

COLLEGE OF LAW

**DEPARTMENT OF PUBLIC, CONSTITUTIONAL AND INTERNATIONAL
LAW**

INTERNATIONAL LAW

LCP401H

Tutorial Letter 102/3/2010

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Dear Student

The aim of this tutorial letter is to give you feedback on some of the activities included in your study guide. You will therefore be in a position to assess your answers. We hope that this tutorial letter will clear up any difficulties which you may have had with these sections of the work. A few of the activities are straightforward and have been indicated as self-study. However, you are always welcome to contact us if you feel uncertain about answering them.

1 . GUIDELINES ON ACTIVITIES IN SECTION A OF THE STUDY GUIDE

TOPIC I: THE DEVELOPMENT AND NATURE OF INTERNATIONAL LAW

Practical exercise 1, p 7

In this exercise you have been asked to write an essay which includes the main points we have given you. We will not write the essay for you and there is not one single perfect answer. You must do this yourself, because it is only through practice that you will learn to write well-structured, clear and accurate essays. Make sure that your essay contains an introduction and a conclusion, and that the main body is divided into subheadings to keep your ideas and arguments focused and in a logical sequence. If you are not sure whether your essay meets the required standard, you may send it to us for comment.

Practical exercise 2, p 12

The emergence of states: The concepts “state” and “statehood” are discussed in detail later in the module when we deal with the international legal personality. Important at this stage is that the emergence of states as separate entities (with legal personalities separate from those of their respective subjects) and with their own governments (which exercise authority over a particular territory) kick-started and influenced the **development of international law** in a number of ways. First, the concept of state sovereignty was born. State sovereignty means that the state may decide what to allow within its borders without interference from other states. This was a particularly strong principle which persists as one of the pivotal rules of international law (see, for example, articles 2(4) and 2(7) of the UN Charter), although concerns for the protection of human rights may have relaxed its strict meaning. Secondly (and perhaps more obviously) these entities have to interact with one another on a daily basis – hence the *raison d’être* of the constantly evolving international law rules.

The international organisation: In order to achieve a stated common purpose (provided it is not prohibited by international law), states may choose to group themselves in various organisations. Such an organisation acquires a separate personality of its own (see *Reparations for Injuries Suffered in the Service of the United Nations* 1949 ICJ Rep 174), and its purpose and capacities are circumscribed by the states which have founded it. Examples of such organisations are the United Nations, which provides an international forum for the discussion of issues of interest to all member states and the maintenance of international peace and security, and the World Trade Organisation, under whose auspices a framework for the conduct of inter-state trade has been developed. We discuss international organisations in detail under the topic of international legal personality.

Ideologies that shape our world: Essentially, international law is a dynamic field, which changes with the shifting needs of the members of the international community. For example, the emergence of the individual as a 'quasi-subject' of international law arose after the international community had realised that it could not allow a repetition of the atrocities committed during the two world wars. International human rights law gained prominence, the concept of strict state sovereignty eroded further, and individuals gained the right to, for example, petition international human rights bodies. A further related development is the emergence of international criminal law – and the idea that states should assist one another in bringing individual perpetrators of war crimes and crimes against humanity to justice.

Further examples are listed on pp 4-5 of the study guide. Can you think of more examples? Return to this exercise once you have completed the course to add more examples.

Positivism and natural law: Positivists are also known as black letter lawyers. Generally, they believe in and apply the law as it has been positivised (written down) in its sources (eg in legislation). Positivists tend to separate law from morality, thus they only follow the written letter of the law. In the context of international law they would argue that international law is based on consent alone, as it has been decreed by states. The advantage of the positivist law theories is that they create certainty and allow for the objective identification of all international law rules.

Natural law followers, on the other hand, believe that we are all bound by a higher law. Initially this was seen as divine law. The early naturalists were influenced by the doctrines of canon law (principally the law of the Catholic Church). Hugo de Groot, a 17th century jurist, was the first to sever the link between divine law and natural law. At the risk of oversimplification, it may be said that natural law is the universal law of eternal application which is founded on human reason and is inseparable from morality. This law is one of higher order. It is not made – it is discovered. It exists and applies universally. The natural law followers would criticise the view that international law is based on consent alone, and they would point out that there are international law rules which can only be explained with reference to a source which is above and beyond consent.

Natural law philosophers such as Suarez, Gentili and De Groot were prominent during 16th and 17th centuries. The positivist movement (headed by jurists such as Van Bynkershoek) gained momentum from the mid-18th century onwards. The inviolability of state sovereignty and the principle that states are only bound by those rules to which they have consented, continued to triumph during the 20th century. The International Human Rights movement, which gained impetus after World War II, has been influenced by the theories of natural law.

The differences between national law and international law: National law operates within the territory of one state, governs the relationships between its subjects (on the one hand), and the relationship between those subjects and the state on the other hand. The rules of national law are binding on each and every subject within the territory of that state. Depending on the nature of the legal system, these binding legal rules are developed by the courts or promulgated in legislative codes by a body authorised to do so (or a combination of the two).

International law consists of rules governing the relationship between states. These rules are created mostly by consent. In other words states are bound by them because they have agreed to be so bound: They choose to enter into treaties or to follow a particular practice that could develop into a rule of customary international law. Thus, unlike national law, international law knows no central legislator and no executive authority. The differences are briefly summarised in the table on page 9 of the study guide.

Why the United Nations is not a legislative body: The General Assembly (GA) of the UN has the powers to adopt recommendations, but these recommendations do not have binding force in the way domestic legislation is binding upon the subjects of the state concerned. UN members may also enter into treaties among themselves, but the provisions of these treaties are only binding on the states who have consented to be parties to them. No state can be forced to enter into a treaty. (In this sense one may say that treaties are comparable to contracts.)

The differences between the International Court of Justice (ICJ) and domestic courts: Only states may appear in contentious proceedings before the ICJ. Individuals have no standing to do so. In addition, the jurisdiction of the ICJ is based on the consent of states to be party to the dispute. Furthermore, the rule of *nemo iudex in sua causa* does not apply to these proceedings and there is no precedent system. Unlike the ICJ, domestic courts exercise jurisdiction within the territory of a given state, over its subjects, who have no say as to who will hear their dispute (in a sense that a subject cannot choose a judge sympathetic to their cause). Depending on the type of legal system in that state, the system of precedent may apply.

The different systems of sanctions in domestic and international law: National law provides for an executive machinery, such as the police, to ensure compliance with its rules. In international law there is no body vested with the automatic authority to impose sanctions on states when they do not comply with the rules of international law.

The Security Council (SC) of the United Nations (UN) may in certain narrowly defined circumstances recommend that sanctions be imposed on a recalcitrant state, or even take binding decisions under Chapter VII of the Charter to the effect that such sanctions should be imposed. But this is a far cry from the fully developed enforcement mechanisms found in national law.

The definition of international law: International law is the body of legal rules which governs the relationships between states and international organisations.

Practical exercise 3, p 13

You should not find this exercise difficult. It tests whether you understand the definitions and explanations of some of the above-mentioned concepts, because it is not enough simply to repeat them verbatim. You need to be able to write a critical essay in which you use the definitions and explanations to clarify your arguments. If you have tried and failed to do the exercise, please do contact us. We will be happy to look at any draft essays you have written.

Practical exercise 4, p 13

This is the first activity involving a set of facts. In other words, it is the problem question which many students appear to dread. Let us explain how you should set about answering this type of question.

I have never really worked out why problems in law cause some students to go blank. Perhaps a fear of mathematics that has originated in childhood contributes to students' fear of problem-type questions. But why should it be more difficult to answer a question like "Johnny has six apples. He gives Mary one and eats two himself. How many apples does Johnny have now?" than to answer $6-1-2 = 3$? In the latter case you are told what to do and you don't have to think. In the former you have to decide what to do and you need to think about it. Of course, in both cases you are really required to do the same thing.

Law is no different. In this activity you are faced with a set of facts (Johnny and his apples), but we could just as well have asked "Explain the positivist approach to law" or something similar. Students often ask us why we don't just ask factual questions to determine whether they know the law and stop trying to trick them by actually introducing facts and practical situations. The truth is that you do not know the law unless you can apply it. When you practise law, Vusi will not ask you to explain the positivist approach to the courts. Instead he will say: "I have bought a house and I want it registered, but the registrar of deeds refuses to register it. Will the courts help me?" (and probably far less clearly than that!). You cannot turn round then and say: "Unisa didn't teach me that." Or if you do, your practice will not survive very long. We would be failing in our duty if we did not teach you to think in legal terms generally and in international law terms specifically. Therefore we do not only expect you to master the facts, but also to acquire the ability to work with them. Here are a few tricks of the trade that can help you to answer this type of question.

- (1) **Read the questions.** This may sound obvious, but many people do not read the questions carefully before they start answering them.
- (2) **Identify each fact in the question.** It may help to make a list of the facts and write them down. The facts are included for a reason and each one tells you something specific. We do not include facts to trick or confuse you.
- (3) **Relate the facts to the theory you are dealing with.** In the activities this is relatively easy, because the questions are asked right after you have studied the theory. Later in the course (and in practice) a number of aspects may be covered in a single problem.
- (4) **Use the facts and the theory when you answer the questions.** Remember, if we ask for your opinion, that is what we want. In international law in particular, you will often find that there are no right or wrong answers. It is important that you present both sides of an argument and then explain which one you prefer and why.

Here follows an example of the application of the steps explained above:

- (1) The question is whether the court's approach is positivist or naturalist.
- (2) Facts:
 - Time frame: Pre-Constitution. In other words, all the apartheid legislation and ideologies are in place.
 - Vusi is black.
 - He buys a house and attempts to send his child to school.
 - Both are refused.
 - Basis: Group Areas Act and Bantu Education Act
 - WPD uphold the refusal (now it would be the South Gauteng Division)
 - Basis: Law is what the state says it is; judges apply the law, don't make it.

From these facts you must now answer the question. Is the court positivist, or naturalist?
- (3) To do this you must show that you know what the two approaches to law entail. In other words, you must explain what positivism and naturalism entail. Explain that in terms of natural law, law comprises principles of universal and eternal application; law is discovered, not made; and it binds both the state and individuals. Conversely, in terms of positivism, law is decreed by states; the basis of international law is either expressed or tacit consent, in other words the will of states is decisive.
- (4) Now compare the facts of the question with the characteristics of the positivist and natural law approaches. Which is a better match? If the facts in the problem are measured against these principles, it is clear that, by finding that the law must be applied as it stands or as the state has proclaimed it without any regard to the "fairness" of the result, Vusi's fundamental rights are ignored. This happens because his fundamental rights are not part of the legislation. Vusi's case is a clear example of positivism. Keep in mind that the facts are set in a state of parliamentary sovereignty, which means that the legislature is supreme and the courts cannot question the validity of a correctly adopted piece of legislation.

We use the same method and approach in the second version of our scenario, the events in 1999. The only substantive difference is that we are now working under the new, supreme Constitution. Start by setting out the principles of both theories and then compare them to the facts. It is universally accepted that human rights are based on universally accepted principles which have eternal application. This universality is reflected in both municipal (national) law and in international law. This clearly points to a higher law which controls what the state is able to legislate, that is natural law.

The importance of some higher law to which a state's municipal law must answer is clearly reflected in the outcome of the case. Vusi wins, his house is registered and his child is registered at the school. This is a clear reflection of the difference between the positivist "the law is what I say it is" and the naturalist "the law is what I consent to, **provided** it falls within certain universally accepted norms which are superior to the individual will of the government of the day".

TOPIC 2: SOURCES OF INTERNATIONAL LAW

Practical exercise 1, p 16

Basis of international law: Consent

Source 1: Conventions; Article 38(1)(a)

Source 2: International custom; Article 38(1)(b)

Practical exercise 2, p 17

Self-study

Practical exercise 3, p 20

The problem with oral agreements is always one of proof. The Vienna Convention on the Law of Treaties (VC) provides in Article 3 that the fact that the VC only applies to agreements in writing, does not affect the legal force of oral agreements. This means in effect that the oral agreements are treaties, because they satisfy all the requirements of treaties (an agreement between international law subjects which has full legal force and is governed by international law). The only difference between treaties in writing and oral agreements is that an oral agreement cannot be registered as a treaty with the UN Secretariat. The oral agreement is not governed by the provisions of the Vienna Convention. This in turn means that any dispute in terms of the treaty cannot be enforced by the ICJ. There is, however, no other category into which an oral agreement such as this fits and in our view it must be regarded as a treaty.

Practical exercise 4, p 21General

According to Article 7(1) and (2) of the Vienna Convention, the following persons may validly conclude binding treaties on behalf of their states:

Article 7(1) VC: Those persons who:

- (a) Produce appropriate full powers; or
- (b) It appears from the practice of the states concerned or from other circumstances that their intention was to consider those persons to be representing the state for such purposes or to dispense with full powers, are considered to be representing the state for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the states to be bound by a treaty.

Article 7(2) VC: Persons by virtue of their functions and without having to produce full powers, namely:

- (a) Heads of state, heads of government and ministers of foreign affairs for all acts relating to the conclusion of the treaty;
- (b) Heads of diplomatic missions for the purpose of adopting the text of a treaty between the accrediting state and the state to which they are accredited;
- (c) Representatives accredited by states to an international conference or to an international organisation or one of its organs, for the purpose of adopting the text of a treaty in that conference, organisation, or organ.

Scenario 1:

(1) Question: Is the agreement a treaty?

(2) Facts:

- Concluded by premier of province & state governor
- Is called a treaty
- Provides for cultural contact
- Will fly flags

(3) Now test this against the theory.

Neither the premiers of our provinces, nor the US state governors are mentioned as people who can bind the state *ex officio* (as a result of the positions they hold – Art 7(2)(a), (b), (c) of the VC). Unless they produce full powers (documents issued by the state stating that the person named in them has the authority to bind the state) or there is a practice that they have bound the state under similar circumstances (Art 7(1) of the VC), they do not have the power to conclude a treaty which binds the state.

This is perhaps a good time to point out the following: If the problem does not expressly include mention of a certain situation, such a situation does not exist. In other words, you cannot read the existence of full powers or a usage into the facts. If we wanted to include them, we would have mentioned them.

The fact that the agreement is called a treaty does not mean that it is indeed one. Each agreement must be tested on its own merits.

The intention of the parties was clearly to promote friendship and cooperation, not to create binding rights which can be enforced. Can you really force someone to fly your flag, (or be your friend, for that matter) and what would you do if they don't (or won't)?

The subject matter regulated by the agreement is simply not of the nature which involves enforceable obligations on the part of the parties.

- (4) Our conclusion is therefore that the agreement is not a treaty. It is an agreement between two unauthorised officials which would be neither governed by nor enforceable under international law.

Scenario 2:

Follow the same process here.

If you compare this set of facts to the facts of the previous activity, and compare it to the requirements for a valid treaty, the differences are glaring. Here two states are concluding an agreement at a conference with a specific purpose and goal. The agreement contains reciprocal rights and duties. The states are represented by persons who satisfy the requirements of Article 7(2) of the VC. The agreement would be governed by international law. The UN would register the treaty. Therefore, it must be a treaty.

Practical exercise 5, p 22

This was put in to show you how these things work in practice. You are not expected to study this article for examination purposes.

- Article 48(1) – signature by state member or other invited state
- Article 48(2) – ratification
- Article 48(3) & (4) – accession and deposit of instrument of accession with the Secretary-General of the UN

Practical exercise 6, p 27

Scenario 1:

The shooting of the bulls has resulted in impossibility of performance. In terms of Article 61 of the VC, this will result in termination of the treaty.

If Ireland had other suitable bulls available, the performance of the treaty would still be impossible, since the original three bulls were expressly stipulated in the treaty. If bulls of the same quality and breed as the originals were available, it would be a simple matter to substitute these and the treaty would remain operative. If not, it would, however, have been possible to conclude a new treaty substituting the bulls and thereby achieving the same end result.

If instead of shooting the bulls, the IRA had held them to ransom, the treaty would have been suspended pending the payment of the ransom and the recovery of the bulls, – provided the parties were willing to negotiate and pay.

If instead of shooting the bulls, the IRA had castrated them, performance (by Ireland, not the bulls) is still possible. Ireland would still be able to deliver the object of the treaty (the bulls). However, since the essential basis for the treaty has fallen away (in a manner of speaking) and this change radically affects the obligations under the treaty, this is a fundamental change in circumstances (Art 62 VC) and would give rise to a right to terminate the treaty.

Scenario 2:

The circumstances which existed at the conclusion of the treaty formed the essential basis of the treaty. Note that South Africa was an industrialised but arid country, while Lesotho had an abundance of water but was poor. At the time of the conclusion of the treaty earthquakes were not a feature in Lesotho and could not have been foreseen by the parties. The fact of the earthquakes radically affected the obligations under the treaty: Lesotho could no longer deliver the water, which was the essential basis for the conclusion of the treaty. There was a fundamental change of circumstances which would give rise to a right to terminate the treaty (Art 62 VC). If Lesotho were regularly plagued by earthquakes it would be a circumstance which existed when the treaty was concluded and was therefore clearly foreseeable. In those circumstances another earthquake could not be raised as a ground for terminating the treaty.

Practical exercise 7, p 31

The first thing you should remember is that the question of succession to treaties occurs only when a new state (with a new international legal personality) has emerged, for example as a result of decolonisation, or one state has dissolved into a few smaller ones, and so on.

According to the theory of universal succession, the new state succeeds to all the treaties of its predecessor and the rights and duties therein. This would pose a problem if the ideologies of the new state were different from those of the old state, and the new state simply did not find the old obligations acceptable.

In terms of the clean slate theory reflected in the 1978 Vienna Convention on the Succession of States with Respect to Treaties, the exact opposite happens: the new state does not have to continue with its predecessor's treaty obligations.

There are exceptions to the general rule. It does not apply, for example, to treaties establishing boundaries. However, this Convention does not seem to reflect customary international law, because the view is not very popular amongst states. This unpopularity is not surprising because the adoption of such a view would mean that the new state would have to start from scratch and renegotiate all treaties, which is of course impractical.

If the provisional succession theory (or rather – solution) were followed, the state would be bound to existing treaties for a certain period of time. The state would therefore not have to exist in a legal vacuum, but would be free to terminate the inherited obligations which it did not wish to accept.

In Southern Africa the tendency seems to be to continue with treaty obligations. In this regard, refer to the South Africa Act of 1909 in terms of which “[a]ll rights and obligations ... binding on any of the Colonies shall devolve upon the Union at its establishment”. Similar provisions were contained in the 1961 Constitution, when South Africa became a republic.

Likewise, Namibia did not adopt the clean slate doctrine. Its 1990 constitution provides that “[a]ll existing international agreements binding upon Namibia shall remain in force, unless and until the National Assembly acting under art 63(2)(d) hereof otherwise decides”.

South African judicial decisions are ambivalent on the topic. *S v Eliasov* 1965 (2) SA (T) concerned the succession to an extradition treaty between South Africa and the Federation of Rhodesia and Nyasaland, and the court observed that when the Federation had been dissolved, its treaties ceased to exist, so Southern Rhodesia had not succeeded to the extradition agreement. The court in *S v Bull* 1967 (2) SA 636 (T) later disapproved of this approach. In *S v Oosthuisen* 1977(1) SA 823 (N) the court found that after Rhodesia had declared independence in 1965, it acquired a new international legal personality and therefore the treaty between South Africa and Southern Rhodesia was terminated.

In *Harksen v President of the Republic of South Africa* 1998 (2) SA 1011 (C) the court found that the extradition agreement between United Kingdom and Germany of 1872 had not been revived as between SA and the FRG by an exchange of notes in 1954. (For more detail on the history of Germany’s treaty-making powers see p 424 of Dugard).

In *S v Bull* 1967(2)SA 636 (T) the court relied on an executive certificate showing the intention of South Africa to continue to be bound and concluded that Malawi had succeeded to the extradition agreement between the Federation of Rhodesia and Nyasaland and South Africa. See also *S v Devoy* 1971 (3) SA 899 (A) in which Malawi was once again found to have succeeded to the above-mentioned extradition treaty.

Practical exercise 8, p 34

Add practical examples from the study material to the table below:

Element	Interpretation	Case law
Uniformity of practice	Substantial compliance	<i>Case concerning military and paramilitary activities in and against Nicaragua</i> 1986 (Nicaragua v USA) ICJ Rep
	Constant and uniform usage	<i>Asylum case (Colombia v Peru)</i> 1950 ICJ Rep
Repetition	Constant and uniform usage	<i>Asylum case</i> 1950 ICJ Rep
	However, one or two repetitions <i>may</i> be sufficient, if it involves specialised subject matter which only concerns (at the time) very few states, such as the exploration of outer space	<i>S v Petane</i> 1988 (3) SA 51 (C)
Time	Short period of time not necessarily a bar to the formation of a customary rule, depends on nature and subject matter of the rule	<i>North Sea Continental Shelf cases (FRG v Denmark and FRG v the Netherlands)</i> See also <i>S v Petane</i>
Number of states	Universal acceptance	<i>Nduli v Minister of Justice</i> 1978 (1) SA 893 (A), decision criticised: see <i>Inter Science Research & Development Services (Pty) Ltd v Republica Polpular de Mocambique</i> – 1980 (2) SA 111 (T)
	General and widespread acceptance	<i>Fisheries Jurisdiction case (UK v Iceland)</i> 1974 ICJ Rep ICJ Rep 3 See also <i>North Sea Continental Shelf cases</i> 1969 ICJ Rep (practice need not necessarily be universal)
	Rule of persistent objector	<i>S v Petane</i> 1988 (3) SA 51 (C) <i>Anglo-Norwegian fisheries case (UK v Norway)</i> , 1951 ICJ Rep 115

	Local custom possible	<i>Right of passage over Indian territory</i> 1960 ICJ Rep See also the <i>Asylum</i> case, where local custom was not permitted because the practice was too divergent and inconsistent. In <i>Nkondo v Minister of Police</i> 1980 (2) SA 894 (O), it was not permitted because it had only happened on four previous occasions.
Actions speak louder than words	Conduct must be generally consistent with statements	<i>Case concerning military and paramilitary activities in and against Nicaragua</i> 1986 (<i>Nicaragua v USA</i>) ICJ Rep
	States must do what they say before a custom can develop	<i>SWA, Second phase</i> , 1966 ICJ Rep, majority

Practical exercise 9, p 35

Customary international law rules form if they meet two requirements: *usus* and *opinio iuris*. In *South West Africa, Second Phase*, Justice van Wyk rejected the idea that GA Resolutions could give rise to custom, because that would give the General Assembly legislative powers, which would bind dissenters, and the GA was not empowered to do this. Justice Tanaka, however, held a dissenting opinion, which has gained support.

Think about this carefully. A GA Resolution is adopted by a vote, which expresses the acceptance of the principle by those states voting in favour. These votes demonstrate the states' support for this principle. In *S v Petane* Conradie J stated that resolutions of the General Assembly may constitute *opinio juris* which, which, if coupled by state practice, could create a rule of customary international law. However, he cautioned that if there was no preceding *usus*, the resolution itself could not create custom. He did mention that one could treat the resolution itself as *usus* and *opinio iuris* at the same time, but was quick to point out that that would stretch the definition of *usus* far too wide, since that latter ought to be evidenced by material, concrete and specific acts by states. In his words: "United Nations Resolutions cannot be said to be evidence of state practice if they relate not to what the resolving states take it upon themselves to do, but what they prescribe for others." He also cast doubt on the creation of customary rules on the basis of certain provisions of the Universal Declaration of Human Rights. The reason for this was that even though states had supported the declaration, and adopted many of its provisions in their national laws, state practice did not follow the Declaration's principles.

A different approach can be seen in the US judgment in *Filartiga v Pena-Irala*, on the question of the prohibition of state torture. Relying on the Universal Declaration and other resolutions, and without investigating the question of *usus* in great detail the court stated that the prohibition had become part of customary international law. A similar stance was taken in the *Nicaragua* case. The court discussed the prohibition on the use of force and

concluded, relying on the presence of *opinio juris* alone, that the latter was part of customary international law. As Dugard points out, the court's reasoning "does suggest that a customary rule may be established with little evidence of settled practice where the *opinio juris* on the part of states is clear from their support for resolutions of the General Assembly". In the *Legality of the Threat or Use of Nuclear Weapons* the court noted that GA resolutions may "provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*" in certain circumstances. The court noted that one also needs to look at the manner in which such resolutions were adopted. For example, a resolution adopted with a number of negative votes and abstentions will fail to establish the existence of an *opinio juris*.

If one is to follow the approach in *Filartiga* and *Nicaragua*, it would seem that a near-unanimous condemnation of apartheid by the international community embodied in GA resolutions would create a rule of custom. However, if South Africa objected to it from the beginning of the rule's formation, it would not be bound to it by virtue of the "persistent objector doctrine". Of course, SA would not have been able to rely on the latter if there was proof that the rule prohibiting apartheid had evolved to the status of *jus cogens*.

Practical exercise 10, p 39

Jus cogens is defined in Article 53 of the Vienna Convention on the Law of Treaties as a peremptory norm of general international law, more specifically "a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

The prohibition of aggression and the use of force has been widely accepted as being a *jus cogens* norm.

The effect of this doctrine is as follows: A treaty which contradicts an existing *jus cogens* norm is void *ab initio*. A treaty which already exists when a new *jus cogens* norm develops is terminated automatically, but performance already rendered in terms of the treaty remains valid and lawful.

Furthermore, the rule of the persistent objector does not apply in the case of *jus cogens* - no state can opt out of it.

Practical exercise 11, p 39

Initially all states had to agree expressly to a reservation before a treaty could operate between them and the reserving state. As you would imagine, this led to problems in that it is no easy matter to achieve universal agreement in the international community. Apart from many states not agreeing, many more just do not bother to respond. The court in *Reservations to the Convention on the Prevention of the Crime of Genocide* 1951 ICJ Rep offered a solution: A state which has made and maintained a reservation which has been objected to by some of the parties to the convention but not by all, could be regarded as being a party to the convention if the reservation is compatible with the

object and purpose of the convention. This can be viewed as an advancement in the field of multilateral international relations as it enables a wide acceptance of multilateral treaties despite reservations having been made.

Practical exercise 12, p 39

The point of this type of question is to test whether you are able to recognise and apply the theory. You must decide whether Lesotho has violated a norm of international law and if so, you must explain under which of the sources of international law you would classify such a norm.

It is important that you realise that any claim for violation in international law must have a basis.

For our purposes the basis can be either a treaty or a custom. In a case like this, read the information carefully and do not be misled by terminology. (For example, just because a set of facts mentions the word 'treaty', it would not necessarily mean that the basis of the claim is a treaty. Remember that the *Nicaragua* case established that there can be a treaty and a custom with the same content, which means that a state which is not a party to the treaty can, through custom, still be bound by the provisions of the treaty, if the latter codifies international law.)

Be that as it may, the present set of facts does not mention the existence of a treaty. This leaves you with the other option – custom.

The question is therefore whether the facts support the existence of a customary rule. To establish this, you ask yourself what the requirements are for the establishment of a customary rule of international law. Your answer is:

- Settled practice (*usus*), also referred to as the "material" element
- A sense of obligation on the part of the states (*opinio juris sive necessitatis*) also known as the psychological element

Now define these concepts with reference to case law and apply your definition to the facts.

Usus is constant and uniform usage as defined in the *Asylum* case-. 1950 ICJ Rep. In this regard:

- The practice need not be universal. Article 38 refers to general practice, therefore a widespread acceptance by states would be sufficient (*Fisheries Jurisdiction* case (1974).
- The number of states is not as important as the identity of those states. In every activity some states' actions are more important than others. (Example: The US and USSR played a leading role in developing the law of outer space.)

- Usage could develop between two or only a few states to form a local or regional custom (*Case Concerning the Right of Passage over Indian Territory*, contrary to the *Asylum* case).
- The practice must be characterised by a degree of uniformity, or substantial compliance (the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)*). It is sufficient that the conduct of states is generally consistent with a rule. An inconsistency should be treated as a breach of the rule rather than an indication that a new rule has been created.
- The number of repetitions necessary to create a custom depends on the nature of the rule involved and the number of states affected.
- The duration for which the states' practice must have persisted likewise depends on the nature of the usage. In *S v Petane*, for example, the court cited GA Res XVIII (1962) (concerning outer space) as a customary rule which developed with little practice.
- The rule of the persistent objector could also be discussed with reference to the *Anglo-Norwegian Fisheries* case (1951); *North Sea Continental Shelf* case; *Asylum* case; and *Nicaragua* case 1986.

If in the given set of facts you have a practice which has continued for 30 years, it is surely constant and uniform enough for anyone.

Opinio iuris is the second requirement, which must be present before the usage can become a binding rule of customary international law. As was stated in the *North Sea Continental Shelf* case, the states concerned must feel that they are conforming to what amounts to a legal obligation. In other words they must feel that if they did not follow the usage they would be breaking international law and would have to bear consequences for not complying with it (for example be subjected to sanctions).

(Other cases you could discuss include the *Arrest Warrant* case; *Lotus* case; and *Nicaragua* case.)

In this case you have been told that Lesotho felt legally bound to resume the supply of power. The legal obligation was demanded by *opinio iuris*.

Therefore we answer that there is a customary rule and by cutting off supply for the second time, Lesotho is violating the rule and South Africa has a claim. The fact that only two states are involved should also be considered. The *Passage over Indian Territory* case confirms that regional customs are possible and that these can develop between two states.

TOPIC 3: INTERNATIONAL LEGAL PERSONALITY

Practical exercise 1, p 52

What are the requirements for statehood? The Montevideo Convention demands that a state should have a permanent population (present in this instance); a defined territory (a requirement which is satisfied); the capacity to enter into foreign relations (apparently demonstrated by the conclusion of international agreements); and an effective

government. It would seem that Republica Srpska satisfies all these requirements. Or does it? The question of whether or not it met the requirements for statehood was discussed by the court in *Doe v Karadžić* 866 FSupp 734 SDNY 1994 and *Kadic v Karadžić* 70 Fed 3d 232 (2nd Cir, 1995). (You do not need to read these judgments for examination purposes.)

In *Doe v Karadžić* the court observed that the current Bosnian-Serb warring military faction did not meet the definition of state (the latter being defined as an entity which has "a defined and a permanent population, [which is] under the control of [its] own government, and [which] engage[s] in or [has] the capacity to engage in, formal relations with other such entities". The situation in the former Yugoslavia was such that the military factions at the time were not stable, or sufficiently identifiable. "The Bosnian-Serbs have achieved neither the level of organization nor the recognition that was attained by the PLO [Palestinian Liberation Organization], as manifested by the PLO's achieving the position of a permanent observer at the UN."

In *Kadic v Karadžić* the court did not answer the question directly, but remarked as follows at 245:

Appellants allegations entitle them to prove that Karadžić's regime satisfies the criteria for a state for purposes of those international law violations requiring state action. Srpska is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments. It has a president, a legislature, and its own currency. These circumstances readily appear to satisfy the criteria for a state in all aspects of international law. Moreover, it is likely that the state action concept, where applicable for some violations like 'official' torture, requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists."

If you were the judge, you would probably have grappled with two requirements, namely effective government and the contested requirement of recognition by other states. These might have proved problematic in the context of Republika Srpska, depending on whether you supported the constitutive or declaratory theory of recognition.

It is worth noting that today Republika Srpska is not a state on its own, but forms part of Bosnia and Herzegovina. The latter has levels of political entities established under a federal government. Republika Srpska is the one and the Federation of Bosnia and Herzegovina the other. They were formally established by the 1995 Dayton Peace Agreement. Lastly (in case the thought crossed your mind) Republika Srpska and Serbia are not one and the same.

Practical exercise 2, p 53

The quick answer is no. The government must be independent of any other authority, and must have legislative and other competencies (as espoused by Brownlie's principles, with which you should be very familiar by now). You will recall the International Committee of Jurists' report on p 45 of your study guide and the remark that public authorities ought to be strong enough to assert themselves throughout the territories of the state without the assistance of foreign troops. All the hints you need to answer this question are already contained in the facts given to you. The Iraqi government may have been given some degree of legitimacy by the elections, but the truth remains that the control exercised by the Iraqi government was incomplete and ineffective, as evidenced by the fact that coalition military troops were still present, and (in addition to as well as despite such presence) the various police and security forces could not secure Iraq's borders. The lack of control is further illustrated by the rampant insurgency and jihadi assaults. Remember, however, that effective government is only one of the requirements of statehood. Even if the Iraqi government was ineffective at the time, Iraq did not cease to be a state. It is simply impractical to have states lose and then regain statehood because they lack an effective regime at some point in time. See also Dugard's discussion on "Failed states" on pp 109–110.

Practical exercise 3, p 53

What students usually regard as very difficult questions are in fact far easier than questions that require rote learning or ready knowledge. Of course you have to have the ready knowledge, but your memory is jolted and you are guided through the process by the presentation of the facts. As you are told over and over again, it is simply a matter of taking each fact and working out why it is given and then fitting it into the progressive argument.

(1) The question is whether state A enjoys international legal personality.

(2) Facts:

(a) A is created by mother state B

It is a perfectly acceptable international law process for one state to hand over part of its territory to another state or, as in the present case, to create a new state in this way. In terms of the *Western Sahara* case, the fact that its population is nomadic does not exclude statehood provided that you are dealing with an organised society. The fact that a large percentage of the population consists of migrant labour (although different from a nomadic population) does not change the position, since size does not count. The added fact of a strictly organised society lends further credence to accepting the statehood of A. At first glance, then, A could qualify as a legitimate, independent state. Keep the fact that it is very poor in mind and see if it has any role to play.

(b) A's borders are not fully defined

Clearly defined borders are not a prerequisite for statehood. Israel's borders have been disputed for a very long time and even South Africa's borders with Swaziland, for example, are the subject of debate.

(c) A has a small enclave separate from the main territory

This, too, is not a bar to statehood. Think of Alaska separated from the USA by Canada.

(d) Test against Brownlie's principles:

- Own executive organs? Yes (eg Minister of Foreign Affairs).
- Conduct foreign relations through them? Not successfully.
- Independent legal system? The existence of magistrate's courts seems to suggest this, but you could argue either way.
- Own courts? The same answer as above.
- Own nationality? A is developing a form of government that differs from B's form of government, which does point to an own nationality.

(e) Financial dependence

We told you at the outset to bear A's financial position in mind. This is again a matter of degree and Brownlie's tests are relevant. If it can be said that the dependence is so complete that B in fact dictates A's policies, then A's financial dependence is relevant. If A is still able to act independently of B (as would appear to be the case here as it is developing a form of government totally alien to that of B), financial dependence alone will not preclude statehood.

(3) The actual conclusion you reach is of less importance; you can argue either way.

Depending on how you interpret the facts, A does not pass the Brownlie test satisfactorily: it relies financially on B; it does not enjoy any independent recognition, save from other states dependent on B, and cannot conduct foreign affairs without this recognition; and it was refused application for UN membership. On the other hand its financial dependence does not seem to influence its policy; it is recognised by some states (even if this is a form of forced recognition, which should be seen as acceptance of the inevitable rather than approval); and so on. Your conclusion therefore depends on your reasoning.

Practical exercise 4, p 53

There is a tiny omission in the set of facts in your study guide (the result of a typing error) so for the sake of clarity we present you with the full set of facts below. (The necessary insertion is underlined and in italics.)

The World Health Organisation (WHO) is an agency of the United Nations. The International Aid Organisation (IAO) is an organisation made up of the following members: the government of Zuba, a small poverty-stricken African state; Asio-European, a multinational mining conglomerate; and Aid International, a humanitarian organisation with membership drawn from the councils of the five leading universities in Britain and the United States.

The WHO and the IAO conclude an agreement in terms of which WHO undertakes to build a multimillion-dollar hospital and research centre in Zuba to fight the spread of AIDS in that country. However, problems arise and the WHO decides to pull out of the agreement. Zuba wishes to enforce the agreement.

Discuss the position in detail from the point of view of both WHO and the IAO. Concentrate in particular on the classification of the agreement between them: who should sue and who should be sued; what legal system will govern the agreement and conflicts arising from it; and what court(s) the agreement should serve before.

Would your answer be different if the IAO had had as its sole members the Zubanese government and the official Health Departments of Britain and the United States? If so, where would the difference lie?

WHO is an international organisation made up of states. It functions under the auspices of the UN. The IAO is not a body of the UN, since it has members which are neither states nor international organisations. Asio-European is a company, but even a transnational company which operates in various countries is not an international organisation. (Please note the difference between an international company and an international organisation.) My view is that Aid International is not an international organisation either. International organisations may consist of organs of state, but strictly speaking universities are not organs of state. If you argue that they are, I cannot penalise you, but the onus will be on you to convince me of your viewpoint. Either way the status of IAO remains the same.

The agreement between the different stakeholders is an ordinary contract because only international law subjects can conclude treaties. Here we have an agreement between an international organisation and a private entity. Although it is possible to make a contract subject to international law, you may accept that it is not the case here since it is not mentioned in the facts. The IAO should sue WHO. The only problem that may arise is that the international organisation may invoke immunity to block the process.

Generally (and we will deal with this later) immunity does not apply to commercial contracts and the court will in all likelihood have jurisdiction. The municipal (national) legal system of Zuba will govern the contract and any conflicts arising out of it, and it will serve before the municipal court in Zuba.

If the sole members of the IAO were the Zubanese government and the official health departments of Britain and the United States, the IAO would meet the requirements to be classified as an international organisation. The agreement would then be a treaty because the parties are international law subjects. In that case, international law would govern the dispute, which would have to be settled by the ICJ.

Practical exercise 5, p 54

Our point of departure is that the GA has only those powers which are given to it in the Charter.

The GA may consider the general principles of cooperation to maintain peace and security, and make recommendations to UN members or the Security Council (SC) in this regard.

It may also discuss any matter relating to peace and security which is referred to it by a UN member, the SC, or a nonmember state, and make recommendations on such matters.

However, this is subject to the proviso that the GA must refer *any* question which requires *action* to the SC. It may make no recommendations on matters which are serving before the SC unless the SC requests it to do so.

What is the effect of this proviso? When it comes to important matters, the GA cannot act, but must defer to the SC. This is why it is said that the GA has only a secondary duty to maintain international peace and security, which is the principal aim of the UN. The GA is therefore largely a discussion forum which makes recommendations to member states. However, its recommendations are by nature not binding on member states.

The GA is therefore not empowered to act or to enforce peace and security. The authority to act or enforce recommendations belongs to the SC. However, the five permanent members of the SC (USA, UK, France, Russia and China) have what is termed "veto power". In practical terms this means when one of the permanent members does not approve of proposed action to maintain international peace and security, it can veto the action and prevent the SC from taking such action. In such instances, the GA's powers of recommendation will be restricted further by the fact that the matter is serving before the SC.

In response the GA argues that although the SC has the *primary* power for the maintenance of international peace and security, it does not have the *sole* power. When the SC cannot or will not act and the body is paralysed, the GA can draw on residual powers and recommend collective measures, including, in the case of a breach of the peace or act of aggression, the use of armed force.

In other words, what the GA is attempting to do here is to expand the powers conferred on it in the Charter through creative interpretation. This concept, which remains controversial, is embodied in the Uniting for Peace Resolution (GA res 377(v) 1950).

TOPIC 4 : JURISDICTION IN INTERNATIONAL LAW

Practical exercise 1, p 57

The case referred to is the *Lotus* case 1927 PCIJ Rep Ser A no. 10.

The three principles laid down by the courts were:

- (1) One state cannot exercise jurisdiction in the territory of another unless they have agreed thereto.
- (2) One state may exercise jurisdiction in its own territory over acts that happened in the territory of another state unless an international law rule forbids this.
- (3) The territoriality of criminal cases is not absolute.

The result was an extraterritorial free-for-all!

Practical exercise 2, p 60

The trick here is to determine which facts apply to the various bases for jurisdiction. This is not an easy task, because you are not given all the facts. What nationality, for example, are the victims? The answer to this question would affect the use of passive personality. You have to make do with the facts at your disposal.

First consider L. What possible bases for jurisdiction can you identify here? L is South African, therefore South Africa could claim jurisdiction on the basis of nationality. The act was committed on a South African plane. Like ships, planes have the nationality of their state of registration, therefore there is also a territorial basis for South African jurisdiction. The South African court would therefore have jurisdiction to try L as he is a South African national and committed an offence in South African territory.

Let us now look at P. She is a British national, therefore Britain will have a claim to jurisdiction. She is on a British ship (a flag state), which gives Britain a territorial basis for jurisdiction. Does this mean that the South African court will not have jurisdiction? Consider the nature of the offence. Theft is what is known as a continuing offence. This means that it is assumed that the offence keeps on happening wherever you are while still in possession of the stolen property (*S v Kruger* 1989 (1) SA 785 (A)). Therefore if P is found in possession of the pearls in South Africa, the South African court can claim jurisdiction on this basis. Failing this, Britain would appear to have the most direct and substantial connection with P and she should be tried there.

Practical exercise 3, p 60

We have established that the South African court has jurisdiction over L according to the above facts. How do the facts change when L boards a British flight? South Africa loses jurisdiction on a territorial basis. The crime now changes to murder. L has not boarded the plane willingly. L has also not been destined for South Africa, but for Namibia.

In terms of the Appellate Division decision in *Ebrahim*, a South African court will not exercise jurisdiction over a person brought into its territory as a result of his or her abduction from another state. L was kidnapped in Britain which is (partly) how he came to be in South African territory. On this ground the court could refuse to exercise jurisdiction. Furthermore, as was held in *Nkondo*, jurisdiction may also be refused if the person is wanted for a non-political crime committed in South Africa if his presence is the result of the aircraft having to enter the territory in distress. Two factors apply to L here: murder is a non-political crime and the aircraft was in distress and forced to enter the territory. In these circumstances the South African court would probably refuse to exercise jurisdiction over L (although it could, in theory, do so on the basis on nationality).

Practical exercise 4, p 60

These facts are obviously based on *S v Mharapara* (discussed by Dugard).

Jurisdiction could possibly be claimed on the principle of nationality. Here, however, you must also consider the nature of the legal system. While civil law countries (Europe) will generally apply the principle, Anglo-American countries (including South Africa and Britain) generally will not unless there is specific municipal provision for it. In the original *Mharapara* case, the judge (Zimbabwe also follows the Anglo-American system) in fact applied the nationality principle to found jurisdiction. This was, however, overturned on appeal when the judge found that although international law allows the exercise of jurisdiction on the basis of nationality, it does not prescribe it. The state's municipal law must also allow for the prosecution of nationals for crimes committed outside the territory of the state. A state's diplomatic mission is not part of its territory; it remains the territory of the host country, but certain exceptions to the exercise of jurisdiction by the host country apply. We will consider this in greater detail below.

Are there any other possible bases? The appeal court thought so. In confirming M's conviction, it based its finding on the objective territoriality (effects) doctrine. In terms of this theory, the state will exercise jurisdiction over acts committed elsewhere if the effect (impact) of the act is felt within the state. In our example, PR committed the offence in Britain, but the effect was felt in Freedonia (a loss of foreign currency because the typewriter had to be replaced) and so jurisdiction is assumed by the courts in F. As in the case of *Mharapara*, one feels that the court was clutching at straws because in neither case was the effect catastrophic.

However, the principle is sound. If it were not, no court would have had jurisdiction as PR could raise immunity in Britain, thereby excluding the court's jurisdiction, and the court in Freedonia would not have had jurisdiction over events outside its territory. In the long-run therefore, the result was correct, even if how it was achieved does stretch credibility a bit.

Practical exercise 5, p 60

In terms of the objective territoriality principle, where the crime commenced within a foreign state and was completed within the territory of another, the latter may exercise jurisdiction. An extension of this theory is the so-called effects principle. In terms of this principle the state in which the impact or effect of the crime has been felt is entitled to exercise jurisdiction. (See the *Lotus* case, in which Turkey could exercise jurisdiction, since the impact was felt on a Turkish ship, which is considered to be part of the state's territory.)

This principle was used in *S v Mharapara* in the conviction of an ex-diplomat for theft from the Zimbabwean government. The theft itself had taken place in Belgium.

The effects principle may, unfortunately, be abused. A prime example of this is the US Sherman Act of 1890, which prohibits monopolistic practices. On the basis of the effects principle, the law has been given extraterritoriality to cover monopolistic trade and commerce agreements abroad if their effect is felt in the USA. In the 1970s the Westinghouse Electric Corporation filed suits in a US court against a number of foreign companies alleged to have taken part in price-fixing. Since many countries object to these US antitrust laws for violating international law and exceeding the permissible limits of extraterritorial jurisdiction, a number of states enacted legislation which would frustrate the enforcement of the US antitrust laws outside the territory of the US. Such legislation generally prohibits compliance with US judgments, arbitral awards, orders, and so on which request inspection of evidence within their territory, or the enforcement of judgments providing for punitive damages. In South Africa provisions to that effect are contained in the Protection of Business Act 99 of 1978, section 1.

Practical exercise 6, p 61

You should be able to structure your own well-substantiated opinion. Below are some salient points which you must include:

- True universal jurisdiction is a highly controversial topic. It applies only in cases of crimes under customary international law. It is said that such crimes injure the interests of the international community as a whole and therefore all states have the right to prosecute. These crimes include piracy, slave-trading, war crimes, crimes against humanity, and torture.
- The national court is said to exercise universal jurisdiction over a crime with which it does not have any of the jurisdictional links which you learnt about in this study unit (territoriality, effects, passive personality, nationality and state protection.) The court, in trying and punishing the offender, acts as an agent of the international community as a whole.

- Many of the above-mentioned customary international law crimes have become the subject of a number of international treaties. The signatories have been conferred jurisdiction by virtue of the provisions of the treaties. The states must either prosecute the offender found in their territory or extradite him to a state which will prosecute him. Dugard refers to this kind of jurisdiction as quasi-universal.
- International law permits (but does not compel) a state to exercise jurisdiction, unless there is a treaty obligation to the contrary.
- Most states will have national legislation that criminalises the conduct before the offender may be prosecuted.
- The Rome Statute of the International Criminal Court (ICC) does not confer universal jurisdiction on the court. However, state signatories have enacted legislation which would enable them to try crimes which fall under the jurisdiction of the ICC. Should the state party be unable or unwilling to prosecute the offender, the case is deferred to the ICC, which will prosecute, provided that:
 - At least one of the parties is a state party.
 - The accused is a national of a state party.
 - The crime is committed in the territory of a state party.
 - A state, not party to the statute, has decided to accept the court's jurisdiction over a specific crime which has been committed in its territory, or which has been committed by its national.
 - The United Nations Security Council acting under Chapter VII of the UN Charter has referred a situation to the prosecutor.
- The implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 is an example of national legislation conferring jurisdiction on a South African court to try an offender who has allegedly committed one of the crimes falling within the jurisdiction of the ICC, even if those crimes were committed outside South Africa, if the person after the commission of the crime is present in the territory of the Republic.
- The *Arrest Warrant* case concerned a Belgian law which conferred universal jurisdiction on Belgian courts to try such crimes "wheresoever they may have been committed" and to issue a warrant for the arrest of such a person outside Belgian territory. The judges' opinions differed. Judge Guillaume stated that international law did not recognise universal jurisdiction, except for the crime of piracy. Judge ad hoc Van den Wyngaert, on the other hand, held that "there was no proposition that universal jurisdiction for war crimes and crimes against humanity can only be exercised if the defendant was present on the territory of the prosecuting state". The Belgian law was subsequently amended as a result of political pressure.

Practical exercise 7, p 61

Jurisdiction may be exercised on the following grounds:

- Territoriality
- Active personality
- Passive personality
- Protection of the state
- Any other basis recognised by law

Furthermore, any alleged offender present in the Republic may be arrested and tried or extradited if a South African court has jurisdiction or if any court in a foreign state has jurisdiction.

TOPIC 5 : ENFORCEMENT OF INTERNATIONAL LAW**Practical exercise 1, p 72**

- Retortion
- Reprisal
- Embargo
- Boycott
- Economic sanctions
- Self-defence

These methods of enforcing international law involve self-help and can be seen as the ultimate violation of the *nemo iudex in sua causa* rule. This is because the states themselves decide whether there has been a violation of international law, assess the violation, decide what to do and then proceed with the chosen action. This is at least to some extent true.

It may happen of course that the Security Council becomes involved. Chapter VI, Article 34 stipulates that the SC may investigate any dispute in order to determine whether its continuance is likely to endanger the maintenance of international peace and security. In terms of Article 36(1) it may recommend appropriate measures in order to remedy the situation, such as the imposition of an arms embargo. The SC may also take action under Chapter VII in situations where there has been a threat to the peace, breaches of peace or an act of aggression. These decisions are binding on member states. Article 41 empowers the SC to direct member states to take measures which do not involve the use of armed forces, such as the imposition of economic sanctions, severance of diplomatic relations. Article 42 empowers the SC to take forcible action against the recalcitrant state(s) in order to maintain or restore international peace and security. In practical terms this means that the SC will authorise member states to take such action. Lastly, Article 51 provides that action taken in self-defence must be reported to the SC and it will be valid only until the SC acts.

In conclusion, the above-mentioned enforcement mechanisms may seem to be violations of the *nemo iudex* rule in circumstances when states do not enrol the help of an outside agency, such as the Security Council. But even measures which involve outside agencies also have elements of self-help. Remember, the fact that we mention these mechanisms in the context of a violation of the *nemo iudex in sua causa* rule does not mean they are not permitted in international law. They will be valid if all the requirements have been met. This just shows you that by nature international law is not always comparable to municipal legal principles.

Practical exercise 2, p 72

a) Reprisal

A reprisal occurs when State A acts unlawfully and State B retaliates with *prima facie* unlawful action. However, B's action is made lawful by A's previous unlawful action. The states involved have to try and rectify the situation and proportionality is required.

It is unlikely that the US will be able to justify their response by claiming it to be a lawful reprisal. The bombing of Afghanistan was said to have started because the government in Afghanistan had allowed al-Qaeda terrorists to operate from its territory and had not taken any action against them, despite US requests. Unless it can be shown that the acts of the Islamist extremists were attributable to the Afghanistan government, the US would have taken action against a non-state actor in Afghan territory, and would be violating the territorial sovereignty and integrity of Afghanistan. In addition, the requirement of proportionality would not have been met.

b) Self-defence

One exception to the rule prohibiting the use of force is an act carried out in self-defence. Self-defence is governed by Article 51 of the UN Charter, which states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." This article further provides that the self-defence measures taken by the member state must be reported to the Security Council immediately and that they shall not in any way affect the authority and responsibility the latter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The following characteristics are important:

- The act taken in exercising the right to self-defence is valid only until the Security Council acts.
- The purpose of the use of force must be clear: to defend oneself.
- The force exercised in self-defence must be proportionate to the posed threat.

It is not clear whether the right to self-defence can be exercised only if an armed attack occurs (whether Art 51 amounts to an exclusive and complete formulation of the right), or whether Art 51 allows anticipatory self-defence (whether inherent right indicates that Art 51 has preserved the pre-Charter customary law definition of the right to self-defence, which would include the right to launch a pre-emptive strike). Under customary international law the right to use force in self-defence was justified if the need for it was instant, overwhelming and immediate, and there was no viable alternative action.

The attacks on Afghanistan were launched on the grounds that the Taliban government had allowed al-Qaeda terrorists to train and operate from its territory and had not taken any action against al-Qaeda after having been asked to do so by the USA. The USA therefore had reason to believe that further acts of terrorism may be directed against it.

It is true that Article 51 envisages acts of self-defence against a state and not against a non-state actor such as al-Qaeda. However, it may be argued that when Article 51 was drafted, terrorism was not as widespread as it is today. Secondly, the fact that the Taliban government was harbouring terrorists and had refused to take action against them leads to the conclusion that the acts of al-Qaeda were attributable to the government of Afghanistan. Another objection to the US actions which may be harder to refute is that the so-called action in self-defence taken with a view of preventing further terrorist attacks stretched the limits of anticipatory self-defence too far, since anticipatory self-defence covers only responses to an imminent attack which cannot be prevented by any other means.

On the other hand, in defence of US actions, it must be noted that after the acts of terrorism had been committed, the Security Council adopted Resolutions 1368 and 1373 recognising the inherent right to self-defence of states and condemning the terrorist attacks. It was after these resolutions had been adopted that the USA invaded Afghanistan. Some scholars, relying on the content of the SC Resolutions mentioned above, have argued that a new subspecies of self-defence, namely self-defence against terrorism, had emerged and the attack on Afghanistan had been approved by the SC Resolutions in recognition that such a right may be exercised.

Practical exercise 3, p 72

Read the question and identify the facts. We have numbered the facts and will refer to these numbers in the solution.

- (1) State X takes State Y's nationals hostage, which is an unlawful action.
- (2) State Y approaches State X for their release in an attempt at rectification.
- (3) To remedy X's unlawful action Y (alone) bans the export of certain goods to X.
- (4) Y freezes all X's assets in its territory.
- (5) Y bans all exports and cuts assistance.
- (6) Y expels X's diplomats and recalls its own.
- (7) Y calls on its allies also to ban exports and they do so.

Now you take these facts and test them against the requirements for the various self-help measures. Remember the numbers in brackets refer to the facts above.

Retortion

Has X violated international law? Yes, see (1).
Does Y try to stop the action? Yes, see (3). So?

Reprisal:

Has X acted unlawfully? Yes, see (1).
Does Y retaliate with a measure which at first glance appears unlawful? Yes, see (4). A state cannot freeze another state's assets at will.
Has Y attempted rectification? Yes, see (2).
Is this in proportion to the harm suffered? Yes. Proportionality is sometimes tricky, but even if all the measures adopted are taken together, they will still be less serious than holding a state's nationals hostage. Had Y dropped a nuclear bomb on X, its actions would have been out of proportion to the harm it suffered.

Embargo and boycott:

I have listed these together as they are really the same thing. Purists may distinguish between them, but the difference is in degree, not substance. The main point here is that the action is unilateral, in other words, Y acts on its own.
Has this happened? Yes, see (3), (4) and (5).

You will notice that we did not ask whether X had acted unlawfully or violated international law. This is because both embargoes and boycotts can be used for political or non-international law motives when no violation has in fact occurred. In our case there has of course been a violation, see (1).

Sanctions:

The difference between embargoes and boycotts on the one hand, and sanctions on the other, lies in the party or parties that impose them. While the first two are unilateral actions (actions taken by a single state), sanctions represent joint action by a number of states or by an international organisation like the UN or the EU. Has there been such joint action? Yes, see (7).

Diplomatic action:

Although this was mentioned almost last in our facts (6), it is usually a state's first line of defence. Our facts include diplomatic action of some sort right in the beginning (2), but the forceful action came only later. This illustrates that diplomatic action may take a number of forms and may vary in intensity.

The first part of the question has now been answered. You would have noticed that we also asked what further action you would suggest. There are only two possibilities that are not included in the facts: self-defence and hot pursuit. There is no suggestion that hot pursuit is an option, but self-defence cannot be ruled out.

States often do not wait to go through all the possible international law-sanctioned processes to secure the release of their nationals. Working on the premise that possession is nine-tenths of the law, they invade or infiltrate the state holding their nationals and attempt to repossess or free them. However, (*mandament van spolie* aside) this is a hazardous exercise. In the first place, it violates two basic principles of international law, namely the sovereignty of the invaded state and the prohibition of the use of force in Article 2(3) and (4) of the UN Charter. For this reason states usually seek to justify their actions by claiming that they are based on self-defence.

Article 51 of the Charter allows states to act individually or together, in self-defence. However, a proportional use of force is required. In addition there must have been an attack on the state's sovereignty before self-defence can be used. Here the link becomes a bit tenuous. It is argued that the taking of hostages amounts to the mistreatment of a state's nationals in foreign territory and that this in turn is an affront to or a violation of the state's sovereignty.

Although the whole process is perhaps questionable, this is the reasoning you would use to justify your government's launching a secret mission into foreign territory, violating sovereignty and flouting a possible *ius cogens* of international law to save the hostages. On the hand, if you were one of the hostages...

Practical exercise 4, p 73

Article 41 of the United Nations Charter provides that the Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations. Article 41 allows for ad hoc measures to be taken. The Art 41 measures are temporary and only apply to a specific issue.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) function in terms of Article 41: the ad hoc tribunals were established for specific temporary purposes.

The International Criminal Court is a permanent body established to try international crimes of a more general nature. It was established by the Rome Statute 1998, which is a multilateral treaty.

The ICC, ICTY and the ICTR have jurisdiction regarding crimes against humanity and genocide. The ICTY and the ICC have jurisdiction regarding war crimes, while the ICTR may consider the rules of non-international armed conflict. The ICC has additional jurisdiction over crimes of aggression.

The ICTR does not have jurisdiction over war crimes as the conflict was of an internal nature (intrastate conflict). War involves more than one state and is viewed as international conflict.

Both the tribunals have primacy of jurisdiction. Although the national courts have concurrent jurisdiction, in other words both the municipal court and the Tribunals can hear the matter, the Tribunals hold sway in the case of conflict.

The ICC has complementarity of jurisdiction: The ICC only has jurisdiction if the state linked to the offences declines, is unable to or refuses to act on the issue.

Practical exercise 5, p 73

The first problem State B may run into is showing that Z's actions are attributable to State A (although they are certainly attributable to State X).

If that hurdle is overcome, State B may be said to be acting in reprisal to the kidnapping of the two soldiers, in which case the most glaring example of unlawfulness on State B's part would be the lack of proportionality between its action and that of Z. Furthermore, it appears that B has not attempted to rectify the situation peacefully before proceeding to bomb the area at the border.

State B may also claim to be acting in self-defence. Let's revisit the requirements for self-defence as they may be gleaned from Article 51:

1. An armed attack must occur.
2. The purpose of the use of force must be clear: to defend oneself.
3. The force exercised in self-defence must be proportionate to the posed threat.
4. The act taken in exercising the right to self-defence is valid only until the Security Council acts.

The armed attack has not yet occurred, but Z (stationed in State A) is showing signs of planning an attack on State B. Whether or not Article 51 of the UN Charter includes the right to launch a pre-emptive strike is a moot point. Under customary international law, states do have the right to respond in situations which fall short of an armed attack. However, it must be shown that:

1. State B has been targeted by the hostile activities of another state.
2. State B has exhausted all alternative methods of protecting itself. The use of force in self-defence must be a last resort.
3. The threat or danger is impending.
4. The use of force is proportionate to the threat.

If all of the above requirements have been complied with, State B will have acted lawfully.

TOPIC 6: INTERNATIONAL LAW IN MUNICIPAL LAW**Practical exercise 1, p 89**

If ever there has been an example of the importance of reading questions carefully and believing what you are told in them, this question is it. Let's get the facts straight.

- (1) SA is not a party to the VC. (This is said clearly.)
- (2) SA has declared that it regards the provisions as binding. (This does not mean that it has become a party to the treaty.)
- (3) Treaty interpretation is governed by Articles 31 & 32 of the VC.
- (4) You are dealing with a case which requires you to interpret a treaty.
- (5) You argue that the VC must be applied.
- (6) Your opponent argues that it must not, because SA is not a party to the VC.

The question you must answer is whether or not the municipal court must apply the VC provisions in interpreting the treaty. If you want to apply these provision you must have a basis in South African law on which to work. The two most obvious bases are treaty and custom. The most obvious basis is treaty - and this is what most students would (incorrectly) go for in an exam, because they have seen the magic word "treaty"!! However, this simply proves that they have not read the question, because the very first statement in the question says that South Africa is not a party to the VC. Therefore the VC cannot be applied as a treaty incorporated into our law because firstly we are not a party to it and secondly there is no indication in the facts that it has been incorporated as required by section 231(4) of the Constitution.

The VC cannot be used on the basis that it forms part of our law. The obvious basis that remains is custom. You must therefore test the VC against the requirements for customary international law. Here you must look at the nature of the VC. According to the textbooks, the study guide and various tutorial letters the VC is a codification (a bringing together in written form) of the customary international law governing treaties existing at the time of its compilation. You will also remember that the *Nicaragua* case has shown that if custom is incorporated in a treaty, this does not mean that the customary rules fall away. Customary rules continue to exist alongside the treaty and are binding on states who are not party to the treaty.

What are the requirements for custom? First, *usus* is required. The very fact that the VC was drawn up proves that this requirement has been met as the VC is a compilation of the rules governing treaties which states at that time considered to be general rules of international law. Remember to quote the cases dealing with usage. *Opinio iuris* too has been met because the treaty is generally accepted. In the case of South Africa, we make things clear by stating South Africa has declared that it regards the provisions as binding. A clearer expression of *opinio iuris* would not be easy to find. Remember to quote the cases dealing with *opinio*.

The VC meets the requirements set in South African legislation (and international law) for the existence of a customary rule of international law. What is the position of customary international law in our law? In terms of the 1996 Constitution, customary international law is law in the Republic unless it conflicts with the Constitution or an Act of parliament. The VC does neither. Articles 31 and 32 of the Vienna Convention are therefore law in the Republic and the court must interpret the treaty in terms of these provisions. If you keep a level head, believe what we tell you, don't invent facts and work through the facts step by step, you can't go wrong.

Practical exercise 2, p 99

This exercise tests whether you are able to apply the theory. The problem is quite complicated and challenging. I used this question in a previous examination and some students questioned the facts because, they said, only men can be transvestites. Note that transvestitism is a cross-gender phenomenon.

The first problem is to decide which of T's rights have been infringed. Clearly she has been discriminated against, but on what basis? Many students said the discrimination was based on her sex, but that would mean that T was refused the post because she was a female. Did this happen? No, it was not because she was a woman that she lost her the job, but rather because she was a woman who acted in a certain way. Other students said the discrimination was based on gender. This too is debatable, depending on how you interpret gender. I see gender as a natural consequence of a person's sex. In other words, the fact that you are female means that you can fall pregnant. This in turn may deter an employer. Such action would then be discrimination based on gender. Does transvestitism fall in this category? The very fact that you can have male and female transvestites argues against this. Is the fact that T likes to dress in men's clothes and sing strange songs a consequence of her being female? No, so the discrimination was not based on her gender. What is left in the sexual spectrum? Yes, sexual orientation. Sexual orientation is the way in which you choose to express your sexuality. Ms Treatment finds her sexual expression in dressing as a man and singing certain songs. Her employer feels this is not appropriate behaviour for a professor and for this reason denies her the post. This is unfair discrimination as what T does in her private time need not affect her academic performance in any way. Of course, you could sidestep all the sexual landmines by claiming that there has been discrimination on one of the grounds listed in the Bill of Rights (BoR) (equality, privacy and so on). This discrimination is then presumed to be unfair and the university must prove the contrary.

You will not be penalized for the grounds for discrimination you point out provided it can be related to the facts and your answer is justified. The important point is that T's human rights have been violated despite the guarantees given by Chapter 2 of the Constitution. What does this mean in terms of international law? When interpreting the Bill of Rights (in other words, when the court has to decide whether the specific action taken against T violates her human rights) the court is bound by the provisions of section 39.

What does section 39 provide? It clearly states that when interpreting the Bill of Rights, the court (or tribunal or forum) **MUST CONSIDER** international law. There are two important points here. First, must means "are obliged to"; it does not mean "should" or "can if it feels like it". The court therefore has no choice and must consider international law. This in turn means that you as the lawyer representing one of the parties or as the presiding official will have to know what is going on in international law.

Secondly, the court must consider international law. In other words, it is not obliged to apply international law. In practice this does not make much difference for those appearing before the court as you will have to present the position in international law in any event. Of course it makes a vital difference for the presiding officer.

We have now established that the rights afforded to T by the Bill of Rights have been violated, therefore section 39 applies, therefore the international law must be considered. The question is: What is this international law that must be considered and where do you find it?

The steps you follow in finding this law are set out on pages 98 and 99 of the study guide. However, the question here is more specific. You are given two courts, the European Court of Human Rights and the German Constitutional Court, and are asked to assess the relative weight which a South African court should attach to these decisions in applying section 39. Your actual task is therefore to establish the position of these courts within the system of international human rights law. To do this you must of course understand the sources of international human rights law (IHRL).

The most important source of IHRL is the international documents (treaties) in which IHRL is set out. In our question you are specifically asked about the European Convention. This Convention is an international instrument or treaty which lays down certain rights. When these rights are violated someone must decide what the specific rights mean. This is the task of the bodies set up by the EC to enforce its provisions. The most important of these bodies is the European Court. This court gives authoritative interpretations or the practical meaning of the rights which the Convention embodies. We therefore have an international court, set up in terms of a treaty, with the specific function of interpreting the rights in a treaty. Its interpretations are part of the international law which a South African court must consider in terms of section 39 of the Constitution.

The other court involved is the German Constitutional Court. A constitutional court is an authoritative body which delivers important judgments, but could it be considered an international court? Look at where it comes from and what its purpose is. It is court set up in terms of German law (in other words foreign law) aimed at interpreting or enforcing provisions in the German constitution or bill of rights (also foreign law) essentially for Germans. This is a municipal court performing a municipal function and the law involved is foreign law, not international law. I would classify the decisions of this court as foreign law which a court **may** consider, in accordance with section 39(1)(c).

We therefore have an international decision by an international court dealing with an international document on the one hand, and a municipal decision by a municipal court dealing with municipal legislation on the other. Clearly in terms of section 39, the decision of the ECHR is more important than the decision of the GCC – the one **MUST** be considered, the other **MAY** be considered. However, remember that things in international law are never that clear-cut. You will remember from our “steps” that municipal case law (in other words, the decisions of the GCC) can also be a source of IHRL. If a right in an international document is the same as a right in a municipal bill of rights, the municipal interpretation of the right can also contribute to the creation of IHRL. However, itself is not international law.

When all these aspects are applied to the facts, things become interesting. Your classification of the human rights violated now becomes important. If you chose sexual orientation you would have encountered problems in finding the IHRL as it is not one of the grounds of discrimination listed in either the European Convention on Human Rights or the German constitution. The European Court and the GCC would therefore not help you much as they could not deal with the question. (T’s friend is at best confused and at worst delusional. This shows that we should never believe everything clients tell us.) What now? The easy answer is to choose the right to privacy, but if this cannot be done, you may look at the other sources of IHRL such as customary international law, soft law and if all else fails, general principles of law recognised by civilised nations, the writings of publicists and so on. In other words, when specifics fail you, fall back on general principle.

In this challenging activity we tried to show you that when you are dealing with human rights you **MUST** consider international law, which is where human rights are best expressed. Also note that it is important to distinguish clearly between international law and foreign law (a common failing of the courts).

Finally, remember that the sources of IHRL (like the sources of international law in general) are not always watertight and they require you to think creatively.

Practical exercise 3, p 101

Section 39(1):

In terms of section 39(1)(b) the court (or any tribunal or forum) must consider international law in order to interpret a provision in the Bill of Rights (BoR). In *S v Makwanyane* it was stated that international law in this context refers both to binding and nonbinding international law. International agreements and customary international law provide the framework within which the BoR can be evaluated and understood. Guidance on the interpretation of its provisions can be obtained from views expressed by the UN Committee on Human Rights and the European Commission on Human Rights, and from decisions of the Inter-American Court of Human Rights and the European Court of Human Rights. It must be remarked, however, that international law, which may advise the court in terms of s 39(1)(b), is not limited to international human rights law.

For example, in *Prince v President of the Law Society, Cape of Good Hope* the court had to interpret the provision protecting religious freedom in the context of the use of cannabis for religious purposes. It was found that South Africa's international obligations pertaining to the suppression of drug abuse outweighed the international norms which protected religious freedom.

It is important to remember that the role of international law in such instances is advisory. The courts *do not apply* the international law rules they have consulted *directly*, in a way in which they would apply, for example, the provision of a South African statute. The courts consult international law in order to flesh out the provision of our BoR which has come under their scrutiny. It is the BoR provision which the courts will apply, but the meaning of that provision has been molded by international law. Therefore we refer to an indirect application of international law.

However, although this is the basic rule, you also have to consider which source of international law the court is working with in interpreting the BoR. If it is a treaty which has been transformed into South African law in terms of section 231(4) or if it is a rule of customary international law which does not conflict with the Constitution or an Act of parliament under section 232, these will be part of South African law and as such will have to be applied, not merely considered, even when interpreting the BoR under section 39.

Given the importance of the human rights culture in South Africa, the indirect application of international law has become prominent in our Constitutional Court jurisprudence. Subsequently, international human rights norms and decisions have been invoked on a number of occasions by the Constitutional Court, some of which are listed below:

In *S v Williams* the court had to consider the prohibition on cruel, inhuman and degrading treatment or punishment. The court observed that the wording of the section corresponded to the wording used in international instruments. It also remarked that in interpreting the constitutional provision, one must have regard to the "emerging consensus of values in the civilized international community" and that "the manner in which the concepts are dealt with in public international law" is a source of valuable insights. The judgment referred to decisions of the UN Human Rights Committee (interpreting corresponding provisions of the International Covenant on Civil and Political Rights - ICCPR) and the ECHR (interpreting the European Convention for the Protection of Human Rights and Fundamental Freedoms).

S v Rens concerned the issue of fairness in appellate proceedings. The court considered ECHR decisions on the same topic.

In interpreting the right to privacy in *Bernstein v Bester*, the court referred to decisions of the ECHR.

In *In re Gauteng School Education Bill* a minority group had challenged the validity of an education Bill. In order to give judgment on the matter, the court examined the practice of the League of Nations and the United Nations related to minority rights.

In *National Coalition for Gay and Lesbian Equality v Minister of Justice* the court had to decide on the constitutionality of the common law offence of sodomy. The court referred to ECHR decisions as well as the view of the Human Rights Committee in *Toonen v Australia*.

The corporal punishment in independent schools came under constitutional scrutiny in *Christian Education South Africa v Minister of Education*. The court invoked South Africa's obligations under the Convention against Torture and the Convention on the Rights of the Child.

In *Mohamed v President of the RSA* the court had to decide on the validity of an accused person's deportation to a country in which there was a risk of the death penalty being imposed on the deportee. In reaching a conclusion, the court referred to decisions of the ECHR.

In *Minister of Health v TAC (No2)* the court had to interpret the meaning of the phrase "minimum core economic and social obligations". The court examined this concept as it was developed by the Committee on Economic, Social and Cultural Rights (established under the International Covenant on Economic, Social and Cultural Rights).

Section 39(2):

In terms of s 39(2) any court, tribunal or forum is required to promote the spirit, purport and objects of the Bill of Rights when it develops the common law or customary law, or when it interprets legislation. Such spirit, purport and objects are linked to international law and the values and approaches of the international community. In *Carmichele v Minister of Safety and Security* the court developed a new rule of common law, dealing with delictual liability of the SAPS. It considered extensively international jurisprudence (including soft law sources). For example, the court cited decisions of ECHR, provisions of the Convention on Elimination of All Forms of Discrimination against Women, as well as UN guidelines on the role of prosecutors before concluding that South African common law was out of line with the spirit of the Constitution. Once again, acting in terms of the provisions of this section, the court will not apply international law directly. It is South African law (for example a common law rule) which will be applied, but at the time of its application it will have been infused with the relevant international law values. This section therefore refers to an indirect application of international law.

Section 231:

This section provides, among other things:

- ...
- (4) Any international agreement becomes law in the Republic when it is enacted as law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
 - (5) The Republic is bound by international agreements which were binding on the Republic when the Constitution took effect.

This section sets out the process in which treaties would apply in South Africa. Unless the provision of a treaty is self-executing, it will have to be transformed into municipal legislation. This can be done in a number of ways:

- The provisions of a treaty may be included in the wording of an Act of Parliament. (For example the Civil Aviation Offences Act 10 of 1972 enacts the 1963 Tokyo Convention on Offences and Certain Acts Committed on Board Aircraft, the Hague 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.)
- The treaty may also be included as a Schedule to an Act of Parliament. An example is the Diplomatic Privileges and Immunities Act 37 of 2001, which incorporates the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, which are included as Schedules to the Act.
- The executive may also bring the treaty into effect in municipal law by means of proclamation in the *Government Gazette*, provided the executive is given the power to do so by an enabling Act of Parliament.

What is important to understand is that whatever legislative shape the treaty takes, the end result of the process will be that its provisions can be applied directly by the South African courts.

Section 232:

This section provides as follows: “Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

From this provision it is clear that customary international law is South African (domestic) law and as such it will be applied directly. If the alleged rule meets the requirements of *usus* and *opinio iuris*, the court will take judicial notice of it and apply it. Only two conditions must be met: Firstly the rule must not contradict the Constitution; and secondly it must not contradict an Act of Parliament. Common law rules and judicial decisions are subordinate to or at least on a par with customary international law.

Section 233:

Section 233 provides as follows: “When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

One of the purposes of this section is to promote harmony between international law and municipal law. As a result of its provisions, international law finds indirect application within the domestic legal system. This position is similar to the one we encountered under section 39. In other words, what is being applied directly is the actual legislative provision, but its meaning (the one which the court has found to be international law compliant) will have been determined by international law. The latter will therefore permeate South African law not directly, but indirectly: the interpretative process will have inculcated the legislative provision with the relevant international law principle.

International law in this context includes customary international law, incorporated, as well as unincorporated treaties to which South Africa is a party. There is a presumption that in enacting legislation, the legislature did not intend to violate South Africa's international obligations.

Lastly, some statutes may specify that international law should be used in their interpretation. For example, the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 provides that when a court applies the Act, it must consider international conventions and international custom. The Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 stipulates that those interpreting the statute may be mindful of international law. The Refugees Act 130 of 1998 stipulates that the Act is to be interpreted and applied with due regard to relevant conventions and the 1948 Universal Declaration of Human Rights. But even if such specific instructions are not included in the legislative text, the provisions of section 233 mandate the indirect application of international law in cases where an international element is present and the court is required to interpret the provisions of a relevant statute.

Practical exercise 4, p 101

Monists advocate that the law is a single legal system made up of different but interrelated parts. These parts are hierarchic, in other words some carry more weight than others. At the top of the hierarchy is natural law, which should form the basis for both international law and municipal law. International law and municipal law are both subject to natural law and should both be expressions of natural law. Because they are all part of the same hierarchy, international law applies in the municipal sphere without specifically having to be transformed or adopted into the law. Should a conflict arise between international law and municipal law, international law will prevail as it has higher status in the hierarchy.

The three aspects of monism you need to isolate in order to test the provisions of the Constitution in the rest of the questions, are the following:

1. A single system, which means that international and municipal law are part of natural law and of each other.
2. This means that you do not have to "do" anything to international law to apply it to your system, because it is already part of your system.
3. It is a hierarchic system. If conflict arises, international law prevails.

The dualist approach treats international law and municipal law as two distinct systems which differ as regards subject, origin and field of application. Because we have different laws operating in different spheres (international and national) problems arise when the rules of one sphere need to be applied in the other. Some change to these rules is required and to effect this change, the theories of incorporation or transformation come into play. The international law rule is taken and changed (usually by legislation) into a rule of municipal law and can then be applied domestically. Should there be a conflict between a rule of customary international law and a municipal rule, the municipal rule prevails.

As with monism, there are three elements to identify:

1. There are two separate systems of law.
2. International law must be changed or transformed in some way to become applicable in national law.
3. Conflict should not arise, but if it does national law prevails.

This is discussed by Dugard in chapter 4. Please read the discussion.

Consider the sections we have asked you to assess and test them against the above-mentioned points.

Section 39(2) provides as follows: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

What should every the court, tribunal or forum do? They must promote the spirit, aims and objects of the BoR. But what is the spirit, purport and objects of the Bill? Look at section 7 of the Constitution: The Bill "affirms ... dignity, equality and freedom" (s 7(1)). The state must also "respect, protect, promote and fulfill the rights in the BoR" (s 7(2)).

Now you know what the rights are. Think about them. Where do these rights come from? What are they an expression of? They come from international law, notably the Universal Declaration of Human Rights (UDHR) and the ICCPR. So what do we have? We have an instruction to courts, tribunals and forums to develop one part of our law (common law and customary law) using the principles of international law. Look at the elements identified above and apply them.

Is there any indication that there is a single system? I think so. The BoR is part of our law, because it is contained in the Constitution. The spirit of the Constitution is therefore also part of the same system. You have just established that the spirit is an expression of international law, therefore international law is part of our Constitution. Therefore there is a single system, as monism requires.

Is there anything that indicates that international law prevails if there is a conflict? Again, I think so. If you must develop certain aspects of your law (common law and so on) using other sources such as international law, international law is clearly superior. Aspects of your law must be developed on the basis international law. Again monism would appear to be the answer.

Lastly, does the section require you to change or transform international law to make it applicable? No, in fact it requires you to change the non-international elements. Again this would appear to support monism and all three elements have been satisfied. In the process we have also disproved the elements inherent in dualism.

Of course, you could also argue the other way if you are very creative. A good argument would get full credit. We want to establish whether you understand the concepts monism and dualism and are able to apply them. Your final choice is not all that counts, because we are interested in your ability to think logically and justify your answer.

Section 231 provides as follows:

- (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within reasonable time.
- (4) Any international agreement becomes law in the Republic when it is enacted as law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
- (5) The Republic is bound by international agreements which were binding on the Republic when the Constitution took effect.

Here we will consider section 231(4) as the obvious example.

What does the section provide? First, to apply in our law (municipal law) all treaties (international law) must be “enacted as law by national legislation”. This means the international law or treaty has to be changed into a law through legislation. In other words, a process of transformation or incorporation is taking place. Such a process is a characteristic of dualism. The first part of s 231(4) is therefore clearly dualist.

The section does not end there and it makes provision for an exception, namely, self-executing treaties (international law) that are regarded as “law in the Republic”. This differs from the first part of s 231(4) because no process is required to transform the treaties into law. They are law because the Constitution says they are law. This is clearly a monist approach.

Note that self-executing treaties (s-e treaties) must meet one important criterion before it can obtain the status of law. This is that they must not conflict with the Constitution or an Act of Parliament. What does this tell us about the characteristics we have identified in (a)? Ask yourself what would happen if the s-e treaty were in conflict with the Constitution or an Act of Parliament. The answer is that it would NOT be law in the Republic. This means that the status of the Constitution or an Act of Parliament is superior to that of a self-executing treaty. Therefore, municipal law will prevail in the case of conflict. This is also dualist.

The first part of s 231(4) that requires incorporation through legislation is clearly dualist. The exception (self-executing treaties) appears to be monist in that no act of transformation is required. However, as the municipal or national law will prevail in the event of a conflict with the Constitution or an Act of Parliament, the possibility of a dualist leaning cannot be excluded.

Section 232 provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

This could have been argued either way. The fact that customary international law is law in South Africa and does not need to be incorporated implies a monistic approach. On the other hand, if it is subjected to the Constitution or an Act of Parliament, two systems are recognised, namely international law (where the custom is found) and municipal law (where the Constitution and Acts are found). This seems to indicate a dualist approach. Our argument about municipal law prevailing in case of conflict and therefore suggesting dualism also applies here.

Section 233 provides as follows: “When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

This section deals with an indirect application of international law. If it is taken literally, it would mean that all legislation must be tested against international law, but it is unlikely that the courts will take such a view. It would come into play in cases where a piece of legislation with an international element has come to be interpreted before the courts. If one possible interpretation is inconsistent with international law, while it is also possible to interpret the text reasonably in a way which would cause it to conform to international law, then the latter is to be preferred. Therefore we have a reversal of the position in section 232 and the self-executing provisions of section 231(4). If there is a conflict here, international law must be followed. This is an essentially monist conception.

The above is an example of the type of analysis we expect when you are dealing with the Constitution. It is important that you think logically about the case. It is not enough just to regurgitate the facts you have memorised.

Practical exercise 5, p 101

This is a fairly easy question that have been touched upon in the preceding exercises. Section 39(1) directs courts, tribunals or forums to consider international law when interpreting the Bill of Rights (BoR). The sources of international law which are considered include provisions in relevant conventions; decisions of international courts and tribunals, and recommendations of commissions concerning the interpretation of these conventions; applicable customary international law rules; soft law, and so forth. (Return to pp 92–97 of your study guide if you do not remember.) The courts use these international law rules in order to flesh out the BoR provision they are interpreting. They do not apply the international law they have considered directly, unless the international law so considered happens to be a treaty which has been transformed into South African law in terms of section 231(4), or it is a rule of customary international law which does not conflict with the Constitution or an Act of Parliament under section 232. (These are part of South African law and as such they must be applied.)

Section 39(2) concerns the interpretation of legislation and the development of common law or customary law. In terms of this section every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights (BoR). As we have already pointed out, the rights in the BoR are an expression of international law rules, principles and aspirations. This section instructs the courts to infuse our legislative provisions, common law and customary law with international law principles during the processes of interpretation or legal development.

Section 233 concerns the interpretation of legislation. It directs South African courts to prefer any reasonable interpretation of legislation which is consistent with international law over any alternative interpretation which is inconsistent with international law.

It is unlikely that *all* legislation will always be tested against international law, but if there is a statute which contains an international element, the courts must, where reasonably possible, give it meaning which is consistent with international law. This provision is in the same vein as that of s 39(2), although the command directed at the courts in s 233 is more explicit.

Practical exercise 6, p 101

We have already discussed this subsection in our answer to practical exercise 3 (above).

2 . GUIDELINES ON ACTIVITIES IN SECTION B OF THE STUDY GUIDE

TOPIC I: TERRITORY IN INTERNATIONAL LAW

Practical exercise 1, p 106

The intertemporal law principle states that a case must be judged in terms of the law applicable at the time the territory was acquired. The creation of the right is judged by the law existing at the time of its creation, while the continued existence of the right is governed by evolving law. *Utī possidetis* is a rule of convenience, related to the principle of intertemporal law – colonial boundaries, however arbitrarily they may have been drawn, must be respected.

Utī possidetis was classified as a customary rule of general scope. This is not very clear, but it would appear to mean a rule of customary law binding on all states – although the court was careful not to call it a rule of *ius cogens*. Because the principle is seen to “freeze” the position of a state’s borders, an exercise of the right to self-determination involving inhabitants of one state cannot change the state’s borders. In effect, therefore, self-determination can only be exercised within the existing borders of a state. This is confirmed (to differing degrees) in a few international instruments. For example, the Declaration of the Granting of Independence to Colonial Countries and Peoples (Res 1514 (XV) of 1960) states that “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”, but “any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and Principles of the Charter of the United Nations”.

Practical exercise 2, p 106

You have to read and summarise this article yourself, so we shall not provide you with a comprehensive essay here. In your answer, think about and discuss the following:

- The efforts of the OAU Commission of Mediation, Conciliation and Arbitration
- The OAU Mechanism for Conflict Prevention, Management and Resolution
- Settlement of disputes by an International Arbitral Tribunal
- The judicial settlement of disputes and more specifically the facts and decisions in the following cases:
 - *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*
 - *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)*
 - *Case concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*
 - *Case concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)*
 - *Case concerning the Territorial Dispute (Libya v Chad)*
 - *Case concerning the Frontier Dispute (Burkina Faso v republic of Mali)*
 - *Case concerning Kasikili/Sedudu Island (Botswana v Namibia)*

Practical exercise 3, p 107

Occupation: Territory which is occupied must be *terra nullius*, in other words, territory belonging to no one. If territory belongs to no one, no one has sovereignty over it. The state acquiring the territory therefore acquires original sovereignty. Occupation represents the establishment of sovereignty which did not exist beforehand.

Annexation also involves a change in sovereignty. The important point here is that it is not a change chosen freely by the state which exercised sovereignty before the annexation.

Because annexation is essentially based on conquest, the original sovereign is compelled to hand over its sovereignty to the annexing state. Annexation represents a forced change in sovereignty.

Cession: Here we also have a change in sovereignty but because cession is based on the free consent of the states concerned, the acquisition differs from that in the case of annexation. Cession is a consensual transfer of sovereignty.

Prescription: Because prescription is based largely on not doing something in other words the state "losing" sovereignty must remain inactive, one can say that prescription represents the acquisition of sovereignty through default or inactivity.

The central idea in territorial acquisition or loss is a change in the sovereignty over territory. In the case of occupation, we find an original establishment of sovereignty. In the case of annexation, sovereignty is established by force, while in the case of cession, it is established by consent. In the case of prescription, it is gained by inactivity.

Practical exercise 4, p 107

In cases of annexation, two elements must be present before the annexing state can claim title to the territory (or rather – could claim, since the prohibition of the use of force has made annexation an unacceptable method of acquiring territory). These two elements are *animus* (the intention to annex the territory), and *corpus* (meaning that the state must have come to be in actual physical control of the territory).

In 1900 Britain claimed to have annexed, amongst other territories, the Transvaal, even though the Anglo-Boer War continued until 1902. So, despite the fact that the *animus* element may have been present, *the corpus* element was lacking in the period between 1900 and 1902. In international law terms, this means that the British did not obtain a title to the territory until 1902 and that the 1900 "annexation" was premature.

After the war, the court in *Van Deventer v Hanke & Mossop* 1903 TS 401 had to decide on the validity of a decree which had been issued by the ZAR government soon after the purported British annexation. The territory of Transvaal was, at the time, still under the *de facto* control of the Boer forces, and the late Republic's government had continued to exercise administrative and legislative competencies over it. The court admitted to the lack of effective British occupation at the time, but stated that, as a court constituted by the British Crown, it had no jurisdiction to inquire into the validity of the annexation.

Thus, it could not recognise as valid the laws passed by the late Republic's government after the date on which the Transvaal had been proclaimed as part of the British dominions.

Practical exercise 5, p 107

Terra nullius, roughly translated, means "land belonging to no one". Land inhabited by indigenous peoples was, during the heyday of western colonialism, regarded as land belonging to no one. The criterion the European states used was one of degree of "civilisation". In this context the term "civilisation" was defined in purely western or European terms (which is to adopt a rather positivist interpretation of the matter). The *Western Sahara case* changed this by stating emphatically that land inhabited by indigenous peoples is not *terra nullius*. The test, in terms of this case, is not some artificial level of civilisation, but whether the peoples have a recognisable (as opposed to a European) social and political structure of their own.

In 1652 the Dutch East India Company established a refreshment station at the Cape. Its employees were eventually allowed to settle – in the process of which the indigenous peoples occupying the lands over the settlement spread were subjugated. These tribes, especially the Khoikhoi, did have some form of social organisation to varying degrees, and therefore – viewed from this angle – it is more probable that the Cape was acquired by conquest, rather than occupation of *terra nullius*, although the position remains uncertain.

The British, the Dutch and the Boer settlers entered into treaties with tribal leaders to the east and to the north, which would indicate that these territories were not regarded by them as being *terrae nullius*. Their settlement would therefore seem not to be based on occupation, but rather on cession or conquest.

Another example illustrating the prevailing positivist view at the time was the acquisition of Walvis Bay in the 1800s. The special Cape Commissioner entered into an agreement with Chief Kamaherero of the Herero in 1876. This agreement established a protectorate over, *inter alia*, Walvis Bay. However, the British considered this land to be *terra nullius*, and the agreement in their view served as notice to other colonisers that the territory had been occupied. In 1878 Walvis Bay was proclaimed as British Crown territory and in 1884 it was annexed to the Cape Colony.

Practical exercise 6, p 108

We expect of you to have read the case and we therefore assume that you are familiar with the facts.

The report of the Secretary General ("Summary legal position of the Palestine Liberation Organization", annex II), stated that "[t]he construction of the Barrier is an attempt to annex the territory contrary to international law ... The de facto annexation of the land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination".

Further views expressed to the court were that "The wall severs the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination and constitutes a violation of the legal principle prohibiting the acquisition of territory by the use of force." Israel, on the other hand, argued that this was a temporary measure and that the purpose of the wall was to combat terrorist attacks launched from the West Bank.

The court referred to the customary law rule that the acquisition of territory by war is inadmissible. It also referred to SC Resolution 242 (1967) of 22 November 1967 which called for the withdrawal of Israel armed forces from territories occupied in the 1967 conflict; for the termination of situations of belligerency; as well as for respect and acknowledgement of the territorial integrity and political independence of every state in the area, and the right of these states to live in peace, free from threats or acts of force.

Furthermore, the court observed that the government of Israel had confirmed that the PLO was a representative of the Palestinian people. It furthermore referred to the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 and its mention of the Palestinian people and its "legitimate rights".

The court took note that Israel had promised that the wall was of a temporary nature and could not amount to annexation. However, the court emphasised that it could not "remain indifferent to certain fears...that the route of the wall will prejudice the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access." The court pointed out that the construction of the wall and its associated regime created a "*fait accompli*" (something that is already done or decided and seems unalterable) on the grounds that it could well become permanent. This, the court concluded, would be tantamount to *de facto* annexation.

Furthermore, the court found that the construction would severely change the demographics in the area and would impede the exercise by the Palestinian people of its right to self-determination.

In a largely commendable advisory opinion, the majority of court ruled that the "construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian territory, including in and around east Jerusalem, and its associated regime, are contrary to international law".

Practical exercise 7, p 111

No it cannot. The cession agreement is a treaty. Treaties cannot be enforced in a South African municipal court unless they have been incorporated into our law by legislative act (s 231(4) of the Constitution). The provision in the agreement allowing for compensation at R10 000 per hectare has not been incorporated. X is therefore asking the court to enforce a provision found only in an unincorporated treaty.

Although the R10 000 provision has not been incorporated, the Act of Parliament does allow for compensation at the rate of R5 000 per hectare. This is part of our municipal law and X can claim this amount before the SA court (on the principle that half a loaf is better than no loaf).

The claim for R10 000 per hectare is based on an unincorporated provision in a treaty that municipal courts cannot enforce. The claim for R5 000 per hectare is based on a statute which is part of our municipal law and can be enforced.

Practical exercise 8, p 111

An act of state is a species of prerogative power, which relates to the acts of the executive in the realm of foreign affairs. The coming into force of the 1993 Constitution marked the beginning of the era of constitutionalism in South Africa and the departure from the Westminster system of parliamentary sovereignty. Although the executive powers enumerated in the Interim Constitution, as well as in the 1996 Constitution *originate* in the prerogative powers, they are now constitutionally authorised. There is no express mention of *prerogative* powers as such in either the Interim Constitution or the 1996 Constitution.

The decision of the Constitutional Court in *President of the Republic of South Africa v Hugo* is the first in a long line of post-1994 era cases impacting on prerogatives. In *Hugo* the court held that the Interim Constitution codified the powers of the President and that the President's powers were limited to the ones listed in s 82(1); consequently, the President had no powers derived from prerogative. Rautenbach and Malherbe point out that this statement is not entirely correct. According to them, one prerogative seems to have remained: the act of state. It is true that some of the prerogatives in the field of foreign relations were included in previous constitutions; however, they have subsequently been excluded from the 1996 Constitution. The excluded powers include the recognition of foreign governments, the treatment of aliens, the acquisition of territory other than by cession in terms of a treaty, proclamation and termination of martial law, declaration of war and making of peace.

However, it must be remembered that by virtue of the transitional provisions contained in both the Interim and the 1996 Constitution, the common law (including the common law powers of the President) will remain in force until it is amended or repealed and to the extent that it is consistent with the Constitution. Therefore the powers related to the conduct of foreign relations (acts of state) remain in existence provided their exercise is consistent with the provisions of the Constitution (s 2 of the Constitution provides that the Constitution is the supreme law and all law or conduct inconsistent with it is invalid).

So, while it is impossible to deny that the executive has the power to conduct foreign relations, the citizens must be protected against an unfettered executive. What will probably happen, therefore, is that the foreign affairs function will be tested, not necessarily against the letter of the Constitution, but rather against its “spirit and purport” as an empowering document in a modern democratic state. This judicial power of review will be even more prominent in cases in which the acquisition or loss of territory affects human rights. Section 8(1) of the Constitution provides that the Bill of Rights applies to all law, and binds the executive, the judiciary and all organs of state.

TOPIC II: IMMUNITY AS AN EXCEPTION TO JURISDICTION: STATE/SOVEREIGN IMMUNITY

Practical exercise 1, p 123

In *Liebowitz v Schwartz* the court recognised that it is a principle of public international law that the courts of a country will not, by their process, make a foreign state a party to legal proceedings against its will, and that such immunity has been admitted in all civilised countries. The court remarked that this principle was founded on “grave and weighty considerations of public policy, international law and comity”.

Sovereign immunity has its roots in the immunity of the person of the foreign sovereign (king) from municipal courts’ jurisdiction. Later this immunity was accepted as belonging to the abstraction of the state and its organs. In other words, the acts of the head of a foreign state, its government and its government departments cannot be challenged in municipal courts.

The first basis, or explanation, for the existence of sovereign immunity is international comity, or goodwill. International comity consists of principles that are not “hard law” – in other words, they are not legally binding. These principles are followed by states out of courtesy towards other states and out of respect for each other’s laws and interests. Thus, one state will not subject another to the jurisdiction of its own courts out of courtesy. Such courtesy is expected to be reciprocal.

The second basis for sovereign immunity is the sovereign equality of states. All states are equal, and one cannot exercise authority over an equal (“*Par in parem non habit imperium*”). Therefore one sovereign cannot be subjected to the jurisdiction of another (at least not without the former’s consent).

Practical exercise 2, p 123

For the sake of clarity, let us distinguish between the theories of absolute sovereign immunity and restricted sovereign immunity.

According to the theory of absolute sovereign immunity, a state was always immune from prosecution in the courts of another state with respect to all acts that it performed. As we have explained above, proponents of this theory argue that all sovereigns were equal and one sovereign could not be subjected to the jurisdiction of another.

The theory of restricted (qualified) sovereign immunity entails that a state is, in principle, immune from being questioned in the courts of another state, but it loses this immunity when it descends into the market place. When a state acts as an ordinary trader it is expected to honour its obligations and it is subject to the laws which all ordinary traders must abide by. One must therefore distinguish between:

- public governmental acts (*acta iure imperii*): if claims arise from such acts, the acting state will be immune from the jurisdiction of another state's courts, and
- *commercial activities (acta iure gestionis)*: a state will not be immune from jurisdiction if claims arise from these activities.

It should also be noted that the 2004 UN Convention on Jurisdictional Immunities of States and Their Property approves the doctrine of restricted immunity in the field of commercial activities and its Preamble proclaims that the jurisdictional immunities of states and their property are generally accepted as a principle of customary international law.

Today, many states (eg Canada, USA, UK) support the theory of restricted immunity (which is the fairer of the two from the ordinary trader's point of view), although the UK (whose judicial practice in this regard has been followed by SA courts) only approved of the restricted approach in 1976 (*Trendtex Trading Corporation v Central Bank of Nigeria*).

Development in SA law

Initially, South African courts applied the theory of absolute sovereign immunity. For example, in *De Howorth v The SS India* such immunity was upheld in respect of a merchant ship owned by the Portuguese government, because the vessel was found to have been used for a public purpose.

In the SA case of *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Moçambique* the court concluded that the theory of restricted sovereign immunity was a general rule of international law (and applied it). The court observed that "[there was] an abundance of South African judicial authority...in support of the absolute doctrine... [but]...there is good reason to believe that the rule of sovereign immunity has undergone an important change, and that the old doctrine of absolute immunity has yielded to the restrictive doctrine". As to whether the doctrine of *stare decisis* would present difficulty in implementing this change, the court concluded that "the rule [of absolute sovereign immunity] stated in the earlier English decisions no longer represents the rule of international law, and the *ratio* of the earlier South African cases is therefore no longer applicable".

The *Inter-Science* decision was approved by the court in *Kafraria Property v Government of the Republic of Zambia*. In the latter judgment the court emphasised that customary international law did change from time to time, and when it had changed (as had happened in the context of sovereign immunity) it was the duty of the courts to ascertain the nature and extent of that change and apply the rule accordingly.

The position of sovereign immunity in SA law was "solidified" by legislation (the Sovereign States and Immunities Act of 1981).

Practical exercise 3, p 123

- (1) If the absolute immunity theory is applied, the money due could not be claimed from Bolivia as it is absolutely immune from the jurisdiction of the South African courts for contracts it has concluded.
- (2) If the restricted immunity theory is applied, the contract will be seen as a normal commercial transaction - in concluding the contract, Bolivia was not performing a public governmental function, but was merely acting as a trader in the marketplace. It would, therefore, not succeed in raising immunity and X would get his money.

Practical exercise 4, p 124

At the risk of oversimplification, one can say that an act *jure imperii* is a public governmental act, an act which the state performs while acting with sovereign authority, such as the passing of legislation.

An act *jure gestionis* refers to an activity of a commercial nature, in which case the state will be in a position of an "ordinary trader".

As for what "test" should be employed in order to determine whether an act is *jure imperii* or *jure gestionis*, there were two schools of thought: one maintained that one should look at the purpose of the act, while another supported the nature of the transaction embodied in the act as being the deciding factor. What is the position in South African law?

In terms of the provisions of FSIA, a foreign state is not immune from the jurisdiction of municipal courts when the instituted proceedings relate to a "commercial transaction" into which the state has entered. "Commercial transaction" is defined in section 4 of the Act as:

- (a) any contract for the supply of services or goods;
- (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such loan or other transaction or of any other financial obligation;
- (c) and any other transaction or activity of a commercial, industrial, financial, professional or other similar character into which the foreign state enters or in which it engages otherwise than in the exercise of sovereign authority, but does not include a contract of employment between a foreign state and an individual.

As is evident from the wording of section 4(c) of FSIA, the determining factor is recognised as the nature of the contract, rather than its purpose. This was confirmed in the judgment of the court in *Akademik Fyodorov: Government of the Russian Federation v Marine Expeditions Inc*, where it was held that section 4(3) of the FSIA poses an objective criterion based on the nature or character of a particular transaction, contract or activity without reference to its purpose.

However, even with this guideline in mind, there may still be actions related to the armed forces and diplomatic activities that will be hard to classify. You will probably also recall the judgment in the American case of *Victory Transport Inc v Comisaria General de Abastecimientos Y Transportes*, where it was held that acts related to the armed forces, internal administrative acts, legislative acts, acts related to diplomatic activity, and public loans are to be regarded as acts in which a state engages in the exercise of sovereign authority – that is, *acta jure imperii*. The difficulty we are referring to can be illustrated by the following example: suppose there is a contract of purchase and sale in terms of which state A buys tyres for its army trucks from a South African company. At first glance this is an act related to the armed forces, but it would also fall within the scope of section 4(c) of FSIA because, as we pointed out above, it is the nature of the contract (a purchase and sale contract), and not its purpose (equipping State A's army) which is relevant in this context. However, Dugard highlights the fact that this view would “fail to have regard to the fact that courts are likely to be weary in asserting jurisdiction over any matter related to the armed forces”. In the American case of *Aerotrade v Republic of Haiti*, the Republic of Haiti was successful in raising immunity against a claim for payment for military equipment supplied to it for use by its armed forces.

Similar difficulty is encountered with the classification of diplomatic activity. For example, in *Prentice Shaw and Scheiss v Government of the Republic of Bolivia* a contract for the erection of an embassy was deemed to be an act *jure imperii*, while in the English case of *Planmount Ltd v Republic of Zaire* a contract for the repairs of an ambassador's residence was classified as an act of a commercial nature.

Practical exercise 5, p 124

A Belgian court issued warrant of arrest against Mr Abdulaye Yerodia Ndongbasi for offences constituting grave breaches of the Geneva Conventions of 1949, and crimes against humanity. When the warrant was issued, Mr Yerodia was the Minister for Foreign Affairs of the DRC. The Congolese government claimed the process constituted a violation of the rules of customary international law on absolute inviolability and immunity from criminal process for incumbent foreign ministers. The Belgian court was able to issue the warrant because, at the time, Belgian law endowed the courts with universal jurisdiction over serious breaches of international humanitarian law, without the possibility of raising immunity *rationae materiae* (immunity with respect to acts performed in the exercise of official functions).

The ICJ majority hearing the case of *DRC v Belgium* concluded that a Minister of Foreign Affairs enjoyed the protection of customary international law, and was entitled to immunity from prosecution to the extent enjoyed by a foreign Head of State. This means that, while in office, a Minister of Foreign Affairs has absolute immunity *rationae personae* from criminal process before national courts, even for crimes against humanity and war crimes. By issuing the warrant, Belgium had therefore violated international law. Once the Minister of Foreign Affairs stepped down, he could be prosecuted for acts committed in his personal capacity, although he would still have immunity for acts committed as part of his official duties while he was in office (immunity *rationae materiae*).

Ad hoc Judge van Wyngaert wrote a dissenting opinion, criticising the finding that Ministers of Foreign Affairs enjoy such immunity under customary international law. Not only was state practice in this regard insufficient, but the negative state practice of not instituting criminal proceedings against Ministers of Foreign Affairs could not comply with the requirement of custom if it could not be shown that there was a conscious awareness of a duty not to prosecute on behalf of states. Furthermore, such a finding would fly in the face of recent developments along the lines of accountability for international crimes.

TOPIC III: HUMANITARIAN LAW

Practical exercise 1, p 137

Before we consider Israel's contention and the response of the ICJ thereto, let us have a look at the text of Common Article 2 of the four Conventions. Article 2 reads as follows:

1. In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
3. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

In a nutshell, Israel did not agree that the Fourth Geneva Convention was applicable to the occupied Palestinian Territory, because this territory had not been recognised as sovereign prior to its annexation by Jordan and Egypt. It thus inferred that it was "not a territory of a High Contracting Party as required by the Convention".

Israel admitted that Jordan had been a party to the Fourth Geneva Convention in 1967, and that an armed conflict did break out between Israel and Jordan at the time. However, Israel contended that the territories which Israel occupied subsequent to that conflict had not previously fallen under Jordanian sovereignty. Therefore, Israel argued, the Convention was not applicable *de jure* in those territories.

The court observed that, in terms of article 2(1) of the Fourth Geneva Convention, the latter is applicable when:

- (i) A situation of armed conflict exists (regardless of whether or not a state of war has been recognized); and
- (ii) This conflict has arisen between two contracting parties.

If these two requirements were met, the Convention would apply in any territory occupied in the course of the conflict by one of the contracting parties.

The court also stated that article 2(2) did not serve to restrict the scope of application of the Convention, as defined by the first paragraph. This article did not mean to exclude those territories which did not fall under the sovereignty of one of the contracting parties. Rather, its purpose was to make it clear that the Convention would apply even if the occupation met with no armed resistance.

The court pointed out that the interpretation of articles 2(1) and 2(2) enunciated above would reflect the intention of the drafters of the Fourth Geneva Convention – namely to protect civilians who find themselves, in whatever way, in the hands of the occupying power. The Fourth Geneva Convention, the court explained, sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories. Such an interpretation was also confirmed by the Convention's preparatory work.

Thus, the court concluded as follows:

In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.

Practical exercise 2, p 137

While you must still read and summarise the judgment, we would like to draw your attention to the following remarks, made by the Appeals Chamber of the ICTY in the *Tadić* case regarding the application of humanitarian law to both internal and international armed conflict:

Historically, international law treated the two classes of conflict in a markedly different way. The first class was interstate wars. They were regulated by a whole body of international legal rules, which governed both the conduct of hostilities and the protection of persons not participating (or no longer participating) therein, such as the civilians, the wounded, the sick, shipwrecked, prisoners of war. However, there were very few international rules governing civil commotion, since internal strife such as rebellion, mutiny and treason were treated as being regulated by national criminal law.

Since the 1930s, this distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict.

The tribunal cited various reasons for this development. For example, civil wars have become more frequent; they have also become more cruel and protracted; because of the increasing state interdependence, third States are finding it harder not to involve themselves in internal strife - either directly or indirectly; and of course the increasing importance of human rights protection and concern for the wellbeing of the people has also played a role in this development.

The Tribunal further pointed out that the emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and the level of treaty law.

The first rules that evolved were aimed at protecting the civilian population from the hostilities. For example:

- The intentional bombing of civilian populations is illegal.
- Objectives aimed at from the air must be legitimate military objectives and must be identifiable.
- Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence.

Subsequently, states have specified certain minimum rules applicable to internal armed conflicts in common Article 3 of the Geneva Conventions of 1949. These rules reflect "elementary considerations of humanity" which apply under customary international law to international and internal armed conflicts alike.

Common Article 3 also contains an important procedural mechanism by virtue of which parties to internal conflicts may agree to abide by the rest of the Geneva Conventions. As the Tribunal explains: "Agreements made pursuant to common Article 3 are not the only vehicle through which international humanitarian law has been brought to bear on internal armed conflicts. In several cases reflecting customary adherence to basic principles in internal conflicts, the warring parties have unilaterally committed to abide by international humanitarian law."

Another important instrument is Additional Protocol II to the Geneva Conventions. The Tribunal observed that "[m]any provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles."

We have mentioned that the general rules designed to protect those who are not taking active part in hostilities have gradually become applicable in situations of internal strife. The same extension is evident in the rules dealing with the protection of civilian objects and cultural property. Furthermore, there has been an extension of the rules and principles governing the means and methods of warfare: those proscribed in international armed conflict are banned in situations of internal conflicts as well.

However, the Tribunal qualified all of the above observations as follows:

The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted:

- (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and
- (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.

Practical exercise 3, p 137

The conduct of the United States with respect to the Taliban combatants is not consistent with international humanitarian law. You should remember that article 44 of Additional Protocol I of 1977 stipulates that combatants are under an obligation to distinguish themselves from the civilian population, and if they are unable to do so, they must carry their arms openly (while engaging in hostilities, or preparing for them, of course). This is important, because as long as they do so they are entitled to retain the status of combatants. Should they be captured, they must be treated as POWs. In addition, the Third Geneva Convention provides that persons who take part in hostilities and are then captured must be presumed to be POWs, at least until their status has been determined by a competent tribunal. As members of the Afghan armed forces, the Taliban combatants were entitled to POW status and all the protection associated with it. However, this is not the position of members of Al Qaeda. The latter cannot be considered combatants – they are civilians who engage in criminal activities.

Practical exercise 4, p 138

You have probably guessed the answer to this activity, so we will not say too much here. We will, however, provide you with the most important points that should be included in your essay. If you tried to answer this question (or plan to do so in future), and are uncertain what to write, please do not hesitate to contact us. We are also willing to read through any draft answer you may have prepared.

In a nutshell, it is important to distinguish between the two.

Combatants are:

- legitimate targets during armed conflict
- entitled to engage in such a conflict
- entitled to prisoner-of-war status when captured.

Combatants are obliged to distinguish themselves from the civilian population if they want to retain the status of combatants.

Civilians, on the other hand, may not be targeted during armed conflict. If an attack is likely to cause civilian casualties that are not proportionate to the expected military advantage, then even military objects may not be attacked. Furthermore, civilians may not engage in armed conflict. If they do so, they are liable to be punished as criminals.

You are expected to expand on, or add to, the abovementioned basic principles, using the rules of the law of The Hague and the law of Geneva (which are described on pp 131-135 of your study guide and will not be repeated here). Some of the issues that should be discussed further include:

- What is the definition of belligerents?
- Are non-combatants, who form part of the armed forces of belligerent parties, entitled to prisoner-of-war status?
- How should prisoners of war be treated?
- How far does the right of belligerents to adopt any means of injuring the enemy extend?
- What happens if an armistice is violated by a private person?
- How should military authority be exercised over the territory of an occupied state?
- How is the civilian population protected during wartime?

Practical exercise 5, p 138

Only states which have become parties to international conventions and their protocols incur obligations in terms of their provisions, but those rules of humanitarian law which form part of customary international law bind all. The Hague Regulations can be regarded as forming part of customary international law. The four Geneva Conventions have been accepted by 192 states and for the purposes of this activity we can accept that states A and B are parties to these Conventions. (Note, however, that the Additional Protocols have been accepted by fewer states.)

In this evaluation, the basic premise is that:

- Belligerents must always distinguish between combatants and civilians.
- Combatants and military objects can legitimately be subjected to an attack, while civilians and civilian objects may not.
- Whatever the circumstances, precautions must always be taken to ensure that any harm caused to civilians and a civilian object is minimal (if it cannot be avoided altogether).

If state B has established a zone in which it exercises control (a buffer zone) it would be considered to be an occupying power. The terms of the Fourth Geneva Convention (Relative to the Protection of Civilian Persons in Time of War) would therefore apply and state B must comply with the duties enumerated therein.

For example, state B must protect the civilian population from harm caused by the hostilities, must not mistreat them (see p 134) and must provide for the population's humanitarian needs. These would include access to, for example, food, medical supplies and functioning hospitals. The facts in our case do not indicate that state B has indeed taken such steps.

With respect to the attacks undertaken by state B, as we have said above, civilian objects cannot be targeted. Civilian objects would include homes, places of worship, hospitals, schools, etc. This would hold true *unless* these objects are used for military purposes. Military objects, and/or civilian objects used for military purposes, can be subjected to a legitimate attack only if:

- these objects make an effective contribution to the military activities of the enemy; and
- their destruction or neutralisation would offer the attacker a definite military advantage.

The destroyed towns (including civilian homes, schools, etc) do not appear to have been used for military purposes and in this regard state B has not complied with humanitarian law. On the other hand, it can be safely assumed that the destroyed roads and bridges could have been used for both civilian and military purposes. In this case State B should have considered the impact which the attack would have had on civilians and should have compared, or weighed that impact, against the military advantage it expected to have gained by the objects' destruction. The principle of proportionality is always important: the attack must not be undertaken if the harm to civilians would be greater than the definite military advantage that state B would gain as a result.

Although the question asks you to evaluate state B's actions, note that state A must also take all necessary precautions to protect civilians against the dangers brought about by the conduct of the armed hostilities. State A must not locate military objects within a populated area and must not use the presence of civilians as a shield against an attack from state B. Even if state A has not complied with the aforementioned duties, state B must abstain from attacking if (as you would have guessed) the expected definite military advantage will cause too great a loss of civilian life. Lastly, state B cannot launch indiscriminate attacks (attacks targeting the entire area in which military objects are located). Instead, state B must target the specific military facilities within that area. On the facts, state B's actions would appear to be illegal.

Planned attacks (affecting civilians) must be preceded by an effective warning. State B seems to have shown an attempt at compliance, although what is "effective" depends on the circumstances. The warning must be timely and due regard must be paid to the civilians' ability to evacuate. State B has inflicted damage to roads and bridges, which would affect the civilian's ability to evacuate. Nor do the "warnings" seem to be given timely. Of course, this is a general remark and what is timely and reasonable will be dictated by the particular conditions.

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But even if the civilians have been warned and they do not evacuate, state B is still under a duty to take all reasonable measures to avoid loss of civilian life and damage to civilian property. State B must cancel the attack if it is evident that the principle of proportionality, which we have emphasised above, will not be met.

TOPIC IV: STATE LIABILITY

Practical exercise 1, p 142

As you no doubt gathered, the facts are very similar to those of *Nduli*. Since a state cannot itself act, the actual physical act must be performed by an individual acting on behalf of the state. South Africa can violate international law, but the actual deed must be performed by an individual (or organ). This is where immutability enters the picture.

The cardinal element of immutability is the capacity in which the person or organ acts. The state is responsible only for the acts of its officials or organs. There must be a link – a *nexus* – between the person/organ acting and the state. Simply put, if X walks down the street and throws a cricket ball through my neighbour's window, it is none of my business – or responsibility. If, however, my son does the same, it is very much my responsibility. The basis for this responsibility is the relationship between the individual causing the damage and me.

The state is responsible in exactly the same manner for violations of international law by its officials/organs or individuals for whom it accepts responsibility. An official is of course also an individual and each case must therefore be judged on its own merits. In terms of the given facts, police officers are public officials. Because of their actions, South Africa has violated international law (by the abduction and violation of Swaziland's sovereign territory), and will therefore incur direct liability towards Swaziland.

In 1987 in *Nduli* it was argued that the police officers in similar circumstances had acted beyond the scope of their duties and the state could not therefore be held liable for their actions. This argument was upheld by the court. In international law terms, the reasoning is not sound. Although exceeding the scope of their duties, the policemen had acted as officials of the state and the state must be liable. In *Ebrahim* in 1991 on similar facts, the court held that the state must approach the court with clean hands and refused to exercise jurisdiction in the matter.

If the two policemen had acted as private individuals, ostensibly as tourists to play in a golf tournament, wearing civilian clothes, the state would not be liable as there is not a sufficient *nexus* between them as private individuals, and the state.

Practical exercise 2, p 143

The following approach is advocated in the Draft Articles on Responsibility of States for Internationally Wrongful Acts:

Wrongfulness will be excluded:

- by consent on the part of the injured state, article 20;
- in a case of self-defence (provided it complies with the provisions of the UN Charter) article 21;
- when the conduct amounts to a countermeasure in response to an international legal act; 22
- *force majeure*, article 23;
- where the state which is “the author of the act has no other reasonable way in a situation of distress, of saving the author’s life or the lives of other persons entrusted in the author’s care”, article 24;
- the state is acting out of necessity, article 25.

However, wrongfulness will not be excluded if doing so would violate a norm of general international law.

Necessity as a ground for excluding state liability for a wrongful act:

Necessity may **only** be invoked if:

- while the state acted in breach of an international obligation, it was the only possible way to safeguard an essential interest against a grave and imminent peril; AND
- the impugned conduct does not seriously impair an essential interest of the state towards which the obligation exists, or the international community as a whole.

Necessity may **never** be invoked if:

- the breached international obligation excludes the possibility of raising necessity as a defence;
- the state has contributed to the situation of necessity.

Serious breaches of peremptory norms (our old “friends” *ius cogens* and obligations *erga omnes*):

A serious breach of an obligation is one which “involves a gross or systematic failure by the responsible state to fulfill the obligation”. Although the final Draft Articles only deal with delictual responsibility of states, they do stipulate that states are obliged to cooperate in order to bring to an end “through lawful means any serious breach of an obligation arising under a peremptory norm of general international law”.

Furthermore, states “shall not recognise as lawful a situation created by such a serious breach”.

Countermeasures as an answer to a charge of state liability:

Countermeasures are self-help measures which do not involve the use of force. Countermeasures may be resorted to by an injured state in order to induce the violator state to comply with its obligations (art 49). They are limited to “the non-performance for the time being of international obligations of the [injured] state towards the responsible state”. Countermeasures or, rather, their effect, must be proportionate to the harm caused by the violator, taking into account the gravity of the internationally wrongful act and the rights in question (art 51).

Countermeasures are “limited to the non-performance for the time being of international obligations of the state taking the measures towards the responsible state”. And, if possible, they must be taken “in such a way as to permit the resumption of performance of the obligations in question”.

In taking countermeasures, the injured state must still comply with its other international obligations, such as:

- the obligation to refrain from the threat or use of force
- obligations to protect fundamental human rights
- obligations of a humanitarian character prohibiting reprisals
- obligations under peremptory norms of general international law
- obligations existing under any dispute settlement procedure applicable between the injured state and the violator state
- obligation to respect the inviolability of diplomatic or consular agents, premises, archives and documents

Practical exercise 3, p 143

The ILC Commentary on article 40 provides that, *inter alia*, the prohibition of genocide and torture are examples of peremptory norms of general international law. Articles 40 and 41 of the Draft Articles stipulate that states must cooperate by lawful means in order to bring an end to the breach of such obligations. In addition, states “shall not recognise as lawful a situation created by such a serious breach”. A serious breach of an obligation occurs in situations in which the responsible state has systematically failed to fulfill its obligation. Article 49 (dealing with countermeasures which may be taken by an injured state) states that its provisions do not prejudice the right of a state (not necessarily an “injured” one) to take lawful measures against another state that has breached an obligation owed to the international community as a whole. The purpose of such measures is to achieve a “cessation of the breach and reparation in the interest of the injured state *or the beneficiaries of the obligation breached*”.

If Zimbabwe's practice of systematically violating human rights is indeed found to qualify as a serious breach of a peremptory norm of general international law, then South Africa will be justified in breaching the treaty obligations, on the basis of the provisions of articles 40, 41 and 49. History is full of examples, when states, which have not been directly injured by another state's unlawful practice, have taken measures in order to stop the violation. A prime example is the conduct of the international community, or rather members thereof, against apartheid South Africa. For example, in 1986 the US violated the US-South Africa Aviation Agreement and suspended the landing rights of SAA on US territory in its efforts to compel South Africa to abolish the system of apartheid.

Practical exercise 4, p 145

A state has a right to protect its nationals abroad who have been injured by the actions of the foreign state. The state may take up the case of its subject by resorting to diplomatic action, or international judicial proceedings. The cornerstone of this right is that an injury to a national is considered to be an injury to the state. Therefore, under international law, the right of diplomatic protection vests in the state. The state is not under any duty to exercise its right. While the domestic laws of a state may impose such obligation, international law does not. (See the article by Prof J Crawford on the ILC's Articles on Diplomatic Protection.)

The interesting question is whether South African law imposes such an obligation on the South African government. In this context we shall consider the cases of *Kaunda*, *Van Zyl* and *Von Abo*.

The facts in *Kaunda* may briefly be summarised as follows: a number of South Africans had been arrested in Zimbabwe and Equatorial Guinea in connection with charges relating to mercenary activities and plotting a coup against the President of the Equatorial Guinea. Those arrested in Zimbabwe feared that they would be extradited to Equatorial Guinea. All the Applicants claimed that they would not receive a fair trial in Equatorial Guinea. Furthermore, they contended that, if they were convicted in Equatorial Guinea, they would be sentenced to death. They claimed, therefore, that the South African government was under an obligation to offer them diplomatic protection.

The court dismissed the application. The majority decision, written by Chaskalson CJ (as he was then known), recognised that international law did not oblige a state to provide diplomatic protection, but in terms of the South African Constitution, there was at least some obligation on the part of the government to provide protection to its nationals abroad. The court began by asserting that a request to the South African government for diplomatic protection was unlikely to be refused if there had been a gross violation of international human rights norms, and the evidence to that effect was clear. Should a request for diplomatic protection ever be refused "the decision would be justiciable, and a court could order the government to take appropriate action".

The court also noted that the assertion of diplomatic protection was "essentially a function of the executive" with which the "courts are ill equipped to deal". However, if the executive were to refuse to consider a legitimate request, or if it were to deal with it in bad faith or irrationally, the court could intervene. In other words, while the executive has a broad discretion when conducting foreign affairs, the courts can review such decisions on the grounds of, for example, irrationality and bad faith.

In a concurring opinion, Ngcobo J, examined, *inter alia*, section 3 (the right to a common South African citizenship) and section 7 which provides that:

- (1) The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- (2) The state must respect, protect, promote and fulfill the rights in the Bill of Rights.

Ngcobo J concluded that "diplomatic protection is a benefit within the meaning of section 3(2)(a). It follows therefore that sections 3(2)(a) and 7(2) must be read as imposing a constitutional duty on the Government to ensure that all South African nationals abroad enjoy the benefits of public protection. The proposition that the Government has no constitutional duty in this regard must be rejected. Such a proposition is inconsistent with the Government's own declared policy and acknowledged constitutional duty".

The dissenting opinion of O'Regan J acknowledged that the conduct of foreign affairs is typically an executive power under the Constitution and submitted that, in the conduct of foreign relations, "the executive must be afforded considerable latitude". She suggested that the court should declare that the executive was "under a constitutional obligation to take appropriate steps to provide diplomatic protection", but that the executive itself was best placed to determine what steps it should take.

In *Van Zyl* the applicants requested the South African government to extend diplomatic protection to them in their dispute with the government of the Kingdom of Lesotho. The dispute related to expropriation of the applicants' mining leases, mining rights and tributary agreements without compensation being paid to them. The contracts referred to were not internationalised. The expropriation had taken place in execution of the Lesotho Highlands Water Project. The latter was provided for in a treaty between the SA government and that of Lesotho.

It was claimed that the applicants were entitled to diplomatic protection, because the government of Lesotho had committed an international delict. The SA government had refused the application on the grounds that no right to diplomatic protection accruing to an individual existed in international law (since, in deciding to exercise diplomatic protection, the SA state would have been inserting its own right). The applicants also contended that inaction by the SA government would lead to a violation of a number of provisions of the SA Constitution.

Ultimately, the application was dismissed. Amongst others, the applicants could not prove that Lesotho had committed an international delict, nor did they satisfy the two prerequisites for the admissibility of a claim for purposes of diplomatic protection (nationality and exhaustion of local remedies.) The court pointed out that neither international law, nor the Constitution recognised the right to diplomatic protection. The court distinguished the case from *Kaunda* in that the latter concerned gross human right violations, while in the *Van Zyl* case the applicants had been expropriated and international law did not recognise the protection of property as an international human right.

In *Von Abo* the applicant was a South African farmer in Zimbabwe. Zimbabwe had violated his rights by destroying his property interests in many Zimbabwean farms as part of a governmental scheme of expropriation. Von Abo was not compensated and he had exhausted all local remedies. Von Abo requested the South African government to afford him diplomatic protection *vis-à-vis* Zimbabwe. The applicant claimed that he had a right to such protection in terms of the South African Constitution. Relying on the judgment in *Kaunda*, the court in *Von Abo* found that there need not be an actual refusal on the part of government to grant diplomatic protection before a court would intervene. The court stated that, in an appropriate case, a court could also come to the assistance of the aggrieved national where government "fails to respond appropriately" or "deals with the matter in bad faith or irrationally". The court relied on, *inter alia*, the judgment in *Kaunda* to conclude that the state had a duty to provide assistance to the applicant. This was a Transvaal Provincial Division judgment.

Practical exercise 5, p 146

First, you would have to determine whether an international norm has been violated. Two months' imprisonment without being charged seems a clear violation of international human rights standards. The criteria to be applied are found in the Universal Declaration of Human Rights and other international instruments. The right to be brought to trial within a reasonable period of time is an accepted international fundamental human right. The basis of South Africa's interest is the interest in its national and its sovereignty and on that basis South Africa will have a claim against Moçambique if it wishes to institute one.

There is a difference of opinion whether the state can be compelled to act. Booyen, basing his opinion on *China Navigation*, suggests that there is no obligation on the state to protect its national. Dugard refutes this argument by stating that *China Navigation* did not, in fact, deal with this issue and concludes that the question has not been settled in our law. It would seem, therefore, that Mrs McBride would not be able to compel the SA government to act on her husband's behalf since the decision to protect a national abroad is (in traditional terms) an executive decision (an "act of state") which cannot be questioned by the courts because it lies within the sole discretion of the national state, and political considerations will play a dominant role.

The question whether the state can be compelled to act in order to protect its nationals has recently come before the South African courts.

In *Kaunda* a group of SA nationals were arrested and subjected to inhumane conditions in a Zimbabwean prison; they further feared the death penalty if extradited to Equatorial Guinea. The majority of the court dismissed the application, but noted that if there had been a gross violation of international human rights norms, and the evidence to that effect was clear, and the government had been requested to assist its national abroad, then it would be difficult – if not impossible - for the government to refuse such a request. In *Van Zyl* (which involved the expropriation of SA nationals' property interests in Lesotho) the court distinguished the case from *Kaunda* on the facts and emphasised the discretionary nature of diplomatic protection.

In the recent *Crawford Von Abo* case it was in fact held that the state had a duty to offer its assistance to a South African farmer in Zimbabwe.

On the other hand, there is nothing stopping Ms McBride from bringing considerable political pressure on the government and so placing it in a position in which it is “compelled” (although not in the legal sense) to act.

Practical exercise 6, p 147

In the case of (1), it is clear that if the government targets only one car manufacturer, the nationalisation will be discriminatory. Car manufacturers from a great many countries operate in South Africa, and singling out BMW constitutes discriminatory treatment of the “national” of Germany (even if all ministers would prefer a BMW to a Uno!). In the case of (2), it seems to be the situation of the property (next to state ground) rather than the nationality of the owner, that is crucial. If there had been a “Portuguese” piece of land and next to it a “British” piece, both with the same potential, the picture could change. The fact that the land is already used for farming would also play a part in the whole scenario. The action is therefore not discriminatory *per se*.

As far as public purpose is concerned, although the concept is rather vague and states are given wide discretion in practice, it must benefit the nation as a whole or, at least, large sections of the population. A benefit that only MPs can enjoy does not seem to satisfy this requirement, whereas giving subsistence farming units to previously dispossessed people appears to be a “public purpose”. The difference lies mainly in the group to whom the benefit will accrue.

Practical exercise 7, p 148

UN Res 1803(XVII) of 1962 requires appropriate compensation in accordance with municipal and international law. UN Res 3281(XXIX) of 1974 requires appropriate compensation in terms of municipal law and the taking into account of all pertinent circumstances. The latter includes the benefit the person has already received for the investment set off against the market value and benefits which have accrued to the nationalising state and the community through the enterprise. There is therefore no universal standard on which there is complete agreement. "Appropriate" compensation does not seem to have any fixed meaning and will depend on the circumstances of each case.

It has been held in arbitration awards that the standard of UN Res 3281(XXIX) does not reflect international law, and only those in terms of UN Res 1803(XVII) qualify as customary international law. Section 25 of the Constitution incorporates both public purpose/public interest and compensation in its requirements for expropriation. The fact that expropriation may only occur in terms of a law of general application also takes care of the non-discrimination requirement. With the exception of the international law requirement, this complies with the Res 1803 standard.

Section 25(3), however, prescribes a number of factors which have to be considered in calculating the amount of compensation. Compared with the "benefits theory", these factors show great similarity to the way Res 3281 is interpreted. On the whole, therefore, section 25 seems closer to the standard required in Res 3281.

3. FINAL WORDS

We hope that this tutorial letter has cleared up any difficulties which you may have experienced with the practical exercises in the study guide. Compare your answers to the ones we have provided. If there are discrepancies, or if you still feel uncertain, please contact us.

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