PRINCIPLES OF PUBLIC INTERNATIONAL LAW

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FROM THE PREFACE OF THE SECOND EDITION

THE prime object remains that of the first edition: to present the subject-matter in terms of law and legal technique, whilst making appropriate reference to the influence of policy and political conflicts. With the inclusion of new chapters the book provides a reasonably comprehensive account of the law of peace based upon the modern practice of states, the practice of organizations of states, and the decisions of international and municipal courts. In preparing the text reference has been made to available evidence of the practice of states generally. The writer has attempted to observe the professional standard which requires the recording of what is happening in the world at large and not merely what is pleasing to the eye. A true estimate of consensus or possibly emergent rules will not relate neatly to the view of any single state or group of states. Of course, in some areas of the law it is not possible to do more than to indicate the divergent tendencies.

A high proportion of the references are to sources and literature in English and French. In preparing a book of this kind I have been indebted to various useful contemporary sources and, in particular, the International Law Reports, edited by Mr E. Lauterpacht, QC. The document reproduced at pp. 311–15 taken from the same learned editor's *British Practice in International Law* (1967), 58.

I am beholden to a number of friends and reviewers for criticisms and suggestions. Particular assistance came from Richard Baxter, Judge of the International Court of Justice (formerly of Harvard Law School), Professor K. Skubiszewski, of the Polish Academy of Sciences (formerly of the Adam Michiewicz University, Poznań), Professor R. Y. Jennings, QC, of Cambridge University, and Dr D. R. Harris, of Nottingham University. Of course, the text now presented remains my responsibility alone. Finally, I am grateful for the help and courtesy of the staff of the Clarendon Press. Neither the work for nor the publication price of the present book has been subsidized by any official source or private foundation.

I.B.

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PART IX

THE PROTECTION OF INDIVIDUALS AND GROUPS

CHAPTER XXIII

INJURY TO THE PERSONS AND PROPERTY OF ALIENS ON STATE TERRITORY

1. *State and Individual*

THE legal consequences of belonging to a political community with a territorial base have not changed a great deal since the feudal era, in spite of changes in the theory used to describe or explain the relation.[1] Ties of allegiance, citizenship, and nationality have provided the basis for the legal community of the state, whether the state was regarded primarily as an organic unity expressed in terms of 'personal' sovereignty or as a territorial domain. Modern practice tends toward the latter view, but has not wholly abandoned the doctrine of Vattel. Vattel, in a much quoted passage,[2] stated that an injury to a citizen is an injury to the state. His principle is often described as a fiction, but it is surely inadequate so to characterize the legal relation between a 'corporate' legal person and its membership. In any case Vattel was not contending that any harm to an alien was an injury to his state: the relation simply provides a necessary basis for principles of responsibility and protection.[3] On the one hand, the state has a certain responsibility for the acts of its citizens or other persons under its control of which its agents know or ought to know and which cause harm to the legal interest of another state. On the other hand, the state has a legal interest represented by its citizens, and those harming its citizens may have to account to the state protecting the latter. This accountability may take the form of subjection to the

[1] On the position of the individual in international law see ch. XXIV.

[2] *Le Droit des gens*, Bk. II, ch. vi, para. 71.

[3] But see Ammoun, sep. op., *Barcelona Traction* case (Second Phase), ICJ Reports (1970), 290–4 (and cf. the same opinion at p. 300, para. 10).

extra-territorial application of the national criminal law to acts harming citizens.[4] More important than this, however, is the diplomatic protection exercised by a state in respect of its nationals.[5] If nationals are subjected to injury or loss by an agency for which another state is responsible in law, then, whether the harm occurs in the territory of a state, or *res communis*, i.e. the high seas or outer space, or in *terra nullius*, the state of the persons harmed may present a claim on the international plane.

The last proposition begs many questions involving the conditions under which responsibility arises, and the principal object of the present chapter is to examine these conditions. The general principles of 'imputability', including responsibility for the unauthorized acts of officials, have been considered in Chapter XX.

2. *Admissions, Expulsion, and Liabilities of Aliens*

The problems of responsibility naturally arise most frequently when aliens and their assets are stationed on state territory, and, by way of preliminary, something must be said of the incidence of aliens within the state. In principle this is a matter of domestic jurisdiction: a state may choose not to admit aliens or may impose conditions on their admission.[6] Internal economic policies and aspects of foreign policy may result in restrictions on the economic activity of aliens.[7] National policy may require prohibition or regulation of the purchase of immovables, ships, aircraft, and the like, and the practice of certain professions by aliens. Provisions for the admissions of aliens in treaties

[4] Generally on jurisdiction: *supra*, ch. XIV.

[5] The concept of nationality is examined in ch. XVIII. The means of establishing the existence of the legal interest based on nationality, and other issues of admissibility, are considered *supra*, pp. 480 ff. Exceptionally, a state may have a legal interest in an individual on some basis other than nationality, e.g. if the individual enters the state service: *supra*, p. 481. On the right of protection of the United Nations in respect of persons in its service see *infra*, p. 686.

[6] This is the view of modern authorities, e.g. Oppenheim, i. 675. For British practice see McNair, *Opinions*, ii. 105–8; and *Musgrove* v. *Chun Teeong Toy* [1891] AC 272. See generally on admission and exclusion of aliens: Goodwin-Gill, 47 *BY* (1974–5), 55–156; id., *International Law and the Movement of Persons between States* (1978); *Répertoire suisse*, ii. 698–973. *British Digest*, vi. 9–77; Verdross, 37 Hague *Recueil* (1931, III), 338–47; Hackworth, iii. 549–52, 690–705, 717 ff.; Puente, 36 *AJ* (1942), 252–70; Doehring, in *Max Planck Institute Encyclopaedia of PIL*, viii (1985), 11–16. On the effect of the European Conv. on Human Rights on admission and expulsion see 23 ILR (1956), 393; 33 *BY* (1957), 317; and ILR 28, 208, 246. On the law of the EEC see the *Movement of Workers* case, ILR 40, 280; Wyatt and Dashwood, *The Substantive Law of the E.E.C.* (1980), 125–54. See also the European Conv. on Establishment, *Europ. Treaty Series*, no. 19.

[7] See further *supra*, p. 261.

of friendship, commerce, and navigation are qualified by references to 'public order, morals, health or safety'.[8]

As might be expected, expulsion is also within the discretion of the state,[9] but tribunals and writers have at times asserted the existence of limitations on this discretion.[10] In particular, the power of expulsion must be exercised in good faith and not for an ulterior motive. While the expelling state has a margin of appreciation in applying the concept of 'ordre public', this concept is to be measured against human rights standards. The latter are applicable also to the manner of expulsion.[11] In certain conditions expulsion may constitute genocide or may infringe the principle of non-discrimination (racial or religious) which is part of customary international law. Expulsion which causes specific loss to the national state receiving groups without adequate notice would ground a claim for indemnity as for incomplete privilege.[12] Finally, and most important of all, the expulsion of persons who by long residence have acquired prima facie the effective nationality[13] of the host state is not a matter of discretion, since the issue of nationality places the right to expel in question.

The liabilities of alien visitors under their own and under the local law lead to overlapping and conflicting claims of the state of origin and the host state in various areas of jurisdiction, including anti-trust regulation, legislation governing labour and welfare standards, monetary regulations, and taxation.[14] The principles on which conflicts of jurisdiction may be approached have been considered in Chapter XIV, and it is at present the intention to examine the limits of the competence of the host state in placing liabilities on aliens of a special kind, viz., duties to serve in the armed forces, militia, or police and to submit to requisitions in time of emergency.[15] The legal position is not in all

[8] e.g. treaty between the United States and Italy, 1948; Briggs, p. 530.

[9] See *British Digest*, vi. 83–241; Hackworth, iii. 690–705; McNair, *Opinions*, ii. 109–12; de Boeck, 18 Hague *Recueil* (1927, III), 443–650; *British Practice* (1964), 209–11; ibid. (1966), 111–15; ibid. (1967), 112–14; Whiteman, viii. 850–63. On asylum and extradition see *supra*, pp. 314–15; *infra*, pp. 558–9.

[10] See generally Goodwin-Gill, *International Law*, pp. 201–310; and in 47 *BY* (1974–5), 55–156; and also Oppenheim, i. 692–3; Hackworth, iii. 690; *British Digest*, vi. 112 ff.; Wooldridge and Sharma, 23 *ICLQ* (1974), 397–425; Doehring, *Max Planck Institute Encyclopaedia*, viii. 16.

[11] The view is sometimes expressed that the expelling state must have complied with its own law: *British Digest*, vi. 151–2; Goodwin-Gill, *International Law*, pp. 263–81; and 47 *BY* (1974–5), 122–35.

[12] Cf. *supra*, pp. 465–6.

[13] *Supra*, pp. 393, 407 ff.

[14] For a very useful survey of such claims see Katz and Brewster, *The Law of International Transactions and Relations, Cases and Materials* (1962), 550–778.

[15] For British practice see *British Digest*, vi. 359–422; McNair, *Opinions*, ii. 113–37. See also Parry, 31 *BY* (1954), 437–52; id., *Nationality and Citizenship Laws of the Commonwealth* (1957), 120–1.

respects clear. Thus there is authority and principle to support the rule that an alien cannot be required to serve in the regular armed forces of the host state.[16] However, American and recent Australian practice supports the view that the alien admitted with a view to permanent residence has an obligation to serve in local militia and police forces and also in forces to be used in external defence.[17] Where the alien has participated in the local political franchise the obligation may also arise.[18] The basis for obligations of this kind is the reciprocity between residence and local protection, on the one hand, and the responsibilities of a 'functional' citizenship. In some cases the long residence and local connections may create a new, effective, nationality opposable to the state of origin.[19]

3. *General Principles*

The exercise of diplomatic protection in respect to nationals visiting or resident in foreign countries has subsisted, with some changes of terminology and concept, since the Middle Ages. Practice with modern features appears in the late eighteenth century, when the grant of special reprisals, an indiscriminate right of private war, to citizens harmed by aliens disappeared. It is the nineteenth century which produced political and economic conditions in which the status of aliens abroad became a problem of wide dimensions. The history has been primarily but not entirely concerned with the conflict of interest between investor states and the economically exploited hosts to foreign capital. In the century after 1840 some sixty mixed claims commissions were set up to deal with disputes arising from injury to the interests of aliens.[20] Literature on protection of aliens from the point of view of investor states grew particularly after about 1890, and influential contributions were made by

[16] Sørensen, pp. 489–90; Verdross, 37 Hague *Recueil* (1931, III), 379; Oppenheim, i. 681; Kozhevnikov (ed.), *International Law* (n.d.), 161, 164; Guggenheim, i. 348; *Polites* v. *Commonwealth of Australia*, 70 CLR 60, 70, per Latham, CJ. The law of war and neutrality may reinforce the position when the host state is involved in civil or foreign war.

[17] See Greig, *Austral. Yrbk.* (1967), 249–56; *British Practice* (1966), 107; Whiteman, viii. 540–73.

[18] The analogue is the principle of allegiance or effective connection as a basis for criminal jurisdiction over aliens: *supra*, pp. 307–9.

[19] *Supra*, pp. 393, 407 ff.

[20] Claims settlement conventions included conventions between Mexico and the United States of 1839, 1848, 1868, and 1923; the Venezuelan arbitrations of 1903 involving claims of ten states against Venezuela; and conventions between Great Britain and the United States of 1853, 1871, and 1908.

the Italian Anzilotti and the American jurists Moore, Borchard, and Eagleton.[21]

The area of law under discussion has always been one of acute controversy, and, in the period since 1945, concepts of economic independence and political and economic principles favouring nationalization and the public sector in national economies have made considerable headway. The legal reasoning offered on precise issues stems from a small number of general principles and the nature of the relation between them. It is always admitted that presumptively the ordering of persons and assets is an aspect of the domestic jurisdiction of a state and an incident of its sovereign equality and independence in the territorial sphere. Customary law contains long-established exceptions to the territorial competence of states, the chief of which is the immunity from local jurisdiction of the premises and personnel of diplomatic missions.[22] Exceptions may of course be created by treaty, and in the past immunity for aliens has been coupled with the privilege of the sending state in maintaining a special system of courts for nationals on the territory of the receiving state. This arrangement, known as a regime of capitulations, applied in countries such as China, Iran, Turkey, and Egypt in the past.[23] Apart from special cases supported by custom or treaty, the territorial competence of the state subsists, and the alien is admitted, in the discretion of the sovereign, as a visitor who as such has a duty to submit to the local law and jurisdiction. If the alien acquires domicile or permanent residence he is even more obviously obliged to accept local duties, including perhaps the duty to serve in the armed forces. However, residence abroad does not of itself deprive an individual of the protection of his own government. In the past writers have rested the right of protection on the right of self-preservation or a 'right of intercourse': the correct way of justifying diplomatic protection and the nationality of claims would seem to be the very existence of the relation of nationality and the general absence of an alternative and better means of grounding protection in existing law. Where the state authorities cause injury to the alien visitor, for example in the form of brutality by police officials, then the legal

[21] See Anzilotti, 13 *RGDIP* (1906), 5–29. 285–309, also in *Opere*, ii. (1) (1956), 151–207; Moore, *Digest*, vi. ch. XXI; Borchard, *The Diplomatic Protection of Citizens Abroad* (1915); and Eagleton, *The Responsibility of States in International Law* (1928). See further Dunn, *The Protection of Nationals* (1932), and Freeman, *The International Responsibility of States for Denial of Justice* (1938). The treatise by Borchard had particular influence. See also Brownlie, *System of the Law of Nations: State Responsibility* (Pt. 1) (1983), 1–9; Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens* (1983); Rousseau, v. 36–88. See also Lillich, 161 Hague *Recueil* (1978, III), 329–442; id., *The Human Rights of Aliens in Contemporary International Law* (1984).

[22] See *supra*, ch. XVI.

[23] Oppenheim, i. 682–6.

position is clear. The host state is responsible, but, as a condition for the presentation of the claim by the state of the alien, the latter is required to exhaust the remedies available (where this is so) in the local courts.[24] The reasons for this particular condition of admissibility are practical: small claims by individuals are handled better in municipal courts, governments dislike the multiplication of claims for diplomatic intervention, and it is reasonable, for the resident alien especially, to submit to the local system of justice.

Much more difficult are the cases where the alien is harmed by acts or omissions which are on their face merely a normal exercise of the competence of organs of administration and government of the host state. These situations include the malfunction of judicial organs dealing with acts which are breaches of the local law affecting the interests of the alien, so-called 'denial of justice',[25] and also general legislative measures, not directed at aliens as such, affecting the ownership or enjoyment of foreign-owned assets. There has always been a current of opinion to the effect that the alien, having submitted to the local law, can only expect treatment on a basis of equality with nationals of the host state. This view is pressed particularly in relation to the lack in most cases of any *major* interest of the state of the alien in respect to injuries to nationals. It is also said that the status of the alien is not the subject of a privilege as 'alien', but is simply that of an 'individual' within the territorial sovereignty and jurisdiction of the host state.[26] The issues raised by such arguments must now be considered.

4. *The Standard of National Treatment*[27]

There has always been considerable support for the view that the alien can only expect equality of treatment under the local law because he submits to local conditions with benefits and burdens and because to give the alien a special status would be contrary to the principles of territorial jurisdiction and equality. Before examining the validity of the principle of national treatment, it must be observed that it is

[24] *Supra*, p. 494. Cf. *British Digest*, vi. 253, 345, 347.

[25] *Infra*, pp. 529–31.

[26] See the opinions of Guha Roy, 55 *AJ* (1961), 863–91. See also Anand, 56 *AJ* (1962), 383 at 400–3; Sinha, 14 *ICLQ* (1965), 121 at 127–8; Castañeda, 15 *Int. Organization* (1961), 38–48; and the debate in the International Law Commission, *Yrbk. ILC* (1957), i. 154 ff.

[27] See the works cited *supra*, n. 21, and, further: Strisower, *Annuaire de l'Inst.* (1927), i. 455–98; Verdross, 37 Hague *Recueil* (1931, III), 327–406; Harv. Research, 23 *AJ* (1929), Spec. Suppl., pp. 131–399; Jessup, 46 *Columbia LR* (1946), 903–28; and in *A Modern Law of Nations* (1948), 94–122; Roth, *The Minimum Standard of International Law Applied to Aliens* (1949); Sohn and Baxter, 55 *AJ* (1961), 545–84; García Amador, *Yrbk. ILC* (1956), ii. 201–3; *British Digest*, vi. 247–440, *passim*, e.g. p. 343 (but cf. pp. 291, 292); Whiteman, viii. 704–6; García Amador, Sohn, and Baxter, *Recent Codifications of the Law of State Responsibility for Injuries to Aliens* (1974).

agreed on all hands that certain sources of inequality are admissible. Thus it is not contended that the alien should have political rights in the host state as of right. Moreover, the alien must take the local law as he finds it in regard to regulation of the economy and restriction on employment of aliens in particular types of employment. Access to the courts may be maintained, but with modified rules in ancillary matters: thus an alien may not have access to legal aid and may have to give security for costs.[28] More general variations may of course be created by treaty. The various standards of treatment commonly employed in treaties are as follows: those of reciprocity, the open door, good neighbourliness, and of identical, national, most-favoured-nation, equitable, and preferential treatment.

The principle of national treatment had support from many jurists both in Europe and Latin America prior to 1940,[29] from a small number of arbitral awards,[30] and from seventeen of the states at the Hague Codification Conference in 1930.[31] At the latter twenty-one states opposed the principle, although some opponents had on occasion supported it in presenting claims to international tribunals.[32]

5. *The International Minimum Standard*

Since the beginning of the present century legal doctrine has opposed an 'international minimum standard', 'a moral standard for civilized states', to the principle of national treatment.[33] A majority of the states represented at the Hague Codification Conference supported the international standard, and this standard is probably affirmed in the Declaration of the United Nations General Assembly adopted in 1962

[28] The *cautio judicatum solvi* of civil law systems.

[29] Including Strupp, De Louter, Sibert, Nys, Alvarez, and Yepes. See also the citations by Herz, 35 *AJ* (1941), 243 at 259, n. 66. The equality principle was advocated as early as 1868 by the Argentinian jurist Calvo.

[30] See the *Canevaro* case (1912), PCA, Hague Court Reports, i. 285; 6 *AJ* (1912), 746; *RIAA* xi. 397; *Cadenhead* case (1914), 8 *AJ* (1914), 663; and the *Standard Oil* case (1926), 8 *BY* (1927), 156; 22 *AJ* (1928), 404; *RIAA* ii. 781 at 794.

[31] See Roth, *Minimum Standard*, pp. 72–4. See also the report of Guerrero of 1926, 20 *AJ* (1926), Spec. Suppl., pp. 176 ff.

[32] e.g. the United States in the *Norwegian Ships* arbitration (1922), *RIAA* i. 307. See also the Havana Conv. of 1928, Art. 5, 23 *AJ* (1929), Spec. Suppl., p. 234; draft Conv. proposed by the Paris Conference on the Treatment of Aliens, 1929, Art. 17; Roth, *Minimum Standard*, p. 71; and the Montevideo Conv. of 1933, Art. 9, 28 *AJ* (1934), Suppl., p. 75.

[33] Leading proponents include Anzilotti, Verdross, Borchard, Oppenheim, Guggenheim, de Visscher, Scelle, and Jessup. See the citations by Roth, *Minimum Standard*, p. 88; and Hertz, 35 *AJ* (1941), 260; and materials cited *supra*, nn. 29–32. See also American Law Institute, Restatement, Second, *For. Relations Law*, pp. 501–7; Whiteman, viii. 697–704; Schachter, 178 Hague *Recueil* (1982, V), 314–21.

on Permanent Sovereignty over Natural Resources.[34] The standard has also enjoyed the support of many tribunals and claims commissions. Thus in the *Neer Claim*[35] the General Claims Commission set up by the United States and Mexico expressed the law as follows:

> . . . the propriety of governmental acts should be put to the test of international standards . . . the treatment of an alien, in order to constitute an international delinquency 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.

6. *The Two Standards in Perspective*

The controversy concerning the national and international standards has not remained within the bounds of logic, and this is not surprising, as the two viewpoints reflect conflicting economic and political interests. Thus those supporting the national treatment principle are not necessarily committed, as is sometimes suggested, to the view that municipal law has supremacy over international law. It is possible to contend that, as a matter of international law, the standard of treatment is to be defined in terms of equality under the local law. Protagonists of national treatment point to the role the law associated with the international standard has played in maintaining a privileged status for aliens, supporting alien control of large areas of the national economy, and providing a pretext for foreign armed intervention. The experience of the Latin American states and others dictates extreme caution in handling the international standard, but it is necessary to distinguish between, on the one hand, the question as to the content of the standard and the mode of application and, on the other hand, the core principle, which is simply that the territorial sovereign cannot in all circumstances avoid responsibility by pleading that aliens and nationals had received equal treatment. Thus if a national law provides that all persons of a particular race resident within the state shall be sterilized[36] it will not satisfy the state of an alien within the category to point to the equal application of the law. Conversely, the rules of international law authorize at least a measure of discrimination, for example in matters of taxation and exchange control. In any case the

[34] Examined *infra*, pp. 539–41.

[35] (1926), *RIAA* iv. 60. See also the *Roberts* claim (1926), *RIAA* iv. 41; the *Hopkins* claim (1926), *RIAA* iv. 41; and *British Claims in the Spanish Zone of Morocco* (1925), *RIAA* ii. 617 at 644. See also the cases on expropriation cited *infra*, pp. 533 ff.

[36] A form of genocide, on which see *infra*, p. 562.

host state owes a special duty to aliens acting as diplomatic or consular agents or in some other official capacity.[37]

A source of difficulty has been the tendency of writers and tribunals to give the international standard a too ambitious content, ignoring the odd standards observed in many areas under the administration of governments with a 'Western' pattern of civilization within the last century or so. Another cause of difficulty, connected with the first, has been the extension of delictual responsibility to the malfunction of administrative and judicial organs, as in the field of denial of justice. This aspect involves the imposition of the law of delict where the true analogy is the use of administrative law remedies to enforce a proper use of legal powers.[38] It will be suggested later that in regard to non-exercise or malfunction of legal powers the standard of national treatment rule has some significance, at least as creating a presumption of absence of *dolus* (intention).

The basic point would seem to be that there is no single standard. Circumstances, for example the outbreak of war,[39] may create exceptions to the international treatment rule, even where this applies in principle. Where a reasonable care or due diligence standard is applicable, then *diligentia quam in suis*[40] might be employed, and would represent a more sophisticated version of the national treatment principle. *Diligentia quam in suis* would allow for the variations in wealth and educational standards between the various states of the world and yet would not be a mechanical national standard, tied to equality. Though the two are sometimes confused, it is not identical with national treatment. There is support for the view that *diligentia quam in suis* has long been accepted as the standard in relation to harm resulting from insurrection and civil war.[41] Finally, there are certain overriding rules of law including the proscription of genocide which are clearly international standards.[42]

A recent development has been the appearance of attempts to synthesize the concept of human rights and the principles governing the treatment of aliens. Thus García Amador, rapporteur of the International Law Commission on the subject of state responsibility, presented in his second report a draft chapter with the rubric 'violation of fundamental human rights'.[43] The first article provided:

> 1. The State is under a duty to ensure to aliens the enjoyment of the same civil rights, and to make available to them the same individual guarantees as are enjoyed by its own nationals. These rights and guarantees shall not, however, in any case be less than the 'fundamental human rights' recognized and defined in contemporary international instruments.
> 2. In consequence, in case of violation of civil rights, or disregard of individual guarantees, with respect to aliens, international responsibility will be involved only if internationally recognized 'fundamental human rights' are affected.

In the article which follows, the expression 'fundamental human rights' is expanded by an enumeration, which is stated not to be exhaustive, of rights, e.g. inviolability of privacy, home, and correspondence, and respect for honour and reputation.

This particular synthesis of human rights and the standard of treatment for aliens involves codifying the 'international minimum standard', raising that standard, extending it to new subject matter, and relating internal affairs and local law to intranational responsibility to a degree which the majority of states would find intolerable Moreover, the standard is unconscionably vague, and the draft provides that the rights and freedoms enumerated 'may be subjected to such limitations or restrictions as the law expressly prescribes for reasons of internal security, the economic well-being of the nation, public order, health and morality or to secure respect for the rights and freedoms of others'.[44] Moreover, as the Indian member of the Commission pointed out,[45] the draft of rights and freedoms involved the application to economic relations between states of the standard of rights which the non-Communist European states had hitherto prescribed for themselves in their domestic affairs: a standard of a particular economic and social system was held out as the universally just standard. The present writer considers that it is not possible to postulate an international minimum standard which in effect supports a particular philosophy of economic life at the expense of the host state.[46] It is certainly the case that since 1945 developments concerning human rights have come to provide a new content for the international standard

[37] See chs. XV and XVI.

[38] See further *infra*, pp. 529–31, on denial of justice. See also *supra*, p. 523.

[39] See HMSO, *Manual of Military Law*, iii, ch. III (1958); and Seeger, *Le Statut personnel des étrangers ennemis et la Convention de Genève du 12 août 1949 relative à la protection des civils* (1958).

[40] i.e. national treatment but on the basis of the standard *ordinarily* observed by the particular state in its own affairs. References to such a standard: Judge Huber, *British Claims in Spanish Morocco* (1924), *RIAA* ii. 617 at 644; McNair, *Opinions*, ii. 198, 245, 247, 250, 254, 258–66.

[41] *Supra*, pp. 452–5, and McNair, *Opinions*, ii. 198, 245, 247, 250, 254, 258–66.

[42] See *Barcelona Traction* case (Second Phase), ICJ Reports (1970), 4 at 32; and see *infra*, ch. XXIV.

[43] *Yrbk. ILC* (1957), ii. 112. Generally on the individual in international law and human rights see *supra*, ch. XXIV. See also Jessup, *A Modern Law of Nations*, pp. 94–122 and in 46 *Columbia LR* (1946). 903–28; Parry, 90 Hague *Recueil* (1956, II), 653–725; Cavaré, in *Makarov Festgabe* (1958), 54–110.

[44] For criticisms of the draft see the discussion in *Yrbk. ILC* (1957), i. 154 ff., and for the rapporteur's answers, ibid. ii. 49.

[45] *Yrbk. ILC* (1957), i. 158 (Pal).

[46] See Fischer Williams, 9 *BY* (1928), 1 at 20, 25.

based upon those human rights principles which have become a part of customary international law. These principles include the principle of non-discrimination on grounds of race,[47] the prohibition of genocide,[48] and the prohibition of torture and of inhuman or degrading treatment or punishment. A careful synthesis of human rights standards and the modern 'treatment of aliens' standards is called for.[49] The concept of discrimination calls for more sophisticated treatment in order to identify unreasonable (or material) discrimination as distinct from the different treatment of non-comparable situations.[50]

7. *Relevant Forms of Delictual Responsibility*

The general principles of state responsibility were examined in the previous chapter, and they are applicable to cases where aliens are injured, whether this occurs within or without the territory of the defendant state. Thus one might expect to rely upon a rule that a state is liable for failure to show due diligence in matters of administration, for example by failing to take steps to apprehend the murderer of an alien. However, the position is far more complex. In the first place, as we have seen, there is no single standard but different standards relating to different situations.[51] Furthermore, reference to a particular standard presumes that the activity concerned is outside the reserved domain of domestic jurisdiction and is the subject of international duties. But in the cases of nationalization (or general expropriation), and termination by governments of concession agreements, this is the major issue. International law is not a system replete with nominate torts or delicts, but the rules are specialized in certain respects. Thus reference may be made to the source of harm, such as unauthorized acts of officials, insurrection, and so on,[52] or to the object and form of harm, as, for example, territorial sovereignty, diplomats and other official agents, or injury to nationals. The category of injury to nationals involves the problems considered in the preceding sections and also certain special topics, the principal of which are denial of justice and expropriation. These will now be considered, together with other related subjects.

[47] *Infra*, pp. 598–601.

[48] *Infra*, pp. 562–3.

[49] This was pointed out in the first edition of this work of 1966, alongside criticism of García Amador's formulation. See further McDougal, Lasswell, and Chen, 70 *AJ* (1976), 432–69; Lillich, 161 Hague *Recueil* (1978, III), 329–442; id., *The Human Rights of Aliens*.

[50] See McDougal, Lasswell, and Chen, 70 *AJ* (1976), 450–1; Wex, 15 *Canad. Yrbk.* (1977), 198 at 222–6; Schachter, 178 Hague *Recueil* (1982, V), 314–21.

[51] *Supra*, pp. 446 ff.

[52] Cf. *supra*, pp. 450 ff.

8. *Denial of Justice*[53]

The term 'denial of justice' has been employed by claims tribunals so as to be coextensive with the general notion of state responsibility for harm to aliens,[54] but it is widely regarded as a particular category of deficiencies on the part of the organs of the host state, principally concerning the administration of justice. It has been pointed out that the term has been given such a variety of definitions that it has little value and the problems could be discussed quite adequately without it.[55] However, if the phrase has a presumptive meaning, the best guide to this is probably the Harvard Research draft,[56] which provides as follows:

> Article 9. A State is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.

A somewhat more restricted definition received some support at the Hague Codification Conference in 1930:[57]

> Article 8, paragraph 2. A State is responsible as a result of the fact that, in a manner incompatible with the international obligations of the State, the foreigner has been hindered by the judicial authorities in the exercise of his

[53] See Freeman, *International Responsibility*; Eagleton, 22 *AJ* (1928), 538–59; Lissitzyn, 30 *AJ* (1936), 632–46; Spiegel, 32 *AJ* (1938), 63–81; McNair, *Opinions*, ii. 295–322; Harvard draft, 23 *AJ* (1929), Spec. Suppl., pp. 173–87; Fitzmaurice, 13 *BY* (1932), 93–114; Puente, 43 *Michigan LR* (1944), 383–406; de Visscher, 52 Hague *Recueil* (1935, II), 369–440; Sørensen, pp. 550–7; Whiteman, viii. 706–20, 726–35, 863–85; García Amador, *Yrbk. ILC* (1957), ii. 110–12; Adede, 14 *Canad. Yrbk.* (1976), 73–95. See also *supra*, pp. 519–23.

[54] See the tribunal in the *Robert E. Brown* claim (1923), *RIAA* vi. 120.

[55] See Lissitzyn, 30 *AJ* (1936), 645, 646; Jessup, 46 *Columbia LR* (1946), 913; Briggs, pp. 679–80.

[56] 23 *AJ* (1929), Spec. Suppl., p. 173. Similar definitions and approval of this definition in Fitzmaurice, 13 *BY* (1932), 108; Dunn, *Protection of Nationals*, p. 148; Freeman, *International Responsibility*, p. 97; McNair, *Opinions*, ii. 295; Briggs, p. 679. See also Restatement, Second, *For. Relations Law*, pp. 502–3, 534–48; Tanaka, sep. op., *Barcelona Traction* case (Second Phase), ICJ Reports (1970), at 144, 156; Padilla Nervo, sep. op., ibid. 252, 265.

[57] *Acts*, p. 158, quoted by Jiménez de Aréchaga, in Sørensen, pp. 556–7. The relevant Committee did not complete its work, however; see Freeman, *International Responsibility*, pp. 634–713.

right to appear in Court, or has encountered in his proceedings unjustifiable obstacles or delays implying a refusal to do justice.

The rubric 'Denial of Justice' concerns the application to certain aspects of state administration of the international standard. Latin American opinion would limit the concept to a duty to allow foreigners easy access to the courts which would duly exercise jurisdiction, without any inquiry into the quality of the justice given.[58]

The most controverted issue is the extent to which erroneous decisions may constitute denial of justice. There is authority for the view that an error of law accompanied by a discriminatory intention is a breach of the international standard.[59]

In the present context the international standard has been applied ambitiously by tribunals and writers and difficulties have arisen. First, the application of the standard may involve decisions upon very fine points of national law and the quality of national remedial machinery.[60] Thus, in regard to the work of the courts, a distinction is sought to be made between error and 'manifest injustice'.[61] Secondly, the application of the standard in this field seems to contradict the principle that the alien, within some limits at least, accepts the local law and jurisdiction. Thirdly, the concept of denial of justice embraces many instances where the harm to the alien is a breach of local law only and the 'denial' is a failure to reach a non-local standard of competence in dealing with the wrong in the territorial jurisdiction. Thus the concept of the foreign state wronged in the person of its nationals is extended to cases where the primary wrong is a breach of municipal law alone. We are concerned with what may be in part an eccentric application of the principles of responsibility in this context,[62] and it would be better if such claims were regarded as resting on an equitable basis only. The existence of the rule of admissibility that the alien should first exhaust local remedies is a partial reflection of the special character of claims on behalf of aliens against the host state.[63]

[58] See the report of Guerrero quoted in Briggs, p. 678. See also Whiteman, viii. 727 (Inter-Am. Juridical C'ee Report, 1961).

[59] See Jiménez de Aréchaga, in Friedmann, Henkin, and Lissitzyn, *Essays in Honor of Philip C. Jessup* (1972), 171–87 at 179–85, referring to the submissions of both parties in the *Barcelona Traction* case, ICJ Reports (1970), 3; Whiteman, viii. 727–31; and see Adede, 14 *Canad. Yrbk.* (1976), 91. See further O'Connell, ii. 948.

[60] Cf. the discussion in the article by Mann, 42 *BY* (1967), 26–9.

[61] See McNair, *Opinions*, ii. 305; and *British Digest*, vi. 287–95.

[62] Cf. Parry, 90 Hague *Recueil* (1956, II), 695–6; and the *Janes* case, discussed *supra*, p. 464. The application of principles of responsibility is eccentric in the context of international relations: of course there is no objection of legal principle to extension of responsibility to cases of maladministration.

[63] *Supra*, p. 494. Cf. Guha Roy, 55 *AJ* (1961), 863 at 877. See further Ténékidès, 14 *RDILC* (1933), 514–35; de Visscher, 52 Hague *Recueil* (1935, II), 421–32.

9. *Expropriation of Foreign Property*[64]

A state may place conditions on the entry of an alien on its territory and may restrict acquisition of certain kinds of property by aliens. Apart from such restrictions, an alien individual, or a corporation controlled by aliens, may acquire title to property within a state under the local law. The subject-matter may be shares in enterprises, single items such as estates or factories, or, on a monopoly basis, major areas of activities such as railways and mining. In a number of countries foreign ownership has extended to proportions of between fifty and one hundred per cent of all major industries, resources, and services such as insurance and banking. Even in *laissez-faire* economies, the taking of private property for certain public purposes and the establishment of state monopolies have long been familiar. Since the Soviet revolution and the extension of the public sector in many economies, both socialist and non-socialist, the conflict of interest between foreign investors and their governments and the hosts to foreign capital, seeking to obtain control over their own economies, has become more acute. The terminology of the subject is by no means settled, and in any case form should not take precedence over substance. The essence of the matter is the deprivation by state organs of a right of property either as such, or by permanent transfer of the power of management and control.[65] The deprivation may be followed by transfer to the

[64] See Fachiri, 6 *BY* (1925), 159–71; id., 10 *BY* (1929), 32–55; Fischer Williams, 9 *BY* (1928), 1–30; Herz, 35 *AJ* (1941), 243–63; Friedman, *Expropriation in International Law* (1953); Bindschedler, 90 Hague *Recueil* (1956, II), 179–306; Feighel, *Nationalization and Compensation* (1964); Wortley, *Expropriation in Public International Law* (1959); White, *Nationalisation of Foreign Property* (1961); Domke, 55 *AJ* (1961), 585–616; McNair, 6 *Neths. Int. LR* (1959), 218–56; Rolin, ibid. 260–75; Verdross, ibid. 278–87; Fouilloux, *La Nationalisation et le droit international public* (1962); Petrén, 109 Hague *Recueil* (1963, II), 492–575; Garcia Amador, *Yrbk. ILC* (1959), ii. 2–24; ILA, *Report of the Forty-Eighth Conference* (1958), 130–239; *Annuaire de l'Inst.* 43, i. 42–132; 44, ii. 251–323; 52, i. 402–527, 656–732; 52, ii. 400–63, 523–6, 560, 565; American Law Institute, Restatement, Third, *Foreign Relations Law of the United States* (1987), para. 712; Whiteman, viii. 1020–185; Delson, 57 *Columbia LR* (1957), 755–86; Ronning, *Law and Politics in Inter-American Diplomacy* (1963), 33–62; Bishop, 115 Hague *Recueil* (1965, II), 403–14; Sohn and Baxter, 55 *AJ* (1961), 545–84; Amerasinghe, *State Responsibility for Injuries to Aliens* (1967), 121–68; *Répertoire suisse*, ii. 661–98; Orrego Vicuña, 67 *AJ* (1973), 711–27; Francioni, 24 *ICLQ* (1975), 255–83; Jiménez de Aréchaga, 11 *NY Univ. Journ. of Int. Law and Politics* (1978), 179–95; Hossain (ed.), *Legal Aspects of the New International Economic Order* (1980); Akinsanya, *The Expropriation of Multinational Property in the Third World* (1980); Dolzer, 75 *AJ* (1981), 553–89; Schachter, 178 Hague *Recueil* (1982, V), 295–326; Higgins, 176 Hague *Recueil* (1982, III), 259–392; Dolzer, in *Max Planck Encyclopaedia*, viii. 214–21; Rousseau, v. 56–66; Dolzer, 1 *ICSID Review* (1986), 41–65; Schachter, 78 *AJ* (1984), 121–30; id., 79 *AJ* (1985), 420–2; Asante, 37 *ICLQ* (1988), 588–628; Pellonpää and Fitzmaurice, 19 *Neths. Yrbk.* 1988, 53–178.

[65] On the various procedures of taking see Sohn and Baxter, 55 *AJ* (1961), 553, 559; Domke, ibid. 588–90; Christie, 38 *BY* (1962), 307–38; Whiteman, viii. 1006–20; Weston, 16 *Virginia JIL* (1975–6), 103–75. See also the *ELSI* case, I.C.J. Reports (1989), 15, 67–71. On concession agreements see *infra*, pp. 547–51.

territorial state or to third parties, as in systems of land distribution as a means of agrarian reform. The process is commonly described as expropriation. If compensation is not provided, or the taking is regarded as unlawful, then the taking is sometimes described as confiscation. Expropriation of one or more major national resources as part of a general programme of social and economic reform is now generally referred to as nationalization or socialization.

State measures, prima facie a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation. Thus foreign assets and their use may be subjected to taxation, trade restrictions involving licences and quotas,[66] or measures of devaluation.[67] While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation. If the state gives a public enterprise special advantages, for example by direction that it charge nominal rates of freight, the resulting *de facto* or quasi-monopoly is not an expropriation of the competitors driven out of business:[68] it might be otherwise if this were the primary or sole object of a monopoly regime. Taxation which has the precise object and effect of confiscation is probably unlawful.[69]

10. *The Compensation Rule*

The rule supported by all leading 'Western' governments and many jurists in Europe and North America is as follows: the expropriation of alien property is lawful if adequate, effective, and prompt compensation[70] is provided for. In principle, therefore, expropriation, as an exercise of territorial competence, is lawful, but the compensation rule

[66] Treaties may make such restrictions unlawful: e.g. under the GATT (*supra*, p. 261), the EFTA Treaty, 1960, and bilateral commercial treaties.

[67] Currency depreciation is lawful unless it is discriminatory: *Tabar claim*, ILR 20 (1953), 211; *Zuk claim*, ibid. 26 (1958, II), 284; *Furni claim*, ibid. 42, 153; *British Digest*, vi. 350; Wortley, *Expropriation*, pp. 107–9; 5 *Canad. Yrbk.* (1967), 268; Whiteman, viii. 982–8. Treaty obligations exist, *inter alia*, under IMF agreements: Mann, 26 *BY* (1949), 263–70. See also *Re Kesim*, ILR 44, 102.

[68] See the *Oscar Chinn* case (1934), PCIJ, Ser. A/B, no. 63; World Court Reports, iii. 416. See further Christie, 38 *BY* (1962), 322, 334–6. This decision is also authority for the view that goodwill is not an item of property separate from an enterprise.

[69] See *British Practice* (1964), 202–6; Whiteman, viii. 980, 1016, 1044; *Tax on Mortgagors' Gains* case, ILR 44, 149 at 153–4.

[70] The formula appears in a Note from the US Secretary of State, Cordell Hull, to the Mexican Government dated 21 July 1938: Hackworth, iii. 655. The formula also appears in various modern commercial treaties: e.g. the Anglo-Japanese Commercial Treaty of 1963, Art. 14; see Almond, 13 *ICLQ* (1964), 925 at 949. See also Whiteman, viii. 1085–9. It is also commonly stipulated that the taking should be 'in the public interest', but see *infra*, p. 545. On the criteria of adequacy, effectiveness, and promptness, see García Amador, *Yrbk. ILC* (1959), ii. 16–24; White, *Nationalisation*, pp. 235–43; Domke, 55 *AJ* (1961), 603–10; Sohn and Baxter, ibid. 553

(in this version) makes the legality conditional. The justifications for the rule are based on the assumptions prevalent in a liberal regime of private property and in the principle that foreign owners are to be given the protection accorded to private rights of nationals, provided that this protection involves the provision of compensation for any taking. These assumptions are used to support the compensation principle as yet another aspect of the international minimum standard governing the treatment of aliens.[71] The emphasis is on respect for property rights as 'acquired rights'[72] and as an aspect of human rights.[73] Reference is also made to general principles of law, including those of unjust enrichment and abuse of rights. The principle of acquired rights is thought by many to be unfortunately vague, and the difficulty is to relate this principle to other principles of law: in short this and other general principles beg too many questions. Constitutional provisions,[74] legislation providing for compensation,[75] and municipal court decisions[76] provide a general guide but no more than that, since local versions of public policy are not necessarily significant for international law.

Whatever the nature of the justifications offered for the compensation rule, it has received considerable support from state practice and the jurisprudence of international tribunals. The United Kingdom, the United States, and France have supported the rule in relation to Mexican agrarian reform, post-war nationalization in Eastern Europe, the Iranian law of 1951 nationalizing the oil industry, the nationalization of the Suez Canal by Egypt, and so on.[77] Agreements involving

(Art. 10(4), 559–60; ICJ Pleadings, *Anglo-Iranian Oil Co.* case (*United Kingdom* v. *Iran*), 100 ff.; Jiménez de Aréchaga, *Yrbk. ILC* (1963), ii. 237–44; Cole, 41 *BY* (1965–6), 374–9; Whiteman, viii. 1143–85; Metzger, 50 *Virginia LR* (1964), 603–7.

[71] On which, *supra*, p. 524.

[72] The statements of the Permanent Court on the principle of respect for vested or acquired rights occur in the context of state succession; see *infra*, n. 81. See generally García Amador, *Yrbk. ILC* (1959), ii. 3–10; Feighel, *Nationalisation and Compensation*, pp. 124–8. See also the *Lighthouses* arbitration (1956), PCA, *RIAA* xii. 155, 236.

[73] Cf. the Additional Protocol to the European Conv. on Human Rights, Art. 1.

[74] See Shawcross, 102 Hague *Recueil* (1961, I), 339 at 347.

[75] See White, *Nationalisation*, pp. 184–93.

[76] Many of these depend on the public policy of the forum and conflict of laws rules. However, see the *S.S. Elise, Ann. Digest*, 15 (1948), no. 50 at p. 200; *Anglo-Iranian Oil Co.* v. *Idemitsu Kosan Kabushiki Kaisha*, ILR 20 (1953), 305; the *Rose Mary* [1953] 1 WLR 246; ILR 20 (1953), 316; *In re Rhein-Main-Donau A.G.*, ILR 21 (1954), 212. See further Gihl, *Liber Amicorum Algot Bagge* (1956), 56–66; and cf. *Czechoslovak Agrarian Reform* case, *Ann. Digest*, 4 (1927–8), no. 94.

[77] The pre-1914 practice involved the following cases: the Sicilian sulphur monopoly granted to a French company, thus harming British subjects (1836), 28 *BFSP*, 1163–242, 29 ibid., 175–204, 1225; 30 ibid., 111–20; the *Charlton* case (1841), 31 *BFSP*, 1025–32; the *Finlay* case (1846), 39 *BFSP*, 410; *British Digest*, vi. 341; the *King* case (1853), Moore, *Digest*, vi. 262; Whiteman, *Damages in International Law*, 3 vols. (1937–43), ii. 1387; the *Savage* case (1852),

provision for some sort of compensation in the form of the 'lump sum settlement' are numerous, but jurists are in disagreement as to their evidential value: many agreements rest on a bargain and special circumstances, and it is difficult to see whether the compensation principle is assumed as the general norm or has been eroded by the frequency of compromise.[78] Although some awards were in substance diplomatic compromises,[79] a good number of international tribunals have supported the compensation rule and the principle of acquired rights.[80] *Dicta* in a number of decisions of the Permanent Court,[81] involving treaty interpretation and the effects of state succession on various categories of property, may be regarded as supporting the

Moore, *Arbitrations*, ii. 1855; the *Delagoa Bay Railway* case (1900), Martens, *N.R.G.* (2nd Ser.), vol. 30, 329; *British Digest*, v. 535; Whiteman, *Damages*, iii. 1694; La Fontaine, p. 398 (Portugal conceded the principle of compensation); *Portuguese Religious Properties* case (1920), *RIAA* i. 7; Hague Court Reports, ii. 1; the proposal for an insurance monopoly in Uruguay (1911), Hackworth, v. 588; the Italian life insurance monopoly (1912), ibid. On the work of the Brussels Conference, 1921, see McNair, *Opinions*, i. 9, and Wortley, *Expropriation*, p. 61. On the Cannes Conference of 1922 see H. of C., Sess. Papers XXIII, 1922 (but see Friedman, *Expropriation*, pp. 19, 101–3). More modern practice includes the following: US Notes to Mexico in 1938 and 1940, Hackworth, iii. 655, 658, 662; Briggs, pp. 556, 559; 33 *AJ* (1939), Suppl., pp. 181–207; UK Note to Mexico, 1938, Cmnd. 5758; UK minute to Poland, *Treaty Series*, no. 23 (1948), Cmnd. 7403 (cf. Fawcett, 27 *BY* (1950), 372–3); UK Memorial, *Anglo-Iranian Oil Co.* case, ICJ Pleadings (1951), 100–9; US Note to Guatemala, 28 Aug. 1953, 29 *Dept. of St. Bull.* (1953), 357, 359; protests of France, UK and US on Suez Canal Company nationalization, 1956; US views on Cuban and Ceylonese nationalizations, 56 *AJ* (1962), 166; 58 *AJ* (1964), 168; UK reaction to Indonesian measures, *British Practice* (1964), 194–200; to Tanzanian nationalization of banks, ibid. (1967), 118–20. Cf. also the Netherlands Note to Indonesia, 18 Dec. 1959, 54 *AJ* (1960), 484; Kiss, *Répertoire* (1962), iv. paras. 655–66.

[78] See White, *Nationalisation*, pp. 193–243; Friedman, *Expropriation*, pp. 86–101; Fawcett, 27 *BY* (1950), 372–3; Drucker, 10 *ICLQ* (1961), 238–54; Shawcross, 102 Hague *Recueil* (1961, I), 348–50; Lillich, 16 *Syracuse LR* (1964–5), 735–6; id., *The Protection of Foreign Investment* (1965), 167–88; Lillich and Weston, *International Claims: Their Settlement by Lump Sum Agreements*, 2 vols. (1975); Whiteman, viii. 1107–29; Lillich and Weston, 82 *AJ* (1988), 69–80.

[79] See the *Delagoa Bay Railway* and *Expropriated Religious Properties* cases, *supra*, n. 77.

[80] *Norwegian Ships* arbitration (1921), PCA, *RIAA* i. 307, 338; Hague Court Reports, ii. 40; *French Claims against Peru* (1921), PCA, *RIAA* i. 215; Hague Court Reports, ii. 31; 16 *AJ* (1922), 480; *Landreau* claim (1921), *RIAA* i. 347, 365; *Spanish Zone of Morocco* claims (1925), *RIAA* ii. 615, 647; *Ann. Digest*, 2 (1923–4), no. 85; *Hopkins* claim (1927), *RIAA* iv. 41; 21 *AJ* (1927), 160; *Ann. Digest*, 3 (1925–6), no. 167; *Goldenberg* claim (1928), *RIAA* ii. 901, 909; 3 *RDI* (1929), 559; *Hungarian Optants* case (1927), *Rec. TAM* viii. 138; arbitral award between Portugal and Germany (1930), *RIAA* ii. 1035, 1039; *Ann. Digest*, 5 (1929–30), 150, 151; *Shufeldt* claim (1930), *RIAA* ii. 1079, 1095; 24 *AJ* (1930), 799; *Martposa* claim (1933), *RIAA* vi. 338; *de Sabla* claim (1933), *RIAA* vi. 358, 366; *Ann. Digest*, 7 (1933–4), no. 92 at p. 243; *Arabian-American Oil Co.* v. *Saudi Arabia* (1958), ILR 27, 117 at 144, 168, 205.

See also the *El Triunfo* case (1901), *RIAA* xv. 467; *Upton* (1903), *RIAA* ix. 234; and *Seluyn* (1903), ibid. 280.

[81] See *German Interests in Polish Upper Silesia* (1926), PCIJ, Ser. A, no. 7, pp. 21, 22, 33, 42; *Chorzów Factory* case (Jurisdiction) (1927), Ser. A, no. 9, pp. 27, 31; and no. 13, p. 19; *Chorzów Factory* case (Indemnity) (1928), Ser. A, no. 17, pp. 46, 47; (cf. Fischer Williams, 9 *BY*, (1928), 8–10); *German Settlers in Poland* (1923), Ser. B, no. 6, pp. 23, 24, 38; *Peter Pázmány University* (1933), Ser. A/B, no. 61, p. 243.

compensation principle, which is supported also by a majority of jurists in Western countries.[82]

Jurists supporting the compensation rule recognize the existence of exceptions, the most widely accepted of which are as follows:[83] under treaty provisions; as a legitimate exercise of police power, including measures of defence against external threats; confiscation as a penalty for crimes;[84] seizure by way of taxation or other fiscal measures; loss caused indirectly by health and planning legislation and the concomitant restrictions on the use of property; the destruction of property of neutrals as a consequence of military operations, and the taking of enemy property as part payment of reparation for the consequences of an illegal war.[85]

11. *The Principle of National Treatment*[86]

A number of jurists[87] and a few tribunals[88] have subscribed to the view that an alien cannot complain provided he receives the same treatment as nationals: if nationals of the expropriating state receive no compensation the alien can expect none. Sir John Fischer Williams has pointed out that a general dogma as to the inviolability of private property can no more be erected into an international duty than other political and economic doctrines. Thus the exceptions to the compensation rule noticed above indicate the relativity of acquired rights even in states founded on private enterprise principles. For reasons offered earlier, it is not thought that the national treatment principle provides a reliable general formula. In relation to expropriation, as

[82] See McNair, Rolin, Verdross, Wortley, White, and Petrén, cited *supra*, n. 64. See also García Amador's report, *Yrbk. ILC* (1959), ii. 2–24; Sørensen, 101 Hague *Recueil* (1960, III), 176 ff.; Fitzmaurice, 92 Hague *Recueil* (1957, II), 128; Guggenheim, i. 333–4; Briggs, p. 569; Shawcross, 102 Hague *Recueil* (1961, I), 339, 369; O'Connell, pp. 776–85.

[83] See Friedman, *Expropriation*, pp. 1–3; Wortley, *Expropriation*, pp. 40–57; Guggenheim, i. 333; Herz, 35 *AJ* (1941), 251–2; *Yrbk. ILC* (1959), ii. 11–12, paras. 43, 44; Sohn and Baxter, 55 *AJ* (1961), 553, 561–2, Art. 10(5); Fischer Williams, 9 *BY* (1928), 22–8; Petrén, 109 Hague *Recueil* (1963, II), 525–36.

[84] See *Allgemeine Gold-und Silberscheideanstalt* v. *Customs and Excise Commissioners* [1980] 2 WLR 555; 51 *BY* (1980), 305.

[85] See the *AKU* case, ILR 23 (1956), 21; *Prince Salm-Salm* case, ibid. 24 (1957), 893. This view is controversial, however. See further *Assets of Hungarian Company in Germany* case, ILR 32, 565; *Re Dohnert, Muller, Schmidt & Co.*, ibid. 570.

[86] See further *supra*, p. 523.

[87] See Dunn, 28 *Col. LR* (1928), 166–80; Cavaglieri, 38 *RGDIP* (1931), 257–96; Brierly, p. 284; Fischer Williams, 9 *BY* (1928), 28–9. See further Herz, 35 *AJ* (1941), 259 n. 66.

[88] See the *Canevaro* case, PCA (1912), Hague Court Reports, i. 285; 6 *AJ* (1912), 746; *RIAA* xi. 397; *Standard Oil Co Tankers* (1926), *RIAA* ii. 781, 794; 8 *BY* (1927), 156; 22 *AJ* (1928), 404.

elsewhere, it plays a subsidiary role in the context of the positive legal principles.[89]

12. *Control of Major National Resources*

The classical model for expropriation has long been the taking of a single item of property, and the analogy has been the wrongful taking of property in private law. Cases in which expropriation is allowed to be lawful in the absence of compensation are within the narrow concept of public utility prevalent in *laissez-faire* economic systems, i.e. exercise of police power, health measures, and the like. The fact is that a large proportion of the members of the community of states now regard the existence of a public sector as an important aspect of national independence and economic development. Many of the poorer states have accepted foreign investment at the expense of economic, and therefore political, independence. It is all very well to say that nationalization is possible—providing prompt and adequate compensation is paid. In reality this renders any major economic or social programme impossible, since few states can produce the capital value of a large proportion of their economies promptly. It is common for the poorer economies to be subjected to foreign ownership to a great extent,[90] and the analogy of private law ownership clashes sharply with the desire of states to govern their own economies. This impasse has led some eminent jurists to distinguish between general expropriation (nationalization, or socialization), on the one hand, and, on the other, small-scale expropriation. In the case of nationalization of a major industry or natural resource compensation would be on a basis of payments phased out over a period and calculated with reference to the general economic position in the state concerned. In other words, compensation of private interests is accommodated to the competence to nationalize.[91] The principle of nationalization unsubordinated to a

[89] See further *supra*, pp. 523, 526, *infra*, p. 543, and cf. Fischer Williams, 9 *BY* (1928), 28–9; Friedman, *Expropriation*, pp. 133, 210.

[90] See the percentages for the Polish economy in 1946, quoted in Friedman, *Expropriation*, p. 32.

[91] See the opinions of Lauterpacht, 62 Hague *Recueil* (1937, IV), 346; id., *International Law: Collected Papers*, i (1970), 387–90; Sørensen, pp. 485–9; Bishop, 115 Hague *Recueil* (1965, II), 409–10; Amerasinghe, *State Responsibility*, pp. 121–68; Oppenheim, i. 352; La Pradelle, *Annuaire de l'Inst.* 43 (1950), i. 60–6; de Visscher, *Theory and Reality in Public International Law*, (1957), 193–5; Rolin, *Annuaire de l'Inst.* 43 (1950), i. 97; id., 6 *Neths. Int. LR* (1959), 272; Friedman, *Expropriation*, pp. 206–11; Guggenheim, i. 334–5. See also Baade, 54 *AJ* (1960), 804, nn. 22, 23. Cf. the Mexican Note to the US of 3 Aug. 1938, Hackworth, iii. 657. For Asian and Latin American opinions see *Yrbk. ILC* (1957), i. 154 ff. See further Petrén, 109 Hague *Recueil* (1963, II), 545 ff.; Sohn and Baxter, 55 *AJ* (1961), 553 (Art. 10, para. 4), 559–60; Sornarajah, 13 *Journ. of World Trade Law* (1979), 108–31.

full compensation rule may be supported by reference to principles of self-determination, independence, sovereignty, and equality.[92] Equitably based, the lump sum settlement (*indemnité globale forfaitaire*) short of the prompt, adequate, and effective standard has become common, and some authors regard the practice as evidence of an *opinio juris*.[93] The jurisprudence of the European Court of Human Rights, in relation to the guarantees in Protocol 1 of the European Convention on Human Rights,[94] has given no little emphasis to considerations of public interest both in relation to the occasion of interference with property and in relation to the measure of compensation. Thus in the *James* case the Court observed that:[95]

> . . . the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1. Article 1 does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of 'public interest', such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.

13. *Expropriation Unlawful per se*

The position achieved by the preceding discussion is as follows:

1. Expropriation for certain public purposes, e.g. exercise of police power and defence measures in wartime, is lawful even if no compensation is payable.
2. Expropriation of particular items of property is unlawful unless there is provision for the payment of effective compensation.

[92] See the resolutions of the UN General Assembly considered below.

[93] See Rolin, *Annuaire de l'Inst.* 43 (1950), i. 97; id., 6 *Neths. Int. LR* (1959), 273. For doubts as to the *opinio juris*, see Sørensen, 101 Hague *Recueil* (1960, III), 180 and Bindschedler, 90 Hague *Recueil* (1956, II), 297. See further Fawcett, 27 *BY* (1950), 372–5; García Amador, *Yrbk. ILC* (1959), ii. 20–4. At the very least, the requirement of 'promptness' has been overshadowed by post-war practice: see on this the *Anglo-Iranian* case, ICJ Pleadings (1951), 106.

[94] 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.' See also the American Conv. on Human Rights, Art. 21; and the African Charter on Human and Peoples' Rights, Art. 14.

[95] Judgment of 21 Feb. 1986; ECHR, Ser. A, no. 98, para. 54. See also *Sporrong and Lönnroth*, Ser. A, no. 52, paras. 56–75; *Lithgow*, Ser. A, no. 102, paras. 111–74; Higgins, 176 Hague *Recueil* (1982, III), 355–75; and Mendelson, 57 *BY* (1986), 33–76. Cf. the decision of the Iran–US Claims Tribunal in *TNA Corporation* v. *Government of the Islamic Republic of Iran*, ILR 75, 595. See, most recently, ECHR, *Mellacher* case (1989) (not yet reported).

3. Nationalization, i.e. expropriation of a major industry or resource, is unlawful only if there is no provision for compensation payable on a basis compatible with the economic objectives of the nationalization, and the viability of the economy as a whole.

Thus expropriation under (2) and (3) is unlawful, if at all, only *sub modo*, i.e. if appropriate compensation is not provided for. The controversial difference between (2) and (3) is the basis on which compensation is assessed. However, whatever may be the relation of these two categories, there is evidence of a category of types of expropriation which are illegal apart from a failure to provide for compensation, in which cases lack of compensation is an additional element in, and not a condition of, the illegality. It has been suggested that this category includes interference with the assets of international organizations[96] and taking contrary to promises amounting to estoppels.[97] Certainly it includes seizures which are a part of crimes against humanity or genocide, involve breaches of international agreements,[98] are measures of unlawful retaliation or reprisal against another state,[99] are discriminatory, being aimed at persons of particular racial groups or nationals of particular states,[1] or concern property owned by a foreign state and dedicated to official state purposes.[2]

The practical distinctions between expropriation unlawful *sub modo*, i.e. only if no provision is made for compensation, and expropriation unlawful *per se*, would seem to be these: the former involves a duty to pay compensation only for direct losses, i.e. the value of the

[96] See Delson, 57 *Columbia LR* (1957), 771.

[97] Friedmann, 50 *AJ* (1956), 505. On estoppel see *infra*, p. 640.

[98] Cf. *German Interests in Polish Upper Silesia* (Merits) (1926), PCIJ, Ser. A, no. 7; *Chorzów Factory* case (Indemnity) (1928), Ser. A, no. 17, pp. 46–7.

[99] Netherlands Note to Indonesia, 18 Dec. 1959, 54 *AJ* (1960), 484; US Notes to Libya, 8 July 1973, *Digest of US Practice* (1973), 334–5; 20 June 1974, ibid. (1975), 490–1; US Court of Appeals, *Banco Nacional de Cuba* v. *Sabbatino* (1962), 56 *AJ*, p. 1085 at pp. 1101–4; *Banco Nacional de Cuba* v. *First National City Bank*, 270 F. Suppl. 1004 (1967); ILR 42, 45; Seidl-Hohenveldern, in *Essays Presented to Kollewijn and Offerhaus* (1962), 470–9; Rolin, 6 *Neths. Int. LR* (1959), 274. An obvious difficulty is to determine when a reprisal is lawful: in principle it should be a reaction to a prior breach of legal duty and be proportionate.

[1] There is much authority for this: see White, *Nationalisation*, pp. 119–44; McNair, 6 *Neths. Int. LR* (1959), 247–9; Rolin, ibid. 269–70; Herz, 35 *AJ* (1941), 243, 249, 259; Sørensen, 101 Hague *Recueil* (1960, III), 178; US Court of Appeals, *Banco Nacional de Cuba* v. *Sabbatino* (1962), 56 *AJ* (1962), 1104–5; *In re Helbert Wagg & Co. Ltd.* [1956] 1 Ch. 323; ILR, 22 (1955), 480; *Bank Indonesia* v. *Semenbah Maatschappij*, ILR 30, 28. And see *infra*, pp. 596–8.

The test of discrimination is the intention of the government: the fact that only aliens are affected may be incidental, and, if the taking is based on economic and social policies, it is not directed against particular groups simply because they own the property involved. See ICJ Pleadings, *Anglo-Iranian Oil Co.* case (1951), 97; *Anglo-Iranian Oil Co. Ltd.* v. *S.U.P.O.R.*, ILR 22 (1955), 23 at 39; Whiteman, viii. 1041–57. See also the *ELSI* case, I.C.J. Reports (1989), 15, 71–3.

[2] White, *Nationalisation*, pp. 151–3.

property, the latter involves liability for consequential loss (*lucrum cessans*);[3] the former confers a title which is recognized in foreign courts (and international tribunals), the latter produces no valid title.[4] The case-law of the Iran–US Claims Tribunal includes examination of the relevance of the distinction between lawful and unlawful expropriation in the remedial sphere.[5]

14. *The General Assembly Resolution of 1962 on Permanent Sovereignty over Natural Resources*

The materials on which an assessment of the rules governing expropriation must be based include important projects canvassed within the United Nations. In 1955 the Third Committee of the General Assembly adopted a draft article, as a part of the Human Rights Covenants, on the right of self-determination, the second paragraph of which stated: 'The peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.' The concept of economic self-determination stemmed from a General Assembly resolution of 21 December 1952.[6] Much later, work in the UN Commission on Permanent Sovereignty over Natural Resources and the Economic and Social Council culminated in the adoption of Resolution 1803(XVII) by the General Assembly on 14 December 1962.[7]

[3] See Sørensen, 101 Hague *Recueil* (1960, III), 178–9; Fatouros, *Government Guarantees to Foreign Investors* (1962), 307–9. Some writers require specific restitution in the latter case; see Baade, 54 *AJ* (1960), 807–30; 56 *AJ* (1962), 504–5; Wortley, 55 *AJ* (1961), 680–3. See also Sohn and Baxter, ibid. 556; Jennings, 37 *BY* (1961), 171–3; and the decision of the Iran–US Claims Tribunal in *Amoco International Finance* v. *Iran*, 15 Iran–US CTR, 189 at 246–52.

[4] See Domke, 54 *AJ* (1960), 305–23; id., ibid. 55 (1961), 610–16; Baade, 54 *AJ* (1960), 801–35; id., ibid. 56 (1962), 504–7; Seidl-Hohenveldern, ibid. 507–10; id., 49 *Michigan LR* (1951), 851–68. The writers are not agreed on these questions, and municipal courts often recognize measures lawful under the *lex situs*: *Luther* v. *Sagor* [1921] 3 KB 532; *In re Helbert Wagg & Co. Ltd.* [1956] 1 Ch. 323; ILR 22 (1955), 480; *Dutch Tobacco Firms in Indonesia*, ILR 28, 16. See Staker, 58 *BY* (1987), 151–252 for a detailed discussion.

[5] See (e.g.) *Amoco International Finance* v. *Iran*, *supra*.

[6] Resol. 626 (VII). See also Resols. 1314 (XIII), 12 Dec. 1958, and 1515 (XV), 15 Dec. 1960. See generally Hyde, 57 *AJ* (1956), 854–67; and UN Secretariat study, *The Status of Permanent Sovereignty over Natural Resources* (1962). Resol. 626 (VII) was cited in *Anglo-Iranian Oil Co. Ltd.* v. *S.U.P.O.R.*, ILR 22 (1955), 23 at 40; and *Anglo-Iranian Oil Co.* v. *Idemitsu Kosan Kabushiki Kaisha*, ibid. 20 (1953), 305 at 313.

[7] Adopted by 87 votes to 2, 12 abstentions. See Gess, 13 *ICLQ* (1964), 398–449 (text of Resol., p. 400) and Fischer, *Ann. français* (1962), 516–28; *Texaco* v. *Libyan Government*, 17 *ILM* (1978), i; 104 *JDI* (1977), 350, Award on Merits, paras. 68, 80–1, 83–4, 87–8; *LIAMCO* Award,

The resolution was in the form of a Declaration on Permanent Sovereignty over Natural Resources. The *considerenda* to the resolution refer, *inter alia*, to 'the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests', and to 'respect for the economic independence of States', and stipulate that the resolution has no bearing on the subject of succession of states and governments.

The substance of the Declaration is as follows:

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned;

2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities;

3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources;

4. Nationalization, expropriation or requisitioning shall 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. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication;

5. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality;

6. International co-operation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.

7. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.

8. Foreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.

20 *ILM* (1981), 1 at 78, 99–103, 131; *Aminoil* Award, 21 *ILM* (1982), 976 at 1021. See further Resol. 2158 (XXI) adopted on 25 Nov. 1966 by 104 votes to 0, 6 abstentions; 6 *ILM* (1967), 147; and the Vienna Conv. on Succession of States in respect of Treaties (1978), Art. 13.

15. *The Charter of Economic Rights and Duties of States*

Since 1972 the less developed states have pressed for the establishment of a 'new deal' in their relations with the industrialized nations. This pressure was reflected, in particular, in the United Nations General Assembly Resolution 3201(S–VI) of 1 May 1974[8] containing a Declaration on the Establishment of a New International Economic Order. On 12 December 1974 the General Assembly adopted the Charter of Economic Rights and Duties of States (120 votes in favour, 6 against, 10 abstentions).[9] The states voting against the resolution were: Belgium, Denmark, German Federal Republic, Luxembourg, the United Kingdom, and the United States.

For present purposes the leading principles of the Charter are to be found in Article 2, as follows:

1. Every State has and shall freely exercise full permanent sovereignty

[8] 13 *ILM* (1974), 715; 68 *AJ* (1974), 798. See also Resol. 3202 (S–VI), ibid. 720.

[9] Resol. 3281 (XXIX), 14 *ILM* (1975), 251; 69 *AJ* (1975), 484. For comment see Lillich, 69 *AJ* (1975), 359–65; Castañeda, *Ann. français* (1974), 31–56; Virally, ibid. 57–77; Brower and Tepe, 9 *Int. Lawyer* (1975), 295–318; Haight, ibid. 591–604; Feuer, 79 *RGDIP* (1975), 273–320; White, 24 *ICLQ* (1975), 542–52; id., 16 *Virginia JIL* (1975–6), 323–45; Mahiou, 12 *Revue belge* (1976), 421–50; Salem, 102 *JDI* (1975), 753–800; Rao, 16 *Indian Journ.* (1976), 351–70; Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 297–310; Brownlie, 162 Hague *Recueil* (1978, IV), 255–71; Bedjaoui, *Towards a New International Economic Order* (1979) Hossain (ed.), *Legal Aspects of the New International Economic Order*; Rosenberg, *Le Principe de souveraineté des états sur leurs ressources naturelles* (1983); Hossain and Chowdhury (eds.), *Permanent Sovereignty over Natural Resources in International Law* (1984); UNITAR, Final Report (Abi-Saab), UN Doc. A/39/504, 23 Oct. 1984; ILA, *Report of the 62nd Conference* (1986), 2–11, 409–87; Bulajić, *Principles of International Development Law* (1986); Makarczyk, *Principles of a New International Economic Order* (1988); Oppermann and Petersmann (eds.), *Reforming the International Economic Order* (1987); Peters, Schrijver, de Waart, 36 *Neths. Int. L.R.* (1989), 285–313. See also the Decl. of Lima, 26 Mar. 1975, Second General Conference of UNIDO; 14 *ILM* (1975), 826.

including possession, use and disposal, over all its wealth, natural resources and economic activities.

2. Each State has the right:

. . . (c) to nationalize, expropriate or transfer ownership of private 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.

What effect do these formulations have on customary international law? Such resolutions are vehicles for the evolution of state practice and each must be weighed in evidential terms according to its merits. The Charter has a strong political and programmatic flavour and does not purport to be a declaration of pre-existing principles. The opinion has been expressed that Article 2 of the Charter is merely a *de lege ferenda* formulation.[10] This view is contradicted by evidence that Article 2(2)(c) is regarded by many states as an emergent principle, applicable *ex nunc*. In the first place, the language harks back to paragraph 4 of the 1962 Resolution (*supra*). Secondly, the attitude of states opposed to Article 2 indicates all too clearly that governments are aware of the need to 'contract out' of such formulations by reservations of position either by explanations of negative votes and abstention or by the making of specific reservations after adoption of a resolution by consensus (without formal vote).[11]

Assuming that the provisions of Article 2 are to be reckoned with, as evidence of new customary law, what are the consequences? The concept of permanent sovereignty over natural resources reinforces the existing principle that taking for public purposes is lawful. The compensation principle is not, as such, denied.[12] Recent comment has neglected to notice that, if the term 'compensation' has an objective content, then failure by the local courts to provide 'compensation' would be contrary to the principles of Article 2. It is also clear that liability for denial of justice may arise if certain standards are not

[10] *Texaco* v. *Libyan Government*, *supra*, Award on Merits, paras. 88–9. However, this approach is modified in paras. 90–1. In the *LIAMCO* case (Award of 12 Apr. 1977), the sole arbitrator, Dr Mahmassani, stressed the vagueness of Art. 2(2)(c): 20 *ILM* (1981), 1 at 76. See also the *Aminoil* Award (24 Mar. 1982), 21 *ILM* (1982), 976 at 1021–2 (para. 90), 1032 (para. 143); and the *SEDCO* case (Iran–US Claims Tribunal) 25 *ILM* (1986), 629 at 633–4.

[11] See 13 *ILM* (1975), 715 at 744, 749, 753, 759, 762.

[12] See Jiménez de Aréchaga, 11 *NY Univ. Journ. of Int. Law and Politics* (1978), 179 at 184; Schachter, 178 Hague *Recueil* (1982, V), 321–3.

observed.[13] Moreover, expropriation contrary to treaty,[14] or in breach of an independent principle of customary law, for example, the principle of non-discrimination on grounds of race or religion, will continue to be unlawful. It has been stated[15] that the reference to the domestic law of the nationalizing state is intended to give general recognition to the Calvo doctrine,[16] but in fact the reference to domestic law is exclusively in relation to 'compensation' and, as it has been suggested above, this is by no means a reference to domestic law willy-nilly.

In conclusion it is to be emphasized that, assuming that Article 2 of the Charter does bring about a change in the customary law, the United States and its associates will not be bound since they have adopted the role of persistent objectors.[17]

16. *Conclusions on Expropriation*

The Declaration of 1962 set out above, which constitutes evidence of the existing law,[18] places emphasis on the rights of the state host to or receiving foreign assets, and in a general way contradicts the simple thesis of acquired rights. However, its actual formulations tend to cover up the real differences of opinion on the law by reference to international law and the payment of 'appropriate compensation'. Question-begging though the provisions may be, it is significant that the right to compensation on whatever basis, is recognized in principle. In view of the real differences of opinion, any statement of conclusions can only be provisional. The present position, including the elements of confusion, can be expressed in a number of independent propositions.

1. A certain number of states insist that expropriation can only take place on payment of adequate, effective compensation. However, in practice deferred payments are regarded as sufficient provided effective compensation takes place.[19] The

[13] Cf. Castañeda, *Ann. français* (1974) at 51, 54; *Texaco* v. *Libyan Government*, *supra*, Award on Merits, paras. 90–1.

[14] For a different view: Jiménez de Aréchaga, 11 *NY Univ. Journ. of Int. Law and Politics* (1978), 179–80; and in 159 Hague *Recueil* (1978, I), 297.

[15] Lillich, 69 *AJ* (1975), 359 at 361.

[16] On which see *infra*, pp. 546–7.

[17] On the persistent objector: *supra*, pp. 10–11. In the Second Committee of the General Assembly, Art. 2(2)(c) of the Charter attracted negative votes or abstentions from 22 delegations.

[18] See UK Note to the Government of Iraq, 4 Sept. 1967; *British Practice* (1967), p. 121.

[19] See Foighel, *Nationalization and Compensation*, pp. 255–7; ICJ Pleadings, *Anglo-Iranian Oil Co.* case, pp. 100 ff.

requirement of promptness has become subordinated to the other conditions and also to economic realities relating to payment of large sums.

2. Neither the principle of acquired rights nor that of national treatment provide reliable guidance.
3. The majority of states accept the principle of compensation, but not on the basis of the 'adequate, effective, and prompt' formula.[20]
4. Where major natural resources are concerned, cogent considerations of principle reinforced by the Declaration of 1962 and the Charter of Economic Rights and Duties of States, militate against the 'adequate, effective, and prompt' formula.[21]
5. Certain categories of expropriation are illegal *per se* and not merely in the absence of compensation.[22]
6. Reference to reprisal action, as a type of expropriation illegal *per se*, only leads to secondary questions as to the legality of the reprisal.
7. Reference to general principles that expropriation must be for purposes of public utility, or that it must not be 'arbitrary', only causes confusion.[23] The determination of public utility is primarily a matter for individual states, and categories of illegality (see proposition (5)) can only depend on particular rules of international law.
8. The 'orthodox' compensation rule is stated to have exceptions, principally on the basis of police power.[24] Here the concept of public utility in certain societies is employed to explain cases where no compensation is payable. The exceptions are an embarrassment since, as a matter of principle, this position is not very different from the view taken by some states with a different view of public utility, viz., that the compensation rule does not apply, at least in the 'adequate, effective, and prompt' form.
9. It is a fact that a considerable number of hosts to foreign capital

[20] See the references in the article by Gess, 13 *ICLQ* (1964), 427–9, to the General Assembly debate on the Decl. of 1962, which provides for 'appropriate compensation'. See further Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 21, 297–310.

[21] See Lauterpacht, 62 Hague *Recueil* (1937, IV), 346; and Sohn and Baxter, 55 *AJ* (1961), 553 (Art. 10(4)), 559–60.

[22] *Supra*, pp. 537–9.

[23] See White, *Nationalisation*, pp. 149–50, who states that the rule against non-discrimination suffices. But absence of discrimination is not by itself a sufficient guide to legality. For references to public utility see Herz, 35 *AJ* (1941), 252–3; *Yrbk. ILC* (1959), ii. 15–16; Sohn and Baxter, 55 *AJ* (1961), 553 (Art. 10); McNair, 6 *Neths. Int. LR* (1959), 218 at 243–7; and the Decl. of the UN General Assembly of 1962, *supra*, p. 539.

[24] *Supra*, p. 535.

are willing to conclude treaties for the protection of investments which commonly contain a provision for the payment of 'prompt, adequate, and effective' compensation in case of expropriation. While these are negotiated deals, the pattern of agreements surely constitutes evidence of an international standard based upon the principle of compensation.[25]

17. *Legal Devices Adopted by Investors and Hosts to Foreign Capital*

There is a large literature on the means of protecting foreign investment, and suggestions are made for the creation of multilateral investment codes.[26] In practice legal protection (apart from general international law) is based upon bilateral investment and aid agreements, guarantees to investors by the governments of capital-exporting states, and agreements between the investor and the recipient state. Investor states attempt to keep issues out of the national courts of the latter by appropriate clauses on jurisdiction in case of dispute and on choice of applicable law.[27] On the proposal of the World Bank an International Centre for the Settlement of Investment Disputes has been set up.[28] The Centre has jurisdiction over 'any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent to in writing to submit to the Centre'. Investor governments, however, are not committed to the view that concession agreements involving recipient states and foreign corporations are 'international agreements' and not contracts of private

[25] See ICC, *Bilateral Treaties* for *International Investment* (1983); 51 *BY* (1980), 467–8; 52 *BY* (1981), 495–7; 53 *BY* (1982), 488; 54 *BY* (1983), 517–18; 55 *BY* (1984), 570–1; 56 *BY* (1985), 509–10; 57 *BY* (1986), 602–4. See further Mann, 52 *BY* (1981), 241–54; Schachter, 178 Hague *Recueil* (1982, V), 299; Dolzer, 75 *AJ* (1981), 565.

[26] See Fatouros, *Government Guarantees to Foreign Investors*; Snyder, 10 *ICLQ* (1961), 469–94; Gros, *Mélanges Rolin* (1964), 125–33; ILA, *Report of the Fifty-Second Conference* (1966), 819–60; *Report of the Fifty-Third Conference* (1968), 667–707; Schwarzenberger, *Foreign Investments and International Law* (1969); 71 *Harv. LR* (1958), 1102–22; Lillich, *The Protection of Foreign Investment*; Rubin, *Foreign Development Lending: Legal Aspects* (1971); Shihata, 203 Hague *Recueil* (1987, III), 95–320; Salem, 113 *JDI* (1986), 579–626; Dicke (ed.), *Foreign Investment in the Present and the New International Economic Order* (1987).

[27] See Sereni, 96 Hague *Recueil* (1959, I), 133–232; Spofford, 113 Hague *Recueil* (1964, III), 121–234; Metzger, 50 *Virginia LR* (1964), 594–627.

[28] Conv. on the Settlement of Investment Disputes between States and Nationals of Other States; opened for signature 18 Mar. 1965; in force 14 Oct. 1966; 4 *ILM* (1965), 532. See ICSID, *1988 Annual Report*. As of 30 June 1988 there were 91 contracting states. Since its inception 25 disputes have been submitted to ICSID.

law.[29] The Convention Establishing the Multilateral Investment Guarantee Agency (MIGA)[30] concerns, *inter alia*, the issuing of guarantees to investors against non-commercial risks.

States receiving foreign investment have long sought means of assimilating the foreign investor and their own nationals, and in treaties they seek to establish a standard of equal treatment or reciprocity. In making concession contracts with aliens, it has been the practice of Latin American governments to insert a 'Calvo clause', under which the alien agrees not to seek the diplomatic protection of his own state and submits matters arising from the contract to the local jurisdiction.[31] The majority of jurists and governments have hitherto denied the validity of such clauses, but international tribunals have since 1926 given them a degree of acceptance.[32] In principle, a clause in a contract of private law cannot deprive a state of the right of diplomatic protection or an international tribunal of jurisdiction. However, a tribunal may interpret the agreement which confers jurisdiction in such a way as to incorporate the clause, particularly where the alien contractor is seeking to use diplomatic protection as a means of avoiding his obligations. In any case the operation of the local remedies rule often makes the clause superfluous,[33] since, subject to what is said below, breach of a private law contract is not an international wrong and the right of diplomatic protection will arise only if there is a denial of justice in the course of exhausting remedies in the local courts.[34] The clause is not superfluous if the agreement conferring jurisdiction upon an international tribunal excludes the operation of the local remedies rule but incorporates by reference the effect of the Calvo clause (or is so interpreted). The practical effect of the clause in arbitrations has been to prevent contractual disputes being the object of diplomatic protection or inter-state proceedings in the absence of a denial of justice.

[29] See *infra*, pp. 547–51.

[30] Entered into force on 12 Apr. 1988. Text: 24 *ILM* (1985), 1598. See further Shihata, 203 Hague *Recueil* (1987, III), 95–320; id., *MIGA and Foreign Investment* (1987).

[31] See Lipstein, 22 *BY* (1945), 130–45; Shea, *The Calvo Clause* (1955); Briggs, pp. 648–50; García Amador, *Yrbk. ILC* (1958), ii. 58–9; O'Connell, ii. 1059–66; Sørensen, pp. 590–3; Whiteman, viii. 916–33; Freeman, 40 *AJ* (1946), 121–47; Summers, 19 *Virginia LR* (1932–3), 459–84; Feller, *The Mexican Claims Commissions 1922–1934* (1935), 185–200; Graham, 6 *Texas Int. Law Forum* (1970–1), 289–308; Rogers, 72 *AJ* (1978), 1–16; Jiménez de Aréchaga, 159 Hague *Recueil* (1978, III), 309–10; Dolzer, 75 *AJ* (1981), 570–3; García Amador, *Max Planck Encyclopaedia*, viii. 62–4; Rousseau, v. 203–8. The 'clause' (there is no singe type) is named after the Argentinian jurist responsible for the device. See further Agreement of Cartagena, Decision of Commission, no. 24, Dec. 1970, Common Regime on Foreign Investments, 11 *Virginia Journ. of IL* (1971), 264.

[32] See the *North American Dredging Co.* claim (1926), *RIAA* iv. 26; (American-Mexican Claims Commission); and comment in Sørensen, p. 592.

[33] The Calvo clause would not be superfluous in a case like the *North American Dredging Co.* claim (last note) since the Conv. by which the adjudicating Commission was constituted contained a specific waiver of the local remedies rule.

[34] On which, *supra*, p. 529.

18. *Breaches and Annulment of State Contracts*

Governments make contracts of various kinds with aliens or legal persons of foreign nationality: loan agreements (including the issue of state bonds), contracts for supplies and services, contracts of employment, agreements for operation of industrial and other patent rights under licence, agreements for the construction and operation of transport or telephone systems, agreements conferring the sole right, or some defined right, to exploit natural resources on payment of royalties, and exploration and production sharing agreements. Agreements involving resource exploitation are sometimes described as 'concession agreements', but there is no firm reason for regarding 'concession agreements' as a term of art or, assuming they can form a defined category, as being significantly different from other state contracts.[35] The contracting government may act in breach of contract, legislate in such a way as to make the contract worthless (for example, by export or currency restrictions), use its powers under domestic law to annul the contract, or repudiate the contract by means illegal in terms of the domestic law. What, then, is the position in terms of international law?

In principle, the position is regulated by the general principles governing the treatment of aliens. Thus, the act of the contracting government will entail state responsibility if, by itself or in combination with other circumstances, it constitutes a denial of justice (in the strict sense) or an expropriation contrary to international law. The general view[36] is that a breach of contract (as opposed to its

[35] Some authorities insist on treating concessions as a special category, e.g. O'Connell, ii. 976–97. For another view: Sohn and Baxter, 55 *AJ* (1961), 566–7. On the position of bonds see Hyde, ii. 1005. See also Mann, 54 *AJ* (1960), at 589–90.

[36] Mann, 54 *AJ* (1960), 572–91 (also, *Studies in International Law* (1973), 302–26); Jessup, *A Modern Law of Nations*, p. 104; id., 46 *Columbia LR* (1946), 913; Dunn, *The Protection of Nationals*, pp. 165–7, 171; Amerasinghe, 58 *AJ* (1964), 881–913; id., *State Responsibility*, pp. 66–120; Bishop, 115 Hague *Recueil*, 399–400; Hyde, *International Law* (2nd edn., 1947), ii. 988–90; Fitzmaurice, 37 *BY* (1961), 64–5; Borchard, *Diplomatic Protection*, ch. 7; Briggs, pp. 664–5; Eagleton, *Responsibility*, pp. 157–68; Metzger, 50 *Virginia LR* (1964), 607–8; Lipstein, 22 *BY* (1945), 134–5; Feller, *Mexican Claims Commissions*, p. 174; Foighel, *Nationalization and Compensation*, pp. 178–93; Petrén, 109 Hague *Recueil*, 523–4; Wengler, 76 *RGDIP* (1972), 313–45; Rigaux, 67 *Revue critique de d.i.privé* (1978), 435–59; Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 305–6; Schachter, 178 Hague *Recueil* (1982, V), 309–12; Lalive, 181 Hague *Recueil* (1983, III), 9–284.

The position of O'Connell, ii. 976–1010, is broadly the same but concession contracts and bond obligations are treated as legally distinct categories. See further Fatouros, *Government Guarantees to Foreign Investors*, pp. 232–301.

confiscatory annulment) does not create state responsibility on the international plane. On this view the situation in which the state exercises its executive or legislative authority to destroy the contractual rights as an asset comes within the ambit of expropriation.[37] It follows that such action will lead to state responsibility in the same conditions as expropriation. Thus, it is often stated that the annulment is illegal if it is arbitrary and, or, discriminatory.[38] These terms cover two situations. First, action directed against persons of a particular nationality[39] or race is discriminatory. Secondly, action which lacks a normal public purpose is 'arbitrary'. A government acting in good faith may enact exchange control legislation or impose trade restrictions which incidentally (and without discrimination) lead to the annulment or non-enforceability of contractual rights. It is difficult to treat such action as illegal on the international plane.[40]

There is a school of thought which supports the view that the breach of a state contract by the contracting government of itself creates international responsibility.[41] Jennings[42] has argued persuasively (though with some deliberate caution) that there are no basic objections to the existence of an international law of contract. He points out that in the field of nationality, for example, rights created in municipal law may be evaluated according to international law standards. Again, the cases of contractual situations giving rise to denial of justice to be found in arbitral jurisprudence are treated as cases of contract when the issues of remedy and reparation are dealt with. Jennings also refers to the Calvo clause,[43] which, in so far as it has validity on the international plane, is not a mere question of domestic jurisdiction. Exponents of the international law character of state contracts

[37] See the *Shufeldt Claim* (1930), *RIAA* ii. 1083; Wortley, *Expropriation*, pp. 55–7; White, *Nationalisation*, pp. 162–79; Schwebel, *Essays in Honour of Roberto Ago* (1987), iii. 401–13. Cf. *Feierabend Claim*, ILR 42, 157; *Hexner Claim*, ibid. 169. See also *Valentine Petroleum Arbitration* (1967), ILR 44, 79 at 85–91; *Texaco* v. *Libyan Government*, ILR 53, 389; *BP Exploration Company* v. *Libya*, ILR 53, 297; *Revere* v. *O.P.I.C.*, ILR 56, 258; *LIAMCO* v. *Libya*, ILR 62, 140.

[38] See e.g. Mann, 54 *AJ* (1960), 574–5; Sohn and Baxter, 55 *AJ* (1961), 566–70; Whiteman, viii. 933, 942.

[39] On this issue see *supra*, p. 538.

[40] Some authorities would regard this on the same basis as expropriation lawful *sub modo*; see White, *Nationalisation*, pp. 162–3, 178. Cf. also O'Connell, ii. 986–9; Garcia Amador, *Yrbk. ILC* (1959), ii. 14–15, 24–36; Hyde, 105 Hague *Recueil* (1962, I), 322–3; the *LIAMCO* Award, *supra*, Pt. 3, V(6).

[41] See Oppenheim, i. 344; Harv. Research, 1929, Art. 8, 23 *AJ* (1929), Spec. Suppl., pp. 167–8 (but the comment considerably modifies the text); Carlston, 52 *AJ* (1958), 760–79; ILA, *Report of the Forty-Eighth Conference* (1958), 161. See also Am. Law Inst., Restatement, Third, *Foreign Relations Law*, para. 712. O'Connell, ii. 993–4, comes close to this position in respect of concession contracts. See further *Annuaire de l'Inst.* (1952), ii. 318, and Schwebel, *Essays in Honour of Robert Ago*.

[42] 37 *BY* (1961), 156–82.

[43] *Supra*.

also use arguments based upon the doctrine of acquired rights[44] and the principle of *pacta sunt servanda*, and refer to certain decisions of international tribunals.[45]

Apart from the merits of these arguments, it has to be recognized that there is little solid evidence that the position they tend to support corresponds to the existing law. The practice of the capital-exporting states, such as the United States[46] and the United Kingdom,[47] clearly requires some element, beyond the mere breach of contract, which would constitute a confiscatory taking or denial of justice *stricto sensu*. On analysis most of the arbitral decisions cited in support of the view that breach of contract by the contracting state is an international wrong are found not to be in point, either because the tribunal was not applying international law or because the decision rested on some element apart from the breach of contract.[48] There is no evidence that the principles of acquired rights and *pacta sunt servanda* have the particular consequences contended for. Exponents of acquired rights doctrine commonly give it a modified form which leaves room for exercise of local legislative competence. Moreover, if one is to apply general principles of municipal law then it becomes apparent that government contracts have a special status and in some systems lack enforceability.[49] It is a striking fact that in English law[50] when the executive receives money paid over by a foreign government in settlement of

[44] See Jennings, 37 *BY* (1961), pp. 173–5, 177; O'Connell, ii. 984–5; Hyde, 105 Hague *Recueil* (1962, I), 315–18. The award in *Saudi Arabia* v. *Arabian-American Oil Co.* (*supra*, p. 534) referred to acquired rights as a 'fundamental principle'. See also McNair, 33 *BY* (1957), 1 at 16–18.

[45] e.g. the *Delagoa Bay Railway* case (*supra*, n. 77); *El Triunfo* claim (*supra*, n. 80); *Landreau* claim (ibid.); *Shufeldt* claim (ibid.); *Rudloff* case, *RIAA* ix. 244; and *Saudi Arabia* v. *Arabian-American Oil Co.* (*supra*, n. 80). See also the *Sapphire-N.I.O.C.* arbitration, ILR 35, 136; see Lalive, 13 *ICLQ* (1964), 987–1021; and *Texaco* v. *Libyan Government*, ILR 53, 389; 17 ILM (1978), 1; see Lalive, ibid. 319–49; Rigaux, 67 *Revue critique de d.i. privé* (1978), 435–59.

[46] Moore, *Digest*, vi. 705; Hackworth, v. 611; Whiteman, viii. 906–7. For a different view of the US position see Wetter, 29 *Univ. of Chicago LR* (1962), 275 at 305–22; Sohn and Baxter, 55 *AJ* (1961), 573.

[47] Pre-1900 items; McNair, *Opinions*, ii. 201–4; *British Digest*, vi. 358. See further *Anglo-Iranian Oil Co.* case, Pleadings, UK Memorial, pp. 83–6, 96–8; *Ambatielos* case, Pleadings, pp. 389, 475; *British Practice* (1966), 108–11. The position of France, the UK, and US on the nationalization of the Suez Canal Company by Egypt in 1956 rested on the special character of the Company as an 'international agency' and on the allegation of breaches of the Conv. of Constantinople: see 6 *ICLQ* (1957), 314; Whiteman, iii. 1084–130. However, compensation was paid to stockholders for the nationalization: E. Lauterpacht (ed.), *The Suez Canal Settlement* (1960).

[48] See Mann, 54 *AJ* (1960), 575–80; Amerasinghe, *State Responsibility*, pp. 77–84. The award in *Saudi Arabia* v. *Arabian-American Oil Co.* (*ut supra*, pp. 144–6) had a declaratory character as the principle of acquired rights had been recognized by both parties.

[49] Note also that decisions of English courts have upheld legislative abrogation of gold clauses: *R.* v. *International Trustee* [1937] AC 500. See also *Kahler* v. *Midland Bank* [1950] AC 24 and Mann, *The Legal Aspect of Money* (4th edn., 1971), 167–75, 290 ff.

[50] And this is typical: *infra*, pp. 592–3.

contract claims (on an *ex gratia* or some other basis), the executive is under no legal duty to pay over the sums received to the private claimants. The arguments based upon acquired rights could be applied to a number of reliance situations created by the host state by the grant of public rights such as citizenship or permission to reside or to work. The distinction drawn by partisans of responsibility in contract situations between loan agreements, concessions, and other contracts is unsatisfactory. Why do they prefer their reasoning only in certain contract or reliance situations?

There is a further issue which requires consideration. In the proceedings arising from the Iranian cancellation of the 1933 Concession Agreement between the Iranian Government and the Anglo-Iranian Oil Company, the United Kingdom contended that violation of an explicit undertaking in a concession by the government party not to annul was illegal quite apart from the law relating to expropriation on payment of adequate compensation.[51] This view almost certainly does not represent the positive law but it is not without merit.[52] An undertaking not to annul by legislative action is a voluntary acceptance of risk comparable to the undertaking given by an alien in the form of a Calvo clause.

The rules of public international law accept the normal operation of rules of private international law and when a claim for breach of a contract between an alien and a government arises, the issue will be decided in accordance with the applicable system of municipal law designated by the rules of private international law. Further questions are raised if the parties to a state contract expressly choose an applicable law other than a particular system of local law, either 'general principles of law' or public international law.[53] A choice by the parties of public international law is assumed by some writers to place the contract on the international plane, but this cannot be correct since a state contract is not a treaty and cannot involve state responsibility as an international obligation.[54] In practice choice of law clauses in state contracts often specify the local law 'and such principles and rules of

[51] UK Memorial, *Anglo-Iranian Oil Co.* case, Pleadings, pp. 86–93. See comment by Mann, 54 *AJ* (1960), 587; and cf. *Digest of US Practice* (1975), 489–90.

[52] A few writers give it support: White, *Nationalisation*, pp. 163, 175–9; O'Connell, ii. 993–4. See also *Radio Corporation of America* case, *RIAA* iii. 1621.

[53] See McNair, 33 *BY* (1957), 1–19; Sereni, 96 Hague *Recueil* (1959, I), 133–232; Mann, 35 *BY* (1959), 34–7; id., 42 *BY* (1967), 1–37; O'Connell, ii. 977–84, 990–1; Weil, 128 Hague *Recueil* (1969, III), 120–88; id., *Mélanges Reuter* (1981), 549–82; Greenwood, 53 *BY* (1982), 27–81; *Annuaire de l'Inst.* 57, i. 192–265; ibid. 58, ii. 192 (Resol.); Mann *et al.*, *Revue belge* (1975), 562–94; the *Abu Dhabi* arbitration, ILR 18 (1951), no. 37.

[54] *Annuaire de l'Inst.* 57, i. 246–7 (Report of van Hecke); Schachter, 178 Hague *Recueil* (1982, V), 301–9. For a different view: *Texaco Award*, ILR 53, 389, paras. 26, 46–8, 71, *per* Dupuy, Sole Arbitrator. See also Von Mehren and Kourides, 75 *AJ* (1981), 476–552.

public international law as may be relevant', and in face of such clauses arbitrators have a certain discretion in selecting the precise role of public international law.[55] The tribunal in the case of *Aminoil* v. *Kuwait*[56] decided that by implication the choice of law was that of Kuwait, that public international law was a part of the law of Kuwait, and that in any event considerable significance was to be accorded to the 'legitimate expectations of the parties'.

19. *Stabilization Clauses*[57]

The term 'stabilization clause' relates to any clause contained in an agreement between a government and a foreign legal entity by which the government party undertakes neither to annul the agreement nor to modify its terms, either by legislation or by administrative measures. The legal significance of such clauses is inevitably controversial, since the clause involves a tension between the legislative sovereignty and public interest of the state party and the long-term viability of the contractual relationship. If the position is taken that state contracts are, in categorical terms, valid on the plane of public international law (see the discussion *supra*), then it follows that a breach of such a clause is unlawful and to be compensated as a form of expropriation.[58] Another view is that stabilization clauses as such are invalid in terms of public international law as a consequence of the principle of permanent sovereignty over natural resources.[59]

In general the problem calls for careful classification. If a state party to a contract effects an annulment this may, depending on the circumstances, constitute an expropriation: and the legality of the annulment will then depend on the general principles relating to expropriation (see *supra*). The legal position will not, on this view, depend upon the

[55] See *B.P. Exploration Company* v. *Libya*, ILR 53, 297; *Texaco* v. *Libya*, ibid. 389; *LIAMCO* v. *Libya*, ILR 62. 140; *AGIP* v. *Congo*, ILR 67, 318; *Benvenuti and Bonfant* v. *Congo*, ibid. 345.

[56] ILR 66, 518. For comment: Mann, 54 *BY* (1983), 213–21; Redfern, 55 *BY* (1984), 65–110.

[57] See generally: Weil, 128 Hague *Recueil* (1969, III), 229–34; id., *Mélanges offerts à Charles Rousseau* (1974), 301–28; Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 307–9; Schachter, 178 Hague *Recueil* (1982, V), 313–14; Higgins, 176 Hague *Recueil* (1982, III), 398–414; Greenwood, 53 *BY* (1982), 60–4; Lalive, 181 Hague *Recueil* (1983, III), 56–61, 147–62; Redfern, 55 *BY* (1984), 98–105.

[58] See the view of the sole arbitrator in *Texaco* v. *Libya*, ILR 53, 389 at 494–5. In the *LIAMCO* case, ILR 62, 140 at 196–7, the Sole Arbitrator held that breach of a stabilization clause was lawful but gave rise to a right to receive an equitable indemnity. The issue was not considered in the *B.P.* Award. See also *Revere* v. *OPIC*, ILR 56, 258 at pp. 278–94; Weil, *Mélanges offerts à Charles Rousseau*, pp. 301–28.

[59] See Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 297–8, 307–9. See also Rosenberg, *Le Principe de souveraineté*, pp. 297–332.

existence of a stabilization clause. If there is a provision for arbitration, then the issue will be governed either by the express choice of law (if there is one) or by the choice of law derived by a process of interpretation. If the choice of law involves elements of public international law, the arbitral tribunal will then approach the stabilization clause in the light of all the relevant circumstances, including the history of the relationship, the conduct of the parties, and the reasonable expectations of the parties.[60] It is to be noted that the tribunal in the *Aminoil* case adopted the view that stabilization clauses were not prohibited by international law, but gave a cautious interpretation to the particular undertaking in question. Thus such a clause could operate but only in respect of 'nationalisation during a limited period of time'. In the instant case, the clause could not be presumed to exclude nationalization for a period of 60 years.[61]

[60] See the majority Award in the *Aminoil* case, ILR 66, 518, paras. 90–101. In his sep. op., Sir Gerald Fitzmaurice stated that the stabilization clauses rendered the expropriation (in effect) unlawful (see the opinion, paras. 19–20). See further Redfern, 55 *BY* (1984), 98–105.

[61] Award, paras. 90–101, and paras. 94–5, in particular.

CHAPTER XXIV

THE PROTECTION OF INDIVIDUALS AND GROUPS: HUMAN RIGHTS AND SELF-DETERMINATION

1. *Sovereignty and Domestic Jurisdiction*

An attempt to assess modern developments concerning the protection of the individual, more especially against his or her own government, must take into account the matrices of customary or general international law. To impose responsibility on a state on the international plane, it is necessary for the complainant to establish that the matter is subject to international law or, more precisely, is not a matter purely within the area of discretion which international law designates as sovereignty. The modern rule is stated in terms of the reserved domain of domestic jurisdiction and bears very closely on the question of human rights.[1]

While there is some difference of opinion, Article 2, paragraph 7, of the United Nations Charter is probably in substance a restatement of the classical rule.[2] Three points arise immediately. First, this provision is concerned with the special question of 'constitutional' competence of the organs of the United Nations, and it may be that its precise content is not therefore identical with the rule of general international law apart from the Charter. However, even if the rules are not identical, since the principles of the Charter are so prominent in the practice of states, interpretation of the provision in Article 2, paragraph 7, by organs of the United Nations will no doubt influence the general law. The second point is that the reservation is inoperative when a treaty obligation is concerned.[3] And, thirdly, the domestic jurisdiction reservation does not apply if the United Nations agency is of the opinion that a breach of a specific legal obligation relating to

[1] Generally on sovereignty and domestic jurisdiction, *supra*, ch. XIII. On the individual in international law generally Jessup, *A Modern Law of Nations* (1948), 68–93; Lauterpacht, *International Law and Human Rights* (1950); Nørgaard, *The Position of the Individual in International Law* (1962); Lauterpacht, 63 *LQR* (1947), 438, 64 *LQR* (1948), 97 (also in Lauterpacht, *International Law: Collected Papers*, ii (1975), 487–533); Sperduti, 90 Hague *Recueil* (1956, II), 733–838; Rousseau, ii. 695–774.

[2] Quoted *supra*, p. 293.

[3] See *Peace Treaties* case, ICJ Reports (1950), 65, 70–1; *Nationality Decrees in Tunis and Morocco*, PCIJ, Ser. B, no. 4, at p. 24 (1923).

PART VIII

THE LAW OF RESPONSIBILITY

CHAPTER XX

THE RESPONSIBILITY OF STATES

1. *The Relations of the Subject*

In international relations as in other social relations, the invasion of the legal interest of one subject of the law by another legal person creates responsibility[1] in various forms determined by the particular legal system. International responsibility is commonly considered in relation to states as the normal subjects of the law, but it is in essence a broader question inseparable from that of legal personality in all its forms. For the sake of convenience the question whether organizations and individuals have the capacity to make claims and to bear responsibility on the international plane has been treated separately.[2] However, while the treatment is conventional in singling out state responsibility, it is specialized in two respects. First, the question of the treatment of aliens and their property on state territory[3] is reserved for Chapter XXIII. This subject is an aspect of substantive law, and, logically, if it is to be included, then so also ought expositions of all the rights and duties of states. Nevertheless the treatment of aliens will be dealt with incidentally in connection with the general problems of responsibility. Secondly, the question of exhaustion of local remedies so often dealt with under our general rubric is segregated as being a part of a separate issue, that of the admissibility of claims. While certain aspects of admissibility require treatment in this chapter (section 14), the subject receives further consideration in Chapter XXI.

[1] See *infra*, pp. 434–5.

[2] *Infra*, pp. 580 ff, 686–7.

[3] Including the problems concerning the international minimum standard, denial of justice, and expropriation.

2. *The Basis and Nature of State Responsibility*[4]

Today one can regard responsibility as a general principle of international law, a concomitant of substantive rules and of the supposition that acts and omissions may be categorized as illegal by reference to the rules establishing rights and duties. Shortly, the law of responsibility is concerned with the incidence and consequences of illegal acts, and particularly the payment of compensation for loss caused. However, this, and many other generalizations offered on the subject, must not be treated as dogma, or allowed to prejudice the discussion which follows. Thus the law may prescribe the payment of compensation for the consequences of legal or 'excusable' acts, and it is proper to consider this aspect in connection with responsibility in general.[5] A scientific treatment of the subject is hindered by the relatively recent generalization of the notion of liability. In the Middle Ages treaties laid down particular duties and specified the liabilities and procedures to be followed in case of breach. In recent times the inconvenience of private reprisals,[6] the development of rules restricting forcible self-help, and the work of the International Court have contributed

[4] See especially Jiménez de Aréchaga, in Sørensen, pp. 533–72; Schwarzenberger, *International Law* (3rd edn., 1957), i. 562–83; Sørensen, 101 Hague *Recueil* (1960, III), 217–26; García Amador, 94 Hague *Recueil* (1958, II), 369–99, 462–7; Reports by García Amador, *Yrbk. ILC* (1956), ii. 173, ch. III; and ibid. (1957), ii. 105, ch. I; ibid. (1960), ii. 57–66; Report of Sub-Committee, ibid. (1963), ii. 227–59; Secretariat papers, ibid. (1964), ii. 125–71; Note by Ago, ibid. (1967), ii. 325–7; Secretariat papers, ibid. (1969), ii. 101–24; Ago, First Report, ibid. 125–56; Second Report, *Yrbk. ILC* (1970), ii. 177–97; Third Report, ibid. (1971), ii (Pt. 1), 199–274; Fourth Report, ibid. (1972), ii. 71–160; Fifth Report, ibid. (1976), ii. (Pt. 1), 3–54; Sixth Report, ibid. (1977) ii (Pt. 1), 3–43; Seventh Report, ibid. (1978) ii (Pt. 1), 31–60; Eighth Report, ibid. (1979) ii (Pt. 1), 4–27; Reports of *ILC* to UN General Assembly, *Yrbk. ILC* (1973), ii. 165–98; ibid. (1974), ii (Pt. 1), 269–90; ibid. (1975), ii. 51–106; ibid. (1976), ii. (Pt. 2), 69–122; Tunkin, *Theory of International Law* (1974), 396–425; Reuter, 103 Hague *Recueil* (1961, II), 583–97; Accioly, 96 Hague *Recueil* (1959, I), 353–70; de Visscher, *Bibliotheca Visseriana*, ii. (1924), 89–119; Anzilotti, *Cours de droit international* (1929), i. 466 ff.; Cohn, 68 Hague *Recueil* (1939, II), 209–325; Ago, ibid. 419–554; Eagleton, *The Responsibility of States in International Law* (1928); Berlia, in *Études en l'honneur de Georges Scelle* (1950), ii. 875–94; Basdevant, 58 Hague *Recueil* (1936, IV), 656–75; Cheng, *General Principles of Law* (1953), 162–80; Parry, 90 Hague *Recueil* (1956, II), 657–98; Quadri, 113 Hague *Recueil* (1964, III), 453–77; Queneudec, *La Responsabilité internationale de l'état pour les fautes personnelles de ses agents* (1966); *Répertoire suisse de d.i.* iii. 673–796; Verzijl, *International Law in Historical Perspective* (1973), vi 616–774; Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 267–87; Riphagen, in Macdonald and Johnston (eds.), *The Structure and Process of International Law* (1983), 581–625; Rousseau, 5–96, 209–50; Brownlie, *System of the Law of Nations: State Responsibility* (Pt. 1) (1983); *Neths. Yrbk.* (1985) (symposium); Max Planck Institute, *Encyclopaedia of PIL*, x (1987); Spinedi and Simma (eds.), *United Nations Codification of State Responsibility* (1987). See also the collected works of Roberto Ago, *Scritti sulla responsabilità internazionale degli Stati*, i. (1979), ii. (1) and ii. (2) (1986).

[5] See *infra*, p. 444.

[6] Formerly sovereigns authorized private citizens to perform acts of reprisal (special reprisals) against the citizens of other states: Wheaton, *Elements* (1866), paras. 291, 292.

towards a more normal conception of responsibility from the point of view of the rule of law. Of course the notions of reparation and restitution in the train of illegal acts had long been part of the available stock of legal concepts in Europe, and the classical writers, including Grotius, often referred to reparation and restitution in connection with unjust war.[7]

The nature of state responsibility[8] is not based upon delict in the municipal sense, and 'international responsibility' relates both to breaches of treaty and to other breaches of a legal duty. There is no harm in using the term 'international tort' to describe the breach of duty which results in loss to another state,[9] but the term 'tort' could mislead the common lawyer. The compendious term 'international responsibility' is used by tribunals and is least confusing.

The relevant judicial pronouncements are as follows. In a report on the *Spanish Zone of Morocco Claims*[10] Judge Huber said: 'Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation.' In its judgment in the *Chorzów Factory* (Jurisdiction)[11] proceedings, the Permanent Court stated that: 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.'

In the judgment on the *Chorzów Factory* (Indemnity)[12] the Court said:

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

[7] See Gentili, *De Iure Belli Libri Tres*, Book II, ch. iii; Grotius, *De Iure Belli ac Pacis*, Book III, ch. x, para. 4. Cf. the discussion of reparation in connection with the armistice conditions and peace treaties, 1918–21: Brownlie, *International Law and the Use of Force by States* (1963), 135–9. See also the Statute of the International Court, Art. 36(2), c, d.

[8] The question of criminal responsibility of states may arise: see Pella, 51 *RGDIP* (1947), 1–27; Brownlie, *International Law and the Use of Force by States*, pp. 150–4; 44 *Annuaire de l'Inst.* (1952), i. 361–457.

[9] See Schwarzenberger, *International Law*, i. 562, 563, 571, 581; *Union Bridge Company* claim (1924), *RIAA* vi. 138 at 142; and Jenks, *The Prospects of International Adjudication* (1964), 514–33.

[10] Translation; French text, *RIAA* ii. 615 at 641. See also *Coenca Bros. v. Germany*, *Ann. Digest*, 4 (1927–8), no. 389.

[11] (1927), PCIJ, Ser. A, no. 9, p. 21. This is quoted in part in the Adv. Op. in the *Reparation* case, ICJ Reports (1949), 184.

[12] (1928), PCIJ, Ser. A, no. 17, p. 29. See also ibid. 27, 47; the *Peace Treaties* case, ICJ Reports (1950), 228; and *Phosphates in Morocco* (Prelim. Objections) (1938), PCIJ, Ser. A/B, no. 74, p. 28.

> reparation. In Judgment No. 8[13] . . . the Court has already said that reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.

The *Corfu Channel* case involved a finding that Albania was liable for the consequences of a mine-laying in her territorial waters and the absence of a warning of the danger:[14] 'These grave omissions involve the international responsibility of Albania. The Court therefore reaches the conclusion that Albania is responsible under international law for the explosions which occurred . . . and for the damage and loss of human life which resulted from them, and that there is a duty upon Albania to pay compensation to the United Kingdom'.

These pronouncements show that there is no acceptance of a contract and delict (tort) dichotomy. However, the emphasis on the duty to make reparation does present a broad concept akin to civil wrongs in municipal systems. The law of claims is of course *in personam* in its operation, and parties may waive their claims. However, the idea of reparation does not always work well, and tends to give too restrictive a view of the legal interests protected and the *locus standi* of plaintiffs.[15] The duty to pay compensation is a normal consequence of responsibility, but is not conterminous with it.

In general, broad formulae on state responsibility are unhelpful and, when they suggest municipal analogies, a source of confusion. Thus it is often said that responsibility only arises when the act or omission complained of is *imputable* to a state.[16] Imputability would seem to be a superfluous notion, since the major issue in a given situation is whether there has been a breach of duty: the content of 'imputability' will vary according to the particular duty, the nature of the breach, and so on.[17] Imputability implies a fiction where there is none, and conjures up the idea of vicarious liability where it cannot apply. Unhappily Oppenheim[18] draws a distinction between original and vicarious state responsibility. Original responsibility flows from acts committed by, or with authorization of, the government of a state; vicarious responsibility flows from unauthorized acts of the agents of the state, or nationals, and of aliens living within the territory of the

[13] *Supra*, n. 11.

[14] ICJ Reports (1949), 23. See *infra*, p. 442, on the main aspects of the case.

[15] See further *infra*, pp. 457, 466.

[16] See e.g. Sørensen, 101 Hague *Recueil* (1960, III), 223. The writers use the term in several senses: cf. Kelsen, *Principles of International Law* (1967), 119–20 (2nd edn.), 199; Anzilotti, 13 *RGDIP* (1906), 291; Accioly, 96 Hague *Recueil* (1959, I), 358–9. See also Reuter, 103 Hague *Recueil* (1961, II), 602–4.

[17] See also Quadri, 113 Hague *Recueil*, pp. 457–9.

[18] i. 337–8, 341. See further Kelsen, *Principles of International Law* (2nd edn.), 119–200.

state. It is to be admitted that the legal consequences of the two categories of acts may not be the same; but there is no fundamental difference between the two categories, and, in any case, the use of 'vicarious responsibility' here is surely erroneous.

3. *Boundaries of Responsibility*

In general.[19] It is intended to consider available defences subsequently,[20] although of course the use of the category 'defence' may be rather arbitrary, involving assumptions about the incidence of the burden of proof on particular issues. When the general problem is approached, the impression received is that those general principles which may be extracted are too general to be of practical value, a quality which belongs to general principles offered in books on the English law of tort and crime. Thus in principle an act or omission which produces a result which is on its face a breach of a legal obligation gives rise to responsibility in international law, whether the obligation rests on treaty, custom, or some other basis.[21] However, many rules prescribe the conduct required without being very explicit about the 'mental state', or degree of advertence, required from the state organs involved. This is a common fault even in the case of the nominate torts of English law, and many of our criminal statutes use question-begging terms like 'knowingly'. Moreover, the issues in inter-state relations are often analogous to those arising from the activities of employees and enterprises in English law, where the legal person held liable is incapable of close control over its agents and rules employing metaphors based on the intention (*dolus*)[22] or negligence (*culpa*)[23] of natural persons tend to be unhelpful. In some cases it is *relationship* rather than fault in the ordinary sense which is held to justify liability. Thus in international law objective tests are usually employed to determine responsibility, although of course it can happen that governments, as groups of morally responsible *natural* persons, are capable of proven *dolus* or *culpa*. Moreover, in certain types of case, *dolus* and *culpa* have a special role to play.[24]

[19] See Judge Azevedo, ICJ Reports (1949), 82 ff.; Schwarzenberger, *International Law*, pp. 581–93.
[20] *Infra*, pp. 465–6.
[21] See *infra*, p. 637, on unilateral acts.
[22] See *infra*, p. 441.
[23] See *infra*, p. 440.
[24] See *infra*, p. 441.

4. *Objective Responsibility*

Technically, objective responsibility rests on the doctrine of the voluntary act: provided that agency and causal connection are established, there is a breach of duty by result alone. Defences, such as act of third party, are available, but the defendant has to exculpate himself.[25] In the conditions of international life, which involve relations between highly complex communities, acting through a variety of institutions and agencies, the public law analogy of the *ultra vires* act is more realistic than a seeking for subjective *culpa* in specific natural persons who may, or may not, 'represent' the legal person (the state) in terms of wrongdoing. Where, for example, an officer in charge of a cruiser on the high seas orders the boarding of a fishing vessel flying another flag, there being no legal justification for the operation, and the act being in excess of his authority, a tribunal will not regard pleas that the acts were done in good faith, or under a mistake of law, with any favour.[26] Moreover, in municipal systems of law, the precise mode of applying a *culpa* doctrine, especially in the matter of assigning the burden of proof, may result in a regime of objective responsibility.

It is believed that the practice of states and the jurisprudence of arbitral tribunals and the International Court have followed the theory of objective responsibility[27] as a general principle (which may be modified or excluded in certain cases). Objective tests of responsibility were employed by the General Claims Commission set up by a Convention between Mexico and the United States in 1923 in the well-known *Neer*[28] and *Roberts*[29] claims, and in the *Caire* claim,[30] Verzijl, President of the Franco-Mexican Claims Commission, applied:

> the doctrine of the objective responsibility of the State, that is to say, a responsibility for those acts committed by its officials or its organs, and which they are bound to perform, despite the absence of *faute* on their part . . . The State also bears an international responsibility for all acts committed by its officials or its organs which are delictual according to international law, regardless of whether the official organ has acted within the limits of his

[25] See Judge Azevedo, ICJ Reports (1949), 85–6.
[26] See the *Jessie* (1921), *RIAA* vi. 57; the *Wanderer* (1921), ibid. 68; the *Kate* (1921), ibid. 77; the *Favourite* (1921), ibid. 82.
[27] See Borchard, 1 *Z. a. ö. R. u. V.* (1929), 223 at 224–5; Schwarzenberger, *International Law*, i. (3rd edn.), 632–41; Guggenheim, ii. 52; Starke, 19 *BY* (1938), 115; Basdevant, 58 Hague *Recueil* (1936, IV), 670–5; Cheng, *General Principles of Law*, pp. 218–32 (very helpful); Schachter, 178 Hague *Recueil* (1982, V), 189–90; Rousseau, v. 14–27; Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 269–71.
[28] (1926), *RIAA* iv. 60 at 61–2.
[29] (1926), *RIAA* iv. 77 at 80.
[30] (1929), *RIAA* v. 516 at 529–31.

competency or has exceeded those limits . . . However, in order to justify the admission of this objective responsibility of the State for acts committed by its officials or organs outside their competence, it is necessary that they should have acted, at least apparently, as authorised officials or organs, or that, in acting, they should have used powers or measures appropriate to their official character . . .

A considerable number of writers support this point of view, either explicitly,[31] or implicitly, by considering the questions of imputability, causation, and legal excuses without adverting to the question of *culpa* and *dolus*.[32] At the same time certain eminent opinions have supported the Grotian view that *culpa* or *dolus malus* provide the proper basis of state responsibility in all cases.[33] A small number of arbitral awards[34] give some support to the *culpa* doctrine: for example, in the *Home Missionary Society* case[35] the tribunal referred to a 'well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection'. However, many of the awards cited in this connection are concerned with the standard of conduct required by the law *in a particular context*, for example claims for losses caused by acts of rebellion, of private individuals, of the judiciary, and so on.[36] Thus in the *Chattin* claim[37] the General Claims Commission described the judicial proceedings in Mexico against Chattin as 'being highly insufficient' and referred, *inter alia*, to 'an unsufficiency of governmental action recognizable by every unbiased man'. Chattin had been convicted on a charge of embezzlement and

[31] See *supra*, n. 27.

[32] See Sibert, *Traité* (1951), i. 309 ff.; and García Amador, rapporteur, *Yrbk. ILC* (1956), ii. 186; ibid. (1957), ii. 106.

[33] See Oppenheim, i. 343 (also in 1st edn.); Lauterpacht, 62 Hague *Recueil* (1937, IV), 359–64; id., *Private Law Sources and Analogies of International Law* (1927), 134–43; Eagleton, *Responsibility*, p. 209; Verdross, *Volkerrecht* (5th edn., 1964), 377; Ago, 68 Hague *Recueil* (1939, II), 498. See also Accioly, 96 Hague *Recueil* (1959, I), 364–70, for an enumeration of the writers.

[34] Cases cited in this connection are: the *Casablanca* case (1909), Hague Court Reports, i. 110; *RIAA* xi. 119; *Cadenhead* (1914), 8 *AF* (1914), 663; *Illalo* claims (1925), *RIAA* vi. 158, 160; *Pugh* claim (1933), *RIAA* iii. 1439; *Award on the Wal-Wal Incident* (1935), *RIAA* iii. 1657 (but see Schwarzenberger, *International Law*, pp. 636–7). See also the *Davis* case (1903), *RIAA* ix. 460, 463; *Salas* case, ibid. x. 720.

[35] (1920), *RIAA* vi. 42 at 44. During a rebellion in the Protectorate of Sierra Leone the Home Missionary Society, an American religious body, suffered losses. The United States alleged that in the face of a crisis the British Government failed to take the proper steps for the maintenance of order and that the loss of life and damage was the result of this neglect and failure of duty. The claim was dismissed because (1) there was no failure of duty on the facts; (2) there had been an assumption of risk.

[36] See *infra*, pp. 446 ff.

[37] (1927), *RIAA* iv. 282. See also Huber, rapporteur, *Spanish Zone of Morocco* claims, *RIAA* ii. 644–6.

sentenced by the Mexican court to two years' imprisonment. The Commission referred to various defects in the conduct of the trial and remarked that 'the whole of the proceedings discloses a most astonishing lack of seriousness on the part of the Court'. Furthermore, both writers[38] and tribunals[39] may use the words *faute* or fault to mean a breach of legal duty, an unlawful act. *Culpa*, in the sense of culpable negligence, will be relevant when its presence is demanded by a particular rule of law. Objective responsibility would seem to come nearer to being a *general* principle, and provides a better basis for maintaining good standards in international relations and for effectively upholding the principle of reparation.

The proposition that the type of advertence required varies with the legal context provides an introduction to the judgment of the International Court in the *Corfu Channel* case,[40] which is considered by Hersch Lauterpacht[41] to contain an affirmation of the *culpa* doctrine. In fact the Court was concerned with the particular question of *responsibility* for the creation of danger in the North Corfu Channel by the laying of mines, warning of which was not given. The basis of responsibility was Albania's knowledge of the laying of mines.[42] The Court considered 'whether it has been established by means of indirect evidence that Albania has knowledge of mine-laying in her territorial waters independently of any connivance on her part in this operation'. Later on it concluded that the laying of the minefield 'could not have been accomplished without the knowledge of the Albanian Government' and referred to 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[43] Liability thus rested upon violation of a particular legal duty. The use of circumstantial evidence to establish Albania's knowledge does not alter the fact that knowledge was a condition of responsibility. The Court was not concerned with *culpa* or *dolus* as such, and it fell to

[38] See Accioly, 96 Hague *Recueil* (1959, I), 369–70.

[39] See the *Prats* case (1868), Moore, *Arbitrations*, iii. 2886 at 2894–5; *Russian Indemnity* case (1912), Hague Court Reports, i. 532 at 543. See further Cheng, *General Principles of Law*, pp. 218–32.

[40] ICJ Reports (1949), 4. See further *infra*, p. 442.

[41] See Oppenheim, i. 345, referring to ICJ Reports (1949), p. 18. And cf. Lauterpacht, *The Development of International Law by the International Court* (1958), 88. See also *Répertoire suisse*, iii. 1695.

[42] See García Amador, 94 Hague *Recueil* (1958, II), 387; id., *Yrbk. ILC* (1960), ii. 62–3; Schwarzenberger, *International Law* (3rd edn.), i. 632–4; Cheng, *General Principles of Law*, pp. 231–2; Jiménez de Aréchaga, in Sorensen, p. 537; id., *Yrbk. ILC* (1963), ii. 236. Judge Badawi, dissenting, supported a doctrine of fault which was in fact based on the notion of the unlawful, voluntary, act: ICJ Reports (1949), 65–6.

[43] ICJ Reports (1949), 18, 22.

Judge Krylov[44] and Judge *ad hoc* Ečer[45] to affirm the doctrine of *culpa*.

5. *Culpa*

The term *culpa* is used to describe types of blameworthiness based upon reasonable foreseeability, or foresight without desire of consequences (recklessness, *culpa lata*). Although *culpa* is not a general condition of liability, it may play an important role in certain contexts. Thus where the loss complained of results from acts of individuals not employed by the state, or from activities of licensees or trespassers on the territory of the state, the responsibility of the state will depend on an unlawful omission. In this type of case questions of knowledge may be relevant in establishing the omission or, more properly, responsibility for failure to act. This type of relevance is not necessarily related to the *culpa* principle.[46] However, tribunals may set standards of 'due diligence' and the like, in respect of the activities, or failures to act, of particular organs of state.[47] Thus the 'subjective element' constitutes the type of duty, the actual object of imputation. In effect, since looking for specific evidence of a lack of proper care on the part of state organs is often a fruitless task, the issue becomes one of causation.[48] In the *Lighthouses* arbitration[49] between France and Greece one of the claims arose from the eviction of a French firm from their offices in Salonika and the subsequent loss of their stores in a fire which destroyed the temporary premises. The Permanent Court of Arbitration said:

> Even if one were inclined . . . to hold that Greece is in principle responsible for the consequences of that evacuation, one could not . . . admit a causal relationship between the damage caused by the fire, on the one part, and that following on the evacuation, on the other, so as to justify holding Greece liable for the disastrous effects of the fire . . . The damage was neither a foreseeable nor a normal consequence of the evacuation, nor attributable to any want of care on the part of Greece. All causal connection is lacking, and in those circumstances Claim No. 19 must be rejected.

In any case, as Judge Azevedo pointed out in his dissenting opinion in the *Corfu Channel* case,[50] the relations of objective responsibility and

[44] ICJ Reports (1949), 71–2, quoting Oppenheim (7th edn.), i. 311.
[45] ICJ Reports (1949), 127–8, also quoting Oppenheim.
[46] Cf. the *Corfu Channel* case, *supra*, p. 425. See also Lévy, 65 *RGDIP* (1961), 744–64.
[47] See generally *infra*, pp. 446 ff.
[48] Garcia Amador, *Yrbk. ILC* (1960), ii. 63.
[49] *RIAA* xii. 217–18; ILR 23 (1956), 352–3.
[50] ICJ Reports (1949), 85.

the *culpa* principle are very close:[51] the effect, at least, of the judgment was to place Albania under a duty to take reasonable care to discover activities of trespassers.

When a state engages in lawful activities, responsibility may be generated by *culpa* in the execution of the lawful measures.[52] The existence and extent of *culpa* may affect the measure of damages,[53] and, of course, due diligence, or liability for *faute* or *culpa*, may be stipulated for in treaty provisions.

6. *Intention and Motive*

The fact that an *ultra vires* act of an official is accompanied by malice on his part, i.e. an intention to cause harm, without regard to whether or not the law permits the act, does not affect the responsibility of his state.[54] Indeed, the principle of objective responsibility dictates the irrelevance of intention to harm, *dolus*, as a condition of liability: and yet general propositions of this sort should not lead to the conclusion that *dolus* cannot play a significant role in the law. Proof of *dolus* on the part of leading organs of the state will solve the problem of 'imputability' in the given case, and, in any case, the existence of a deliberate intent to injure may have an effect on remoteness of damage as well as helping to establish the breach of duty.[55] Malice may justify the award of 'penal' damages.[56]

Motive and intention are frequently a specific element in the definition of permitted conduct. Thus the rule is stated that expropriation of foreign property is unlawful if the object is that of political reprisal or retaliation.[57] Again, action ostensibly in collective defence against an aggressor will cease to be lawful if the state concerned in the action is proved to be intent on using the operation for purposes

[51] See Garcia Amador, *Yrbk. ILC* (1960), ii. 63.
[52] e.g. of sequestration of Italian property in Tunisia by the French Government after the defeat of Italy: *In re Rizzo*, ILR 22 (1955), 317 at 322. The Conciliation Commission said: 'the act contrary to international law is not the measure of sequestration, but an alleged lack of diligence on the part of the French State—or, more precisely, of him who was acting on its behalf—in the execution of the said measure . . .'. See also the *Ousset* claim, ibid. 312 at 314; the *Philadelphia-Girard National Bank* case (1929), *RIAA* viii. 67, 69; and *Yrbk. ILC* (1969), ii. 103 (paras. 6–8).
[53] See the cases of *Janes* (1926), *RIAA* iv. 82; *Baldwin* (1842), Moore, *Arbitrations*, iv. 3235; and *Rau* (1930), Whiteman, *Damages in International Law*, p. 26.
[54] e.g. *Baldwin* (1942), Moore, *Arbitrations*, iv. 3235; Meron, 33 *BY* (1957), 95–6.
[55] *Dix* case, *RIAA* ix. 119 at 121; cf. *Monnot* case, ibid. 232 at 233.
[56] See *infra*, pp. 460, 464.
[57] See *infra*, pp. 537–9.

of annexation.[58] Similarly, where conduct on its face unlawful is sought to be justified on the grounds of necessity or self-defence,[59] the intention of the actor is important, since it may remove all basis for the defences.[60]

7. *The Individuality of Issues:* the *Corfu Channel* case

At this stage it is perhaps necessary to stress that over-simplification of the problems, and too much reliance on general propositions about objective responsibility, *culpa*, and intention, can result in lack of finesse in approaching particular issues. Legal issues, particularly in disputes between states, have an individuality which resists a facile application of general rules. Much depends on the assignment of the burden of proof, the operation of principles of the law of evidence, the existence of acquiescence and estoppels, the nature of the *compromis*, and the precise nature of the relevant substantive rules or treaty provisions. This note of caution can be justified by reference to the *Lotus*,[61] *Corfu Channel*,[62] and *Fisheries*[63] cases in the International Court.

The most interesting of these is perhaps the *Corfu Channel* case.[64] The approach adopted by the majority of the Court fails to correspond neatly with either the *culpa* doctrine or the test of objective responsibility. 'Intention' is a question-begging category and appears in the case only in specialist roles. Thus, in the case of the British passage 'designed to affirm a right which had been unjustly denied' by Albania, much turned on the nature of the passage.[65] Taking all the circumstances into account, the Court held that the passage of two cruisers and two destroyers, through a part of the North Corfu Channel constituting Albanian territorial waters, was an innocent passage. As to the laying of the mines which damaged the destroyers *Saumarez* and *Volage*, the Court looked for evidence of knowledge of this on the part of Albania. The case also illustrates the interaction of the principles of proof and responsibility. The Court said:[66]

[58] See Brownlie, *International Law and the Use by Force by States*, pp. 408–9. See also *supra*, p. 194, on innocent passage through the territorial sea.

[59] See *infra*, p. 465.

[60] Of course, action in good faith is not necessarily justified by reason of the mistake as to necessity for action.

[61] *Supra*, pp. 250, 301.

[62] ICJ Reports (1949), 4.

[63] *Infra*, pp. 183 ff.

[64] See generally Brownlie, *International Law and the Use of Force by States*, pp. 283–9; Wilhelm, 15 *Ann. suisse* (1958), 116–30.

[65] ICJ Reports (1949), 30. The right was that of passage through an international strait: see ibid. 28–30.

[66] p. 18.

> . . . it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.
>
> On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence . . .
>
> The Court must examine therefore whether it has been established by means of indirect evidence that Albania has knowledge of mine-laying in her territorial waters independently of any connivance on her part in this operation. The proof may be drawn from inferences of fact, provided they leave *no room* for reasonable doubt. The elements of fact on which these inferences can be based may differ from those which are relevant to the question of connivance.

The decision raises another issue. At the time of the British mission 'designed to affirm a right', there had been no finding that the North Corfu Channel was an 'international strait',[67] and the question of passage for warships through the territorial sea, whether or not forming part of such a strait, was controversial. No attempt at peaceful settlement had been made, and the naval mission was an affirmation of what were, at the time, only *putative* rights.[68] Against this it could be said that Albania, by her policy of exclusion, supported on a previous occasion by fire from coastal batteries, had also adopted an *ex parte* view of her right to exclude warships. However, it is possible that in such a case there is a presumption in favour of the right of the coastal state; and, in any case, the British action on 22 October remained nonetheless a forcible affirmation of *putative* rights. The better course would have been to regard the naval mission as illegal,[69] and to consider whether the laying of mines without warning was a legal means of dealing with trespassers even for a small state with no navy of its own. It is probable that the nature of the *compromis* prevented such an approach, which would have avoided the necessity of holding that the naval mission was involved in an innocent passage as well as the

[67] See *supra*, p. 282.

[68] The status of the North Corfu Channel was very doubtful: see Brüel, *Festschrift für Rudolf Laun* (1953), 259 at 273, 276.

[69] See the diss. op. of Judges Azevedo, ICJ Reports (1949), 109; and Krylov, ibid. 75. Self-help remains self-help whichever view of the law on the subject of the action is subsequently upheld.

Court's unhappy assimilation of putative rights and legal rights, in a dispute which in part concerned the law applicable.

8. *Liability for Lawful Acts. Abuse of Rights*

It may happen that a rule provides for compensation for the consequences of acts which are not unlawful in the sense of being prohibited.[70] Thus, in the Convention on the High Seas of 1958, Article 22 provides for the boarding of foreign merchant ships by warships where there is reasonable ground for suspecting piracy and certain other activities. Paragraph 3 then provides: 'If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.' One is reminded here of the doctrine of incomplete privilege.[71]

Several systems of law know the doctrine of abuse of rights,[72] exemplified by Article 1912 of the Mexican Civil Code:[73] 'When damage is caused to another by the exercise of a right, there is an obligation to make it good if it is proved that the right was exercised only in order to cause the damage, without any advantage to the person entitled to the right.' This doctrine[74] has had limited support from the dicta of international tribunals.[75] In the case concerning *Certain German Interests in Polish Upper Silesia*[76] it was held that, after the peace treaty came into force and until the transfer of sovereignty over Upper Silesia, the right to dispose of state property in the territory remained with Germany.

[70] See Sørensen, 101 Hague *Recueil* (1960, III), 221–3; Quadri, 113 Hague *Recueil*, pp. 461–5.

[71] See *infra*, pp. 465–6. See also the Law of the Sea Convention, 1982, Art. 106.

[72] See Gutteridge, 5 *Camb. LJ* (1933), 22–45. See further the decision of the ILO Admin. Trib. in *McIntire* v. *F.A.O.* (1954), ILR 21 (1954), 356.

[73] Cf. Art. 226 of the German civil code.

[74] Generally, on abuse of rights in international law, see Oppenheim, i. 345–7; Lauterpacht, *The Function of Law in the International Community* (1933), 286–306; id., *Development*, pp. 162–5; Schwarzenberger, *International Law*, pp. 84–109; also in 42 *Grot. Soc.* (1956), 147–79; Cheng, *General Principles of Law*, pp. 121–36; Politis, 6 Hague *Recueil* (1925, I), 1–109; García Amador, 94 Hague *Recueil* (1958, II), 377–82; id., *Yrbk. ILC* (1960), ii. 58–60; Guggenheim, 74 Hague *Recueil* (1949, I), 249–54; Kiss, *L'Abus de droit en droit international* (1953); Fitzmaurice, 27 *BY* (1950), 12–14; 30 *BY* (1953), 53–4; 35 *BY* (1959), 210–16; Whiteman, v. 224–30; Ago, Second Report, UN Doc. A/CN.4/233, paras. 48, 49; Iluyomade, 16 *Haro. Int. LJ* (1975), 47–92; Taylor, 46 *BY* (1972–3), 323–52.

[75] Citations often involve *ex post facto* recruitment of arbitral awards, e.g. the *Portendick* claim (1843), Lapradelle and Politis, i. 512, and the collection of references to the principle of good faith. See also *Yrbk. ILC* (1953), ii. 219, para. 100.

[76] (1926), PCIJ, Ser. A, no. 7, p. 30.

Alienation would constitute a breach of her obligations if there was 'a misuse[77] of this right'. In the view of the Court German policy amounted to no more than the normal administration of public property. In the *Free Zones* case the Court held that French fiscal legislation applied in the free zones (which were in French territory), but that 'a reservation must be made as regards the case of abuse of a right, an abuse which, however, cannot be presumed by the Court'.[78] It is not unreasonable to regard the principle of abuse of rights as a general principle of law.[79] However, while it is easy to sympathize with exponents of the doctrine, the delimitation of its function is a matter of delicacy. After considering the work of the International Court, Lauterpacht observes:[80]

> These are but modest beginnings of a doctrine which is full of potentialities and which places a considerable power, not devoid of a legislative character, in the hands of a judicial tribunal. There is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused. The doctrine of abuse of rights is therefore an instrument which . . . must be wielded with studied restraint.

In some cases the doctrine explains the genesis of a rule of existing law, for example the principle that no state has a right to use or permit the use of its territory in such a manner as to cause injury by fumes to the territory of another.[81] Often it represents a plea for legislation or, which is nearly the same thing, the modification of rules to suit special circumstances. In general what is involved is the determination of the qualities of a particular category of permitted acts: is the power or privilege dependent on the presence of certain objectives? The presumption in the case of acts prima facie legal is that motive is irrelevant: but the law may provide otherwise. When the criteria of good faith, reasonableness, normal administration, and so on are provided by an existing legal rule, reference to 'abuse of rights' adds nothing. Similarly, in the case of international organizations, responsibility for

[77] The Court said: 'Such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement.'

[78] (1930), PICJ, Ser. A, no. 24, p. 12. See also *Free Zones* case (1932), PCIJ, Ser. A/B, no. 46, p. 167. References in sep. and diss. op. are as follows: ICJ Reports (1948), 79, 80; ibid. (1955), 120. Cf. Judge Anzilotti, *Electricity Company of Sofia* case (1939), PCIJ, Ser. A/B, no. 77, p. 98. A constant exponent of the doctrine was Judge Alvarez: ICJ Reports (1949), 47; ibid. (1950), 15; ibid. (1951), 149 ff.; ibid. (1952), 128–33.

[79] See Cheng and Lauterpacht, cited, n. 74, *supra*. See also Kiss, *L'Abus de droit*, pp. 193–6 (a general principle of international law).

[80] *Development*, p. 164. See also Schwarzenberger, 42 *Grot. Soc.* (1956), 147–79; Verzijl, *International Law in Historical Perspective*, (1968), i. 316–20.

[81] See the *Trail Smelter* arbitration (1941), *Ann. Digest* (1938–40), no. 104; *RIAA* iii. 1905. See also the *Corfu Channel* case, *supra*, p. 442.

responsibility for the wrongful acts of its servants.' Unreasonable acts of violence by police officers and a failure to take the appropriate steps to punish the culprits will also give rise to responsibility.[98] Except for the operation of the local remedies rule,[99] the distinction between higher and lower officials has no significance for the placing of responsibility on the state.[1] In each case it will be for the relevant rule of law applied to the particular facts to establish whether responsibility flows from the act of the official as such or from the insufficiency of the measures taken by other organs to deal with the consequences of the act of the official. In the *Rainbow Warrior* incident (1985) the French Government admitted its responsibility for the destruction by agents of the Ministry of Defence of the vessel *Rainbow Warrior* in Auckland harbour. The mediation of the UN Secretary-General resulted in a complex settlement which involved the payment of 7 million US dollars as compensation for the breach of New Zealand sovereignty.[2] The judgment of the International Court in the Merits phase of the *Nicaragua* case held the United States responsible for a pattern of hostile activities directed against Nicaragua and carried out by its agents.[3]

(ii) *Armed forces.* The same principles apply to this category of officials, but it is probably the case that a higher standard of prudence in their discipline and control is required, for reasons which are sufficiently obvious.[4] Commissioner Nielsen, in his opinion on the *Kling* claim,[5] said: 'In cases of this kind it is mistaken action, error in judgment, or reckless conduct of soldiers for which a government in a given case has been held responsible. The international precedents reveal the application of principles as to the very strict accountability for mistaken action.' A recent example of responsibility arising from mistaken but culpable action by units of the armed forces is the Soviet action in shooting down a Korean commercial aircraft (1983).[6]

[98] *Roper* claim (1927), *RIAA* iv. 145; *Pugh* claim (1933), *RIAA* ii. 1439.

[99] On which see *infra*, p. 494.

[1] See the *Massey* claim and *Way* claim, *ubi supra*; Schwarzenberger, *International Law*, pp. 617–18; Briggs, p. 697. For another opinion: Borchard, *Diplomatic Protection of Citizens Abroad* (1928), 185–90 (but see Briggs's comment).

[2] Ruling of the Secretary-General, 6 July 1986; *ILR* 74, 241; 26 *ILM* (1987), 1346.

[3] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, ICJ Reports (1986), 14 at 146–9.

[4] See Huber in the *Spanish Zone of Morocco* claims (1925), *RIAA* ii. 617 at 645; Freeman, 88 Hague *Recueil* (1955, II), 285. Cf. the *Caire* case (1929), *RIAA* v. 516 at 528–9. See also the *Chevreau* case (1931), *RIAA* ii. 1115; the *Naulilaa* case (1928), ibid. 1013; *Eis Claim*, ILR 30, 116; *Garcia and Garza* case, *RIAA* iv. 119; and the report of a League of Nations Commission of Inquiry, 1925, for which see Conwell-Evans, *The League Council in Action* (1929), 155–60; Garner, 20 *AJ* (1926), 337. See also Whiteman, viii. 825–30.

[5] (1930), *RIAA* iv. 575 at 579; Briggs, p. 686 and p. 689.

[6] See 22 *ILM* (1983), 1190–8, 1419; 54 *BY* (1983), 513.

(iii) *Federal units, provinces, and other internal divisions.*[7] A state cannot plead the principles of municipal law, including its constitution, in answer to an international claim.[8] Arbitral jurisprudence contains examples of the responsibility of federal states for acts of authorities of units of the federations.[9]

(iv) *The legislature.*[10] This organ is in normal circumstances a vital part of state organization and gives expression to official policies by its enactments. The problem specific to this category is to determine when the breach of duty entails responsibility. Commonly, in the case of injury to aliens, a claimant must establish damage consequent on the implementation of legislation or the omission to legislate.[11] However, it may happen that, particularly in the case of treaty obligations,[12] the acts and omissions of the legislature are without more creative of responsibility. If a treaty creates an obligation to incorporate certain rules in domestic law, failure to do so entails responsibility for breach of the treaty, Professor Schwarzenberger[13] observes:

> It is a matter for argument whether the mere existence of such legislation or only action under it constitutes the breach of an international obligation. Sufficient relevant *dicta* of the World Court exist to permit the conclusion that the mere existence of such legislation may constitute a sufficiently proximate threat of illegality to establish a claimant's legal interest in proceedings for at least a declaratory judgment.[14]

(v) *The judicature.*[15] The activity of judicial organs relates substantially to the rubric 'Denial of justice', which will be considered subsequently in Chapter XXIII on the treatment of aliens. However, it is

[7] See Accioly, 96 Hague *Recueil* (1959, I), 388–91; Schwarzenberger, *International Law*, i. (3rd edn.), 625–7; McNair, *Opinions*, i. 36–7.

[8] *Supra*, pp. 35–6.

[9] *Youmans* claim (1926), *RIAA* iv. 110; *Mallén* claim (1927), *RIAA* iv. 173; *Pellat* claim (1929), *RIAA* v. 534.

[10] See Sibert, 48 *RGDIP* (1941–5), 5–34; García Amador, 94 Hague *Recueil* (1958, II), 401–2; id., *Yrbk. ILC* (1956), ii. 182, 186; ibid. (1957), ii. 107, 108; Accioly, 96 Hague *Recueil* (1959, I), 374–5; McNair, *Opinions*, ii. 219–21; Schwarzenberger, *International Law* (3rd edn.), i. 614–15; Fitzmaurice, 92 Hague *Recueil* (1957, II), 89–90; Briggs, pp. 695–6; Guggenheim, ii. 7–9; Jiménez de Aréchaga, in Sorensen, pp. 544–6.

[11] See the *Mariposa* claim (1933), *RIAA* vi. 338 at 340–1.

[12] Where, on a reasonable construction of the treaty, a breach creates a claim without special damage. In any case, representations may be made and steps to obtain redress, *quia timet* may be taken. On the Panama Canal Tolls controversy between Great Britain and the United States, see McNair, *Law of Treaties* (1961), 547–50; Hackworth, vi. 59.

[13] *International Law*, p. 614.

[14] See ibid. 604–5.

[15] On the category 'judicial officer' see the *Way* claim (1928), *RIAA* iv. 391 at 400. Generally see Jiménez de Aréchaga, in Friedmann, Henkin, and Lissitzyn (eds.), *Transnational Law in a Changing Society* (1972), 171–87.

important to bear in mind, what is perhaps obvious, that the doings of courts may affect the responsibility of the state of the forum in other ways.[16] Thus in respect of the application of treaties McNair[17] states: '. . . a State has a right to delegate to its judicial department the application and interpretation of treaties. If, however, the courts commit errors in that task or decline to give effect to the treaty or are unable to do so because the necessary change in, or addition to, the national law has not been made, their judgments involve the State in a breach of treaty.'

(vi) Ultra vires *acts of organs and officials*.[18] It has long been apparent in the sphere of domestic law that acts of public authorities which are *ultra vires* should not by that token create immunity from legal consequences. In international law there are other reasons for disregarding a plea of illegality under domestic law. Moreover, the lack of express authority cannot be decisive as to the responsibility of the state. Arbitral jurisprudence and the majority of writers support the rule that states may be responsible for *ultra vires* acts of their officials committed within their apparent authority or general scope of authority.[19] An act of arrest by a police officer, in fact carrying out a private policy of revenge, but seeming to act in the role of police officer to the average observer, would be within the category. The rule accords generally with a regime of objective responsibility.

In the *Union Bridge Company* case[20] a British official of the Cape Government Railways appropriated neutral (American) property during the Second Boer War, mistakenly believing it was not neutral: the tribunal considered that liability was not affected by the official's mistake or the lack of intention on the part of the British authorities to

[16] In 1941 the Supreme Ct. of Eire assumed jurisdiction over certain Latvian and Estonian vessels over which the Soviet Government claimed ownership. The Soviet Government regarded the judgment as illegal and held the Irish Government responsible. See the *Rumava* [1942] Ir. R. 148, 171; *Ann. Digest*, 10 (1941–3), no. 20; and 75 *Irish LT* (1941), 215.

[17] *Law of Treaties*, p. 346.

[18] See Meron, 33 *BY* (1957), 85–114; García Amador, *Yrbk. ILC* (1957), ii. 107, 109–10; Accioly, 96 Hague *Recueil* (1959, I), 360–3; Briggs, pp. 616–17; Guggenheim, *ii*. 5–7; Anzilotti, *Cours*, i. 470–4; Freeman, 88 Hague *Recueil*, 290–2; Quadri, 113 Hague *Recueil* (1964, III), 465–8; *Yrbk. ILC* (1975), ii. 61–70.

[19] Meron, 33 *BY* (1957), 85–114; Jiménez de Aréchaga, in Sørensen, p. 548. See also the *Bases of Discussion* of the Conference for the Codification of International Law, 1930, for the views of governments and the proposals of the Preparatory Committee (see Meron, 33 *BY* (1957), 101–2). Basis no. 13 was adopted by the Third Committee of the Conference as Art. 8 (2): 'International responsibility is . . . incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State. International responsibility is, however, not incurred by a State if the official's lack of authority was so apparent that the foreigner should have been aware of it, and could, in consequence, have avoided the damage.'

[20] (1924), *RIAA* vi. 138; 19 *AJ* (1925), 215.

appropriate the material, stating that the conduct was within the general scope of duty of the official. In the *Caire* claim[21] a captain and a major in the Conventionist forces in control of Mexico had demanded money from M. Caire under threat of death, and had then ordered the shooting of their victim when the money was not forthcoming. In holding Mexico responsible for this act, Verzijl, President of the Commission, said:

> The State also bears an international responsibility for all acts committed by its officials or its organs which are delictual according to international law, regardless of whether the official or organ has acted within the limits of his competency or has exceeded those limits . . . However, in order to justify the admission of this objective responsibility[22] of the State for acts committed by its officials or organs outside their competence, it is necessary that they should have acted, at least apparently, as authorized officials or organs, or that, in acting, they should have used powers or measures appropriate to their official character . . .

In the *Youmans* case[23] the Commission stated: 'Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts.' It is not always easy to distinguish personal acts and acts within the scope of (apparent) authority. In the case of higher organs and officials the presumption will be that there was an act within the scope of authority.[24] Where the standard of conduct required is very high, as in the case of military leaders and cabinet ministers in relation to control of armed forces, it may be quite inappropriate to use the dichotomy of official and personal acts: here, as elsewhere,[25] much depends on the type of activity and the related consequences *in the particular case*.[26]

Students of the English rules as to the liability of employers for the torts of employees may well suspect that the concepts of 'apparent authority' and 'general scope of authority' are means to an end and are

[21] (1929), *RIAA* v. 516 at 530; *Ann. Digest*, 5 (1929–30), no. 91. For other examples of mistaken action see *supra*, p. 437.

[22] See *supra*, pp. 437 ff.

[23] (1926), *RIAA* iv. 110 at 116; 21 *AJ* (1927), 571 at 578; *Ann. Digest*, 3 (1925–6), no. 162.

[24] But see the *Benkley* case, Moore, *Arbitrations*, iii. 3018 (responsibility denied for the personal act of the governor of a Mexican state).

[25] See *supra*, pp. 435, 441.

[26] Cf. the finding of the International Military Tribunal for the Far East on the operations by the Japanese Kwantung Army at Nomonhan in 1939; judgment (Far Eastern Comm. text), 331–3; Brownlie, *International Law and the Use of Force by States*, pp. 210–11.

not to be examined too closely. It is not difficult to find cases in which the acts of state agents were clearly *ultra vires* and yet responsibility has been affirmed. *Youmans*[27] was such a case, where troops sent to protect aliens besieged by rioters joined in the attack, in which the aliens were killed. In some cases the decisions for responsibility may be buttressed by circumstances indicating negligence by superior officers. So in the *Zafiro*[28] the United States was held responsible for looting by the civilian crew of a merchant vessel employed as a supply vessel by American naval forces, under the command of a merchant captain who in turn was under the orders of an American naval officer. The tribunal emphasized the failure to exercise proper control in the circumstances.[29] What really matters, however, is the amount of control *which ought to have been exercised* in the particular circumstances, not the amount of actual control.[30]

(*c*) *Mob violence, insurrection, revolution, and civil war.*[31] The general principles considered below apply to a variety of situations involving acts of violence either by persons not acting as agents of the lawful government of a state, or by persons acting on behalf of a rival or candidate government set up by insurgents. The latter may be described as a '*de facto* government'. In the case of localized riots and mob violence, substantial neglect to take reasonable precautionary and preventive action and inattention amounting to official indifference or connivance will create responsibility for damage to foreign public and

[27] *Supra*, p. 451 n. 23.

[28] (1925), *RIAA* vi. 160; 20 *AJ* (1926), 385; *Ann. Digest*, 3 (1925–6), no. 161. See also the *Metzger* case (1903), *RIAA* x. 417; the *Roberts* case, ibid. ix. 204; the *Crossman* case, ibid. 356.

[29] Viz., the absence of civil or military government in Manila during the Spanish–American war. The tribunal might seem to overemphasize the need for failure to control, but the case is different from those in which unauthorized acts of armed forces occur within the area of established sovereignty of the state to which the armed forces belong: cf. the *Caire* case, *supra*.

[30] See *Case of Ireland against the United Kingdom*, Europ. Ct. of HR, 18 Jan. 1978, ILR 58, 190; Judgment, paras. 158–9; *Velasquez Rodriguez* case, Inter-Am. Ct. of HR, Judgment of 29 July 1988; the *Gordon* case (1930), *RIAA* iv. 586; 25 *AJ* (1931), 380; *Ann. Digest*, 5 (1929–30), no. 103 (army doctors at target practice with privately acquired pistol); and the *Morton* case, ibid. 428 (murder in a *cantina* by a drunken officer off duty); and cf. the *Mallén* case (1927), ibid. 173; 21 *AJ* (1927), 803; the *Henriquez* case, ibid. x. 727.

[31] See Ago, *Ybk. ILC* (1972), ii. 126–52; Report of the Commission, ibid. (1975), ii. 91–106; Accioly, 96 Hague *Recueil* (1959, I), 395–403; Schwarzenberger, *International Law* (3rd edn.), i. 627–30; Briggs, pp. 697–721; McNair, *Opinions*, ii. 238–73, 277; *British Digest*, vi. 175–99; Borchard, *Diplomatic Protection*, pp. 213–45; Harv. Research, 23 *AJ* (1929), Spec. Suppl., pp. 188–96; Oppenheim, i. 366–9; Silvanie, 33 *AJ* (1939), 78–103; Hackworth, v. 657–82; Eagleton, *Responsibility*, pp. 125–56; Whiteman, viii. 189–24, 830–7; de Visscher, *Les Effectivités du droit international public* (1967), 120–1; 8 *Canad. Ybk.* (1970), 356–7; Jiménez de Aréchaga in Sørensen, pp. 561–4; Akehurst, 43 *BY* (1968–9), 49–70; *Reperiare suisse*, iii. 1738–43; Verzijl, *International Law in Historical Perspective*, vi. 694–705; Brownlie, *System of the Law of Nations* (Pt. 1), 167–79; Rousseau, v. 73–5, 81–8.

private property in the area.[32] In the proceedings arising from the seizure of United States diplomatic and consular staff as hostages in Tehran, the International Court based responsibility for breaches of the law of diplomatic relations upon the failure of the Iranian authorities to control the militants (in the early phase) and also upon the adoption and approval of the acts of the militants (at the later stage).[33]

Lord McNair[34] extracts five principles from the reports of the legal advisers of the British Crown on the responsibility of lawful governments for the consequences of insurrection and rebellion. The first three principles are as follows:

(i) a State on whose territory an insurrection occurs is not responsible for loss or damage sustained by a foreigner unless it can be shown that the Government of that State was negligent in the use of, or in the failure to use, the forces at its disposal for the prevention or suppression of the insurrection;
(ii) this is a variable test, dependent on the circumstances of the insurrection;
(iii) such a State is not responsible for the damage resulting from military operations directed by its lawful government unless the damage was wanton or unnecessary, which appears to be substantially the same as the position of belligerent States in an international war.

These principles are substantially similar to those presented by writers of various nationalities. The general rule of non-responsibility[35] rests on the premisses that, even in a regime of objective responsibility, there must exist a normal capacity to act, and a major internal upheaval is tantamount to *force majeure*. This is straightforward enough, but uncertainty arises when the qualifications put upon the general rule are examined. At the outset it will be noted that the general rule and the qualifications are stated in respect of damage to

[32] *Ziat, Ben Kiran* claim, *RIAA* ii. 730; *Youmans* case, ibid. iv. 110; Whiteman, viii. 831 (claim against Libya); UK and Indonesia, Exchange of Notes, 1 Dec. 1966, *Treaty Series*, no. 34 (1967), Cmnd. 3277; Cole, 41 *BY* (1965–6), 390–2; Noyer case (1933), *RIAA* vi. 308; *Pinson* case (1928), *RIAA* v. 327; *Sarropoulos* v. *Bulgaria* (1927), 7 Recueil des décisions des tribunaux arbitraux mixtes, p. 47 at p. 50; *Ann. Digest*, 4 (1927–8), no. 162; Hackworth, v. 657–65.

[33] *Case Concerning United States Diplomatic and Consular Staff in Tehran*, ICJ Reports (1980), 3 at 29–30, 33–6.

[34] *Opinions*, ii. 245.

[35] See also Huber, *Spanish Zone of Morocco* claims (1924), *RIAA*, ii. 615 at 642; and *RIAA*, ii. 730. Cf. the *Home Missionary Society* case (1920), *RIAA* vi. 42 at 44; *Pinson* claim (1928), *RIAA* v. 327 (also for a discussion of the terms 'insurrection' and 'revolution'); *Sambiaggio* claim (1903), *RIAA* x. 500 (and see the index); *Volkmar* case (1903), *RIAA* ix. 317; *Santa Clara Estates Company* case (1903), ibid. 455; *Standard-Vacuum Oil Company* claim, ILR 30, 168; *Socony Vacuum Oil Company* claim, ILR 21 (1954), 55. Cf. also *Mossé* case, *RIAA* xiii. 486; *Treves* case, ibid. xiv. 262; *Levi* case, ibid. 272; *Fubini* case, ibid. 420. See also the *Gelbtrunk* claim, ibid. xv. 463.

justice. The second problem concerns the dependent state.[47] In the case where the putative dependent state cannot be regarded as having any degree of international personality[48] because of the extent of outside control, then the incidence of responsibility is no longer in question. In other cases a state may by treaty or otherwise assume international responsibility for another government.[49] In dealing with the *Spanish Zone of Morocco* claims[50] Huber said:

> . . . it would be extraordinary if, as a result of the establishment of the Protectorates, the responsibility incumbent upon Morocco in accordance with international law were to be diminished. If the responsibility has not been assumed by the protecting Power, it remains the burden of the protected State; in any case, it cannot have disappeared. Since the protected State is unable to act without an intermediary on the international level, and since every measure by which a third State sought to obtain respect for its rights from the Cherif, would inevitably have an equal effect upon the interests of the protecting Power, it is the latter who must bear the responsibility of the protected State, at least by way of vicarious liability . . . the responsibility of the protecting State . . . is based on the fact that it is that State alone which represents the protected State in international affairs . . .

However, in cases where the dependent state retains sufficient legal powers to maintain a separate personality and the right to conduct its own foreign relations, the incidence of responsibility will depend on the circumstances: here, if the suzerain,[51] or state in an analogous position, is responsible on the facts, the responsibility will not be vicarious or derivative.[52]

The principles relating to joint responsibility of states are as yet indistinct, and municipal analogies are unhelpful. A rule of joint and several liability in delict should certainly exist as a matter of principle, but practice is scarce.[53] Practice in the matter of reparation payments for illegal invasion and occupation rests on the assumption that Axis

[47] See Schwarzenberger, *International Law* (3rd edn.), i. 624–5.

[48] See *supra*, p. 74.

[49] The basis of responsibility may then rest either on the actual extinction of the personality of the protected state or on estoppel. Cf. *Studer (United States)* v. *Great Britain* (1925), *RIAA* vi. 149; *AJ* (1925), 790. See also Guggenheim, ii. 26–7. Cf. agreements for indemnification of the agent: *Zadek* v. *United States*, ILR 22 (1955), 336; *Oakland Truck Sales Inc.* v. *United States*, ibid. 24 (1957), 952.

[50] (1925), *RIAA* ii. 615 at 648–9. See also *Trochel* v. *State of Tunisia*, ILR 20 (1953), 47.

[51] See *supra*, p. 117.

[52] See Schwarzenberger, *International Law*, i. 624–5, and the *Broun* claim (1923), *RIAA* vi. 120 at 130–1. Conceivably there could exist a joint liability.

[53] See Brownlie, *System of the Law of Nations* (Pt. 1), 189–92. On the question of complicity see *Yrbk. ILC* (1978), ii. (Pt. 1), 52–60 (Ago, Seventh Report); ibid. (1978), ii. (Pt. 2), 98–105 (Report of the Commission); ibid. (1979), ii. (Pt. 1), 4–27 (Ago, Eighth Report); ibid. (1979), ii. (Pt. 2), 94–106 (Report of the Commission); Quigley, 57 *BY* (1986), 77–131; Case of *Nicaragua* v. *Honduras* (Merits), *Memorial of Nicaragua* (1989), Ch. 12.

countries were liable on the basis of individual causal contribution to damage and loss, unaffected by the existence of co-belligerency.[54] However, if there is joint participation in specific actions, for example where state A supplies planes and other material to state B for unlawful dropping of guerrillas and state B operates the aircraft, what is to be the position? Must a plaintiff proceed by making a joint claim against both tortfeasors, or against the operator of the aircraft for all the damage, or may it go against states A and B separately for proportions of damage? In the *Corfu Channel* case the Court was untroubled by the possibility that another state had laid the mines in Albanian waters, and, as compensation is the principal object of international claims, it would seem that, if a confederate were later identified in such a case, the joint tortfeasor would be immune from liability to pay compensation, though not perhaps from liability to measures of satisfaction.[55]

11. *The Types of Damage and the Forms and Functions of Reparation*[56]

In general. These subjects must be treated with caution, since the problems involved lead back to substantial issues as to the nature of responsibility and are far from being a mere appendix to the law of

[54] But cf. the *obiter dictum* of the US Court of Claims in *Anglo-Chinese Shipping Co. Ltd.* v. *United States*, ILR 22 (1955), 982 at 986. See also claims by the United Arab Republic in respect of the Suez attack in 1956, and claims against individual states involved in the joint occupation of Germany and Austria.

[55] In the case of several concurrent tortfeasors a tortfeasor sued separately will benefit from a reduction of damages: see the *Zafiro* (1925), *RIAA* vi. 160. See further Adam, *Les Organismes internationaux spécialisés* (1965), i, 119–23.

[56] See generally García Amador, *Yrbk. ILC* (1956), ii. 209–14; ibid. (1958), ii. 67–70; ibid. (1961), ii. 2–45; and ir. 94 Hague *Recueil* (1958, II), 462–87; Schwarzenberger, *International Law* (3rd edn.), i. 653–81; Cheng, *General Principles of Law*, pp. 233–40; Briggs, pp. 742–7; Eagleton, 39 *Yale LJ* (1929), 52–75; Kozhevnikov (ed.), *International Law* (n.d.), i 30–3. See further Whiteman, *Damages in International Law*, 3 vols. (1937–43); Reitzer, *La Réparation comme conséquence de l'acte illicite en droit international* (1938); Personnaz, *La Réparation du préjudice en droit international public* (1938); Ralston, *The Law and Procedure of International Tribunals* (1926), 241–69; id., Supplement (1936), 115–34; Jiménez de Aréchaga, in Sørensen, pp. 564–72; Przetacznik, 78 *RGDIP* (1974), 919–74; Verzijl, *International Law in Historical Perspective*, vi. 742–71; Subilia, *L'Allocation d'intérêts dans la jurisprudence internationale* (1972); Bollecker-Stern, *Le Préjudice dans la théorie de la responsabilité internationale* (1973); *Yrbk. ILC* (1980), ii. (Pt. 1), 107–29 (Riphagen); ibid. (1980), ii. 62–3 (Report of the Commission); ibid. (1981), ii. (Pt. 1), 79–101 (Riphagen, Second Report); ibid. (1981), ii. (Pt. 2), 142–5 (Report of the Commission); ibid. (1982), ii. (Pt. 1), 22–50 (Riphagen, Third Report); ibid. (1982), ii. (Pt. 2), 78–82 (Report of the Commission); ibid. (1983), ii. (Pt. 1), 3–24 (Riphagen, Fourth Report); ibid. (1983), ii. (Pt. 2), 40–3; ibid. (1984), ii. (Pt. 1), 1–4 (Riphagen, Fifth Report); ibid. (1984), ii. (Pt. 2), 99–104 (Report of the Commission); ibid. (1985), ii. (Pt. 1), 3–19 (Riphagen, Sixth Report); ibid. (1985), ii. (Pt. 2), 24–7 (Report of the Commission); ibid. (1986), ii. (Pt. 2), 35–9 (Report of the Commission); Rousseau, v. 209–50; Gray, *Judicial Remedies in International Law* (1987).

state responsibility. Other aspects of the subject also justify circumspection. In the first place, while the science of responsibility in municipal law is helpful, in the sphere of international relations there are to be found important elements, including the rules as to satisfaction,[57] which would look strange in the law of tort and contract. Secondly, the terminology of the subject is in disorder, a fact which in part reflects differences of opinion on matters of substance. The usage adopted by the present writer is as follows. The term 'breach of duty' denotes an illegal act or omission, an 'injury' in the broad sense. 'Damage' denotes loss, *damnum*, whether this is a financial quantification of physical injury or damage, or of other consequences of a breach of duty. 'Reparation' will be used to refer to all measures which a plaintiff may expect to be taken by a defendant state: payment of compensation (or restitution), an apology, the punishment of the individuals responsible, the taking of steps to prevent a recurrence of the breach of duty, and any other forms of satisfaction. 'Compensation' will be used to describe reparation in the narrow sense of the payment of money as a 'valuation' of the wrong done. Confusion arises in the case where compensation is paid for a breach of duty which is actionable without proof of particular items of financial loss, for example the violation of diplomatic or consular immunities, trespass in the territorial sea, or illegal arrest of a vessel on the high seas. The award of compensation for such illegal acts is sometimes described as 'moral' or 'political' reparation, terms connected with concepts of 'moral' and 'political' injury, and it is this terminology which creates confusion, since the 'injury' is a breach of *legal* duty in such cases and the only special feature is the absence of a neat method of quantifying loss, as there is, relatively speaking, in the case of claims relating to death, personal injuries, and damage to property.[58] It may happen that the particular rule of law makes loss to individuals or some other form of 'special damage' a condition of responsibility.

In the ordinary type of claim the object is similar to that of an action in the municipal sphere. In the *Chorzów Factory* (Indemnity) case[59] the Permanent Court declared that:

> 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, as 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. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

[57] See *infra*, p. 460.

[58] Even then, the 'compensation' awarded for a broken limb is an exaction for the legal wrong involved, and not all aspects of the injury, e.g. pain and suffering, can be 'quantified' in simple terms of compensation and equivalence.

[59] (1928), PCIJ, Ser. A, no. 17, p. 47.

The normal type of claim has these objectives and primarily aims at the protection of the interests of the claimant state: it is thus to be distinguished from the type of case in which the individual state is seeking to establish its *locus standi* in order to protect legal interests not identifiable with that state alone or with any existing state.[60] Before attention is turned to the principal topics of restitution and compensation, two other forms of remedy associated with the normal type of claim, but having features of their own, must be considered, viz., the declaratory judgment and satisfaction.

Declaratory judgments.[61] In some cases a declaration by a court as to the illegality of the act of the defendant state constitutes a measure of satisfaction (or reparation in the broad sense).[62] However, international tribunals may be empowered or may assume the power to give a declaratory judgment in cases where this is, or is considered by the parties to be, the appropriate and constructive method of dealing with a dispute and the object is not primarily to give 'satisfaction' for a wrong received.[63] While the International Court is unwilling to deal with hypothetical issues and questions formulated in the abstract, it has been willing to give declaratory judgments,[64] and in some cases, for example those concerning title to territory, it may in any case be appropriate to give a declaratory rather than an executory form to the judgment.[65] The applicant states in the *South West Africa* cases[66] were seeking a declaration that certain legislation affecting the territory was

[60] See *infra*, pp. 466–73.

[61] See Lauterpacht, *Development*, pp. 205–6, 250–2; García Amador, *Yrbk. ILC* (1961), ii. 14–16; Gross, 58 *AJ* (1964), 419–23; C. de Visscher, *Aspects récents du droit procédural de la Cour internationale de justice* (1965), 187–94; Shihata, *The Power of the International Court to determine its own Jurisdiction* (1965), 216–19; Borchard, 29 *AJ* (1935), 488–92; Ritter, *Ann. français* (1975), 278–93; Gray, *Judicial Remedies*, pp. 96–107.

[62] See *infra*.

[63] See *Arabian-American Oil Co.* v. *Saudi Arabia*, ILR 27, 117 at 144–6.

[64] See *Certain German Interests in Polish Upper Silesia* (1926), PCIJ, Ser. A, no. 7, p. 18; and the *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory)* (1927), ibid., no. 13, pp. 20, 21. And cf. the *Mavrommatis* case (1925), ibid., no. 5, p. 51, and see *infra*, p. 461 on the *Corfu Channel* case.

[65] See the *Eastern Greenland* case (1933), PCIJ, Ser. A/B, no. 53, pp. 23, 24, 75.

[66] ICJ Reports (1962), 319; ibid. (1966), 6; and see *infra*.

contrary to the obligations of South Africa under the Mandate. In the *Case Concerning United States Diplomatic and Consular Staff in Tehran*[67] the judgment of the International Court included several declaratory prescriptions involving the termination of the unlawful detention of the persons concerned. In the *Nicaragua* case[68] the judgment at the Merits phase contained an injunctive declaration 'that the United States is under a duty immediately to cease and refrain from all such acts as may constitute breaches of the foregoing legal obligations'.

Satisfaction.[69] Satisfaction may be defined as any measure which the author of a breach of duty is bound to take under customary law or under an agreement by the parties to a dispute, apart from restitution or compensation. Satisfaction is an aspect of reparation in the broad sense. However, it is not easy to distinguish between pecuniary satisfaction and compensation in the case of breaches of duty not resulting in death, personal injuries, or damage to or loss of property. Claims of this sort are commonly expressed as a claim for an 'indemnity'. If there is a distinction, it would seem to be in the intention behind the demand. If it is predominantly that of seeking a token of regret and acknowledgment of wrongdoing then it is a matter of satisfaction. The objects of satisfaction are three, which are often cumulative: apologies or other acknowledgment of wrongdoing by means of a salute to the flag or payment of an indemnity; the punishment of the individuals concerned; and the taking of measures to prevent a recurrence of the harm. In the *I'm Alone*[70] case the Canadian Government complained of the sinking on the high seas of a liquor-smuggling vessel of Canadian registration by a United States coastguard vessel, as a climax to a hot pursuit which commenced outside United States territorial waters but within the inspection zone provided for in the 'Liquor Treaty' between Great Britain and the United States. The Canadian claim was referred to Commissioners appointed under the Convention concerned, and in their final report the following appears:

We find as a fact that, from September, 1928, down to the date when she was

[67] ICJ Reports (1980), 3 at 44–5.

[68] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986), 14 at 146–9. See also the joint diss. op. of four judges in the *Nuclear Tests Cases (Australia v. France)*, ICJ Reports (1974), 253 at 312–19.

[69] See García Amador, *Yrbk. ILC* (1961), ii. 19–28; Schwarzenberger, *International Law* (3rd edn.), i. 658–9; Jiménez de Aréchaga, in Sørensen, p. 572; Whiteman, viii. 1211–14. See further Bissonnette, *La Satisfaction comme mode de réparation en droit international* (1952); Rousseau, v. 218–20; Przetacznik, 78 *RGDIP* (1974), 919 at 944–74.

[70] Whiteman, *Damages*, i. 155–7; *RIAA* iii. 1609. See Hyde, 29 *AJ* (1935), 296–301; Fitzmaurice, 17 *BY* (1936), 82–111. See also the *Borchgrave* case (Prelim. Objections) (1937), PCIJ, Ser. A/B, no. 72 and no. 73, p. 5; and the *Panay* incident, *Documents on International Affairs* (*RIIA*, 1937), 757; Hackworth, v. 687–9.

sunk, the *I'm Alone*, although a British ship of Canadian registry, was *de facto* owned, controlled, and at the critical times, managed, and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert who were entirely, or nearly so, citizens of the United States, and who employed her for the purposes mentioned[71] . . . The Commissioners consider that, in view of the facts, no compensation ought to be paid in respect of the loss of the ship or the cargo.

The act of sinking the ship, however, by officers of the United States Coast Guard, was, as we have already indicated, an unlawful act; and the Commissioners consider that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong the United States should pay the sum of $25,000 to His Majesty's Canadian Government; and they recommend accordingly.

A number of ancillary questions remain. It is sometimes suggested that an affront to the honour of a state or intention to harm are preconditions for a demand for satisfaction, but this is very doubtful. Such elements may enter into the assessment of compensation,[72] as also may the failure to undertake measures to prevent a recurrence of the harm or to punish those responsible. Measures demanded by way of apology should today take forms which are not humiliating and excessive.[73]

There is no evidence of a rule that satisfaction is alternative to and, on being given, exclusive of a right to compensation for the breach of duty.[74] In the *Corfu Channel* case[75] the Court declared that the minesweeping operation by the Royal Navy in Albania's territorial waters was a violation of her sovereignty, and then stated: 'This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.' In spite of the terminology, this is not an instance of satisfaction in the usual meaning of the word: the declaration is that of a court and not a party, and is *alternative* to compensation. No pecuniary compensation had been asked for by Albania, and a declaration of this kind was therefore the only means of giving an effective decision on the matter.[76]

[71] i.e. smuggling liquor.

[72] See *infra*, p. 463, on 'penal damages'.

[73] Cf. Stowell, *Intervention in International Law* (1921), 21–35, on measures of 'expiation' demanded in the past, and, on the *Tellini* incident, see Eagleton, 19 *AJ* (1925), 304.

[74] No mandatory rule, that is: parties to a dispute may agree otherwise.

[75] ICJ Reports (1949), 4 at 35. See also the *Carthage* and the *Manouba* (1913), Hague Court Reports, i. 329 at 335 and 341 at 349; *RIAA* xi. 457 at 460, and 471 at 476. And see Parry, 90 Hague *Recueil* (1956, II), 674–93.

[76] Cf. Judge Azevedo, dissenting, ICJ Reports (1949), 113–14; *Aerial Incident* case (Prelim. Objections), ICJ Reports (1959), 127 at 129–31; and see Sørensen, 101 Hague *Recueil* (1960, III), 230.

Restitution in kind and restitution in integrum.[77] To achieve the object of reparation tribunals may give 'legal restitution', in the form of a declaration that an offending treaty, or act of the executive, legislature, or judicature, is invalid.[78] Such action can be classified either as a genuine application of the principle of *restitutio in integrum* or as an aspect of satisfaction. Restitution in kind, specific restitution, is exceptional, and the vast majority of claims conventions and *compromis* (agreements to submit to arbitration) provide for the adjudication of pecuniary claims only.[79] Writers[80] and, from time to time, governments and tribunals[81] assert a right to specific restitution, but, while it is safe to assume that this form of redress has a place in the law, it is difficult to state the conditions of its application with any certainty. In the disputes arising out of the Mexican oil expropriations of 1938 and the Iranian measures in respect of the oil industry in 1951, some of the states the corporations of which were affected[82] demanded restitution, but eventually agreed to compensation. In many situations it is clear that a remedy which accommodates the internal competence of governments,[83] while giving redress to those adversely affected, is to be preferred: restitution is too inflexible. At the same time it will not do to encourage the purchase of impunity by the payment of damages and specific restitution will be appropriate in certain cases. In exceptional cases customary law or treaty may create obligations to which is annexed a power to demand specific restitution. Thus in the *Chorzów*

[77] García Amador, *Yrbk. ILC* (1961), ii. 17–18; Baade, 54 *AJ* (1960), 814–30; Wortley, 55 *AJ* (1961), 680–3; Schwarzenberger, *International Law* (3rd edn.), i. 656–7; Jiménez de Aréchaga in Sørensen, pp. 565–7; Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 285–6; Rousseau, v. 214–18; Gray, *Judicial Remedies*, pp. 95–6; Schachter, 178 Hague *Recueil* (1982, V), 190–1.

[78] Such action is unusual, but see the *Martini* case (1930), *RIAA* ii. 975 at 1002. See also Robertson, *Human Rights in Europe*, p. 85; McNair, *Opinions*, i. 78; and the *Barcelona Traction* case, ICJ Reports (1964), 6; (Second Phase), ICJ Reports (1970), 4; *South West Africa* cases (Second Phase), ICJ Reports (1966), 6 (with particular reference to the laws of apartheid).

[79] See also the General Act for the Pacific Settlement of International Disputes 1928, Art. 32. A revised General Act came into force on 20 Sept. 1950, 71 UNTS, p. 101.

[80] See especially Mann, 48 *BY* (1976–7), 1–65 at 2–5; Verzijl, *International Law in Historical Perspective*, vi. 742.

[81] See the *Walter Fletcher Smith* claim (1927), *RIAA* ii. 913 at 918; Whiteman, *Damages*, ii. 1409; *Central Rhodope Forests* (1933), *RIAA* iii. 1405 at 1432; *Ann. Digest*, 7 (1933–4), no. 39 at p. 99; Whiteman, ii. 1460 at 1483. In the latter two awards restitution was not considered appropriate for practical reasons. See further Whiteman, iii. 1581–2; and cf. the *Interhandel* case, ICJ Reports (1959), 6. See also *BP Exploration Company (Libya) Ltd.* v. *Government of Libyan Arab Republic*, ILR 53, 297 (1973) (*restitutio in integrum* not favoured); *Texaco* v. *Government of the Libyan Arab Republic*, ILR 53, 389 (1977) (*restitutio* affirmed as a principle); *LIAMCO* v. *Government of Libyan Arab Republic*, ILR 62, 140 (1977) (*restitutio* not favoured).

[82] In the first case the UK and the Netherlands; in the second the UK.

[83] See *supra*, pp. 107 ff., on sovereignty and jurisdiction; *infra*, pp. 532–3, 547, on acquired rights and concessions.

Factory case[84] the Permanent Court took the view that, the purpose of the Geneva Convention of 1922 being to maintain the economic status quo in Polish Upper Silesia, restitution was the 'natural redress' for violation of or failure to observe the treaty provisions. There is much that is uncertain, but it would seem that territorial disputes may be settled by specific restitution, although the declaratory form of judgments of the International Court masks the element of 'restitution'.[85] In imposing obligations on aggressor states to make reparation for the results of illegal occupation, the victims may be justified in requiring restitution of 'objects of artistic, historical or archaeological value belonging to the cultural heritage of the [retro]-ceded territory'.[86]

Restitution has appeared in rather different contexts from those considered above. Peace treaties normally deal with the detailed problems arising from war measures of requisition, confiscation, and sequestration, and the solutions propounded may not depend in all cases on the illegality of the original seizure.[87] 'Restitution' was also used to describe the exercise of powers by the Allies to gather in monetary gold, looted by the Germans, to be used in satisfying reparation claims.[88] Finally, by virtue of their joint assumption of supreme power in Germany in 1945, the Allied powers enacted legislation concerning restitution and compensation by means of a civil remedy within German law, to victims of the National Socialist regime.[89]

[84] (1927), PCIJ, Ser. A, no. 8, p. 28. See also ibid., no. 17, p. 47. *Italian Rep.* v. *Fed. Rep. of Germany*, ILR 29, 442 at 474–6; and *Amoco International Finance* v. *Iran*, 15 Iran–US CTR 189 at 246–8 (Chamber Three, 14 July 1987). See further Baade, 54 *AJ* (1960), 822–7. It is normal to release vessels mistakenly captured in prize in neutral waters (see Whiteman, *Damages*, ii. 1139), but there may be no obligation to replace foreign property requisitioned in wartime in kind (Hackworth, vi. 649). But cf. on the obligations of unlawful belligerents, Art. 78 of the Italian Peace Treaty, and the *Duc de Guise* claim, ILR 18 (1951), 423.

[85] See generally *supra*, p. 458, and in particular the *Eastern Greenland* case and the *Temple* case. In the latter the Court found, *inter alia*, that Thailand was obliged to restore to Cambodia any sculpture, stelae, fragments of monuments, and pottery which might have been removed by the Thai authorities.

[86] See the Italian Peace Treaty, Arts. 12, 37, 78 and Annex XIV, para. 4, and cf. the *Franco-Ethiopian Railway Co.* claim (1956), ILR 24 (1957), 602. See further Pt. III of the Final Act of the Paris Conference on Reparations, para. A (text: ILR 20 (1953), 441).

[87] See Fitzmaurice, 73 Hague *Recueil* (1948, II), 324 ff.; Whiteman, viii. 1203–11. Cf. the Settlement Conv., 1952–4, on which see the *Apostolidis* case, ILR 34, 219.

[88] See Treaty Series, no. 56 (1947), Cmnd. 7173; and the arbitration on *Gold Looted by Germany from Rome in 1943*, *RIAA* xii. 13; ILR 20 (1953), 441; and the *Monetary Gold* case, ICJ Reports (1954), 19. See also, on the liquidation of assets in neutral countries, Simpson, 34 *BY* (1958), 374–84.

[89] See Bentwich, 32 *BY* (1955–6), 204–17.

12. *Compensation, Damages (Dommages-Intérêts)*

The general aspects of reparation and satisfaction have been considered already, and it remains to refer to certain problems concerning assessment of pecuniary compensation.[90] International tribunals face the same problems as other tribunals in dealing with indirect damages and deal with the issues in much the same way.[91] It is important to appreciate, even if the tribunals are often obscure in this respect, the intrinsic connection between 'remoteness' and 'measure of damages', on the one hand, and, on the other, the rules of substance. The particular context of a breach of duty, i.e. the nature of the duty itself and the mode of breach, may determine the approach to the question of damages.[92] For the sake of argument, it may be that the rule of law is simply that if harm is caused by negligence in the course of some lawful activity then compensation is payable.[93] The scale of compensation will in such a case be less ambitious than that applicable to activity unlawful at birth, for example, unprovoked attacks on the vessels of another state. There is some debate as to the possibility of penal damages in international law.[94] The problem concerns in part the granting of compensation for non-political loss, i.e. breach of legal duties as such, for example, by unlawful intrusion into the territorial sea. Compensation in such cases is not correctly described as 'penal damages'.[95] However, it is true to say that tribunals are cautious in approaching cases of non-material loss,[96] and there is no simple solution to the problem of assessment. Thus in the *Janes* claim[97] the United States presented a claim based on a failure by Mexico to take adequate steps to apprehend the murderer of an American citizen. The award saw liability in terms of the damage caused to the individ-

[90] See the literature cited *supra*, p. 457; and further Salvioli, 28 Hague *Recueil* (1929, III), 235–86; Yntema, 24 *Columbia LR* (1924), 34–53; *Fisheries* case, Pleadings, I, p. 101.

[91] See Schwarzenberger, *International Law*, i. 664–81; Cheng, *General Principles of Law*, pp. 233–40.

[92] Cf. Jennings, 37 *BY* (1961), 156–82; Salvioli, 28 Hague *Recueil* (1929, III), 268; and the *Dix* case, *RIAA* ix. 119, 121. On causation see also Cheng, *General Principles of Law*, pp. 241–53.

[93] See *supra*, pp. 441, 444. Cf. the rule that expropriation of alien property is lawful if compensation is paid: *infra*, pp. 532 ff.

[94] See García Amador, *Yrbk. ILC* (1956), ii. 211–12; Schwarzenberger, *International Law*, i. 673–4.

[95] Cf. *supra*, on the *I'm Alone* and *Corfu Channel* cases. See the *Lusitania* claims (1923), 18 *AJ* (1924), 361 at 368; and Cheng, *General Principles of Law*, pp. 235–8.

[96] See Parry, 90 Hague *Recueil* (1956, II), 669 ff.

[97] (1925), *RIAA* iv. 82. See Brierly, 9 *BY* (1928), 42–9; Jennings, 121 Hague *Recueil* (1967, II), 496. Another problem is the effect of waiver of a right to restitution on damages: see Salvioli, 28 Hague *Recueil* (1929, III), 238; Jennings, 37 *BY*, p. 172.

uals concerned rather than to the United States,[98] and gave compensation to the relatives of Janes for the 'indignity' caused by the non-punishment of the criminal. However, the United States was making no claim apart from that 'on behalf of' the dependants of Janes, and the Claims Commission was concerned to translate the Mexican breach of duty into damages. The problem was, as it were, one of quantification rather than ascription.

13. *Justifications*[99]

Classifications of 'defences' or 'justifications' are conventional and not very logical. Separate treatment of quantities as 'defences' should denote the existence of a legal burden of proof on the proponents of defences, but this is not always the case. Moreover, in international law the incidence of the burdens of proof is not dependent on a plaintiff-defendant relation as found in systems of municipal law.[1] Again, emphasis on objective responsibility and the specialized nature of many groups of rules narrows the scope of generally accepted defences. Extinctive prescription, and acquiescence and waiver, are usually considered as issues of admissibility of claims.[2]

Tribunals accept defences of assumption of risk of the particular harm[3] and contributory negligence.[4] These defences have operated in practice in cases concerning harm to aliens, and the conduct of the individuals concerned has been treated as assumption of risk and so on. The defences also apply, of course, where conduct of organs of the claimant state amounts to assumption of risk or contributory

[98] See Art. I of the General Claims Conv. of 1923, set out in Briggs, p. 639.

[99] See Guggenheim, ii. 57–63; Schwarzenberger, *International Law*, i. 641–6; García Amador, *Yrbk. ILC* (1956), ii. 108–9; McNair, *Opinions*, ii. 221–37; Whiteman, viii. 837–50; *Yrbk. ILC* (1978), ii. (Pt. 1), 61–227; ibid. (1979), ii. (Pt. 1), 27–66 (Ago, Eighth Report); ibid. (1979), ii. (Pt. 2), 106–36 (Report of the Commission); ibid. (1980), ii. (Pt. 1), 14–70 (Ago, Eighth Report, Add.); ibid. (1980), ii. (Pt. 2), 34–62 (Report of the Commission); ibid. (1981), ii. (Pt. 2), 142–3 (Report of the Commission); Rousseau, v. 89–96; Jagota, 16 *Neths. Yrbk.* (1985), 249–77; Elagab, *The Legality of Non-forcible Counter-Measures in International Law* (1988); Alland, in Spinedi and Simma (eds.), *United Nations Codification of State Responsibility* (1987), pp. 143–95; Malanczuk, ibid. 197–286; Barboza, in *Essays in Honour of Manfred Lachs* (1984), 27–42; Salmon, ibid. 235–70. On the invalidity and termination of treaties see *infra*, pp. 613 ff. On the relations to *jus cogens*, *infra*, pp. 512–15.

[1] See Lauterpacht, *Development*, pp. 363–7.

[2] See *infra*, pp. 504–5. Claimant's wrongdoing may be regarded also as a matter of admissibility: see *infra*, p. 506.

[3] *Home Missionary Society* case (1920), *RIAA* vi. 42. Cf. *Yukon Lumber* case (1913), *RIAA* vi. 17 at 20. See also Whiteman, viii. 842–5; Brownlie, *Festschrift für F.A. Mann* (1977), 309–19.

[4] *Davis* case (1903), *RIAA* ix. 460; Salmon, in *Essays in Honour of Roberto Ago* (1987), iii 371–99.

negligence. *Force majeure*[5] will apply to acts of war[6] and under certain conditions to harm caused by insurrection and civil war.[7] However, necessity as an omnibus category probably does not exist, and its availability as a defence depends on specialized rules.[8] In particular contexts in the law of war military necessity may be pleaded, and the right of angary allows requisition of ships belonging to aliens lying within the jurisdiction in time of war or other public danger.[9] The use of force in self-defence, collective self-defence, and defence of third states now involves a specific legal regime, though it related in the past to the ambulatory principle of self-preservation.[10] Armed reprisals are clearly excluded by the law of the United Nations Charter, but the propriety of economic reprisals and the plea of economic necessity is still a matter of controversy.[11] A useful principle is that of incomplete privilege according to which the defendant is privileged to commit what would otherwise be a trespass, but upon the terms that he shall compensate the plaintiff for any damage caused.[12] The right of angary is conditioned in this way. However, attractive as such a doctrine might be in municipal law, in international relations it would encourage too many breaches of the peace if widely adopted.

14: *The Nature of a Legal Interest: Locus Standi*[13]

The types of international claim considered so far in this chapter involve direct harm to the legal rights of the plaintiff state in a context

[5] See UN Secretariat Study, ST/LEG/13, 27 June 1977 (390 pp.).

[6] *American Electric and Manufacturing Co.* case, *RIAA* ix. 145; *Russian Indemnity* case (1912), *RIAA* xi. 421 at 443; and the *Lighthouses* arbitration (1956), ILR 23 (1956), 354; *RIAA* xii. 220 at 242. Cf. *Kelley* claim (1930), *RIAA* iv. 608; *Chevreau* case (1930), *RIAA* ii. 1113 at 1123. On special problems affecting contracts by state enterprises see Mann, 9 *ICLQ* (1960), 691–4; Domke, 53 *AJ* (1959), 788–806; and Riad, 108 Hague *Recueil* (1963, I), 646–52.

[7] *Spanish Zone of Morocco* claims (1924), *RIAA* ii. 615 at 642. See further *supra*, pp. 452–4.

[8] Jiménez de Aréchaga in Sorensen, pp. 542–4. But cf. Cheng, *General Principles of Law*, pp. 73–4, 223–31.

[9] McNair, *Opinions*, iii. 398.

[10] See Brownlie, *International Law and the Use of Force by States*; id., 37 *BY* (1961), 183–268; Bowett, *Self-Defence in International Law* (1958). On the use of force to enforce laws in a contiguous zone see *supra*, p. 205. Cf. Cheng, *General Principles of Law*, pp. 69–102.

[11] See Zoller, *Peacetime Unilateral Remedies* (1984); Elagab, *The Legality of Non-forcible Counter-Measures in International Law* (1988).

[12] Described as such in American doctrine on the law of tort: Harper, James and Gray, *The Law of Torts* (2nd edn., 1986), i. 71–6; *Vincent* v. *Lake Erie Transportation Company* (1910), 109 Minn. 456; Lawson and Markesinis, *Tortious Liability for Unintentional Harm in the Common Law and the Civil Law* (1982), i. 21–2. Statements in Oppenheim, i. 298, 343 n. 2, contain a similar doctrine. See also Ross, *A Textbook of International Law* (1947), 248.

[13] See Mbaye, 209 Hague *Recueil* (1988, II), 227–341.

of delict, but it can happen that individual states may ground a claim either in a broad concept of legal interest or in special conditions which give the individual state *locus standi* in respect of legal interests of other entities. In the *South West Africa* cases[14] Ethiopia and Liberia made applications to the International Court in which the Court was asked to affirm the status of South West Africa as a territory under mandate, and to declare that South Africa had violated various articles of the Mandate Agreement and Article 22 of the Covenant of the League of Nations in consequence of certain aspects of her administration of South West Africa and, in particular, of the practice of apartheid. To found the jurisdiction of the Court the applications relied on Article 7 of the Mandate and Article 37[15] of the Statute of the Court, and the Union of South Africa, in its objections to the jurisdiction, submitted that Ethiopia and Liberia had no *locus standi* in the proceedings. Article 7 of the Mandate provides, in part:

> The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice . . .

Apart from the issue as to survival of jurisdiction of that Court by reason of Article 37 of the Statute of the present Court, South Africa argued that neither Ethiopia nor Liberia was 'another Member of the League of Nations' as required for *locus standi* by Article 7 of the Mandate. The Court rejected this argument as contrary to the meaning of the article.[16] Another objection to the jurisdiction rested on the proposition that the dispute brought before the Court by the applicants was not a dispute as envisaged in Article 7, in particular because it did not affect any material interests of the applicant states or their nationals. As a matter of interpretation of Article 7 the Court rejected this argument also:[17]

> For the manifest scope and purport of the provisions of this Article indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the

[14] *South West Africa* cases (Prelim. Objections), ICJ Reports (1962), 319; ILR 37, 3. See Verzijl, 11 *Neths. Int. L.R.* (1963), 1–25; and the literature cited *infra*.

[15] This part of the argument based on Art. 37 is not relevant to the subject at present under discussion. See *infra*, p. 722.

[16] ICJ Reports (1962), 335–42. Emphasis was placed on the importance of effective judicial protection of the 'sacred trust of civilization'.

[17] Ibid. 343.

inhabitants of the Mandated Territory,[18] and toward the League of Nations and its Members.

Having rejected these and other South African preliminary objections, the Court held that it had jurisdiction to decide the merits of the dispute.[19] In his separate opinion Judge Jessup[20] argued at length that 'international law has long recognized that States may have legal interests in matters which do not affect their financial, economic, or other "material", or, say, "physical" or tangible interests', and referred to provisions for settlement of disputes in minorities treaties, the Genocide Convention, and the Constitution of the International Labour Organization, cases in which all states had a legal interest in the protection of general interests of mankind.

This highly interesting decision, by a narrow majority, can of course be confined to the specific issue of the interpretation of Article 7 of the Mandate Agreement. It is significant that the dissenting judges were much more cautious on the nature of a legal interest. Thus President Winiarski expressed himself as follows:[21]

> The relevant words of Article 7 cannot be interpreted in such a way as to conflict with the general rule of procedure according to which the Applicant State must have the capacity to institute the proceedings, that is to say, a subjective right, a real and existing individual interest which is legally protected. 'No interest, no action': this old tag expresses in a simplified, but, on the whole, correct form the rule . . . of international law. We have seen it in the *Mavrommatis* case.[22] In the *Wimbledon* case[23] the Permanent Court of International Justice met the objection raised by Germany by saying . . . that 'each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags' . . . [the Applicants] assert that they have a sufficient legal interest . . .: 'a legal interest in seeing to it through judicial process that the sacred trust of civilization created by the Mandate is not violated'. But such a legally protected interest has not been conferred on them by an international instrument . . .

Subsequently the view of the dissenting judges was to prevail. In the *South West Africa* cases (Second Phase),[24] contrary to the expectations of those appearing before the Court, the merits were not dealt with. There had been certain changes in the membership of the Court, and the minority of 1962 now appeared as a majority.[25] The view of the majority in 1966 was that the question of the legal interest of the applicants had not been finally settled in the first phase of the proceedings. A fine distinction was drawn between the right to invoke a jurisdictional clause and the question of legal interest, the latter being an issue of merits.[26] The Court disagreed with the view that the issue of legal interest was a question of admissibility disposed of in 1962. Even if the issue were treated as one of admissibility it would fall to be dealt with at the second phase.[27] In the event the Court treated the issue of legal interest as one of merits. In the view of the 'minority' of seven judges the consequence was to violate the principle of *res judicata* by reopening a question settled at the first phase.

On the matter of the legal interest of the applicants the Court took up the general position of the minority on the Court in 1962. It is important to record precisely what the Court in 1966 said on the issue of legal interest. The Court was concerned with the interpretation of a particular instrument, the Mandate for South West Africa, and refused to apply the teleological principle of interpretation of treaties.[28] As a matter of interpretation, individual states only had a legal interest in respect of certain provisions of the Mandate characterized by the Court as the 'special interests' provisions, for example those concerning freedom for missionaries who were nationals of members of the League of Nations to enter and reside in the territory for the purpose of prosecuting their calling.[29] The applicants were not invoking interests protected by such provisions but referred to various provisions classified by the Court as 'conduct' provisions in respect of which the only supervision provided for was through the political organs of the League of Nations.[30]

Aside from the issue of interpretation of the relevant instrument,

[18] See further Judge Bustamante, sep. op., ibid. 355–6, 374, 378, 380; and Verzijl, 11 *Neths. Int. LR* (1963), at 25.

[19] By 8 votes to 7.

[20] ICJ Reports (1962), 424–33.

[21] Ibid. 455–7. See also the joint diss. op. of Spender and Fitzmaurice, pp. 547–9; and the diss. op. of Morelli, pp. 569–71.

[22] (1925), PCIJ, Ser. A, no. 5.

[23] (1923), PCIJ, Ser. A, no. 1, p. 20.

[24] ICJ Reports (1966), 6; ILR 37, 243. For comment see Cheng, *Curr. Leg. Problems* (1967), 181–212; Katz, *The Relevance of International Adjudication* (1968), ch. 4; Higgins, 42 *Int. Affairs* (1966), 573–99; Falk, 21 *Int. Organization* (1967), 1–24; Jennings, 121 Hague *Recueil* (1967, II), 507–11; Nisot, 3 *Revue belge* (1967), 24–36; de Visscher, *Aspects récents du droit procédural de la Cour internationale de justice*, pp. 17–28; Gross, 120 Hague *Recueil* (1967, I), 375–84; Dugard, 83 *SALJ* (1966), 429–60; Fleming, 5 *Canad. Yrbk.* (1967), 241–52. See also on the concept of *actio popularis*, Seidl-Hohenveldern, *Comunicazioni e studi*, 14 (1975), 803–13; Schwelb, 2 *Israel Yrbk. of Human Rights* (1972), 46–56.

[25] The decision was by 7 votes, together with the casting vote of the President (Spender, Fitzmaurice, Winiarski, Spiropoulos, Morelli, Gros, and Van Wyk, the *ad hoc* judge for South Africa). The 'minority' of seven judges consisted of Wellington Koo, Koretsky, Tanaka, Jessup, Padilla Nervo, Forster, and Mbanefo, the *ad hoc* judge for Ethiopia and Liberia.

[26] ICJ Reports (1966), 36–8.

[27] pp. 42–3.

[28] pp. 35, 48. On this principle see *infra*, p. 631.

[29] pp. 19–23, 31–2, 43–4.

[30] On the issue of supervision see *infra*, p. 648.

the Court made certain statements of general application. In considering the argument that interpretation of the Mandate should proceed in the light of the necessity for effectiveness in the system of supervision, the Court said:[31]

> Looked at in another way moreover, the argument amounts to a plea that the Court should allow the equivalent of an '*actio popularis*', or right resident in any member of a community to take legal action in vindication of a public interest. But, although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present . . .

It is important to notice that the dissenting judges (the 1962 majority view) did not assert the existence of such a general principle. The difference of view consisted of two principal elements: (*a*) the minority of 1966 did not regard judicial supervision, as opposed to supervision by political organs, as very exceptional, and consequently were more prone to interpret the relevant provisions to the effect that individual states had an interest in observance of the instrument concerned; (*b*) the minority of 1966 were prepared to regard the common interest of the contracting parties in enforcement of a certain type of multilateral treaty as a normal feature of international law and relations and, in the process of interpretation, not to be ruled out as an eccentric possibility.[32]

The difference between the two sides of the Court is virtually one of presumption and style of interpretation in approaching the economic and social aspects of international relations. The Court in 1966 took an empirical view of legal interest as a general issue and refused to restrict the concept, as a matter of general principle, to provisions relating to a material or tangible object:[33]

> Next, it may be said that a legal right or interest need not necessarily relate to anything material or 'tangible', and can be infringed even though no prejudice of a material kind has been suffered. In this connection, the provisions of certain treaties and other international instruments of a humanitarian character, and the terms of various arbitral and judicial decisions, are cited as indicating that, for instance, States may be entitled to uphold some general principle even though the particular contravention of it alleged has not affected their own material interests;—that again, States may have a legal interest in vindicating a principle of international law, even though they have, in the given case, suffered no material prejudice, or ask only for token damages. Without attempting to discuss how far, and in what particular circumstances,

[31] p. 47.
[32] See Wellington Koo, ICJ Reports (1966), 225–9; Koretsky, pp. 242–8; Tanaka, pp. 251–4; Jessup, pp. 352–88; Padilla Nervo, pp. 461–4; Forster, pp. 478–82; Mbanefo, pp. 501–5.
[33] pp. 32–3. Cf. Winiarski, quoted *supra*.

these things might be true, it suffices to point out that, in holding that the Applicants in the present case could only have had a legal right or interest in the 'special interests' provisions of the Mandate, the Court does not in any way do so merely because these relate to a material or tangible object. Nor, in holding that no legal right or interest exists for the Applicants, individually as States, in respect of the 'conduct' provisions, does the Court do so because any such right or interest would not have a material or tangible object. The Court simply holds that such rights or interest, in order to exist, must be clearly vested in those who claim them, by some text or instrument, or rule of law;—and that in the present case, none were ever vested in individual members of the League under any of the relevant instruments, or as a constituent part of the mandates system as a whole, or otherwise.

Very similar issues were raised by the *Northern Cameroons* case (Preliminary Objections),[34] arising from an application by the Cameroons of 30 May 1961 which requested the Court to declare that the United Kingdom, as administering authority for the Cameroons, failed to fulfil its obligations under the Trusteeship Agreement relating to that territory. On 21 April 1961 the General Assembly of the United Nations approved the results of a plebiscite in the Northern Cameroons and declared that British administration should terminate on 1 June 1961, when it would become a province of the Federation of Nigeria. The background of the application was the dissatisfaction on the part of the Cameroons Government with the manner in which preparations for the plebiscite were made and a belief that maladministration had resulted in a plebiscite which favoured union with Nigeria and not the Cameroons. The application was based on Article 19 of the Trusteeship Agreement (which was still in force when the application was made), a provision similar to Article 7 of the Mandate Agreement for South West Africa.[35] The Court held that there was a dispute in existence, thus disposing of the preliminary objections of the United Kingdom.[36] However, having established the *right* to exercise jurisdiction, the Court went on to decide against the *propriety* of exercising jurisdiction in this case. Since the Cameroons was not seeking reparation or a finding which would invalidate the union with Nigeria, the issue was 'remote from reality' in the Court's view. The Court said:[37]

> The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical

[34] ICJ Reports (1963), 15; 58 *AJ*, p. 488; ILR 35, 353; and see Gross, 58 *AJ* (1964), 415–31; Johnson, 13 *ICLQ* (1964), 1143–92; Verzijl, 11 *Neths. Int. LR* (1964), 25–33.
[35] *Supra*, p. 467.
[36] ICJ Reports (1963), 27. On the definition of a 'dispute' see *infra* on admissibility.
[37] Ibid., pp. 33–4. See also the sep. op. of Fitzmaurice, pp. 97–100.

consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function.

A part of the judgment in the *Cameroons* case was devoted to the question whether in the case it would be proper to give a declaratory judgment. The Court thought not, since the treaty in question—the Trusteeship Agreement—was no longer in force and there was no opportunity for a future act of interpretation or application in accordance with the judgment.[38] It is not easy to justify this refusal in the light of the declaration in the *Corfu Channel* case[39] on the illegality of Operation Retail (in regard to which Albania did not ask for any reparation), and several dissenting judges thought that the *Corfu Channel* case should have been followed.[40] More difficult is the determination of the difference between the *Cameroons* and *South West Africa* cases in regard to the nature of a legal interest. In this respect the two adjudication clauses involved were identical, though, as adjudication clauses in different contexts, they might call for different interpretations.[41] In his dissenting opinion in the *South West Africa* cases (Second Phase)[42] Judge Jessup stated that, since the applicants were in effect asking for a declaratory judgment and not an award of damages for their individual benefit, after the decision in 1962 they were entitled to a declaratory judgment without any further showing of interest.[43] On this view the only distinction between the two cases is that the legal and political situation in the *Cameroons* case had precluded any pertinent pronouncement by the court. In the *Nuclear Tests* case (*Australia* v. *France*)[44] four judges were of the opinion that the purpose of the claim was to obtain a declaratory judgment. The majority of the judges thought otherwise and, in the light of a French undertaking not to continue tests, held that the dispute had disappeared.

In these cases much turns on the interpretation of the relevant adjudication clause, the definition of dispute, and notions of judicial propriety. However, assuming that the hurdles of jurisdiction,

[38] Ibid. 37. See also Wellington Koo, sep. op., p. 41; Fitzmaurice, sep. op., p. 97.

[39] ICJ Reports (1949), 4 at 36. See further *supra*, p. 461. See also the *Right of Passage* case: ICJ Reports (1960), 6 and Gross, 58 *AJ* (1964), 427–8.

[40] See ICJ Reports (1963), 150–1 (Badawi), 170, 180 (Bustamante), and 196 (Bebe a Don). The suggested method of distinguishing the *Corfu Channel* case in the sep. op. of Fitzmaurice, ibid. 98 n. 2, is attractive but not conclusive. See also the sep. op. of Morelli, pp. 140–1.

[41] The majority judgment (see p. 35) in substance ignored this aspect of things. See, however, the sep. op. of Spender, ibid. 65–73, and the diss. op. of Bustamante, pp. 156 ff.

[42] ICJ Reports (1966), 328.

[43] He quotes from the sep. op. of Fitzmaurice in the *Cameroons* case, pp. 99, 100.

[44] ICJ Reports (1974), 253; joint diss. op. at pp. 312–21; and see Ritter, *Ann. français* (1975), 28–93.

admissibility,[45] and propriety are surmounted, there is no inherent limitation of the concept of legal interest to 'material' interests. In this respect generalization is to be avoided, and the law is still developing. Thus states acting in collective self-defence, or a war of sanction against an aggressor, would seem to have a claim for costs and losses, although the evidence is not as yet very abundant.[46] 'Protective' claims in respect of 'dependent' peoples may have special features; for example, a tribunal should be reluctant to reject a claim on account of prescription or laches of the protecting sovereign.[47] Such claims, and the type of legal interest which they represent, may be founded on the principle of self-determination[48] as a part of *jus cogens*[49] and on the General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples.[50]

15. *Causes of Action*[51]

As a practical matter it is important to establish the precise subject of the particular legal dispute. In diplomatic correspondence it is helpful if the complainant state indicates with reasonable clarity what it is complaining about, and in particular, whether a legal demand is being advanced as opposed to a mere remonstrance or request for reparation or political action irrespective of the legal issues (as may happen). As a question of instituting proceedings before an international tribunal, the relevant special agreement or application employed to start proceedings must indicate the subject of the dispute and the parties.[52] In the case of proceedings by application the precise issue will be isolated

[45] See *infra*, ch. XXI.

[46] See Brownlie, *International Law and the Use of Force by States*, p. 148. Cf. McNair, 17 *BY* (1936), 150 at 157, where he says of the General Treaty for the Renunciation of War (Kellogg–Briand Pact): 'it is a reasonable view, though I cannot assert it to be an established opinion, that a breach of the pact is a legal wrong not merely against the victim of the resort to armed force but also against the other signatories of the Pact.'

[47] See the *Cayuga Indians* case (1926), *RIAA* vi. 173 at 189. See *supra*, p. 60 and *infra*, p. 505; on the European Conv. of Human Rights and the European Court of Human Rights, *infra*, pp. 574–5, 587 ff.

[48] *Infra*, pp. 595–8.

[49] *Infra*, pp. 512–15.

[50] *Infra*, p. 596.

[51] See generally Brownlie, 50 *BY* (1979), 13–41; and also in *System of the Law of Nations* (Pt. 1), 53–88. The practical relevance of the topic is exemplified by the issues in the *Nicaragua* case, with particular reference to the effect of the multilateral treaty reservation forming part of the US Decl. accepting the jurisdiction of the Court: ICJ Reports (1986), 14 at 29–38; Judge Ago, sep. op., pp. 182–4; Judge Sette-Camara, sep. op., pp. 192–200; Judge Ni, sep. op., pp. 201–11; Judge Oda, diss. op., pp. 215–19; Judge Schwebel, diss. op., pp. 296–306; Judge Jennings, diss. op., pp. 529–36.

[52] See Art. 40 of the Statute of the International Court. See the comment by Mann, 46 *BY* (1972–3), 504–5, referring to the *Norwegian Loans* case, ICJ Reports (1957), 9.

by the tribunal in the light of the pleadings in general and the final submissions in particular.[53] There are no rigid forms of action in international law but the definition of the cause of action may have significance beyond the exercise, just noticed, by which a tribunal decides what it has to decide on the merits.

(*a*) Objections to jurisdiction *ratione temporis* or based upon the reserved domain of domestic jurisdiction require consideration of what is the subject of the dispute.[54]

(*b*) A tribunal may have to apply the principle of *res judicata* and thus decide whether in previous proceedings a particular issue was disposed of finally and without possibility of revision in proceedings affecting the same general subject-matter.[55]

(*c*) The operation of the rule of admissibility of claims requiring prior exhaustion of local remedies in certain cases may call for careful examination of the nature of the dispute as presented to the relevant municipal court and the dispute as presented on the international plane. It must be decided whether local remedies were available in respect of the particular harms complained of.[56] In the same connection a tribunal must consider whether the issue is exclusively one of national law.[57]

(*d*) In presenting the merits of a claim there may be some advantage in relating the evidence to more than one category of unlawful activity. Thus in the *Barcelona Traction* case[58] Belgium presented the general pattern of action by the Spanish courts and administrative authorities as amounting to a despoliation of the property of the Barcelona Traction Company. There was no expropriation or direct forced transfer as such, but the effect of wrongfully entertaining and enforcing bankruptcy proceedings, as alleged, and enabling a private Spanish group to purchase the assets of the Barcelona Traction group at a ridiculously low price, as alleged, was to bring about a despoliation, an unlawful deprivation of property. The facts relied upon were presented in terms of four legal categories: abuse of rights; usurpation of jurisdiction; denial of justice *lato sensu*; denial of justice *stricto sensu*. The claims for damage and reparation were not apportioned in relation to these heads separately but to each and all of them. In the *Nuclear Tests* cases[59] the applicant states had some difficulty in relating the deposit of radioactive fall-out to existing legal categories.[60]

[53] Cf. *Fisheries* case, ICJ Reports (1951), 126; *Interhandel* case, ibid. (1959), 19.

[54] *Right of Passage* case (Merits), ICJ Reports (1960), 32–6.

[55] See Rosenne, *The Law and Practice of the International Court* (1985), ii. 623–30.

[56] See Read. diss. op., *Norwegian Loans* case, ICJ Reports (1957), 98–100; Lauterpacht, sep. op., ibid. 39.

[57] See Lauterpacht, sep. op., ibid. 36–8.

[58] ICJ Reports (1970), 4 at 15–25, Final Submissions, preamble, and ss. I–V. See also Tanaka, sep. op., pp. 146, 153. There may also be certain hazards in this type of presentation since the abuse of rights content in the *Barcelona* case seemed to contradict certain other positions.

The concept of causes of action also concerns two other issues. First, the requirement that the applicant state establish a legal interest may be described in terms of a need to show a cause of action.[61] Secondly, there is a relatively unexplored territory reminiscent of the problems in the common law of relating the form of action to the heads of damage. For example, in the English law of torts it is easier to obtain recovery for financial loss if this can be presented as a head of 'damage' related to a recognized head of 'liability', such as nuisance, or presented as the damages flowing from an acceptable type of loss, such as negligence causing physical harm. In international claims comparable issues have arisen. Thus, there is an interaction between the availability of local remedies and the type of harm which can be the subject of an international claim. Thus it may happen that a contract (governed by a system of private law) is broken by a diplomatic agent or government agency for which immunity from the local jurisdiction is claimed and in respect of which no remedy may exist in the national law of the state of origin. In such a case the state of the nationality of the other party to the contract will have a claim, arising from the breach of contract, on the international plane. Such transposed causes of action are difficult to characterize.[62]

16. *Ultra-hazardous Activities*

Many systems of municipal law contain rules creating 'absolute' or relatively strict liability for failure to control operations which create a serious or unusual risk of harm to others. Such rules are based, in part at least, upon principles of loss distribution and liability imposed upon the effective (insured) defendant. It is the general opinion that international law at present lacks such a principle,[63] although Dr Jenks[64] has proposed that the law be developed on the basis of a Declaration of

[59] *Australia* v. *France*, ICJ Reports (1974), 253; *New Zealand* v. *France*, ibid. 457.

[60] See, in particular the *Pleadings, Nuclear Tests* cases, 2 vols. (*Australia* v. *France*), I, p. 14; Handl, 69 *AJ* (1975), 50–76.

[61] See Jennings, 121 Hague *Recueil* (1967, II), 507–11.

[62] See Jessup, sep. op., *Barcelona Traction* case (Second Phase), ICJ Reports (1970), 168. Compare the items of loss in the *Janes* case, *supra*, p. 464; the *General Electric Company* claim, ILR 30, 140 at 142–3; and the *Singer* claim, ibid. 187 at 197.

[63] Sørensen, p. 539.

[64] 117 Hague *Recueil* (1966, I), 105 at 176–96. See also Goldie, 14 *ICLQ* (1965), 1189–264; Quadri, 113 Hague *Recueil* (1964, III), 468–71; Whiteman, viii. 763–9; Dupuy, *La Responsabilité internationale des etats pour les dommages d'origine technologique et industrielle* (1976).

Legal Principles Governing Ultra-hazardous Activities Generally which would be adopted by the United Nations General Assembly. Caution is required in accepting the statement that the existing law lacks such a principle. Confusion arises because the operation of the normal principles of state responsibility may create liability for a great variety of dangerous activities on state territory or emanating from it. In truth the division between fault liability and strict liability is not as sharp as it is said to be in the textbooks of municipal law. It follows that the regime of objective responsibility in international law provides some measure of protection in respect of dangerous activities. In any event the International Law Commission has been working on the topic of 'international liability for injurious consequences arising out of arts not prohibited by international law'.[65]

Particular problems have been dealt with in multilateral conventions. Thus, absolute liability has been recognized in respect of nuclear installations[66] and the operation of nuclear ships.[67] This liability exists as a civil liability under the applicable system of municipal law. The precise rules governing harm caused by objects launched into space have been agreed in the form of the Convention on International Liability for Damage Caused by Space Objects of 1972.[68]

[65] See the Report of the Commission on the work of its 39th session, 1987; *Yrbk. I.L.C.* (1987) ii (Pt. II), 39–49; McCaffrey, 82 *AJ* (1988), 150–1; Akehurst, 16 *Neths. Yrbk.* (1985), 3–16; Pinto, ibid. 17–48; Boyle, 39 *I.C.L.Q.* (1990), 1–26.

[66] Paris Conv. on Third Party Liability in the Field of Nuclear Energy, 1960; 55 *AJ* (1961), 1082; Brussels Conv. Suppl. to the Paris Conv.; 2 *ILM* (1963), 685; Vienna Conv. on Civil Liability for Nuclear Damage; ibid. 727. See further Hardy, 36 *BY* (1960), 223–49; id., 10 *ICLQ* (1961), 739–59; Arangio-Ruiz, 107 Hague *Recueil* (1962, III), 503 at 575–630; and Cigoj, 14 *ICLQ* (1965), 809–44.

[67] Brussels Conv. on Liability of Operators of Nuclear Ships, 1962; 57 *AJ* (1963), 268.

[68] See UNGA Resol. 2777 (XXVI) of 29 Nov. 1971; and 10 *ILM* (1971), 965.

CHAPTER XXI

THE ADMISSIBILITY OF STATE CLAIMS

1. *Introductory*

A STATE presenting an international claim to another state, either in diplomatic exchanges or before an international tribunal, has to establish its qualifications for making the claim, and the continuing viability of the claim itself, before the merits of the claim come into question.[1] In the case where the claim is presented before a tribunal the preliminary objections may be classified as follows.[2] Objections to the jurisdiction, if successful, stop all proceedings in the case, since they strike at the competence of the tribunal to give rulings as to the merits or admissibility of the claim. An objection to the substantive admissibility of a claim invites the tribunal to reject the claim on a ground distinct from the merits—for example, undue delay in presenting the claim. In normal cases the question of admissibility can only be approached when jurisdiction has been assumed, and issues as to admissibility, especially those concerning the nationality of the claimant and the exhaustion of local remedies, may be closely connected with the merits of the case. Even if a claim is not rejected on grounds of lack of jurisdiction or inadmissibility, a tribunal may decline to exercise its jurisdiction on grounds of judicial propriety:[3] this was the outcome of the *Cameroons* case.[4]

[1] Generally see Witenberg, 41 Hague *Recueil* (1932, III), 5–132.

[2] See Fitzmaurice, 34 *BY* (1958), 12–14; id., sep. op. in the *Cameroons* case, ICJ Reports (1963), 100 ff.; Rosenne, *The Law and Practice of the International Court* (1985), 296–313; Winiarski, diss. op. in the *South West Africa* cases, ICJ Reports (1962), 449; Morelli, diss. op., ibid. 573–4; Bustamante, diss. op. in the *Cameroons* case, ICJ Reports (1963), 180–1; and Shihata, *The Power of the International Court to Determine its Own Jurisdiction* (1965), 107–12.

[3] See Fitzmaurice, 34 *BY* (1958), 21–2, 36–9; sep. op. in the *Cameroons* case, ICJ Reports (1963), 100–8; Rosenne, *Law and Practice*, pp. 256–7. Fitzmaurice, ICJ Reports (1963), 103, describes questions of propriety as 'of a wholly antecedent or, as it were, "pre-preliminary" character'. See also Bustamante, ibid. 181–3; Bebe a Don, pp. 189 ff.

[4] *Supra*, p. 471. See also Gross, 58 *AJ* (1964), 415 at 423–9. The Court, ICJ Reports (1963), 28, did not find it necessary to deal with the issue of admissibility.