2; and N Schrijver *Development without Destruction* (2010), chs 2 & 3.

¹⁰⁴ General Assembly Resolution 1803 (XVII) (14 December 1962).

¹⁰⁵ General Assembly Resolution 3201-S.VI (1 May 1974).

¹⁰⁶ General Assembly Resolution 3281-XXIX (12 December 1974).

¹⁰⁷ See also S Subedi ‘International investment law’ in MD Evans (ed) *International Law* 4th ed (2014) 727 at 733 *et seq.*

¹⁰⁸ Preambular para 8. See also preambular para 4 of the CBD.

¹⁰⁹ Resolution 1803, for example, requires that permanent sovereignty must be exercised in the interest of the national development and well-being of the people.

¹¹⁰ This is also recognised in the preamble of the UNFCCC, which affirms that permanent sovereignty must be exercised pursuant to environmental and development policies and should not cause damage to other states.

¹¹¹ O Schachter *Sharing the World’s Resources* (1977).

¹¹² FX Perrez *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law* (2000).

¹¹³ W Scholtz ‘Custodial sovereignty reconciling sovereignty and global environmental challenges amongst the vestiges of colonialism’ 55(3) *Netherlands International Law Review* (2008) 323 at 333.

¹¹⁴ The preamble of the UNFCCC recognises climate change and its adverse effects as a common concern of humankind.

¹¹⁵ See in this regard, AAC Trindade *International Law for Humankind* (2010) 327–52.

¹¹⁶ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* ICJ Reports 2010, 14, 38 para 101.

¹¹⁷ Ibid, para 101. In this case, the ICJ characterised the obligation of due diligence as ‘an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators’. See para 197. Due diligence is not a guarantee that significant harm will not occur. In the instance where it is impossible to totally prevent the harm, the state of origin must exert its ‘best possible efforts to minimize the risk’. See ‘Commentary’ to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities *Yearbook of the International Law Commission* (2001, Vol II, Part II) 153.

¹¹⁸ Birnie et al op cit 143.

¹¹⁹ ‘Commentary Draft Articles Transboundary Harm’ *supra* at 163

¹²⁰ Birnie et al op cit 145.

¹²¹ *Pulp Mills* *supra* at 204.

¹²² The polluter pays principle has, however, gained considerable recognition in the EU normative framework. See R Logan *Sustainable Development: Towards a Judicial Interpretation* (2011) 104.

¹²³ For an analysis, see U Kettlewell ‘The answer to global pollution? A critical examination of the problems and potential of the polluter-pays principle’ 3(2) *Colorado Journal of International Environmental Law and Policy* (1992) 429–78.

¹²⁴ WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation *Progress on Sanitation and Drinking Water: 2015 Update*, www.wssinfo.org/fileadmin/user_upload/resources/JMP_Update-report-2015_English.pdf.

- 125 O McIntyre *Environmental Protection of International Watercourses under International Law* (2007) 12.
- 126 Hereafter, UN Watercourses Convention of 1997.
- 127 Article 5(1).
- 128 Article 36(1).
- 129 See International Water Law Project ‘Status of the Watercourses Convention’ (as of 31 July 2015), available at http://www.internationalwaterlaw.org/documents/intldocs/watercourse_status.html.
- 130 See United Nations Committee on Economic, Social and Cultural Rights, General Comment No 15: The Right to Water, UN Doc E/C 12/2002/11 (2003). See also SR Tully ‘The contribution of human rights to freshwater resource management’ 14 *Yearbook of International Environmental Law* (2003) 101.
- 131 See International Water Law Project *supra*.
- 132 Article 2(a)–(d).
- 133 United Nations Economic Commission for Europe.
- 134 Decision III/1 of 28 November 2003 and decision VI/3 of 30 November 2012 of the Meeting of the Parties to the UNECE Water Convention.
- 135 See A Rieu-Clarke & R Kinna ‘Can two global UN water conventions effectively co-exist: Making the case for a “package approach” to support institutional coordination’ 23(1) *Review of European Community & International Environmental Law* (2014) 15–31.
- 136 See art 6(4)(h).
- 137 Article 4.
- 138 O Yoshida ‘Soft enforcement of treaties: The Montreal non-compliance procedure and the functions of the internal international institutions’ 10 *Colorado Journal of International Environmental Law and Policy* (1999) 95.
- 139 See UNEP ‘Ozone Treaty Anniversary Gifts Big Birthday Present to Human Health and Combating of Climate Change’ (2009), available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=596&ArticleID=6305&l=en>.
- 140 IPCC ‘Summary for Policymakers’ in ML Parry et al *Climate Change 2007* (2007).
- 141 IPCC ‘Synthesis Report’ in TF Stocker et al *Climate Change 2013* (2013).
- 142 Article 2.
- 143 Article 3(1).
- 144 Article 3(2).
- 145 Article 3(3).
- 146 Article 3(4).
- 147 Article 3(5).
- 148 The preamble to the Kyoto Protocol of 1997 refers to the principles. See *Vienna Convention on the Law of Treaties* (1969), art 31(2).
- 149 Articles 7–11.
- 150 Decision I/CPI (1995).
- 151 Listed in Annex B. The list is similar to the list in Annex I of the UNFCCC.
- 152 These mechanisms are the Clean Development Mechanism (art 12), Joint Implementation Mechanism (art 6) and Emissions Trading Mechanism (art 17).
- 153 UNFCCC, art 7(1) and Kyoto Protocol, art 13(4).
- 154 See UNFCCC, arts 9, 10 and Kyoto Protocol, art 15.
- 155 See Kyoto Protocol, art 8.
- 156 Article 13 of the Convention and 6th *Report of the Ad Hoc Working Group on Article 13* (1998), UN Doc FCCC/AG13/1998/2, Annex II. See also art 16 of the Protocol. For a critical analysis, see J Werksman ‘Compliance and the Kyoto Protocol: Building a backbone into a flexible regime’ 9 *Yearbook of International Environmental Law* (1998) 48–101.
- 157 Decision 27/CPM.1 For a discussion, see S Oberthür & R Lefeber ‘Holding countries to account: The Kyoto Protocol’s compliance system revisited after four years of experience’ 1 *Climate Law* (2010) 133–58.
- 158 Decision 1/CP13 (14–15 December 2007) in UN Doc FCCC/CP/2007/6/Add1 (14 March 2008). For a discussion, see C Spence, K Kulovesi, M Gutierrez & M Munoz ‘Great expectations: Understanding Bali and the climate change negotiating process’ 17(2) *Review of European Community & International Environmental Law* (2008) 142–53.
- 159 Decision 2/CP15 in UN Doc FCCC/CP/2009/11/Add1 (30 March 2010). See D Bodansky ‘The Copenhagen climate change conference: A postmortem’ 104(2) *American Journal of International Law* (2010) 230–40.

¹⁶⁰ Decision 1/CP.16, Report of the Conference of the Parties on its Sixteenth Session, Cancún, 29 November–10 December 2010, FCCC/CP/2010/7/Add.1 para 36 and Decision 1/CMP.6, Conference of the Parties serving as the Meeting of the Parties, Sixth Session, 29 November–10 December 2010, FCCC/KP/CMP/2010/12/Add.1 para 3.

¹⁶¹ L Rajamani ‘The Cancun climate change agreements: Reading the text, subtext and tea leaves’ 60(2) *International & Comparative Law Quarterly* (2011) 499–519.

¹⁶² Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, UNFCCC Decision 1/CP.17 (UN Doc. FCCC/CP/2011/9/Add.1, 11 December 2011). For a discussion of the Durban Platform, see L Rajamani ‘The Durban Platform for enhanced action and the future of the climate regime’ 61(2) *International and Comparative Law Quarterly* (2012) 501–18.

¹⁶³ Amendment to the Kyoto Protocol pursuant to its art 3, para 9 (the Doha Amendment), UNFCCC Decision 1/CMP.8 (UN Doc FCCC/KP/CMP/2012/13/Add.1, 28 February 2013).

¹⁶⁴ Decision 3/CP.18 in Report of the Outcome of the Conference of the Parties on its Eighteenth Session, held in Doha from 26 November to 8 December 2012.

¹⁶⁵ Further Advancing the Durban Platform, para 2 of UNFCCC Decision 1/CP.19 (UN Doc FCCC/CP/2013/10/Add.1, 31 January 2014).

¹⁶⁶ Lima Call for Action, para 14 of UNFCCC Decision 1/CP.20 (UN Doc FCCC/CP/2014/10/Add.1, 2 February 2015).

¹⁶⁷ Ad Hoc Working Group on the Durban Platform for Enhanced Action ‘Work of the Contact Group on Item 3: Negotiating text’ (February 2015), available at https://unfccc.int/files/bodies/awg/application/pdf/negotiating_text_12022015@2200.pdf.

¹⁶⁸ DK Asante-Duah and IV Nagy *International Trade in Hazardous Waste* (1998).

¹⁶⁹ Article 4(1)(a) & (b).

¹⁷⁰ Article 4(1)(c).

¹⁷¹ Decision II/2 in Report of the Second Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (UNEP/CHW.2/30 of 25 March 1994). This is known as the ‘Basel Ban’.

¹⁷² Decision III/1, Decisions Adopted by the Third Meeting of the Conference of the Parties to the Basel Convention (UNEP/CHW.3/35 of 28 November 1995). The Ban Amendment, however, does not refer to OECD and non-OECD countries.

¹⁷³ Article 17 deals with the procedures concerning the amendment of the Convention.

¹⁷⁴ A Daniel ‘Transboundary movements of hazardous waste’ 17 *Yearbook of International Environmental Law* (2006) 358.

¹⁷⁵ SG Ogbodo ‘Environmental protection in Nigeria: Two decades after the Koko incident’ 15(1) *Annual Survey of International and Comparative Law* (2009) 1–18.

¹⁷⁶ Article 4(1).

¹⁷⁷ Article 3(1)(a) and (b).

¹⁷⁸ Article 3(1)(b).

¹⁷⁹ Article 6.

¹⁸⁰ Article 5 and Annex C.

¹⁸¹ For example, Secretariat of the Convention on Biological Diversity, *Global Biodiversity Outlook 3* (2010).

¹⁸² Other important instruments address specific threats to biodiversity, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973. For a discussion, see Sands & Peel *op cit* 472 *et seq.*

¹⁸³ Article 15.

¹⁸⁴ Article 1 and the preamble.

¹⁸⁵ Article 6 *et seq.*

¹⁸⁶ Article 15(2). For a discussion, see GS Nijar ‘Incorporating traditional knowledge in an international regime on access to genetic resources and benefit sharing: Problems and prospects’ 21(2) *European Journal of International Law* (2010) 457–75.

¹⁸⁷ Article 15(4).

¹⁸⁸ Article 15(5).

¹⁸⁹ Article 15(7).

¹⁹⁰ Articles 16(1), 16(3), 19(1)–(2). For a discussion, see J Curci *Protection of Biodiversity and Traditional Knowledge in the International law of Intellectual Property* (2009); and F Francioni & T Scovazzi *Biotechnology and International Law* (2006).

- 191 Article 16(2).
- 192 The text is available on <http://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf>.
- 193 For a discussion, see M Buck & C Hamilton 'The Nagoya Protocol on access to genetic resources and the fair and equitable sharing of benefits arising from their utilization to the convention on biological diversity' 20(1) *Review of European Community & International Environmental Law* (2011) 47–61; A Shibata (ed) *International Liability Regime for Biodiversity Damage: The Nagoya-Kuala Lumpur Supplementary Protocol* (2014).
- 194 Article 4. Article 3(g) contains a definition of living modified organisms.
- 195 Articles 1, 10(6), 11(8) and Annex III.
- 196 Articles 8–10 and Protocol, art 12.
- 197 Article 20.
- 198 For a discussion, see TA Berwick 'Responsibility and liability for environmental damage: A roadmap for international environmental regimes' 10(2) *Georgetown International Environmental Law Review* (1998) 257–67 and J Brunnée 'Of sense and sensibility: Reflections on international liability regimes as tools for environmental protection' 53(2) *ICLQ* (2004) 351–68. For a discussion on state responsibility, see J Crawford, A Pellet & S Olleson (eds) *The Law of International Responsibility* (2010) and chapter 4 of this book.
- 199 The Draft Articles were adopted during the 53rd session of the ILC in 2001. See UN Doc A/56/10.
- 200 Ibid, general commentary para (1).
- 201 Ibid.
- 202 Ibid, para 2.
- 203 Meaning the state in the territory or under the jurisdiction or control of which the hazardous activity is planned or carried out. Draft Article 2(d).
- 204 Commentary to Draft Article 3, paras 7, 11.
- 205 Ibid, para 17.
- 206 Commentary to art 1, para 6.
- 207 *Nuclear Weapons* case supra, para 29; *Pulp Mills* case supra, para 101.
- 208 See chapter 4 of this book.
- 209 See also Berwick op cit at 258, 259.
- 210 GS Nijar 'Civil liability in the supplementary protocol' in A Shibata (ed) *International Liability Regime for Biodiversity Damage: The Nagoya-Kuala Lumpur Supplementary Protocol* (2014) 111 at 118.
- 211 Ibid.
- 212 Draft Articles, commentary to art 2, para 2.
- 213 Ibid, para 4.
- 214 Draft Article 7.
- 215 UN Doc A/61/10.
- 216 Security Council Resolution 687 (3 April 1991) para 16.
- 217 P Gautier 'Environmental damage and the United Nations Claims Commission: New directions for future international environmental cases' in TM Ndiaye & R Wolfrum (eds) *Law of the Sea: Environmental Law and Settlement of Disputes* (2007) 177 at 194.
- 218 Ibid, 199, 200. See also Sands & Peel op cit 720 *et seq.*
- 219 Quoted in Sands & Peel op cit at 721. See also P Sands, Foundation for International Environmental Law and Development & UNEP Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities *Liability for Environmental Damage and the Report of the UNEP Working Group of Experts: An Introductory Note* (1996).
- 220 Sands & Peel op cit 722.
- 221 See UNEP *Africa Environment Outlook 3: Summary for Policymakers* (2013).
- 222 A distinction can be made between 'environmental problems of poverty' and environmental problems deriving from the 'excess of affluence'. See J Ntambirweki 'The developing countries in the evolution of an international environmental law' 14(4) *Hastings International & Comparative Law Review* (1990/91) 905 at 907.
- 223 See AU Constitutive Act preamble and art 3.
- 224 Article 3(c).
- 225 Article 3(h).
- 226 Article 3(j).
- 227 Article 3(k).
- 228 See para 16.7.3 below.
- 229 AU Constitutive Act, arts 13(3) and 15(c).
- 230 Article 14(1)(d).

- 231 AU Doc EX/CL/31 (III).
- 232 AU Doc EX.CL/627 (XVIII).
- 233 AU Doc EX.CL/631 (XVIII) and EX.CL/525 (XV).
- 234 AU Doc EX.CL/512 (XV) Add.3.
- 235 AU Doc EX.CL/356 (XI).
- 236 See UNEP: The African Ministerial Conference on the Environment (AMCEN) website: <http://www.unep.org/ROA/amcen/>.
- 237 AU Doc AHG/Decl.1 (XXXVII) and AU Doc ASS/AU/Decl 1(I), para 10.
- 238 NEPAD Framework Document of 2001, para.1.
- 239 The conditions for the achievement of sustainable development are discussed under the heading '(V) Programme of Action: The Strategy for Achieving Sustainable Development in the 21st Century'.
- 240 Article 3(j).
- 241 Treaty Establishing the African Economic Community of 1991.
- 242 Article 58(1) contains the commitment of member states to pursue the right to a healthy environment.
- 243 This provision refers to 'measures to accelerate the reform and innovation process leading to ecologically rational, economically sound and socially acceptable development policies and programmes'.
- 244 For a comprehensive analysis, see M van der Linde 'A review of the African Convention on Nature and Natural Resources' 2(1) *African Human Rights Law Journal* (2002) 33.
- 245 Article II.
- 246 Hereafter, the Maputo Convention. This Treaty has not entered into force yet owing to the absence of the required deposit of ratifications.
- 247 Article VI.
- 248 Article VII.
- 249 Article VIII.
- 250 Article IX.
- 251 Article X, XI.
- 252 Article XII.
- 253 Article XV.
- 254 Article XXVI.
- 255 It states that '[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind'. Sub-article (2) affirms that '[s]tates shall have the duty, individually or collectively, to ensure the exercise of the right to development'. The African Commission dealt with art 22 in the famous *Endorois* case, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication 276/2003.
- 256 Communication 155/96, *Social and Economic Rights Action Centre and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) 15th Annual Activity Report, hereinafter the SERAC case. See also M van der Linde & L Louw 'Considering the interpretation and implementation of article 24 of the African Charter on Human and People's Rights in the light of the SERAC communication' 3(1) *African Human Rights Law Journal* (2003) 167.
- 257 Paragraph 52.
- 258 Paragraph 53.
- 259 See the discussion in W Scholtz 'Human rights and the environment in the African context' in A Grear & L Kotze *Research Handbook on Human Rights and the Environment* (2015) 401.
- 260 *Fourth Assessment Working Group II Report* of 2007 444. See also Chapter 22 of the IPCC *Fifth Assessment Working Group II Report* of 2014.
- 261 Decision 2/CP.15, 4 The Cancun agreements subsequently affirmed the designation of Africa as one of the vulnerable entities. Para 95 of Decision 1/CP.16 and the Preamble of Decision 1/CMP.6.
- 262 Para 3.
- 263 Para 8.
- 264 NEPAD Framework Document 35.
- 265 NEPAD Transforming Africa: Climate Change and National Resource Management webpage: <http://www.nepad.org/climatechangeandsustainabledevelopment> accessed 3 July 2014.
- 266 See DM Pallangyo and W Scholtz 'Climate change and the AU' in W Scholtz & J Verschuren (eds) *Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development* (2015). The African Union Convention for the Protection and Assistance of Internally Displaced Persons in

Africa of 2009 (Kampala Convention) constitutes an exception. According to art 5(1), states parties have the primary duty and responsibility for the protection of IDPs. Article 5(4) explicitly extends the responsibility of states to persons displaced through climate change. See W Scholtz ‘The day after no tomorrow? Persons displaced environmentally through climate change: AU law to the rescue?’ 35 *South African Yearbook of International Law* (2010) 36–55.

267 For a discussion on the relationship between human rights (in particular art 24) and environmental protection, see W Scholtz ‘Human rights and climate change: Extending the extraterritorial dimension via the common concern’ in W Benedek et al (eds) *The Common Interest in International Law* (2014) 127–42.

268 Assembly of the African Union, Eighth Ordinary Session, 29–30 January 2007, Addis Ababa, Ethiopia, Assembly/AU Dec. 134/(VIII) Decision on Climate Change and Development in Africa Doc. Assembly/AU/12/(VIII). See Item 5. See also the AU Assembly/AU Dec. 4/(VIII) Declaration on Climate Change and Development.

269 Assembly of the African Union, Twelfth Ordinary Session, 1–3 February 2009, Addis Ababa, Ethiopia, Assembly/AU Dec. 236/XII Decision on the African Common Position on Climate Change Doc. Assembly/AU/8 (XII) Add.6. See item 3.

270 Item 6.

271 Assembly of the African Union, Thirteenth Ordinary Session, 1–3 July 2009, Sirte, Libya Assembly/AU/Dec.257(XIII) Rev.1 Decision on the African Common Position on Climate Change including the Modalities of the Representation of Africa to the World Summit on Climate Change.

272 UNEP/AMCEN/12/9. See UNEP ‘African Ministers Adopt the Nairobi Declaration on Climate’ (2 June 2009), available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=589&ArticleID=6199&l=en&t=long>.

The Executive Council has endorsed the declaration. See Fifteenth Ordinary Session of the Executive Council 24–30 June 2009, Sirte, Libya EX.CL/Dec.502(XV) Decision on the Report of the African Ministerial Conference on the Environment (AMCEN) Special Session on Climate Change Doc.EX.CL/519(XV).

273 Paper No. 2: Algeria on behalf of the African Group, AWG-LCA 6, FCCC/AWGLCA/2009/MISC.4 (Part I). The initial Algiers Declaration served as a reference document for African negotiators at COP 14/CMP 04 held in Poznan, Poland in December 2008. Prior to this document, a draft African position paper for COP 12 and COP/MOP 2 was the outcome of a meeting organised by AMCEN and UNEP in September, 2006 in Naivasha, Kenya.

274 For a comprehensive analysis, see W Scholtz ‘The promotion of regional environmental security and Africa’s common position on climate change’ 10 *African Human Rights Law Journal* (2010) 1–25.

275 Nairobi Declaration, para 1.

276 See, for instance, Assembly/AU/Dec.308 (XV) as well as Assembly/AU/Dec 342 (XVI) on COP 16/17; Assembly/AU/Dec. 448 (XIX) and Decision 14/12 of AMCEN concerning COP 18; Assembly/AU/Dec.457 (XX) in preparation of COP 19; Assembly/AU/Dec.514(XXII) relating to COP 20; the (AMCEN) Bamako Declaration on Consolidating the African Common Position on Climate Change and Preparation for the United Nations Conference Sustainable Development (Rio+20) of 2011 and the (AMCEN) Gabarone Declaration on Climate Change and Africa’s Development of 2013. The later declaration reaffirms AMCEN’s commitment to the common position. See also NEPAD, ‘Africa presents common position at climate change negotiations’ <http://www.nepad.org/nepad/news/3200/africa-presents-common-position-climate-change-negotiations> accessed 12 August 2014.

277 See AFDB ‘Framework document for the establishment of the ClimDev-Africa Special Fund’ (2012) and UNECA ‘ClimDev-Africa Programme Work Plan for 2012–2014’ (2012), available at <http://www.afdb.org/en/>.

278 See <http://amesd.au.int/> accessed 10 August 2013.

279 FAO ‘Harmonised regional strategy for implementation of the “Great Green Wall Initiative of the Sahara and the Sahel”,’ available at http://www.fao.org/fileadmin/templates/europeanunion/pdf/harmonized_strategy_GGWSSI-EN_.pdf accessed 12 August 2013.

280 Article 5(1)(a).

281 Article 5(1)(g).

282 Article 21(3)(f).

283 Protocol on Shared Watercourse Systems of 1995 and the Revised Protocol of 2000. In accordance with art 2, it is the general objective of the Protocol to promote co-operation for judicious, sustainable and co-ordinated management, protection and utilisation of shared watercourses in the SADC Region.

- ²⁸⁴ The Protocol on Energy of 1996. Article 2(8) specifically provides that development and use of energy must be environmentally sound.
- ²⁸⁵ In art 2(10) of the Protocol on Mining of 1997, member states ‘undertake to jointly develop and observe internationally accepted standards of health, mining safety and environmental protection’.
- ²⁸⁶ The Protocol on Wildlife Conservation and Enforcement of 1999. Article 3 requires each member state to ensure the conservation and sustainable use of wildlife resources under its jurisdiction.
- ²⁸⁷ It is the primary objective of the Protocol on Fisheries to promote the ‘sustainable use and protection of living aquatic resources and aquatic ecosystems’ (art 3).
- ²⁸⁸ This is to be achieved by means of the 2002 Protocol on Forestry, which applies to ‘all activities relating to development, conservation, sustainable management and utilisation of all types of forests and trees, and trade in forest products’ (art 2).
- ²⁸⁹ See SADC ‘Regional Indicative Strategic Development Plan’ (1 March 2001), available at http://www.sadc.int/documents-publications/show/Regional_Indicative_Strategic_Development_Plan.pdf accessed on 25 November 2014. Institutional difficulties led to the adoption of a Report on the Restructuring of SADC Institutions. In accordance with the latter report, the RISDP has been developed. It is the main aim of the RISDP to provide policy direction over the long term for the member states.
- ²⁹⁰ RISDP, Chapter 4, para 7. The Plan includes a selection of ‘intervention areas’. The areas discussed in Chapter 4 are based on their contribution to the overarching objectives and priorities identified in the Report of the Review of SADC Institutions.
- ²⁹¹ RISDP, Chapter 4, para 7.2.
- ²⁹² W Scholtz and G Ferreira ‘Much ado about nothing? The SADC Tribunal’s quest for the rule of law pursuant to regional integration’ 71 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht/Heidelberg International Law Journal* (2011) 331–58.
- ²⁹³ A Boyle ‘Human rights and the environment: Where next?’ 23 *European Journal of International Law* (2013) 613.
- ²⁹⁴ W Scholtz ‘Collective (environmental) security: The yeast for the refinement of international law’ 19 *Yearbook of International Environmental Law* (2009) 135–62.
- ²⁹⁵ W Scholtz ‘Custodial sovereignty: Reconciling sovereignty and global environmental challenges amongst the vestiges of colonialism’ (2008) 55(3) *Netherlands International Law Review* 323.

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ACP	African, Caribbean and Pacific
ACWC	ASEAN Commission on Women and Children, 2010
AFTA	ASEAN Free Trade Area
AGOA	African Growth and Opportunity Act (United States)
AICHR	ASEAN Intergovernmental Commission on Human Rights
AMCEN	African Ministerial Conference on the Environment
AMESD	African Monitoring of the Environment for Sustainable Development
APRM	African Peer Review Mechanism
ASEAN	Association of Southeast Asian Nations
AU	African Union
AWG	ad hoc working group
BIT	bilateral investment treaty
CAHOSCC	Conference of African Heads of State and Government on Climate Change
CAT	Convention against Torture, 1984
CBD	Convention on Biological Diversity, 1992
CBDR	common but differentiated responsibilities (principle)
CBDRRC	common but differentiated responsibilities and respective capabilities (principle)
CED	Convention on Enforced Disappearances, 2006
CEDAW	International Convention on the Elimination of All Forms of Discrimination Against Women, 1979
CERD	Convention on the Elimination of Racial Discrimination, 1965
CESCR	Committee on Economic, Social and Cultural Rights
CITES	Convention on International Trade in Endangered Species, 1973
ClimDev-Africa	Climate for Development in Africa (programme)
CMW	International Convention on the Protection of the Rights of All Migrants and Members of their Families, 2000
CoE	Council of Europe
COMESA	Common Market for Eastern and Southern Africa
COP	Conference of the Parties
CRC	Convention on the Rights of the Child, 1989
CRPD	Convention on the Rights of Persons with Disabilities, 2006
CSD	Commission on Sustainable Development
CTC	Counter-Terrorism Committee
CTED	Counter-Terrorism Executive Directorate
DADP	Draft Articles on Diplomatic Protection (ILC, 2006)
DARIO	Draft Articles on the Responsibility of International Organisations (ILC, 2011)
DASR	Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ILC, 2011)

DPKO	United Nations Department of Peacekeeping Operations
DRC	Democratic Republic of Congo
DSB	Dispute Settlement Body (of the WTO)
DSU	Dispute Settlement Understanding
EAC	East African Community
EAP	environment action plan
EC	European Community
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECOMOG	Economic Community of West African States Monitoring Group
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
EEC	European Economic Community
EEZ	Exclusive Economic Zone
EFTA	European Free Trade Association
EPA	European Partnership Agreement
ESA	Endangered Species Act of 1973 (United States)
ETP	Eastern Tropical Pacific Ocean
ETS	Emission Trading System
EU	European Union
FAO	Food and Agriculture Organization
FTA	free trade agreement
GA	General Assembly
GATT	General Agreement on Tariffs and Trade
GEO	Global Environmental Organization (proposed)
GMO	genetically modified organism
GNP	gross national product
HRC	Human Rights Council
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights, 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for the Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda

ICTY	International Criminal Tribunal for Yugoslavia
IDP	internally displaced person
IHL	international humanitarian law
IIA	international investment agreement
ILC	International Law Commission
IMO	International Maritime Organization
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for Conservation of Nature
KFOR	Kosovo Force
LAS	League of Arab States
LMO	living modified organism
MEA	multilateral environmental agreement
MERCOSUR	Mercado Común del Sur (Southern Common Market in Latin America)
MFN	most favoured nation
MIA	multilateral investment agreement
MOP	meeting of the parties
MOU	memorandum of understanding
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NDB	New Development Bank
NDPP	National Director of Public Prosecutions
NEPAD	New Partnership for Africa's Development
NGO	non-governmental organisation
NPA	National Prosecuting Authority
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
NT	national treatment
OAS	Organization of American States
OAU	Organization for African Unity
OECD	Organisation for Economic Co-operation and Development
OIC	Organization of the Islamic Cooperation
ONUC	United Nations Operation in the Congo
OSCE	Organization of Security and Cooperation in Europe
PAP	Pan-African Parliament
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice

POP	persistent organic pollutant
PPP	public private partnership
PSC	Peace and Security Council (of the AU)
PTA	preferential trade agreement
REC	regional economic community
RISDP	Regional Indicative Strategic Development Plan
RTA	regional trade agreement
RTIA	regional trade and investment agreement
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADR	Sahrawi Arab Democratic Republic or ‘Western Sahara’
SBI	subsidiary body for implementation (UNFCCC)
SBSTA	subsidiary body for scientific and technological advice (UNFCCC)
SC	Security Council
SDG	sustainable development goal
SOFA	status of forces agreement
SREAP	sub-regional economic action plan
STC	specialised technical committee
TTIP	Transatlantic Trade and Investment Partnership
TPP	Trans-Pacific Partnership
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights
UNCHR	United Nations Commission on Human Rights
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNECE	United Nations Economic Commission for Europe
UNEF	United Nations Emergency Force
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change, 1992
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMIS	United Nations Mission in Sudan
UNOGIL	United Nations Observer Group in Lebanon
UNPROFOR	United Nations Protection Force

UNTS	United Nations Treaty Series
UNTSO	United Nations Truce Supervision Organization
UPR	Universal Periodic Review
VCCR	Vienna Convention on Consular Relations (1963)
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation
WSSD	World Summit on Sustainable Development (Johannesburg, 2002)
WTO	World Trade Organisation
WWF	World Wildlife Fund

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