

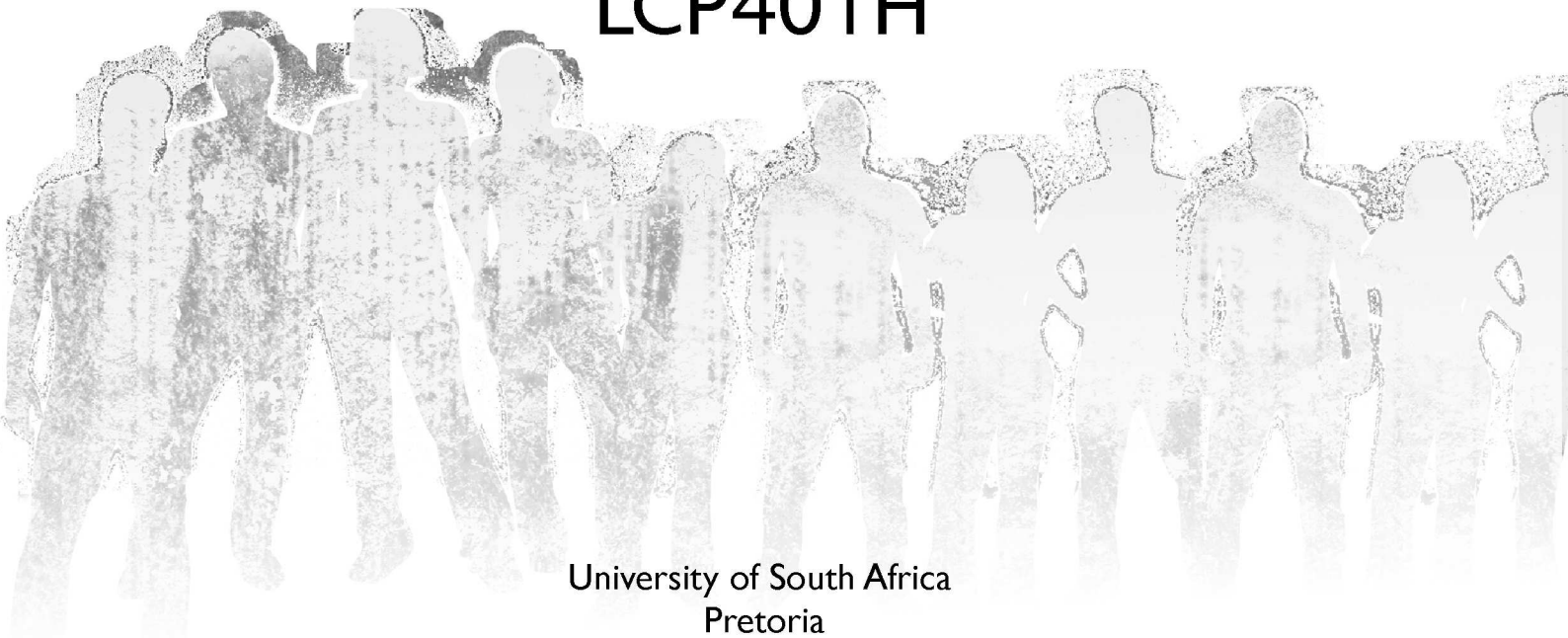
Public Constitutional and International Law

INTERNATIONAL LAW

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Only study guide for

LCP401H



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INTRODUCTION

1 WHY YOU ARE STUDYING INTERNATIONAL LAW

The most obvious answer to this question, of course, is because you have to! Yes, international law is a compulsory module without which you cannot obtain a law degree at this university — and most other South African universities. So, the bottom line is: you are stuck with us whether you like it or not.

However, this is the least important reason for studying international law, or it should be. You have all heard of globalisation and the “shrinking world”. We are part of the process both internationally, within the United Nations (UN) and the World Trade Organization (WTO), and regionally, within the African Union (AU), the New Partnership for African Development (NEPAD) and the African Peer Review Mechanism (APRM); we all have human rights and expect them to be respected; we all fly overseas when we can; we all at least post letters to those who have flown, or send SMSs; etcetera. All of these institutions and activities are to a greater or lesser degree governed by the principles of international law. This means that whereas a decade or two ago international law could be regarded as something that only states “did”, as a field of law, it is encroaching on your and my daily lives to an ever increasing extent.

In addition to this worldwide trend, the drafters of the Constitution of the Republic of South Africa saw fit to give international law an extremely prominent role within our national law. The upshot of this is that no thinking person, and certainly no practising “law person” (attorney, advocate, legal adviser, magistrate, judge, commissioner, or whatever) can today be without an adequate working knowledge of international law.

Now that you know why you are studying this course, let’s look at how you are studying it.

2 OUR APPROACH TO THE STUDY OF INTERNATIONAL LAW

Much as I hate to start a course on a note of warning (or moaning), there are a few things that we must get clear right now as you start your studies.

- **International law is a LAW course** — it is law just as much as mercantile law or criminal law. Just as you wouldn’t (I sincerely hope) attempt to prosecute fraud, or murder or rape without a detailed knowledge of the elements of the crime, or to charge a company director with a violation of the Companies Act without having its provisions at your fingertips, so, too, the principles of international law must be known. Just because you see international law in operation on TV, or hear about it on the radio (Yes, radio still exists and broadcasts are governed by international law, by the way!) doesn’t change it from a law subject to some “airy-fairy thing” where anything goes and you can waffle on happily! The principles of international law, like all law, are studied and are not absorbed by osmosis!
- **The second point is that international law is a LEGAL SYSTEM.** This is important and is also why you study it only towards the end of your legal training

when you already have a background in the different branches of national law. International law brings together many of the subjects you have studied as separate modules in national law, but within the international legal system. So, for example, whereas in the law of persons you studied when a person comes into being, here you will study the requirements for statehood and when international legal personality arises; in company law you studied the duties and capacities of a company, here you study those of an international organisation; and whereas in criminal law you studied the elements of a crime, here you study the elements of an international crime.

In other words, our approach is “holistic” and you must see the various topics you study in the context of an entire system. Virtually all the subjects you have studied to date are brought together in one system of law. The principles are sometimes similar, but they are not the same.

- **This is a FINAL-YEAR (4th-level), compulsory LLB module.** This has certain implications for the standard we expect and, in fact, are required by law to set.
- (a) Our emphasis is definitely on application and understanding. While, as indicated above, you must have the factual, “hard-law” knowledge on this level, we need you to apply this to factual situations, real and invented, to evaluate them and to present and assess different points of view.
- (b) We expect you to take responsibility for yourselves and your decisions. If you choose to enrol for 10 modules per semester (as some people insist on doing), this is your decision. Likewise, the fact that you are working and are juggling family life (including babies with colic — I’ve had them — dogs which fight, cats which probably fight the dogs, birds which are eaten by the cats, parents or children who have their own expectations, etc.) and studies is simply a fact of life (albeit an unpleasant one). While we sympathise and are happy to support you where we can, these factors can’t (and won’t) affect the standard we expect.

3 YOUR APPROACH TO THE STUDY OF INTERNATIONAL LAW

- To be successful in this course, you must understand how the guide works. Strange as it may seem, we call it a “guide” because that is exactly what it is — an aid to guide you through the prescribed work. It is NOT a textbook, and, yes, you must have the textbook and must study the prescribed sections in Dugard’s third edition (see the prescribed material in *Tutorial Letter 101*).
- We refer you to sections in Dugard, which you are expected to study using the skeleton provided in the guide. The guide is intended solely to highlight certain aspects which may prove problematic, to provide you with different perspectives, and to contextualise the work and make it more real through asking questions and presenting scenarios which will help you to apply what you have just learned. Some of these scenarios are in the body of the topic, and some are at the end. It all depends on whether we felt you needed a break from “fact-loading” at some point.
- We may also refer you to articles, to international documents (treaties like the UN Charter, etc., reports of commissions, etc.) and to both national and international case law. These, too, you must study.
- What I would suggest is that you grab your wife, husband, partner, someone who owes you big or the parrot perhaps and get them to read the topic you are working on “at you”. Failing this, use a tape recorder. The topics are intended as lectures — they highlight the main points, sometimes give extra information, and they orient you generally in the course. Having listened to a topic, turn to your textbook.

- What I would advise you to do having listened to/read through the topic in the guide to orientate yourself, is to then study the prescribed section in Dugard. Then return to the guide and work through it thoroughly, answering questions, solving the problems we raise, etcetera.
- As you will see, this guide is divided into two sections:
 - (a) Section A consists of six topics, all of which you must study. Questions drawn from section A make up 75% of your examination mark.
 - (b) Section B offers four topics for more detailed and independent study (here, in particular, you will be expected to go beyond the textbook and find a few things for yourselves). One question counting 25% of your examination mark will be set on each of the topics in section B. In other words, four questions will be set and you must answer one. You must therefore study at least one of these topics (of course, we hope you will study all four, but we are realists at the end of the day!).
- As we said above, you should concentrate on application. This means that, once you have mastered the principles in the topic you are studying, you must ask yourself how you would apply these in practice. We have designed some “practical exercises” that appear either in the body of a topic, or at the end, which will help you here.
- You must do these exercises. Yes, sit down and answer them in writing! BUT don’t send them in for correction. During the course of the semester, you will receive a tutorial letter in which we discuss the exercises. Check these against your answers — particularly as regards the way you approached answering them — and, if you find you missed the mark, contact us for help.
- Lastly, as we move into the 21st century, we are becoming more and more “electronic” — kicking and screaming, if you are electronically challenged as I am. You are in the very fortunate position of having MyUnisa at your fingertips (literally). Please make use of this facility. It is ideal for setting up discussion groups and will minimise that feeling of isolation that inevitably goes with distance education. Still more important, however, in the light of the postal problems many students experience, tutorial letters, etcetera, are available on MyUnisa the day we finish writing them — this is often four to six weeks before the printed copies reach you (if they ever do). So, even if you don’t have home or work access to the Internet, it is well worth a monthly visit to a friend or an Internet café to keep up with what is going on. Please do this — we also “gatecrash” your forum once in a while and it provides interesting reading and gives us an indication of what you are struggling with!

4 AIMS/OBJECTIVES/OUTCOMES

At the risk of sounding flippant, your aim is to pass, your objective is to get your degree, and the outcome of all this is to find employment and make money!

Seriously, however, within this paradigm, what we are trying to do in this course is to give you sufficient knowledge of international law to enable you to do the following:

- see a situation in everyday life, whether in a “work” context or in a broader global context
- recognise where international law is involved
- analyse the situation to identify its essential elements
- situate these elements within the broader international law context
- know which principles of international law apply to the situation
- then, most important of all, apply these principles to explain, and hopefully resolve, the situation

- within the strictly legal context, be in a position to substantiate your solution with reference to authoritative sources.

In short, our aim is to send you out into the wicked world with a sufficient knowledge of international law to function effectively. Hopefully, we will also engender a real interest in the subject which you will pursue (either formally or informally) for the rest of your careers.

5 ASSESSMENT

I said above when discussing our approach to the course that I hate starting out on a note of moaning and warning. Well, I hate ending on such a note just as much. However, life being what it is, there must be some way that we can decide at the end of the day (or semester in this case) whether we have succeeded in our aims or achieved our objectives, and whether you have achieved the outcomes we have set for the course.

Well, unfortunately, this can only really be done through examination in one or other form. The exercises we require you to do in the course of your studies are what we call “formative assessment” — in other words, they provide an opportunity for you to develop as an international lawyer and they give us an opportunity to form your international law thinking, but they don’t “count for marks” (if you still think that way!).

In the subject, International Law, we have two summative assessment exercises. Both are compulsory.

The main summative exercise, however, is the two-hour examination you will write at the end of the semester. As indicated above, section A will count 75% of your mark and section B 25%. You must study everything in section A and at least one of the topics in section B.

What, then, is the relationship between formative and summative assessment in this course? The formative assessment prepares you for the summative assessment. In the exam, we ask the same **type** of question. In fact, a number of the practical exercises are taken from previous exam papers. The chances of getting exactly the same question are slim (that would merely be testing your memory), but the chances of questions embodying the same content are very good. In short, it is well worth your while to do the practical exercises.

But the assessment function doesn’t end there. We would also like

YOU TO ASSESS US

This is a new guide which will probably “stand” for three years — barring some international disaster which can’t be remedied by tutorial letter! Like a giraffe, it is a creature created by a committee made up, on the writing side, of Prof Neville Botha, Ms Mirelle Ehrenbeck and Ms Polina Dlagnekova. (And, at this point, we would also like to thank Dr Le Roux, who kept an eagle eye on our “instructional design”.) Although we all followed more or less the same format, we hope that each of our “voices” emerged both in the tone and in the detail of the work.

What we need you to do is tell us whether it works in the light of what was said in the preceding sections of this introduction. In other words, think of what we are trying to achieve with the guide and then assess how successful — or not — we have been. Try to assess the guide objectively and in “an ideal world” — in other words, just

because you hate the subject doesn't mean that the guide is "bad"; similarly, just because you like the subject doesn't mean the guide is good. What we are looking for is constructive criticism (but praise would be nice too!!) and suggestions for improvement. And, before you say it: no, we can't write a guide which will replace the prescribed textbook, and, no, cancelling the course is not an option — you need it in practice!

At the end of the guide you will find a form which you can use for this assessment. It would be nice to have your names or numbers, as we could then compare your experience of the guide with how you fared in the course. However, if you are paranoid and think that we will hold negative comments against you (which we won't) or deluded and think that positive comments will earn you marks (which they won't), don't identify yourself. Either way, thanks in advance.

6 PLAN OF ACTION

Enough of introductions and preaching; it's time to get down to the work. If anything in this introduction is not crystal clear, contact us and sort it out now.

So, sit down, grab your "reader", take your guide and your Dugard, and get going! Most important of all, enjoy the course.

SECTION A

All six topics in this section must be studied.

Questions set on section A will total 75% of your examination paper at the end of the semester.

TOPIC 1

THE DEVELOPMENT AND NATURE OF INTERNATIONAL LAW

In this topic, we consider the following:

Study unit

- 1 Introduction
- 2 The history and development of international law
 - 2.1 The evolution of international law
- 3 Theories on the basis of international law
 - 3.1 International law authorities
 - 3.2 Theoretical bases
- 4 The legal nature of international law
 - 4.1 Differences between international law and national law
 - 4.2 The United Nations
 - 4.3 Similarities between international law and national law
- 5 Definition of international law
- 6 Assessment



Prescribed reading for topic 1:

Dugard 3 ed chapter 1 pp 1-11
Article 38(1)(d) of the Statute of the International Court of Justice

STUDY UNIT 1

INTRODUCTION

First of all, while reading chapter 1 of Dugard you will notice that he throws you in at the deep end by first considering the nature of international law. We feel that, before you can understand the nature of something, you must know where it came from. In this topic, therefore, we will first look at the history and development of international law, will work towards understanding its legal nature and the theories that inform it, and, lastly, will offer a definition of international law once you know what we are talking about.

Dugard starts by defining international law as a body of rules and principles which are binding upon states in their relations with one another, which is a rather blunt way of introducing you to a highly complex, but very interesting, branch of law. This definition, as you will see from the work you will be doing in the course, is not quite accurate. Analyse it and think critically about it while you are reading Dugard, since, at the end of this chapter, we will pose a number of questions for you to answer.

STUDY UNIT 2

THE HISTORY AND DEVELOPMENT OF INTERNATIONAL LAW

2.1 THE EVOLUTION OF INTERNATIONAL LAW

Although certain aspects of what we today regard as international law are as old as history itself (eg provision was made for extradition in a peace treaty between Ramses II of Egypt and Hattusili, a Hittite prince, in 1279 BC), international law as we know it today is of relatively recent origin (only some 400 to 500 years old).

Why did modern international law develop? In broad terms, international law is the law between nations. In early times, private individuals or institutions such as the feudal lords or the church were, to all intents and purposes, the owners of all land and often the people on it! Relations between these "individuals" were therefore what we would classify today as private law rights and duties — something like the law between neighbours. However, in about 1400, a change set in when the collapse of feudalism and the advent of the Renaissance and the Reformation resulted in the emergence of entities that existed separately from the individuals who were either living in them or running them. In short, states were born.

The emergence of states as distinct territorial units brought with it a feeling of nationalism among the inhabitants of the states. This, in turn, led to the feeling that what went on in the state was the sole business of the state: the state was master over its own territory and of its own destiny. The concept of state sovereignty was born.

A state with a government of its own exercised rights over its territory to the exclusion of all "foreign" elements — xenophobia emerges even at this early stage! The individual Lord of the Manor (or the Pope) had been superseded by an impersonal entity which, although (ideally) representing the individual, enjoyed an existence separate from the individuals comprising it.

All would have been well had there been only one state. However, there were various

states, each claiming rights. Inevitably, these claims came into conflict. With this conflict came the need to regulate relations between states. And so public international law (or international law as we will refer to it in this module) was born: public, because it dealt primarily with the state rather than the individual; international, because it dealt with relations between nations represented by states; and law, because it comprised a set of rules.

Law, however, is a dynamic concept and this is no less true of international law. As the need for universal control, and particularly the needs of commerce, became more sophisticated, so, too, we see a sophistication in the instruments used to regulate relations. There was a move towards government through organisations dealing with issues as varied as peace (eg the United Nations (UN)), trade (eg the World Trade Organization (WTO)), and the like. The international organisation was born.

An international organisation is an organisation made up of states (or other international organisations) rather than individuals. It owes its existence to a founding document (generally termed a “statute” — as in the articles of association of a partnership or the memorandum of a company, and not to be confused with a “statute” as in *Butterworths statutes of South Africa*) that exists separately from the states establishing it. (We shall examine international organisations more closely in topic 3.) Like a state, an international organisation is a subject of public international law, enjoying international legal personality. This was clearly established in *Reparations for Injuries Suffered in the Service of the United Nations* 1949 ICJ Rep 174.

You will have noticed that, from the emergence of the state as a separate entity, the role of the individual has virtually disappeared from our discussion of international law. However, while states were debating their rules of cooperation, plying their trade and fighting their wars (all in terms of agreed international rules), individuals within the states were making money from trade, were losing money as a result of state action or were dying in the wars — again, all under internationally approved rules! Needless to say, this situation could not continue indefinitely and one of the newest “trends” in international law has been a re-evaluation of the position of the individual. Since the mid-1900s, international law has in a few limited instances taken on a “person-centred” colour. An individual is not an international law subject in the same way that a state is, or even in the way that an international organisation is. The individual does, however, feature there somewhere, and we will return to this question in topic 3.

So far, we have examined the history of international law purely from the point of view of its subjects. However, this only gives half the picture. International law, far more than national law, is a law of intellectual flow. It reflects the major ideological trends as they sweep (or perhaps creep?) through the world. The emergence of each of the “subjects” above can be tied to major ideological movements in world history. For example:

- (1) The idea of international law as a law solely between states is linked to state sovereignty and remains the dominant theme of international law.
- (2) The idea of the international organisation as an entity distinct from its member states developed in response to the need to regulate issues affecting states as part of a world community and to place some limits on the potential for conflict inherent in a purely self-serving state sovereignty.
- (3) The idea of the individual as a “quasi-subject” of international law developed as a result of the atrocities of two world wars, the emancipation of colonial territories and the desire of the individual for acknowledgment of his/her human rights and right to self-determination.

We have certainly not seen the end of the development of international law. We are clearly at present in a state of flux. How things will develop is uncertain. However, is there anything wrong with speculation? World ideologies are presently at a crossroads and are still influenced by viewpoints on religions — in some ways, the “war on terror” that touches every country can be likened to the Crusades of earlier times. The modern international community faces new challenges in many areas: terrorism, human rights, international criminal law and climate change. These are a few of the areas where international law has a role to play.

We are “of Africa”, so how has Africa fared in all this? The answer is “not too badly”. The rise to prominence of the Afro-Asian and South American states (the “developing countries”) and numerical dominance in the international community have led to a reassessment of many of the traditional concepts in international law. For example, is “market value” a realistic (and perhaps, more importantly, a fair) yardstick for assessing compensation for nationalisation. Most rich states say “Yes”, while many poor states say “No”. What does this reflect in ideological terms? Perhaps what we are seeing is the emergence of an international law based on an ideology of “sharing” — idealistic though this may sound. Past profits based on exploitation and made at the expense of human development must now be reconciled with wealth distribution. Africa and the developing world have found their voice in international law — most notably in the UN and in economic forums. It is up to you to write the new lyrics!

One of the major trends in current international law is fragmentation. As problems become more acute, calls go out for “specialisation” — a nice term for fragmentation. We therefore see arguments for separate systems within international law. This is nothing new. For instance, international humanitarian law (which governs the “rules of war”) has been around almost longer than general international law. More recently, however, international human rights law, international trade law and international criminal law have also emerged as separate branches of traditional international law. There are also calls for a separate international environmental law.

Now there are two ways of looking at this development. One can see it as an inevitable reflection of evolution within the global community, and thus as essentially positive. However, there is another side. If each of these systems demands recognition of “unique” rules, and if it remains essentially treaty- (and therefore consent-) based, won't we perhaps end up with hundreds of slightly different rules which bind only states that have bought into the subsystem, with there being little or no truly international control? Think about it a bit and decide what you think.

For those of you who would like to read further on this topic, Davon Lapaš has written a very interesting article in *The Comparative and International Law Journal for Southern Africa* entitled “Some remarks on fragmentation of international law: disintegration or transformation” (2007) XL *CILSA* pages 1–29.

STUDY UNIT 3

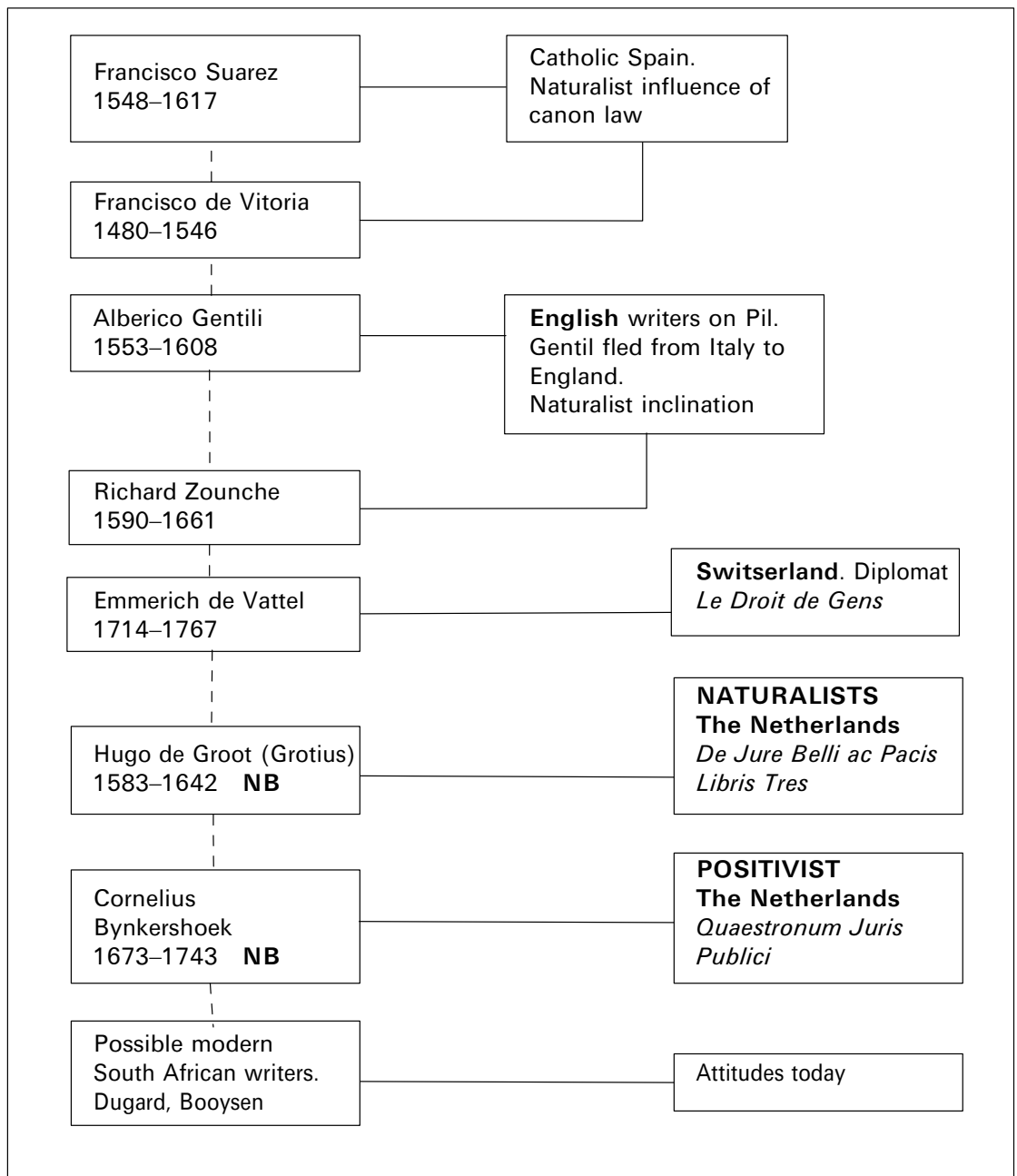
THEORIES ON THE BASIS OF INTERNATIONAL LAW

3.1 INTERNATIONAL LAW AUTHORITIES

In this section, we examine the legal theories often used to explain the basis of international law. The first diagram places the most important international law writers in context — both historically and ideologically. These were the individuals who first set out the rudimentary principles of international law.

DIAGRAM 1

Historical perspective — Writers on public international law



Why do we focus on the writers in international law? Do writers' opinions still form an important source of international law? At this stage, you might like to take a quick look at Article 38(1)(d) of the Statute of the International Court of Justice (ICJ). Article 38 gives the sources of international law that the ICJ must take into consideration and will be discussed in greater depth in topic 2.

3.2 THEORETICAL BASES

There are two principal theories which are used to explain the legal foundations of international law, namely natural law and positivism. While studying this section, systemise the information you read along the following lines:

- arguments for and against these theories
- how these theories hold up in modern international law
- examples of the working of these theories in modern international law.



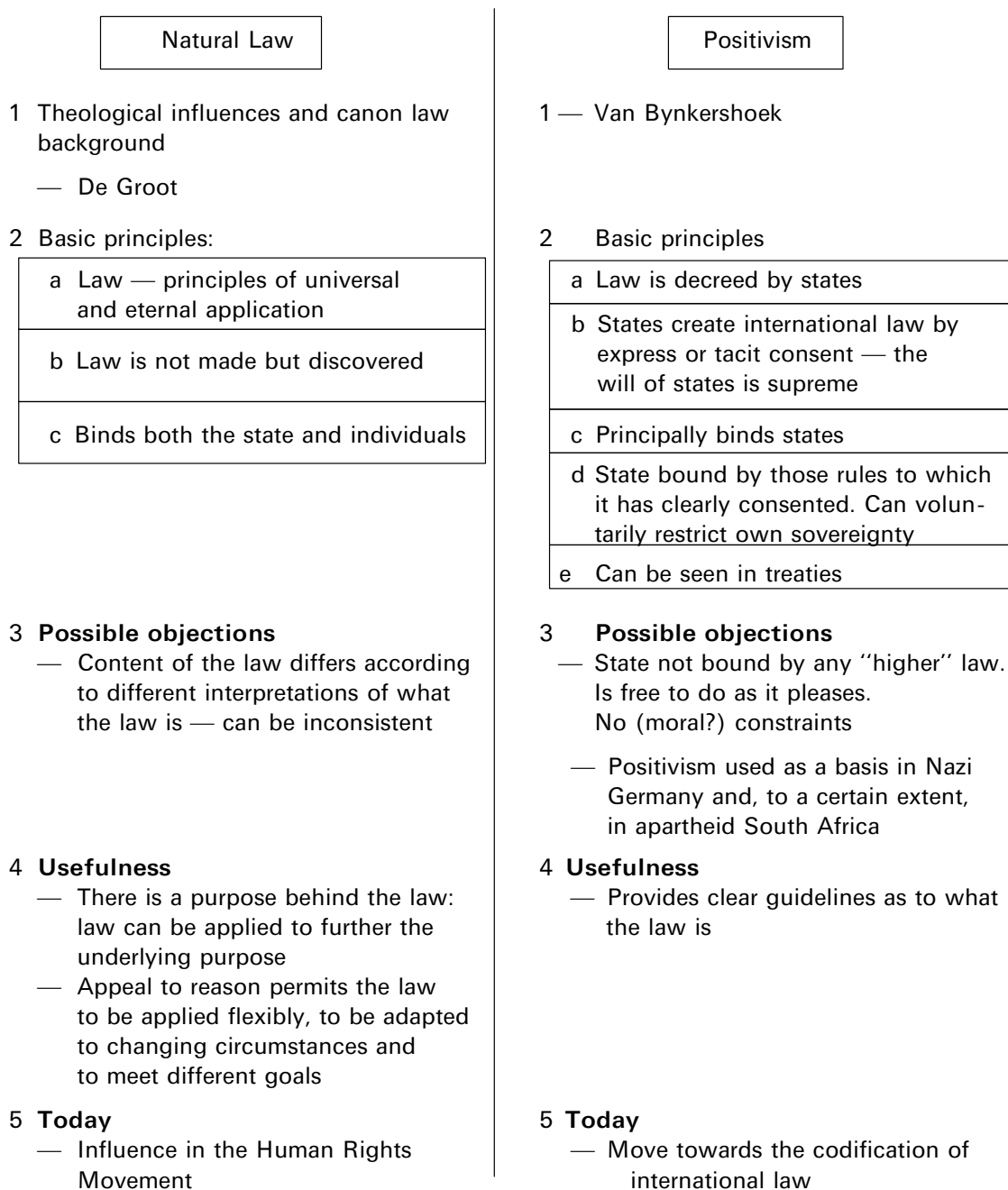
Practical exercise 1

Using Dugard and the draft outline of the two concepts we give below, compare natural law and positivism and assess the role that each plays in present-day international law.

The exercise stresses, from the outset, that we expect you to be able to express your opinion on all the topics in this course. Here we are giving you a simple outline which you need to expand into an essay. Most students tend to study our outlines and repeat them (or try to!) verbatim in the examination. This is not enough. Part of the assessment process is based on whether you can write clearly and accurately and can integrate facts, and the law applicable to those facts, into a legal opinion. This is a "starter activity" to get you used to writing, so we are providing an outline consisting of the main points you should address in your discussion. In study unit 6 of this topic, we will link this theory to two factual situations.

DIAGRAM 2

Theories of public international law



STUDY UNIT 4

THE LEGAL NATURE OF INTERNATIONAL LAW

One of the long-standing debates in international literature is whether international law is in fact law. Because, as law students, your frame of reference is largely national law, this question is generally approached through a comparison of international law and national law. Some of the main characteristics of the South African legal system

are isolated and we see whether they also occur in international law. Although a number of differences emerge, there are also similarities.

4.1 DIFFERENCES BETWEEN INTERNATIONAL LAW AND NATIONAL LAW

International law	National law
1 There is no legislator in international law	1 Complete legislative process
2 There is no court to enforce international law (i) there is no precedent system (ii) the state is judge in its own case	2 Fully developed judiciary (i) precedent system applies (ii) <i>nemo iudex in sua causa</i>
3 There is no executive to enforce judgments — sanctions are poorly developed	3 Complete executive machinery for enforcement of judgments
4 Subjects are generally states	4 Subjects are individuals or legal persons

Turn now to Dugard and “flesh out” the skeleton provided in this table. Make sure that you understand the concepts in the table. If not, refer to your Constitutional Law guides for a more detailed explanation of how the legislature, executive and judiciary operate.

4.2 THE UNITED NATIONS

We are going to use the UN as an example to illustrate the differences between international law and national law. This is a brief introduction to the UN and how it operates. You will be dealing with the UN in detail in later topics, but what follows are the bare essentials of how things work internationally. It would therefore be a good idea to make sure that you understand the work now.

(1) Why isn't the UN a legislator? How does it differ from parliament?

The UN does not have the power to enact rules which are binding on all states. The General Assembly (GA) may only adopt resolutions, and these are merely recommendations. States cannot be compelled to apply them.

A parliament (as an instrument of national law), on the other hand, makes laws which are fully binding on the community it represents.

In the UN, the representatives of states are not elected to the GA, but are appointed by their respective states, as opposed to a democratic parliament where the members are elected by you and me when we vote in an election.

The binding decisions of the Security Council (SC) are restricted to situations determined by the SC as constituting a threat to international peace and security — in practice, such determinations have been hampered by the veto power of the five permanent member states.

(2) *The national law precedent system v the International Court of Justice (ICJ). Does the ICJ follow a precedent system?*

As you know, under the precedent system, lower courts are bound by the decisions of higher courts. Article 59 of the Statute of the ICJ provides that the decision of the court binds only the parties to a particular case, and only in respect of that particular case. The precedent system is therefore excluded on two fronts:

- the decision applies only to the parties involved: in other words, if the same issues arise between different parties, the court is not bound to give the same ruling; and
- the decision applies only in that specific case.

(3) *Why do we say that the state judges its own case? On what basis are the judges in the ICJ appointed for a specific case? How does such appointment differ from that in respect of the judges in a national case? (You may read, but need not study, Chapter 2 of the Statute of the ICJ.)*

In international law, the state itself decides whether there has been an infringement of international law, judges the matter itself, and takes whatever steps it decides on.

States are also closely involved in the process of appointing the panel that will hear their case. They can either elect their own representatives to the panel or they can at least elect people who will be sympathetic to their cause. It is in this sense that they are judges in their own cause.

In national law, there is a permanent body of judges, magistrates, etcetera, who hear all cases. The plaintiffs or accused have no say in who will hear their cases.

Later in this course you will be expected to study an ICJ decision on a specific topic. The following (brief!) extract from an ICJ case is a practical example of the situation where two judges representing their states' interests are chosen.

International Court of Justice 24 May 2007 Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) Preliminary Objections.

This case concerned the diplomatic protection of a citizen and, on page 6, paragraph 4, the following is stated:

Since the court included upon the bench no judge of the nationality of either of the Parties, each of them availed itself of the right under Article 31, paragraph 3, of the Statute to choose a judge ad hoc to sit in the case. Guinea chose Mr Mohammed Bedjaoui and the DRC Mr Auguste Mampuya Kanunk'a-Tshiabo. Following Mr Bedjaoui's resignation on 10 September 2002, Guinea chose Mr Ahmed Mahiou.

(4) *Explain the difference between the executive "machinery" backing up national judgments and that backing up international law judgments*

Municipal judgments are backed by the complete executive machinery of the state in the form of a police force and so forth. In international law, there is no central executive authority with a police force at its disposal to enforce judgments.

At the international level, the SC does have some "sanctions" that can be brought to bear on offending states. Chapter VII of the UN Charter allows the SC to direct its

members, either individually or collectively, to use force against a state whose violation of international law constitutes a threat to international peace. The SC can also make use of economic sanctions against an offending state.

Having considered the differences, we can now look at the similarities between international law and national law.

4.3 SIMILARITIES BETWEEN INTERNATIONAL LAW AND NATIONAL LAW

International law	National law
1 Comprises accepted norms prescribing state behaviour	1 Comprises accepted norms prescribing behaviour
2 Uses writings, etc., of jurists rather than morality	2 Writings of jurists and precedent are freely used
3 Can be consciously altered by treaty	3 Can be consciously altered by statute

The similarities are pretty self-explanatory. In good legal tradition we have presented both the pros and the cons. It is now your task to “consider your verdict”.

Although international law and national law differ, international law is closer to national law than to any social or moral norm system applying in a specific community. We use a juridical approach to study international law, and that is why it is studied as a law subject by law students.

Although international law is often termed “weak” law, this is simply because we can identify certain weaknesses in the system when we compare it with national law. In international law, rules are often difficult to identify and their observance often appears to be arbitrary. Don’t you think that the term “incomplete” would better describe these characteristics? International law could therefore be termed an incomplete system rather than a weak system. Either way, it remains a legal system that is binding on the parties.

We must distinguish international law from what is termed “soft law”. Like international law, soft law can originate in agreement between states, but, unlike international law, the states do not intend these agreements to have binding legal force. Because international law is a consensual system of law — in other words, states are bound because they consent to be bound — if this intention is lacking, binding (in the sense of enforceable) law does not result. This law is then “soft”. To coin a phrase: international law may be “weak”, but it’s never “soft” — and don’t give this phrase back to me in the exam!

STUDY UNIT 5

DEFINITION OF INTERNATIONAL LAW

We now come to the definition which you will be using throughout the course, hopefully with a better understanding of how states fit together, of where

international organisations fit in and of how they all interact. The definition we offer is a simple one based on the subjects of international law.

Public international law may be defined as the rules which govern the following relations:

S — S S — IO IO — IO

where:

S = sovereign independent state

IO = an organisation made up of states (not individuals) — for example the UN

The individual is generally not an international law subject, although he/she may fall within the ambit of international law in certain circumstances (eg when waging war, when asserting his/her human rights, when he/she has fallen foul of international criminal law, etc.). For a further discussion on this, see topic 3, which deals with international legal personality.

STUDY UNIT 6

ASSESSMENT

As we pointed out in the introduction to this guide, assessment is both formative and summative. The practical exercises in the text and below fall into the former category. In practical terms, this means that you must do them, but that we will not be marking them. Bear in mind, however, that when we come to draw up our summative assessment “pieces”, we will naturally be drawn to what we know you have worked through for yourselves. To call a spade a spade, although the chances are that we won’t use one of these exercises “as is” in the exam, we will definitely be influenced by the material covered in them and by what we expect you to be able to do with that material.



Practical exercise 2

Now that you have studied this module and have integrated it with the work in Dugard, go over the following concepts and see if you can expand on them and can discuss them in detail:

the emergence of states
development of international law
the international organisation
ideologies that shape our world
positivism and natural law
the differences between national law and public international law
why the UN is not a legislative body
the differences between the ICJ and domestic courts
the different systems of sanctions in domestic and international law
the definition of international law



Practical exercise 3

Write a critical essay indicating the major stages in the development of public international law and the role it could play in the future. Use the following concepts to guide your essay: emergence of state; state sovereignty; international organisation; world government; emergence of individual; human rights; ideologies.



Practical exercise 4

Remember our discussion above of the natural law and positivist approaches to international law? Well, we promised to add some facts to make it more interesting. Here they are then:

Imagine that you are still living in apartheid South Africa (in other words, before the adoption of the 1993 and 1996 Constitutions). Vusi, a black man living in a one-roomed house in Soweto, wins R2 million at the races. Wishing to improve his living conditions, he concludes a contract of sale for a modest property in Bryanston, Johannesburg. He also attempts to register his daughter at a state school in the area. The Registrar of Deeds refuses to register the house in Vusi's name, and the school principal refuses to register Vusi's daughter at the school. The basis of their refusal is the Group Areas Act, which prohibits black people from residing or owning property in an area classified as white, and the Black Education Act, which entrenches separate education for blacks and whites. Vusi takes the matter to court.

In the judgment given against him, the judge states that the law is what the government of the day enacts in legislation and that the function of the court is to apply the law as it stands and not to make the law.

Vusi accepts this, as he has no choice, and proceeds to spend all his money. It is now 1999, after the current dispensation has been put in place. Luck again strikes and Vusi wins R1 million, this time on the Lotto! Amazingly, the house is again available and the school is still there. Unfortunately, through a slip on the part of the legislative review board established to bring South African legislation into line with the Constitution, the two offending Acts are still on the statute books.

Vusi challenges the validity of the Acts in the Constitutional Court. The court finds that both Acts violate Chapter 2 of the Constitution and declares them invalid as representing gross violations of human rights. Vusi gets his house and his daughter goes to the school of her choice.

Using these two stages in Vusi's life experience, explain the approach of the respective courts and how they reflect the ideology underlying a state's legal system.

When would you rather have lived?

TOPIC 2

SOURCES OF INTERNATIONAL LAW

In this topic, we will look at the following:

Study unit

- 1 Introduction to the sources
- 2 Traditional sources of international law: treaties
 - 2.1 Introduction
 - 2.2 Definition
 - 2.3 Requirements for the conclusion of a treaty
 - 2.4 Concluding a treaty
 - 2.5 The validity of treaties
 - 2.5.1 Void treaties
 - 2.5.2 Treaties that are voidable or may be terminated
 - 2.5.2.1 Fulfilment of obligation
 - 2.5.2.2 Treaty provision
 - 2.5.2.3 Consent
 - 2.5.2.4 Unilateral repudiation
 - 2.5.2.5 Conclusion of a new treaty
 - 2.5.2.6 Breach of treaty — VC Article 60
 - 2.5.2.7 Impossibility of performance — Article 61
 - 2.5.2.8 Fundamental change of circumstances: *rebus sic stantibus*
 - 2.5.2.9 War and suspension of diplomatic/consular relations
 - 2.5.2.10 *Ius cogens*
 - 2.6 Reservations to treaties
 - 2.7 Treaty interpretation
 - 2.8 Succession to treaties
 - 2.8.1 General
 - 2.8.2 International theory on succession

Study unit

- 3 Traditional sources of international law: custom
 - 3.1 Introduction
 - 3.2 Definition
 - 3.3 *Usus*: the first requirement
 - 3.4 *Opinio iuris*: the second requirement

- 4 Traditional sources of international law: general legal principles, judicial decisions and the opinions of writers as sources of international law
 - 4.1 Introduction
 - 4.2 General legal principles
 - 4.3 Judicial decisions and the teachings of the most highly qualified publicists

- 5 The emerging sources of the “new” international law: soft law, codifications, *ius cogens* and obligations *erga omnes*
 - 5.1 Introduction
 - 5.2 Soft law
 - 5.3 Codification
 - 5.4 *Ius cogens* and obligations *erga omnes*

- 6 Assessment
 - 6.1 General remarks
 - 6.2 Practical exercises



Prescribed reading for topic 2:

- Dugard 3 ed chapter 3
- Dugard 3 ed chapter 19 — specifically for treaties
- Article 38 of the Statute of the International Court of Justice (ICJ)
- Vienna Convention on the Law of Treaties 1969
- Additional material as specified in the various study units

STUDY UNIT 1

INTRODUCTION TO THE SOURCES

You saw in topic 1 how the international legal system developed, and continues to develop. Where international law is considered as a system, the focus is centred largely on the subjects of the system, which doesn't tell one much about the actual "rules" and where they come from.

That is what we will be doing in this topic: looking at how the law that governs the international legal system is created and where we find it once it has been created.

For you as a lawyer, this is vital. When you present international law to the courts in argument — as you are required to do by the Constitution — you must be able to show where the rule came from, where it is found and why it is binding. To do this, you need to know, and be able to work with (dare one say manipulate?), the sources.

An important point that emerged from topic 1, and one that you must always remember, is that international law is based on the consent of its subjects. Logically, therefore, the sources of international law will reflect this consent.

When talking of sources, one immediately thinks of Article 38 of the Statute of the International Court of Justice (ICJ). Although the article does not use the term "sources" — in fact you will not find official sources listed under that name in any document — it is generally accepted that the "things" that the ICJ is instructed to use in settling the cases before it "in accordance with international law" are the sources. The article reads:

- A 38(1) The Court, whose function it is to decide in accordance with international law, such disputes as are submitted to it, shall apply:
- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States
 - (b) international custom, as evidence of a general practice accepted as law
 - (c) the general principles of law recognized by civilized nations
 - (d) subject to the provisions of Article 59, judicial precedent and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

Dugard (3 ed 27) says that there is no hierarchy in the sources. In other words, just because treaties are mentioned in Article 38(1)(a) does not mean that they carry more weight (or are "higher" or more important) than custom, which term appears in Article 38(1)(b). By and large, I agree — but look again at Article 38(1)(d). The Statute expressly provides here that precedent and writings are "subsidiary" means. Doesn't "subsidiary" mean secondary — in other words, something to be used only when the rest have failed you? Think about it!



Practical exercise 1

In the *Lotus case (France v Turkey)* 1927 PCIL Rep Ser A no 10, a French tanker (the *Lotus*) collided with a Turkish tanker (the *Boz-Kourt*) on the high seas. Eight Turkish soldiers were killed. When the *Lotus* docked at Constantinople, the

French officer who was the lookout at the time of the collision was charged with culpable homicide in the Turkish courts.

Called upon to decide on the issue of jurisdiction, the Permanent Court of International Justice (PCIJ) held:

The rules of international law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law

What does this quotation tell us about the basis of international law?

Can you recognise the two sources of international law identified in this quotation?

Under which sections of Article 38 of the Statute of the ICJ would you classify each source?

Basis of international law:

Source 1 A 38

Source 2 A 38

In your reading, you may also encounter the terms “sources of origin” and “formal/cognitive sources”. Don’t be thrown by this. A source of origin is a source from which international law arises — it creates international law. A cognitive source, on the other hand, is a source you would consult to find the content of an existing rule of international law. In practical terms, there is no difference between them.



Practical exercise 2

OK, you can now list the sources of international law, can indicate where they are set out and (hopefully) can even recognise them in a judgment of the ICJ! But, if you are actually going to apply them in practice — internationally or nationally — you need to know them more “intimately”. We are therefore going to unpack the traditional ICJ sources one by one. At the end of the exercise, you will be in a position to use them in the courts — which is, after all, what law is all about.

STUDY UNIT 2

TRADITIONAL SOURCES OF INTERNATIONAL LAW: TREATIES

2.1 INTRODUCTION

As regards treaties, the international “bible” is the Vienna Convention on the Law of Treaties (1969) and its sister treaty concluded in 1986, the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations.

The full text of the Vienna Convention on the Law of Treaties (1969) (the VC) can be accessed at untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

We strongly urge you to consult this text.

Note that, for this unit, you must study both chapters 3 and 19 in Dugard.

Pointers for studying chapter 19:

- As treaties form the backbone of contemporary international law, the chapter must be studied in detail.
- Be sure that you can explain the examples Dugard uses in this chapter.
- Certain sections in the chapter (which you will see clearly when you study it) are South Africa-specific. We deal with the position of treaties in South African law in a separate topic (topic 6).

2.2 DEFINITION

You will find a number of definitions of a treaty ranging from the very simple to the more complex. If you were to compare a treaty to a municipal law phenomenon, it is most closely related to a contract. On the international plane, however, treaties are perhaps best compared to laws/legislation.

The classic definition of a treaty is found in Article 2(1)(a) of the VC, which provides that a treaty is:

An international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

We use the following definition:

A treaty is an agreement, whether written or oral, concluded between public international law subjects with the intention of creating a public international law relationship. The agreement must give rise to reciprocal rights and duties and must be governed by public international law.

Can you spot the differences, and why do you think we have introduced them?

In case you can't, here they are:

the VC specifies "states"; we use "international law subjects".

Although states remain the major role-players in international law, they are certainly not the only ones. Today, international organisations, non-state actors and even individuals are to an ever increasing extent "performing" on the international plane. We therefore feel that it is more in keeping with modern trends to classify treaty parties in terms of their capacity rather than their status as such.

the VC talks of "written form"; we say "written or oral".

The conclusion Dugard draws from Article 2(1)(a) is that verbal agreements between states are not treaties, although they do bind the parties. Do you agree? I don't! If you are dealing with an agreement between international law subjects that is of full legal force and is governed by international law, you have a treaty and calling it a "binding agreement" doesn't change its nature. There is no other category into which it can fit. The treaty may not be governed by the provisions of the VC and may not be enforceable before the ICJ (because it can't be registered as required by both Article

102 of the United Nations (UN) Charter and Article 80 of the VC), but it remains a treaty. The problem is one of proof, not of validity.

Other important points to note from the two definitions are:

“What’s in a name?” — to quote “the Bard”

When dealing with treaties, the answer is “precious little”. Just because something is not called a treaty doesn’t mean it isn’t one! We are concerned with the nature of the agreement, not its name. For example:

The African **Charter** on Human and Peoples’ Rights is a treaty.

The UN **Convention** on the Law of the Sea is a treaty.

The **Protocols** to the Geneva Conventions on the Laws of War are treaties.

A **memorandum of agreement** between South Africa and Zimbabwe is a treaty.

The **international agreement** referred to in the South African Constitution is a treaty.

Just as we have different types of sources (see study unit 1), so, too, we find different types of treaty.

The most obvious distinction you will encounter is between **bilateral** and **multilateral** treaties. Bilateral treaties involve only two states (eg a trade treaty between South Africa and Lesotho), whereas multilateral treaties involve a number of states (eg the Law of the Sea Convention).

You will, however, also encounter other forms of treaty (eg treaty contracts constituting treaties or law-making treaties). Don’t get confused: they all remain treaties and there is no juridical difference between the various forms.

2.3 REQUIREMENTS FOR THE CONCLUSION OF A TREATY

OK, we have now established what a treaty is. The next step is to find out how you go about making one. In other words, are there any requirements laid down for the conclusion of a treaty?

First, there are no formal requirements in the sense of statutory requirements as one finds, for instance, in South Africa’s (national law) Alienation of Land Act 68 of 1981. This does not mean that there are no requirements whatsoever.

- Because a treaty is a consensual agreement, there must be **consent** by the parties. The parties must **agree** to create an international law relationship.
- The parties must be **competent** to conclude the treaty (see below).
- The treaty must give rise to **reciprocal rights and duties**.
- The rights and duties must be **governed by international law**.

Note that an agreement between parties with international legal personality will be governed by international law, unless the parties specifically provide that it will be governed by some other legal system.



Practical exercise 3

Dugard states at 328-329: "[A]lthough oral agreements between state representatives may create legal obligations for states, they do not qualify as treaties."

Assess the validity of this statement in not more than 15 lines.

Hints:

- Why is there a problem with oral treaties?
- What does the VC provide in respect of oral treaties?
- What are the requirements for a treaty?
- Have they been met here?
- What then is the agreement?
- What is the basic "thing" that you can do to a written treaty but not to an oral treaty (Arts 80 VC, 102 UN)?
- Does not doing this thing affect the validity of the treaty?
- What is the effect?

2.4 CONCLUDING A TREATY

The first question arising here is whether the conclusion of treaties is governed by international law or by national law. In essence, a state's national law determines who may conclude treaties on behalf of the state, and this is why you will not find uniform rules applying to all states. Therefore, to determine who may conclude treaties that will bind South Africa or any other state, your first source of reference is the law of the states concerned. In South Africa, this will be the Constitution (s 231(1), (2) & (3)).

However, international law is also not silent on who may conclude treaties. While national law provides the "nuts and bolts", international law lays down certain general principles as to who may conclude treaties — but it is important to remember that these remain subject to the national law.

Certain people are presumed to bind the state because of the positions they hold ("ex officio" is the official term you will encounter). In terms of Article 7(2) of the VC, they are:

- the head of state (President/Queen, etc.)
- the head of government (Prime Minister — which we don't have in South Africa)
- the Minister of Foreign Affairs
- the head of a diplomatic mission (ambassador/consul)
- state representatives at treaty-making conferences.

If a person does not fall into one of these categories, Article 7(1)(a) of the VC applies and she/he must produce "full powers". Full powers are documentary proof issued by his/her government stating that she/he is authorised to represent the state in the conclusion of the treaty.

Alternatively, Article 7(1)(b) provides that, if it is clear from the practice of the states, or from other considerations, that the parties intended the person to represent the state, full powers aren't necessary.

It is important to note that, although a treaty concluded by an unauthorised person is essentially invalid (see below), all is in fact not lost. Just as in municipal law where you may ratify (approve after the fact) the unauthorised acts of your agent and

thereby become bound yourself, so, too, in international law a state may ratify the conclusion of a treaty by an unauthorised party and so give the treaty full effect (Art 8 VC).



Practical exercise 4

Consider the following facts:

The Premier of *Gauteng* and the Governor of Washington State, United States of America, sign an agreement. The heading of the agreement, in gold and red Gothic script, reads "Treaty of Friendship & Cooperation". The agreement provides, among other things, that the administrations of the Province of *Gauteng*, South Africa, and the State of Washington, United States of America, will cooperate in promoting cultural contact and will, on public holidays, fly each other's flags from their respective provincial/state legislatures.

Now consider the following facts:

A conference is arranged between South Africa, the United States of America and Mozambique to discuss possible compensatory payment to Mozambique for losses suffered through the following: the involvement of the former government of South Africa in the Mozambican civil war and in the shooting down of President Machel's plane, which resulted in his death. At the close of the conference, South Africa and Mozambique sign a treaty brokered by the United States providing for the payment of compensation to the Mozambican nation. South Africa is represented at the conference by her Minister of Foreign Affairs, Mozambique by her President and the United States by her Secretary of State for Defence.

In not more than one page, analyse and compare these two scenarios on the basis of our definition of a treaty above and the requirements we have discussed for the conclusion of a treaty.

We have now established who can consent to a treaty on behalf of a state. The next question is: How is this consent expressed?

The VC identifies six methods in Articles 11 to 15. In terms of Article 11, these are: signature; the exchange of instruments; ratification; acceptance; approval; and accession. There is a catch-all which reads: "or by any other means if so agreed".

The following require some explanation:

Ratification: Although, in principle, treaties come into operation on signature, this is not always the case — in fact, it is the exception rather than the rule. Most treaties have the additional requirement of ratification. The VC (Art 1(b)) defines ratification as "the international act ... whereby a State establishes on an international plane its consent to be bound by a treaty". No specific procedure is laid down, as this is a matter for the states' national law. The parties sign the treaty and then each state has a "second chance" to confirm its intention to be bound or to amend its national law in order to meet its obligations under the treaty. Note that ratification binds the state internationally and that, until a treaty (that requires ratification) has been ratified, it does not bind the state — although the state is obliged to do nothing that would defeat the objects of the treaty (Art 18 VC). See the examples Dugard gives. (In the South African context, this is embodied in s 231(2) and (3) of the Constitution, which provides for the "international ratification" of treaties. See topic 6.)

Accession is the way in which a state which was not a party to the original treaty may become a party. This it does by depositing a notice of accession. The original

treaty must allow for accession, or the parties to the original treaty must agree to the "new" state joining the treaty.



Practical exercise 5

Article 48 of the International Covenant on Civil and Political Rights (ICCPR) (999 UNTS 171) provides:

Article 48:

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialised agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this Article.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Identify the various ways in which the ICCPR allows states to express their commitment.

2.5 THE VALIDITY OF TREATIES

As you know from your studies of the law of contract, a document may, on the face of it, appear perfectly valid and enforceable, but may in fact be invalid. The same applies to treaties. It is important that you are able to assess whether a treaty on which a party wishes to rely is in fact binding.

An initial distinction must be drawn between treaties which are **void** and those which are **voidable**.

If a treaty is **void**, this means that no agreement ever came into existence. There was no legal act and, as a result, the parties have no rights or obligations. Note that a state need not apply to have a treaty "declared" void, for there is nothing to be voided.

If a treaty is **voidable**, this means that a treaty has in fact come into being, with full rights and duties for the parties. The treaty is valid and the rights and duties are enforceable until one of the parties decides to query the treaty's application. The option of nullifying a treaty generally rests with the "innocent" party. Remember that enforceable rights and duties can arise from a voidable treaty.

2.5.1 VOID TREATIES

Treaties are void if the following can be shown (These grounds correspond to those that you will find in any national legal system.):

VC Art 48: error	VC Art 49: fraud	VC Art 50: corruption	VC Art 51: coercion	VC Art 52: force
<p>A state may invoke error if it assumed the following:</p> <ol style="list-style-type: none"> 1. a fact or situation (which was) 2. material (and) 3. formed the basis of consent 4. when the treaty was concluded <p>AND</p> <ol style="list-style-type: none"> 5. it did not itself contribute to the error; or 6. the circumstances were not suspicious. 	<p>A state may invoke fraud if:</p> <ol style="list-style-type: none"> 1. it was induced by 2. fraudulent action 3. of other negotiating states to conclude the treaty. 	<p>A state may invoke corruption if there was:</p> <ol style="list-style-type: none"> 1. direct or indirect corruption (of) 2. the state's representative (by) 3. another negotiating state. 	<p>A state may invoke coercion where there was:</p> <ol style="list-style-type: none"> 1. coercion of a representative 2. by acts or threats 3. against the representative 4. by any person. 	<p>A state may invoke force if there was:</p> <ol style="list-style-type: none"> 1. coercion of a state 2. by threat or use of 3. force 4. contrary to the principles of international law in the Charter.

There are other grounds which are exclusive to international law. These are:

Constitutional provisions

Article 46: A state may raise the fact that consent to be bound was given in violation of its constitutional provisions to invalidate a treaty only if

- the violation is manifest, and
- it concerns a rule of fundamental importance.

With this Article, read Article 47, which deals with authority to conclude a treaty which is subject to express restrictions, and Article 7 (see above).

Ius cogens

Ius cogens is defined in Article 53 of the VC as:

- an obligatory rule (of)
- general international law (which is)

- accepted and recognised by the community of states as a whole (as)
- a rule from which no deviation is allowed (and)
- which can be altered only by another norm or rule of the same kind.

From this you will gather that *ius cogens* is “something special” in international law. The requirements for a rule of *ius cogens* are much the same as those for custom (see study unit 4), with the important difference that states cannot “contract out” of *ius cogens* — it is absolutely binding on all states whether they like it or not.

Of course, because it is so important and binds all states, there is some controversy about what exactly constitutes *ius cogens*. The only rule that is more or less generally accepted as *ius cogens* is the prohibition on the use of force (Art 2(4) of the UN Charter).

What is the effect of *ius cogens* on the existence of a treaty? (Remember we are dealing with void/voidable treaties at the moment!) A treaty which conflicts with an existing norm of *ius cogens* is void *ab initio* (from the outset). No treaty comes into existence. We will return to *ius cogens* when considering the termination of treaties below.

2.5.2 TREATIES THAT ARE VOIDABLE OR MAY BE TERMINATED

This heading is rather a mouthful! The reason is simple. A treaty that is voidable is a treaty that can be terminated. However, not all treaties are terminated because they are voidable. Voidability is therefore a subspecies of termination. We include the term in the heading to distinguish between treaties that never existed (void treaties) and those that exist, but which, because of some “defect” — or because they have served their purpose — allow one of the parties an “out”.

Again, your source is the VC, this time Articles 54 to 64.

The provisions of the Convention are fairly detailed and only those which we emphasise need be studied in detail. For the rest, you must know that they exist.

2.5.2.1 FULFILMENT OF OBLIGATION

Where a treaty has been concluded to serve a specific purpose, the treaty will terminate once the object of the treaty has been fulfilled. For example, the riots following the general election in Kenya in December 2007 lead to a chronic food shortage. To alleviate the situation and avert starvation, South Africa and Kenya conclude a treaty for the delivery of maize. Once the maize has been delivered, the object of the treaty has been fulfilled and the treaty will terminate.

2.5.2.2 TREATY PROVISION

Where a treaty specifically provides that it may be terminated in a specific way, the treaty will terminate if the prescribed procedure is followed. For example, Article XVIII of the extradition treaty concluded between Great Britain and Peru on 26 January 1904 (and which is technically binding on South Africa through succession — see below) provides as follows: “[This treaty] may be terminated by either of the High Contracting Parties by a notice not exceeding one year and not less than six months.” If the necessary notice is given, the treaty will terminate once this period has passed.

2.5.2.3 CONSENT

A treaty may be terminated if all the parties concerned agree to its termination. This again emphasises the consensual nature of treaties.

2.5.2.4 UNILATERAL REPUDIATION

Where the treaty itself doesn't provide for withdrawal or denunciation, there can be no withdrawal unless:

- the parties intended such a right, or
- the nature of the treaty implies such a right.

2.5.2.5 CONCLUSION OF A NEW TREATY

A treaty will be terminated by implication if:

- all the original treaty parties
- conclude a new treaty
- which covers the same subject matter
- **and** it appears that the parties intended the new treaty to govern the issues
- **or** the two treaties conflict to such an extent that they cannot operate concurrently.

2.5.2.6 BREACH OF TREATY – VC ARTICLE 60

The first requirement is that the breach of the treaty must be material or, in simple terms, "important". Article 60(3) defines "material" as:

- a repudiation not allowed by the VC, **or**
- the violation of a provision **essential** for the achievement of the **object** or **purpose** of the treaty.

Your first step, therefore, is to apply the two criteria above to determine whether the violation of the treaty is material. What happens if it is?

Now you must distinguish between the effect on bilateral and multilateral treaties (see 2.1 above in study unit 2). In the case of a bilateral treaty, the innocent party may suspend or terminate the operation of the treaty in part or entirely. In the case of a multilateral treaty, the innocent party may do likewise, but it may choose to do so only between itself and the guilty party, or between itself and all the parties to the treaty.

Note in regard to termination for breach:

- Where the nature of the treaty means that a breach will affect all future performance, any party other than the guilty state may terminate the treaty.
- Breach of treaty **cannot be raised** to terminate a treaty protecting "the human person".
- Breach of treaty doesn't always mean that the other parties will terminate the treaty — it merely gives them the right to do so should they so wish.

2.5.2.7 IMPOSSIBILITY OF PERFORMANCE – ARTICLE 61

It becomes impossible to perform in terms of the treaty if:

- an object indispensable for the performance is
- permanently destroyed and
- this isn't the fault of the party raising the impossibility.

Note that, if the object is not permanently destroyed, the treaty may only be suspended and not terminated.

2.5.2.8 FUNDAMENTAL CHANGE OF CIRCUMSTANCES: REBUS SIC STANTIBUS

Don't confuse impossibility of performance and *rebus sic stantibus*. Article 62 of the VC governs change of circumstance.

First, the relevant circumstances are those which existed when the treaty was concluded. Secondly (surprise!), a change in circumstances must have occurred. Thirdly, the change must not have been foreseen by the parties.

The general rule is that a change in circumstances does **not** give a party the right to terminate a treaty. However, there are (inevitably) exceptions:

- If the existence of the circumstances was an essential basis for the conclusion of the treaty, **and**
- if the change radically affects the obligations under the treaty, the change may give rise to a right to terminate.

Note that *rebus sic stantibus* may **not be raised** with regard to treaties **establishing boundaries** or by the **party responsible** for the change.

2.5.2.9 WAR AND SUSPENSION OF DIPLOMATIC/CONSULAR RELATIONS

The outbreak of war between two or more of the parties to a treaty does not automatically lead to the termination of all treaties between them. Here you must be guided by the nature of the treaty. Obviously, a treaty of friendship and cooperation will be terminated or suspended. A treaty on the treatment of prisoners of war will, just as obviously, remain in force.

For a South African example, see *Harksen v President of the Republic of South Africa* 1998 2 SA 1011 (C). Here, the court found that an extradition treaty is suspended rather than terminated by the outbreak of war.

Similarly, the suspension of diplomatic/consular relations will affect only those treaties where such relations are indispensable for the application of the treaties.

2.5.2.10 IUS COGENS

We return to our "old friend", *ius cogens*. We saw above that a treaty which conflicts with an existing *ius cogens* is void. But what happens if a treaty is concluded and a new rule of *ius cogens* then develops, which, you will remember, binds all states unequivocally?

The situation here is unique and somewhat anomalous. The treaty isn't void — performance which has already been rendered is perfectly valid. However, there can be no further performance. While, in the case of other voidable treaties, the "injured" party must initiate the termination of the treaty and it remains valid until this is done, in the case of a new *ius cogens*, there is no need for action — the treaty terminates automatically.



Practical exercise 6

Consider the following scenario:

New scientific research by Professor B Breaker reveals that mad cow disease is transmitted solely by bulls. As a result, the British government destroys all the bulls in Britain. This leaves the government with a problem. The Republic of Ireland has only three bulls which are suited to the purpose of replenishing the British beef herd. England and Ireland conclude a treaty in terms of which these three bulls (which are identified in the treaty by their brands) are sold to England for a sum which will balance the Irish economy for years to come. While being transported to England, but still in Irish territory, the trucks transporting the bulls are hijacked by the IRA and the bulls are shot.

Would it have made a difference if the following circumstances had arisen?

- Ireland had not sold all its suitable bulls in terms of the treaty
- instead of shooting the bulls, the IRA had held them to ransom
- instead of shooting the bulls, the IRA had castrated them.

Now consider the following scenario:

South Africa, as the most industrialised state in Southern Africa, is in desperate need of additional water supplies. Lesotho, as an economically less developed state, needs revenue and has abundant water supplies. The two states therefore conclude a treaty in terms of which they agree that South Africa will erect a series of dams in Lesotho which will eventually supply South Africa with water and will provide Lesotho with revenue.

During the planning stages, Lesotho is shaken by a severe earthquake. As a result, the river on which the dams have been planned is diverted and its flow permanently reduced. Engineers — who are amazed by the earthquake, as there has never before been such an occurrence in the region — advise that the project is no longer feasible. South Africa claims that it may validly terminate the treaty. Would it make any difference if Lesotho were regularly plagued by earthquakes?

You are approached for an opinion in both instances. Contrast these two scenarios, explaining which grounds for the termination of treaties you would advise, and why you would do so.

2.6 RESERVATIONS TO TREATIES

Reservations are covered by **Articles 19 to 23** of the VC and by the ICJ's advisory opinion in *Reservations to the Convention on the Prevention of the Crime of Genocide* 1951 ICJ Rep, which established the approach later incorporated in the VC. Although this topic may appear to be extremely involved, it can be reduced to comprehensible terms if you remember a few basic principles.

First, reservations arise only in multilateral treaties. In a bilateral treaty, a "reservation" is in fact an offer by the objecting state to conclude a different treaty. If this offer is accepted, a new treaty comes into operation.

Secondly, you must remember that treaties are consensual. In other words, states cannot be forced to accept that which they do not wish to accept.

Thirdly, the aim of a multilateral treaty is to get as many states as possible

to agree on as many issues as possible. This is the basis of reservations. If they were not possible, the treaty would be sabotaged and the object of concluding the treaty would be defeated. Reservations allow a state which does not agree with all the provisions in a treaty to still become a party to the treaty and be bound by those provisions which it can live with.

With these principles in mind, let's start at the beginning with a definition.

A reservation is an offer by the reserving state to the other parties to a multilateral treaty that the agreement between them will have a certain content.

The next logical question is whether a state can always accept a treaty subject to reservations. The answer lies in **Article 19** of the VC. This article provides that a state may accept a treaty subject to reservations, **unless**:

- the treaty forbids reservations
- the treaty allows only certain reservations (and the one proposed isn't one of them)
- the reservation proposed is contrary to the object and purpose of the treaty.

The general rule, therefore, is that all treaties may be accepted subject to reservations. If the treaty is silent on the question of reservations, it may be assumed that reservations are allowed.

Because treaties are consensual and a proposed reservation is an offer, it stands to reason that the other parties to the multilateral treaty may do one of two things: accept the reservation or reject the reservation.

However, life being what it is and states being what they are, you will often find that a state neither accepts nor rejects a reservation — it merely says nothing. Failure to object to a reservation is taken to mean tacit consent to the reservation.

A state that objects to a reservation may also do one of two things:

- (1) it may simply object to the reservation, but not to the operation of the treaty,
or
- (2) it may object to the reservation and to the treaty coming into operation between itself and the reserving state.

In the first case, the treaty will operate between the two states minus the offending clause. In the second case, no treaty will operate between the two states.

What effect does a reservation have on the multilateral treaty?

Here you must distinguish between states which accept the reservation and states which reject it.

Treaty obligations between states accepting the reservation and the reserving state

Remember that acceptance may be either express or tacit (through silence or conduct).

The entire treaty applies between the parties.

BUT, the provision in the original treaty to which the reservation has been entered will be replaced by the provisions in the reservation.

NB: If states A, B and C accept a reservation entered by state D, the treaty will apply normally between states A, B and C. It is only treaty relationships between state D and other states that are affected by the reservation.

Treaty obligations between states rejecting the reservation and the reserving state

Rejection of a reservation must be express.

If a state rejects a reservation, the reservation doesn't come into operation between the reserving and the rejecting state (there is no consensus).

BUT, the clause to which the reservation is entered also cannot apply (again there is no consensus) and it is removed from the treaty **for those parties**.

If a *lacuna* (vacuum) arises from the cancellation of the clause, customary international law will apply to that aspect.

The rest of the treaty (all the provisions minus those to which reservations have been entered) applies between the parties.

If the state rejects the reservation and the treaty coming into operation, the treaty will not operate between the two states.

Remember: treaty obligations between all non-reserving parties remain unaffected by the reservation!

To summarise in very simple terms:

Because the aim of multilateral treaties is to get as many states as possible to agree on as much as possible, and because states cannot be forced to consent to something they don't agree with, the public international law relationship in the case of a treaty accepted subject to reservations comprises **the highest common denominator existing between the parties**.

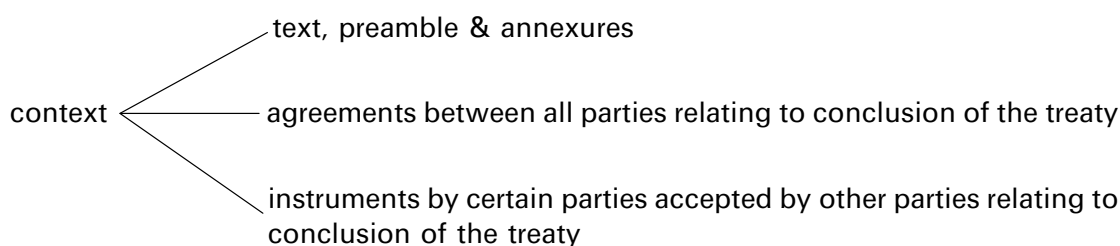
2.7 TREATY INTERPRETATION

Having established the existence of a treaty, it is of course vital to know how to interpret it. Treaty interpretation is governed by Articles 31, 32 and 33 of the VC. As in municipal law, there are two principal streams in the interpretation of treaties:

- (1) The literalist or textual approach, which concentrates on the actual text of the treaty and reflects a literalist/positivist approach to law. This approach was followed in the *South West Africa case, Second Phase* 1966 ICJ Rep.
- (2) The teleological or purposive approach, which interprets the treaty to give effect to the purpose for which it was concluded. This was followed, for example, in the case, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* 1971 ICJ Rep.

The VC marries the two approaches in Article 31 by providing that treaties must be interpreted **in good faith** in accordance with the **ordinary meaning** of the words used **in context**, bearing in mind the **object and purpose** of the treaty.

These are the **primary** means of interpretation, and the key phrase here is **context**, which is defined in Article 31(2) as:



Together with the context, also consider:

Art 31(3)(a)	Art 31(2)(b)	Art 31(2)(c)
<i>Subsequent agreements</i> relating to the interpretation or application of the treaty	<i>Subsequent application</i> which established agreement as to application	<i>Relevant rules of public international law</i>

These are the **primary** means of establishing meaning. Once you have done this, you can turn to the **secondary or supplementary** means, but only:

- to **confirm** the meaning you have established,
- if the meaning established is **ambiguous** or **obscure**, or
- if the meaning established is **manifestly absurd or ambiguous**.

The **supplementary** means referred to in **Article 32** of the VC are the preparatory work leading to the conclusion of the treaty and the general circumstances surrounding the conclusion of the treaty.

2.8 SUCCESSION TO TREATIES

The last aspect of treaties we will be considering is whether, and, if so, how, a state can succeed to treaty obligations undertaken by some other state.

2.8.1 GENERAL

When dealing with succession, the key concept is “change”. The nature of the state as an entity in international law must change. This means that a change in government — even a fairly radical one — will not involve the issue of succession. The “thing” that the new government is governing has not changed. It is only when this “thing” takes on an entirely new form — it becomes something else — that you need to ask whether or not the new entity is bound by the obligations undertaken by the old entity. To make this more real for you, let’s look at two of the examples Dugard uses.

Namibia was a “mandated territory” administered by South Africa in terms of the Charter of the League of Nations (originally) and then under the UN Charter. This was its status under international law, which meant that it could only do things on the international plane that a mandated territory could validly do. In 1990, it gained independence, thus becoming a state — therefore a different entity under international law able to do different things. The question of whether it wished to be bound by the treaties South Africa had concluded on its behalf therefore arose.

On the other hand, before 1994, South Africa was a state — a much-criticised state, but a state nonetheless. In 1994, this state adopted a new constitution which completely changed its ideological direction, but it did not change the “nature of the beast”. Pre-1994, it was a state governed in terms of internationally unacceptable policies; post-1994 it remains a state governed in terms of internationally acceptable policies.

In practice, states adopting a new constitution will generally set out their approach to succession to treaties — this can occur in both instances (eg Namibia and South Africa). This is, however, only legally necessary in the case of “new entities”. In the

case of a continuing state, this serves merely to clarify the situation and warn other states what they may expect to happen to existing treaties.

2.8.2 INTERNATIONAL THEORY ON SUCCESSION

There are three theories in international literature that are used to explain the succession process.

First, there is “universal succession”. As the name suggests, the new entity succeeds to all the treaty obligations of its predecessor. This is the oldest of the theories and is one that is not generally followed, particularly where the new state differs ideologically from the old.

Secondly, there is the “clean-slate” theory in terms of which the new state literally starts with a clean slate — it carries over none of the previous state’s treaty obligations/rights. Although, as Dugard points out (3 ed 421), this is the approach advocated by the Vienna Convention on Succession of States in respect of Treaties 1978, states haven’t “bought into” the idea. It also gives rise to numerous practical problems. For example, the new state lives in a vacuum as regards its international relations until such time as it renegotiates all its treaties. Given the practical problems facing new states — particularly those in Africa which generally gained independence without the necessary technical and human resources to run a modern state — this could take some time and is simply not practical.

This brings us to the third — and more realistic and generally accepted — solution, which, inevitably in international law, represents a compromise. This is “provisional succession”. What happens here is that, on attaining its new international status, the state declares that it will be bound by existing treaties, either for a fixed period (eg three years) or until such time as it gives notice to the contrary. This way, things carry on, but the new entity retains the right to cancel commitments it finds unacceptable.



Practical exercise 7

Discuss the three theories governing succession to treaties and contextualise these through an analysis of state practice in southern Africa. Your discussion should analyse the theories critically, explaining the practical effect of each and illustrating their application using relevant case law. Your answer should not exceed three pages.

Well, that is what we expect you to know as regards treaties in international law. Remember, however, that this is only the first source. We now turn to the others.

STUDY UNIT 3

TRADITIONAL SOURCES OF INTERNATIONAL LAW: CUSTOM

3.1 INTRODUCTION

Because treaties have assumed so dominant a role in modern international dealings, there is sometimes a tendency to regard custom as treaties' "poor cousin". This is a mistake in general terms and would be a fatal mistake for you to make!

Because international law knows no legislature and no compulsory system of courts, custom has remained a very important — and constantly developing — source of international law. Custom may be regarded as the common law of the international community. It is the law which is applied when the parties have not arranged matters in a treaty, when the treaty provisions aren't universally acceptable (see, eg, 2.6 Reservations to treaties in study unit 2 above) or where a treaty is silent on a particular point. A customary rule can eventually be embodied in a treaty form (eg the VC is in the main a codification of customary international law existing at the time of its conclusion), but, by the same token, the practice of states under a treaty can develop into a customary rule which may, in practice, even supplant, or modify, the actual provisions of the treaty. As was pointed out in the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA)* 1986 ICJ Rep, the fact that a treaty has been adopted that covers the same ground as a customary rule does not necessarily mean that the custom has ceased to exist — the two can exist concurrently. There is consequently a constant ebb and flow between the various sources of international law which defies their being strictly compartmentalised.

3.2 DEFINITION

For our definition of customary international law we draw on Article 38(1)(b) of the Statute of the ICJ. This article provides that, in settling disputes, the court must apply:

international custom, as evidence of a general practice accepted as law.

From this definition we can establish two "legs" to customary international law. Before a customary rule can develop, both of these must be present. These are:

- (1) general practice
- (2) accepted as law.

In the literature, you will generally find these referred to by their Latin equivalents:

- (1) *usus*
- (2) *opinio iuris sive necessitatis*.

We will now examine each of these in detail.

3.3 USUS: THE FIRST REQUIREMENT

There must be a general practice among states for custom to develop. This requirement is defined in the *Asylum case* 1950 ICJ Rep as:

a constant and uniform usage.

Unfortunately, things are never so simple. A number of elements have been identified which must be considered when deciding whether or not a general practice/usage has developed.

Uniformity: Does this mean that the usage must be followed in exactly the same way by every state? See the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA)* 1986 ICJ Rep for the concept of “substantial compliance”.

Repetition: How many repetitions do there have to be to make a custom? Here, you will have to consider the nature of the rule involved. If it is a rule that will affect most states, there will be a greater number of repetitions required. If, however, it is a rule which can in essence affect only a few states, fewer repetitions — in fact even one or two — would be sufficient. For example, a rule relating to the use of outer space affects only those states involved in space exploration. Thus, if they all agree, there is no reason to refuse to acknowledge the rule because the practice has occurred only once or twice. The *Asylum case* (above) also considers this point.

Time: Closely related to the number of repetitions is the question of the length of time a usage must persist. By its nature, custom is a slow process. There are, however, no hard-and-fast rules. Again, the nature of the usage will often be decisive — and, again, space exploration can serve as an example. This is echoed in *S v Petane* 1988 3 SA 51 (C), where a South African court considering the formation of custom cited GA Res XVIII (1962) as a customary rule which developed with little or no practice.

The number of states: How many states must follow a usage, and are all states bound by it? There is controversy about whether acceptance must be “universal”, “general” or “widespread”. See, in this regard, the *Fisheries Jurisdiction case* 1974 ICJ Rep, the *North Sea Continental Shelf cases* 1969 ICJ Rep, and the *South West Africa case, Second Phase* 1966 ICJ Rep.

Can a usage develop between two, or only a few, states? Here we are dealing with a local or regional custom and there is no reason why such a custom should not develop. See the *Case Concerning Right of Passage over Indian Territory* 1960 ICJ Rep. However, see, too, the *Asylum case* where a different view was adopted.

Related to this is the question whether a state which has opposed the formation of a custom, is bound by it — termed the “rule of the persistent objector”. See, in this regard, the *Anglo-Norwegian Fisheries Case* 1951 ICJ Rep, the *North Sea Continental Shelf Case* 1969 ICJ Rep, the *Asylum case* 1950 ICJ Rep, and the *Nicaragua case* 1986 ICJ Rep.

Actions speak louder than words: There is often a considerable difference between what states say and what they do. Must a state do what it says before a practice can develop? Ideally, the answer is “Yes”, and this was the approach adopted by Justice Van Wyk in the majority decision given in the *South West Africa case, Second Phase*. The only generally recognised exception was that, where a state had not yet had an opportunity to give concrete expression to its intentions on a particular issue, its statements alone would be sufficient to establish a usage. However, we feel that the trend started by Justice Tanaka in his dissenting opinion in the *South West*

Africa case, Second Phase, and carried further in the *Nicaragua case*, has had an effect. By softening the absolute approach to practice in general and finding that

the conduct of states should, **in general**, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule

the ICJ has provided a loophole for states not to do exactly what they say. Inconsistent behaviour can therefore be seen as a “slip” in state practice which will make proof more difficult, but it will not exclude the possibility of the practice developing.

Where does one find practice? It is all well and good to say that you must establish a settled practice, but where do you go to find it? The answer is simple — anywhere where the practice of the state is reflected. This can be newspapers, court decisions, communiqués, the opinions of law advisers, law journals (eg the *South African Yearbook of International Law*, etc.) and so on.

Obviously, the attitudes of members of civil society (who are generally not recognised as subjects of international law) cannot form the basis of customary international law. However, Judge Van Den Wyngaert, in a well-received dissenting opinion in the *Arrest Warrant Case (DRC v Belgium)* 2002 ICJ Rep, found that the opinion of civil society “cannot be completely discounted in the formation of customary international law today”. In finding that, under customary international law, a Minister of Foreign Affairs is not immune from the jurisdiction of other states when charged with war crimes and crimes against humanity, the ad hoc judge referred to several “scholarly organizations” such as the International Law Association, Amnesty International and Human Rights Watch. But this does not mean that you can rely exclusively on such opinions.



Practical exercise 8

Draw up a table for yourself in which you list the essential “problems” surrounding the concepts that make up *usus* (uniformity, repetition, time, number, say/do). Using Dugard, add a practical example of each to your list and then add a case as authority for your solution to/discussion of the “problem”. This will then provide a handy “plan” for an essay on *usus* as a requirement for custom. It will also be a reference point in solving practical problems involving custom.

3.4 OPINIO IURIS: THE SECOND REQUIREMENT

We have spent so much time on practice that you may be forgiven for forgetting that this is only half of the customary international law picture. Once you have applied all that you have learned above, you will still not have a rule of customary international law. What you will have is a settled practice or way of behaving. This we generally call a usage and it represents the first essential stage of custom development. What is required to turn this usage into law?

You will remember that Article 38(1)(b) of the ICJ Statute talks of a usage which is “accepted as law”. This, then, must be the “magic formula” which turns a non-binding way of behaving into a binding rule of law. It is relatively easy to prove a usage, as it is based on concrete behaviour by a state. *Opinio iuris*, on the other hand,

is a slippery concept. Not for nothing is it called the “psychological element”. How do you prove what a state is thinking? — it’s difficult enough with humans! This is a problem that we will leave for you to unravel at postgraduate level. For present purposes, we will merely tell you what you must prove!

The clearest formulation of *opinio iuris* is found in the *North Sea Continental Shelf cases* 1969 ICJ Rep. The state must comply with the usage/practice because it feels legally obliged to do so. It must feel that, if it does not follow the usage, it will be committing an international “wrong”, that is, that it will be breaking international law. Following a rule simply because you feel that it is the “right” or morally correct thing to do is insufficient. (Doesn’t this remind you of what states say/do in the previous study unit?)

In the *Arrest Warrant case* 2002 ICJ Rep, the majority of the court found that there was a rule of customary international law granting a serving Minister of Foreign Affairs full immunity from criminal jurisdiction. In her dissenting opinion, Judge Van Den Wyngaert found that the negative state practice of not instituting criminal proceedings against Ministers of Foreign Affairs could meet the test of *opinio iuris* only if it were shown that the practice was the result of the relevant states being conscious of a legal duty not to prosecute. Therefore, it is not enough that there was no practice of instituting criminal proceedings against Ministers of Foreign Affairs. In addition, this failure to institute criminal proceedings against Ministers of Foreign Affairs must be based on the state believing that it has a legal obligation not to prosecute.



Practical exercise 9

An interesting question that Dugard addresses in a separate section (3 ed 34-37) is whether resolutions of the UN can give rise to customary international law that is binding on all states.

Using what you have learned about the requirements for the development of custom set out in Article 38(1)(b) of the Statute of the ICJ, argue, using South Africa and the UN’s condemnation of apartheid as your example, whether or not a customary rule outlawing apartheid that would have been binding on South Africa can be said to have developed. Concentrate here on the question of *opinio iuris*, which is the interesting part!

STUDY UNIT 4

TRADITIONAL SOURCES OF INTERNATIONAL LAW: GENERAL LEGAL PRINCIPLES, JUDICIAL DECISIONS AND THE OPINIONS OF WRITERS AS SOURCES OF INTERNATIONAL LAW

4.1 INTRODUCTION

In the previous two topics, we dealt with the principal sources of international law. However, what happens if there is no treaty governing a specific issue and no rule of

customary law has developed? Unfortunately for judges, once a case is before them, they can't throw up their hands and say they don't know the answer simply because there is no treaty or custom dealing with the matter! From your reading of Article 38 of the Statute of the ICJ you will remember that two other sources are listed. These are general legal principles, and judicial decisions and writings. These are the sources we will now consider.

4.2 GENERAL LEGAL PRINCIPLES

Article 38(1)(c) of the Statute provides that the court may also use general principles of law recognised by civilised nations. Although this "definition" may seem simple at first glance, think a bit about it. Which nation is a civilised nation? Whose standards must be applied to determine civilisation? I'm sure we all think we are more civilised than most — xenophobia rules!

Apart from this problem (which has no real solution), there is also the more technical question of what constitute "general principles of law". As we pointed out in topic 1, the essence of international law is its consensual nature. This is the basis of both treaty and custom. However, in the case of general principles, we are not dealing with universals which all states have agreed on. If the basis is not to be found in consensus, it must be sought in some higher order — and it is here that some argue for natural law as the basis of public international law (see topic 1). Dugard (3 ed 38) cites the following passage from the *South West Africa case, Second Phase* 1966 ICJ Rep (Justice Tanaka again):

[I]n Article 38(1)(c) some natural-law elements are inherent. It extends the concept of the source of international law beyond the limit of legal positivism according to which, the states being bound only by their own will, international law is nothing but the law of consent and auto-limitation of the state.

(Does this quotation call to mind anything from topic 1? — if not, perhaps you should look at that topic again!) This source is becoming ever more important in international law, which struggles to keep abreast of rapid changes in a globalising world. While it is not possible to give strict requirements which will allow you to recognise these principles without fail, for each case has to be judged on its merits, here are a few examples that will give you an idea of the type of principle involved. It will be your duty to convince a court that the rule you are claiming fits the bill.

unjust enrichment — *Lena Goldfields Arbitration* 1930 5 AD 3; reparation for violation of an agreement — *Chorzow Factory (Merits) case* 1928 PCIJ Rep Ser A no 17; *res iudicata* — *Effect of Awards of Compensation made by the UN Administrative Tribunal* 1954 ICJ Rep; limited corporate liability — *Barcelona Traction, Light & Power Company, Ltd* 1970 ICJ Rep; estoppel — *Temple of Preah Vihear case* 1962 ICJ Rep; *nemo iudex in sua causa* — *Mosul Boundary case* 1925 PCIJ B no 12 (which is somewhat ironic in the light of what we said in topic 1); *exceptio non adimpleti contractus*/he/she who seeks equity must do equity — Judge Hudson's opinion in *The Meuse case* 1937 PCIJ Ser A/B no 70.

This is enough to give you an idea of the type of principles involved. You will see that they do have a certain universal character in that they are not tied to any specific system or approach to law. They deal with basic characteristics of law and justice.

4.3 JUDICIAL DECISIONS AND THE TEACHINGS OF THE MOST HIGHLY QUALIFIED PUBLICISTS

This is the final source recognised by Article 38(1) of the Statute of the ICJ where it provides in subsection (d) that the court shall apply:

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

There are two modifiers in this article. First, Article 59, and, secondly, the term “subsidiary means”. Both must be considered if you wish to apply the article.

Article 59 of the ICJ Statute provides that ICJ decisions bind only the parties involved and are binding only for that specific case. (This should ring a bell, as we dealt with it in topic 1 when comparing international and national law as distinct systems. It is the article used to justify the absence of a precedent system in international law.)

A question that arises is whether judicial decisions should be interpreted solely as the decisions of international courts (and then, notably, of the ICJ) or whether the decisions of municipal courts may also be consulted. While a case can possibly be made out for both sides, the qualification of the use of judicial decisions by reference to a provision in the Statute implies that it is international decisions — and most notably those of the ICJ — which are primarily intended. However, if an important point has been particularly thoroughly examined in a municipal context, the court could also refer to it. It is important to note that the reference to Article 59 specifically excludes any question of precedent.

The court is also authorised to use the works of international writers. Again, the provision is rather vague, because how do you determine who is “most highly qualified”? Each judge has been trained in his/her own legal system and will tend to regard those writers he/she is familiar with as the most highly qualified. The choice is arbitrary and subjective.

(We have an interesting example of this in our own case law. In *Nduli v Minister of Justice* 1978 1 SA 893 (A), for long one of the leading South African cases on international law, Rumpff CJ referred with great conviction to only one international writer in the person of “Francois”. Many were perplexed by this reference until the rumour spread that “Francois” wrote the textbook which the judge had used at university! So much for most highly qualified writers!)

It is important to remember that the use of “publicists” and “judicial decisions” is classified as a **subsidiary means for the determination of rules of law**. This has two implications with regard to such sources. In the first place, it implies that they are not, in and of themselves, capable of creating international legal rules, but can be used to ascertain what the rules of law are. Writers on international law may, after synthesising state practice and documents, conclude that there is some practice constituting a rule of customary international law. The Statute of the ICJ allows the court to refer to these works in support of such a contention. Similarly, the ICJ has often referred to its own decisions as a means of supporting the existence (or not) of a particular rule of international law.

The second and related implication was discussed in study unity 1 of this topic in relation to the question whether the sources of international law are hierarchical. If you don't know what we are talking about, go back to study unit 1 now!

STUDY UNIT 5

THE EMERGING SOURCES OF THE "NEW" INTERNATIONAL LAW: SOFT LAW, CODIFICATIONS, *IUS COGENS* AND OBLIGATIONS *ERGA OMNES*

5.1 INTRODUCTION

As we have indicated repeatedly, international law is facing a number of challenges. Many of these are centred around its inability to meet the demands of a rapidly evolving international society. The sources we discuss here are geared towards meeting these needs. Some argue that they can be fitted into the traditional sources, while others argue that they are entirely new. Decide for yourself.

5.2 SOFT LAW

This is a halfway house between non-law and customary international law. It is custom that has reached only the usage stage (or not even that). Soft law is not binding on states, but it is persuasive and has a potentially important effect on the overall perceptions of the international community. It is also available to our courts in the interpretation process, as you will see in topic 6.

5.3 CODIFICATION

When discussing custom, we indicated that one of the problems with it is that, because it is by definition unwritten, it is difficult to establish just what the norms are. The international community's response to this is to get a group of experts together and to write down (or codify) the customary law in a single, subject-specific document which will then serve as a point of reference. In this way, the existing international law is written down for use by international courts, etcetera. At the same time, the law is developed as and when the compilers see obvious gaps or things that have changed — they are not going to sit around idle, are they?

See the examples discussed by Dugard (who, for interest sake, is a member of the International Law Commission).

5.4 *IUS COGENS* AND OBLIGATIONS *ERGA OMNES*

This is an important and very interesting area of developing international law. In fact, it challenges much of what we have said on the role of individual consent as the cornerstone of international law. Here, we have principles which a state may not necessarily agree with, but by which it is bound. South Africa and apartheid are a classic example, the principle of course being the right to self-determination. It is also hardly surprising, then, that the concept of principles *erga omnes* was first set out in one of the *South West Africa* cases 1996 ICJ Rep.

Make sure that you understand these two concepts, are able to trace their development through case law and other relevant sources, and can assess their impact on traditional international law thinking.

STUDY UNIT 6

ASSESSMENT

6.1 GENERAL REMARKS

Because this was a mammoth topic, we introduced a number of the formative assessment exercises in the text of the topic to break the “monotony” and reinforce what you had just learned. Make sure that you have in fact done practical exercises 1 to 8 and “read them in” here as well.

Here are a few more general exercises that bring a number of the sources together.

6.2 PRACTICAL EXERCISES



Practical exercise 10

You have encountered the concept of *ius cogens* in a number of places while you were studying this topic. Identify where this concept has been discussed and then analyse the role it plays in each of these instances.



Practical exercise 11

The ICJ's Advisory Opinion in *Reservations to the Convention on the Prevention of the Crime of Genocide* 1951 ICJ Rep was seminal as regards the status of reservations to treaties. Analyse the effect which this opinion has had on advancing or retarding multilateral international relations.



Practical exercise 12

For 30 years, South Africa has drawn electricity from a source in Lesotho. Although this electricity is essential for the economic development of South Africa, a formal agreement has never been concluded between the parties. After a democratic election in Lesotho, a new government comes to power. This government immediately closes off South Africa's access to this power source. No explanation is given. The South Africa government registers a formal protest with the Lesotho government. After consideration of the protest, Lesotho issues a statement in which it acknowledges that it feels obliged to meet its obligations to supply South Africa with power. The power supply is restored and all breathe easily.

This is, however, only the quiet before the storm. One month later, Lesotho again cuts off the power supply, declaring that it is under no obligation to facilitate South African domination of the region by supplying cheap power. South Africa now claims that Lesotho has breached a norm of international law. Using these facts, identify the norm on which South Africa will have to rely. Discuss all aspects of the requirements for the formation of this norm through an analysis of the facts given.

TOPIC 3

INTERNATIONAL LEGAL PERSONALITY

In this topic, we discuss the following:

Study unit

- 1 Introduction
 - 1.1 General remarks
 - 1.2 Categories of international legal subjects
 - 1.2.1 Original (primary) subjects
 - 1.2.2 Derivative (secondary) subjects
- 2 States
 - 2.1 General remarks
 - 2.2 Permanent population
 - 2.3 Defined territory
 - 2.4 Effective government
 - 2.5 Capacity to enter into relations with other states (foreign affairs capacity)
- 3 Recognition of states as international law subjects
 - 3.1 General remarks and forms of recognition
 - 3.2 Theories of recognition
- 4 International organisations
 - 4.1 Introduction
 - 4.2 International legal personality of international organisations
 - 4.3 Some general characteristics of international organisations
 - 4.4 The United Nations as an example of an international organisation
- 5 Individuals
- 6 Assessment



Prescribed reading for topic 3: Dugard

- chapter 5: States pp 81-110
- chapter 22: The United Nations and the Maintenance of International Peace pp 480-500

Additional reading material:

Should you wish to acquire more knowledge of, and insight into, the matters discussed here, you may consult the other two sources used in the compilation of this topic:

Slomanson WR (2007) *Fundamental perspectives on international law*

- chapter 2: States pp 65-116
- chapter 3: Organizations pp 117-190
- chapter 4: Individuals and Corporations pp 191-232

Wallace MM (2005) *International law (5 ed)*

- *chapter 4: International Legal Personality pp 59-95*

STUDY UNIT 1

INTRODUCTION

1.1 GENERAL REMARKS

This topic aims to introduce you to the concept of international legal personality. Why is this concept important, you may ask? Well, the International Court of Justice (ICJ) explained it succinctly in *Reparations for Injuries Suffered in the Service of the United Nations* (1949 ICJ Rep): an entity which is endowed with international legal personality is an international law subject and, as such, is “capable of possessing international rights and duties, and has the capacity to maintain its rights by bringing international claims”.

States remain the original, or primary, subjects of international law. However, there are others, such as international organisations, belligerents, and even the individual, which may enjoy some degree of international legal personality. Therefore, once you have completed this topic, you will be able to identify which entities qualify as subjects of international law and are able to act independently on the international plane, that is, which entities are able to acquire rights and incur obligations under international law.

We will also be dealing with another important issue: the definition of the extent of each legal subject’s international legal personality. It is important to know this, because not all legal subjects have the same capacities to act on the international plane. The content of their capacities is determined by the extent of international legal personality they possess. Alternatively, if you are given the extent of the capacity of a certain entity, you should be able to say what it is or is not!

But, before we go any further, we must make one important distinction, namely that between “original” and “derivative” international law subjects.

1.2 CATEGORIES OF INTERNATIONAL LEGAL SUBJECTS

1.2.1 ORIGINAL (PRIMARY) SUBJECTS

An original subject is one which has its international legal personality simply by virtue of its existence. The state is the original, primary and principal “person” of international law. If an entity meets all the requirements necessary for statehood (discussed below), it will automatically have international legal personality, which entitles it to:

- conclude treaties
- contribute to the formation of customary international law — remember topic 2?
- be a party to a contentious case before the ICJ, etc.

1.2.2 DERIVATIVE (SECONDARY) SUBJECTS

These subjects have international legal personality only if, and to the extent to which, the primary subjects have conferred it on them. Their mere existence does not guarantee them international legal personality. An example of a derivative, or secondary, subject is an international organisation. The latter is created by an agreement between its members (states). The extent of its legal personality is limited

to those powers and duties for which the states that created it have provided. Its personality is, therefore, more limited than that of states.

The states which have created the organisation will also agree on the powers which that organisation will have. These powers or competencies will differ from one organisation to another, depending on the purpose for which the organisation was created and on the content of the common interests of the member states it serves.

In summary, therefore, as an original subject of international law, a state will have all the powers allowed by international law, except those that have specifically been limited. It doesn't have to "do" anything to get these. An international organisation, on the other hand, will have no powers, except those given to it by its founding members.

STUDY UNIT 2

STATES

2.1 GENERAL REMARKS

The question which needs to be answered is: What is a state? At first, the answer appears simple: an entity will qualify as a state when it meets all the requirements for statehood. To this end, the Montevideo Convention of 1933 provides as follows:

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

A state may therefore be defined as:

[A] community, which consists of a territory and a population subject to an organised political authority ... and such a state is characterised by sovereignty. (*Opinion No 1 of the Arbitration Commission of the European Conference of Yugoslavia* 92 ILR 162, 165.)

Let us now look at each of these requirements in more detail.

2.2 PERMANENT POPULATION

As Wallace points out:

States are aggregates of individuals and accordingly a permanent population is required.

This does not, however, mean that there is a required minimum number of people. For example, Nauru, with a population of 10 000, is a full and equal member of the international community.

The fact that a population is nomadic (eg the tribes on the Kenya-Ethiopia border) does not affect statehood either. Nomads move around as whole communities and one may therefore find that a certain territory has a population at certain times only. The court in the *Western Sahara case* 1975 ICJ Rep found that a nomadic population

is not a bar to statehood. What is important for the purpose of the “permanent population” requirement is that the population lives in accordance with an organised, recognisable social and political structure with a clear chain of command.

2.3 DEFINED TERRITORY

This is a requirement which flows from the fact that states are territorial units, that is, have borders. It is important for a state’s territory to be defined, because, as Article 9 of the Montevideo Convention provides:

The jurisdiction of States within the limits of national territory applies to all the inhabitants.

As with the “permanent population” requirement, you will find that there is no required minimum size for a territory. It also does not mean that the territory must have undisputed borders. An example is to be found in the Israel-Palestine conflict: despite continuing disagreement, Israel still satisfies the requirements for statehood. As Philip Jessup points out:

[B]oth reason and history demonstrate that the concept of territory does not necessarily include precise delimitation of the boundaries of that territory. The reason for the rule ... is that one cannot contemplate a state as a kind of disembodied spirit. Historically, the concept is one of insistence that there must be some portion of the earth’s surface which its people inhabit and over which its Government exercises authority. (“On the Condition of Statehood” 3 UN Security Council Official Records 383rd Meeting 91948 at 9–12.)

A further question that may occur to you is whether the territory must be one single unit: the answer is — it depends! Alaska is part of US territory, even though they are separated by Canada. Until 1971, East and West Pakistan formed one state, even though they were separated by India. The bottom line is that the state must be sufficiently homogenous to be able to perform its government functions effectively. Article 4 of the United Nations (UN) Charter requires that a state be able and willing to meet its obligations in terms of the Charter; in other words, there must be a stable community within an area over which its government has control. If the territories are so dispersed that such control cannot be exercised in all of them, statehood will not be granted.

In this regard, the decision in *Van Deventer v Hancke & Mossop* 1903 TS 401 is of particular interest. In 1900, the Transvaal Republic lost its territory because it was annexed by Britain. The Treaty of Vereeniging was concluded two years later. The court had to determine what the status of the Transvaal Republic was during this two-year period. The court found that the Boers had remained subject to the law of the Transvaal Republic and could enact new laws, conclude valid treaty commitments, and so forth. This case, therefore, illustrates the situation where a community of people, which was subject to a specific government, qualified as a state despite the fact that it had no territory.

2.4 EFFECTIVE GOVERNMENT

In order to satisfy the requirements of statehood, the entity must have a government which is independent of any other authority, and it must have legislative and administrative competencies. For example, in 1920, the International Committee of

Jurists presented a report on the status of Finland and remarked that it would not be a state:

until a stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the state without the assistance of foreign troops.

(As an aside — and as a practical example — how would you classify this report if you had to consider it under the sources of international law (topic 2 above)? Ah, yes, of course, it's soft law!)

Now we can ask two questions:

- First: What effect does civil war have on statehood?

In this context, it must be pointed out that a change of government, even if achieved through revolution, will not affect the existence of the state as an international legal person. Somalia, Angola and the Democratic Republic of Congo could perhaps have been classified as "failed states" that could not exercise their legal capacities as a result of a lack of an effective regime. Yet, during these periods of anarchy, they continued to be recognised as states.

As Dugard remarks:

Although logic might suggest that such an entity ... should cease to be a state, the practice of states provides no support for such a view.

(Remember what we said about succession to treaties in topic 2? And consider what we will say about the succession provision (s 231(5) in the South African Constitution in topic 6.)

- Secondly: What is the role played by a state's economic dependence on another?

The existence of economic dependence alone is not decisive, but it may provide evidence of lack of independence. If the controlling state uses its position of economic power to manipulate the dependant state, it would be tempting to call the "effectiveness" of its government into question.

Another international law scholar, Brownlie, suggests some guidelines which can be used to assess a government's effectiveness. (Please note that Brownlie's test deals with the existence of an effective government and not with the existence of a state. Remember that "effective government" is only one of the requirements for statehood.) Brownlie says that, to judge whether a government is effective, one must ask the following questions:

1. Does it have its own executive organs?
2. Does it conduct relations through these organs?
3. Does it have an independent legal system?
4. Does it have its own courts?
5. Does it have its own nationality?

If you answer "Yes" to these questions, the entity is controlled by an effective government.

2.5 CAPACITY TO ENTER INTO RELATIONS WITH OTHER STATES (FOREIGN AFFAIRS CAPACITY)

This requirement means that a state must be independent of any other authority in the

exercise of its foreign relations; in other words, the entity must be regarded as sovereign. Thus, if another state dominates it and dictates its foreign policy, the requirement will not be satisfied and the entity cannot be said to possess statehood. This requirement is also closely linked to the issue of recognition — if the other members of the international community refuse to recognise it and to enter into relations with it, the entity will, for all practical purposes, be deprived of its capacity to enter into relations with other states.

However, the fact that a state has relinquished certain aspects of its sovereignty will not necessarily deprive it of statehood. (See, for example, *R v Christian* 1924 AD 101 where the court recognised the fact that not all states are fully sovereign. Consider, also, the facts and decision in *Van Deventer v Hancke & Mossop* above.) What is important for the establishment of statehood and the accompanying international legal personality is the presence of external sovereignty. However, that is not to say that even parts of a federal state authorised to enter into international agreements by the federal constitution will satisfy the requirements for statehood. Remember that the limited international legal personality they will be enjoying is not a natural consequence of their existence, for it has been conferred on them by virtue of the federal constitution.

STUDY UNIT 3

RECOGNITION OF STATES AS INTERNATIONAL LAW SUBJECTS

3.1 GENERAL REMARKS AND FORMS OF RECOGNITION

“Recognition” is not specifically mentioned in the Montevideo Convention, but you have probably realised how crucial this requirement is for the ability of a state to enter into relations with other states. Please do not confuse the recognition of states (the formal acknowledgement by other states (or another state) that the entity possesses the attributes of statehood and therefore that they would be prepared to enter into international relations with it) with the recognition of governments (whereby a state acknowledges that the regime within a state is the effective government). Here, we are discussing the recognition of states.

The recognition of a state is a political act. It is also usually a once-off act. Thus, if the requirements for statehood continue to be satisfied, the recognition of an entity as a state, and therefore an international legal subject, will, generally, not be withdrawn. I have qualified this statement with “generally” because South Africa in fact offers an example of a situation where recognition was withdrawn. The previous South African government recognised the Republic of China (ROC) on Taiwan as an independent state — significantly at a time when it was not in a position to recognise mainland China and when we needed a market for our iron ore! When the present government came to power, mainland China was again prepared to trade with us, but on condition that we did not recognise the ROC on Taiwan! Guess what happened? South Africa withdrew its recognition of the ROC and recognised mainland China, which is now our number one trading partner. This just serves to emphasise that recognition is essentially a political (and economically expedient) act.

Recognition may be either unilateral (when one individual state recognises the entity in question as a state) or collective (when a group of states such as the UN recognises the entity as being a state). The latter would be an example of a “true”, collective recognition. On the other hand, “apparent” collective recognition occurs when, on the same occasion, a number of states take independent, individual decisions to recognise an entity (ie, they are not acting as a single body — eg, at a diplomatic conference, South Africa, Swaziland and Lesotho each decide not to recognise Tshona, a secessionist region in Zimbabwe that is claiming statehood.)

Recognition may also be express (when a state issues an official declaration to that effect) or tacit (eg the UN admits the entity as a member or an individual state concludes a treaty with the newly emerged entity).

3.2 THEORIES OF RECOGNITION

Whether or not recognition is one of the requirements of statehood has given rise to two theories: the declaratory theory and the constitutive theory.

Proponents of the constitutive theory maintain that the act of recognition is one of the requirements for the creation of international legal personality. This theory, however, is not without its shortcomings. First, it is not clear what the position of unrecognised entities would be — could they behave as they choose, without observance of the international legal order? What if an entity is recognised by some states only?

To counter this, proponents of the declaratory theory therefore argue that the act of recognition is not a requirement for statehood and that such an act merely acknowledges an existing state of affairs; in other words, statehood and international legal personality arise the moment the requirements of the Montevideo Convention have been fulfilled. Followers of this school of thought (such as Lauterpacht) would therefore also point out that there is a legal duty on other states to recognise an entity that complies with the Montevideo requirements (unless that entity came into existence after having violated a rule of international law).

The reality, of course, is that, although states do take into account whether the other four factual requirements have been met, the decision to recognise may be motivated by political ideology. This may prompt a state to recognise an entity prematurely, or to deny it recognition.

As to which is the “better” theory was considered by a South African court in the case of *S v Banda* 1989 4 SA 519 (Bop). The court had to decide whether or not Bophuthatswana qualified as a state under international law, which was relevant to the charge of treason against the accused (which crime, as you know, can be committed only against a state). The court considered both the constitutive and the declaratory theories. It came to the conclusion that the declaratory theory was the more acceptable one. It was found to be preferable because:

- it was objective, and
- it took into account only those four requirements which are based on well-established rules of international law.

The court criticised the constitutive theory for being arbitrarily applied and politically based. It was found to make allowance for political, ideological and economic motives behind the act of recognition. Because it was ridden with so many variables, and was so subjective, it was considered an unsuitable theory to use in the determination of the existence of a legal entity.

Dugard, however, points out that one cannot completely ignore the need for recognition. After all, the capacity of a new entity to enter into foreign relations (or at least, practically, to demonstrate such a capacity) depends on it.

STUDY UNIT 4

INTERNATIONAL ORGANISATIONS

4.1 INTRODUCTION

As we mentioned at the beginning of this topic, there are international law subjects other than the state. These, too, have international legal personality, although not as extensive as that of states. That is because an international organisation is created by, and is made up of, states (or other international organisations) and its international legal personality depends on its creators' discretion. These organisations are limited by their respective constituent charters (the agreements establishing them).

Slomanson defines an international organisation as follows:

[A] formal institution, established by agreement of the affiliated members who created it. The common feature of most [international organisations] is that their members all benefit from an organization working toward their desired objectives.

International organisations must be distinguished from non-governmental organisations (such as Amnesty International) which do not depend on any state for their existence and whose membership is not limited to states.

An international organisation must be created by virtue of an international agreement among states.

International organisations may be universal, such as the UN, or regional, such as the European Union (EU) or the Southern African Development Community (SADC). From a legal point of view, there is no difference between a universal and a regional international organisation. The mere fact that the UN operates on a global level does not mean that its resolutions are more important to its members than those of the other regional organisations of which they are members. Ideally, however, there should be no irreconcilable conflict between such resolutions.

4.2 INTERNATIONAL LEGAL PERSONALITY OF INTERNATIONAL ORGANISATIONS

Even though international organisations do not have a capacity as extensive as that of states, they can act independently (in fact, they should have been created to act independently of any state sovereign power) on the international plane. This was confirmed by the ICJ in *Reparation for Injuries Suffered in the Service of the United Nations* 1949 ICJ Rep. In this case, the ICJ was asked to find whether the UN could exercise diplomatic protection over its agents and also institute action on their behalf for injuries suffered in the course of their duties. The exercise of diplomatic protection and the institution of a claim for harm to a national are both capacities which typically

accrue to a state. By finding that the UN could in fact do both, the ICJ recognised that it was a subject of international law enjoying international legal personality.

The extent of international legal personality enjoyed by international organisations differs. The powers of any given organisation depend on the purpose for which it was created and on the functions and powers which it has been given. In *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* ICJ Rep 1996, the court remarked that:

[I]nternational organisations are subject to international law [and] do not, unlike States, possess a general competence. International organisations are governed by the “principle of speciality”, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those states entrust to them.

As stated above, what an international organisation may or may not do is set out in its founding document, or constituent charter, and may be further developed by practice.

4.3 SOME GENERAL CHARACTERISTICS OF INTERNATIONAL ORGANISATIONS

You will find that most international organisations:

- may pursue legal remedies and can enjoy rights and duties under international law
- may sue and be sued (For this purpose, the founding document may mention where the seat of the organisation will be. If not, it will be where its head office is situated.)
- have the capacity to own, acquire and transfer property
- may enter into contractual and international agreements with states or other international organisations.

Bear in mind, however, that the powers of each organisation will differ and that some of the abovementioned powers may be restricted in accordance with the agreement its creators have entered into. If you want to establish the extent of the international legal personality of any international organisation, you must consult its founding document or constitutive charter.

The one feature that will always be common to all international organisations is the fact that their members are states, or other international organisations made up of states. The original members will be those that signed the founding document. Usually, this document contains provisions governing later admission to the organisation, which is subject to certain requirements for membership and to the affirmative vote of the majority of members. If a member state grants independence to part of its territory, the new state will have to apply to become a member of the organisation, and, for that reason, it will have to comply with the requirements set for membership. It will not, therefore, automatically succeed to the mother state’s membership. After all, you learned in topic 2 that there are requirements for the succession of one entity to the treaties concluded by another. An international organisation’s constitutive charter is a treaty and so the general treaty rules (of the VC) apply.

4.4 THE UNITED NATIONS AS AN EXAMPLE OF AN INTERNATIONAL ORGANISATION

We are “killing two birds with one stone” here. It is important that you are well versed in the general workings of the UN. However, the UN is the quintessential international organisation. Therefore, in studying this study unit, try to relate what you are studying to the general principles governing international organisations which you have just studied.

The UN succeeded the League of Nations, which was created in 1920 with the dream of maintaining international peace and security. It however failed: the withdrawal of many of its existing members, the offensive military objectives pursued by many of them (think of the USSR, Germany and Japan), the economic depression of the 1930s, and, of course, the outbreak of World War II all spelled disaster for the League.

In 1942, towards the end of the Second World War, the members of the League decided to replace it with another international organisation, namely the UN. Its Charter was drawn up by 50 states during a conference held in San Francisco (April–June 1945), and the UN officially came to life in October 1945.

Who, therefore, drew up and signed the Charter establishing the UN, and how does this tie in with the characteristics of international organisations discussed above?

The main purpose of the UN is to maintain international peace and security. It does this through its principal organs, which are: the General Assembly (GA); the Security Council (SC); the Economic and Social Council; the Trusteeship Council; the Secretariat; and the International Court of Justice (ICJ). The primary organ charged with maintaining peace and security is the SC (which we will consider in greater detail in topic 6), which deals with the enforcement of international law. We will also consider the ICJ under topic 6.

Because the GA offers an interesting example of an international organisation operating within its powers, it is the body we have chosen as our example here.

The GA is made up of all 191 UN member states. It is the UN plenary body, which meets annually and provides a forum for member states to discuss world problems.

As with any international organisation, the GA has only those powers which are given to it in the Charter. What then are the powers of the GA?

The GA may:

- consider and
- make recommendations to
- UN members or
- the SC regarding the general principles of cooperation in the maintenance of peace and security.

It may also discuss, and make recommendations on, any matter relating to peace and security which is referred to it by:

- a UN member
- the SC
- a non-member state.

This is, however, subject to a very important proviso: the GA must refer **any** question which requires **action** to the SC before or after it (the GA) has discussed the matter. It may further alert the SC to matters which are likely to endanger peace and security. Furthermore, the GA 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 — it 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. Recommendations are precisely what the term says, namely recommended (as opposed to compulsory) courses of action.

What we have just said relates to the maintenance of international peace and security, but the GA does have other powers. It may:

- initiate studies and make recommendations to promote political cooperation, to encourage the progressive development of international law, to promote international economic, social and cultural education and health cooperation, and to assist and promote the realisation of human rights and fundamental freedoms
- where the matter is not before the SC, recommend measures for the “peaceful adjustment” of situations it feels impair the general welfare or friendly relations between states
- consider the annual and special reports from the SC on measures it has adopted to maintain peace and security, as well as reports from other UN organs.

Importantly, the GA also controls the UN budget and admission to, and cancellation or suspension of, membership of the UN. See, in this regard, Dugard’s discussion of the South African situation during the apartheid years.

From this you will see that, in terms of the powers conferred on it, the GA is not empowered to act — in other words, to actually enforce peace and security. This it must refer to the SC. But, the five permanent members of the SC (the US, the UK, France, Russia and China) have what is termed the veto power, in terms of which any of the five permanent members may veto any resolution before the SC. What this boils down to is that, if one of the permanent members doesn’t approve of proposed action to maintain international peace and security, it can “kill” it right there.

Does this then mean that the UN is paralysed? Remember that this will be a matter which is serving before the SC, and so the GA’s powers (of recommendation) will be even more restricted.

This “veto crisis” has in fact happened a number of times. Needless to say, the GA was not particularly “jolly” about it. 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. Where the SC can’t, or won’t, act and the body is “paralysed”, the GA draws on “residual powers” and can 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).

STUDY UNIT 5

INDIVIDUALS

The international legal personality of individuals is very limited and is found mostly in the field of international human rights law. Individual human rights are provided for in many international and regional human rights instruments. Some of them even create a system which allows for individual petitions against a state to an international court (or similar body). For example, the International Human Rights Committee may be petitioned by individuals in terms of the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). Some international courts, such as the African Court on Human and Peoples' Rights, allow for individuals to have standing before them if certain conditions are met.

Developments in international criminal law and the recognition of individual criminal responsibility have also propelled the individual into the international arena. As the Tribunal at Nuremberg remarked:

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

Individuals can therefore be held responsible for genocide, crimes against humanity, war crimes, etcetera. The International Criminal Tribunals for Rwanda and Former Yugoslavia, the Sierra Leone Tribunal and the newly established International Criminal Court were all created for the purpose of prosecuting individuals alleged to have committed universal crimes. Some of these courts and tribunals are discussed in topic 5, which deals with enforcement of international law.

STUDY UNIT 6

ASSESSMENT

What we said about assessment in topic 1 applies here as well. Note that, to complete the practical exercises successfully, you will need to integrate what you have learned in this topic with what you learned in topic 2 (see exercise 4 in particular). Remember that you are working with a legal system, not isolated topics. This means that all the aspects of the course feed into one another.



Practical exercise 1

Prior to the official establishment of the various entities within Former Yugoslavia's territory, the Serbs in Bosnia controlled an area which they called "Republica Srpska". They proceeded to drive out Muslims and Croats and make "Republica Srpska" a "purely" Serbian entity within Bosnian territory. Republica Srpska was alleged to be in control of a defined territory, to have a permanent population, to have its own currency, and to have even concluded international agreements. If this case had come before you as a judge, would you have concluded that Republica Srpska was, or was not, a state? Substantiate your answer.



Practical exercise 2

Revisit our discussion on the requirement of "effective government" (including your prescribed reading material). Then think about the establishment of the interim Iraqi government (set up after the dissolution of the Coalition Provisional Authority in 2004). Take into consideration the rampant insurgency, the presence of foreign military troops and the jihadi assaults directed at driving the US out of Iraq and then evaluate whether or not that government could have been said to have effective control.



Practical exercise 3

State A is a new state created by the legislative act of its mother state, B. State A is very poor. Its population is largely nomadic, in addition to which some 60 percent of the adult males are forced by economic necessity to seek employment on the mines in the former mother state. The remainder of the population lives in organised tribes, each under a patriarchal leader and along strict hierarchical lines.

The borders of state A are not yet fully defined, since negotiations are continuing between it and the former mother state for the extension of its territory. One of the territories currently falling within A is a small enclave that is completely separated from the main body of its territory. The enclave contains only a fishing town with a canning factory, a school, a magistrate's court, and certain government offices manned partly by officials seconded from state B and partly by local inhabitants of state A, who are receiving training from B's officials.

Because the government of state A is virtually bankrupt, it relies heavily on financial assistance from state B. It is, however, actively developing a form of government totally alien to that of B. Although A's Minister of Foreign Affairs has travelled extensively in an attempt to establish diplomatic relations in Europe, no country other than B and a few neighbouring states, which are wholly dependent on A for a route to the sea, have recognised A. A's application for membership of the UN has also been refused.

Discuss fully, substantiating your answer by reference to case law, practical examples and other authority, whether A is a state enjoying international legal personality.



Practical exercise 4

The World Health Organization (WHO) is an agency of the UN. The International Aid Organization (IAO) is an organisation made up of the following members: the government of Zuba, a small, poverty-stricken African conglomerate, Asia-America 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 US.

The WHO and the IAO conclude an agreement in terms of which the WHO undertakes to build a multimillion-dollar hospital and research centre in Zuba to fight the spread of AIDS in that country. Problems however 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 the 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? What court(s) should the agreement serve before?

Would your answer have been different if the IAO had had as its sole members the Zubanese government and the official health departments of Britain and the US? If so, where would the difference lie?



Practical exercise 5

It is generally agreed that the situation in Iraq poses a threat to international peace and security. A resolution is brought before the SC calling for the immediate withdrawal of US and UK troops from Iraq, failing which sanctions will be imposed by the UN on these two states. When it comes to the vote, the resolution is vetoed by both permanent members (the UK and the US). The GA is extremely disturbed by this move and invokes the Uniting for Peace Resolution to enforce the withdrawal.

Discuss the powers of the GA and why it is technically "paralysed" by the veto. How has this body (the GA) responded to this type of situation and what are the chances of it succeeding?

TOPIC 4

JURISDICTION IN INTERNATIONAL LAW

In this topic, we consider the following:

Study unit

- 1 Introduction
 - 1.1 General
 - 1.2 Jurisdiction and the *Lotus case*

- 2 Bases for jurisdiction in international law
 - 2.1 Territoriality
 - 2.2 Effects — subjective and objective territoriality
 - 2.3 State protection
 - 2.4 Nationality
 - 2.5 Passive personality
 - 2.6 Universality

- 3 Assessment
 - 3.1 General
 - 3.2 Practical exercises



Prescribed reading for topic 4:

- Dugard 3 ed chapter 9 pp 148-173

STUDY UNIT 1

INTRODUCTION

1.1 GENERAL

One of the consequences of statehood is that a state is regarded as sovereign within its own territory. Very simply put, sovereignty is the exclusive right which a state enjoys to act within its own territory. One of the consequences of sovereignty, or this sole right, is that the state may exercise jurisdiction within its territory.

Jurisdiction is the capacity (power) of a state to exercise its

- legislative (it may make its own laws)
- executive (it may govern its own people)
- enforcement (it may enforce its laws, judgments, etc.)

functions within a specific territory.

One of the major characteristics of states (and also one of the major sources of conflict) is that they are territorial. One state will not put up with another state or entity acting within its territory. This is emphasised in Article 2(7) of the Charter of the United Nations (UN), which provides:

Nothing in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

However, as we all know, there is more than one state in the international community and, because both people and the consequences of their actions move across boundaries, states sometimes feel it necessary to extend their spheres of influence. When this happens, problems arise, as we then have conflicting claims to jurisdiction over a single person or event.

State A and state B both claim to have exclusive jurisdiction over a single person or event — an interstate or international problem has arisen and international law must be called in to resolve it.

Please note that international law deals principally with criminal jurisdiction — civil jurisdiction is generally governed by the rules of private international law/ conflict of laws.

It is here that the concept of extraterritorial jurisdiction comes into play. Extraterritorial jurisdiction is involved where a state exercises jurisdiction within its territory over acts which occurred outside its territory. An event takes place in Zimbabwe which South Africa feels demands redress. South Africa therefore passes judgment in a South African court on the event which took place in Zimbabwe. South Africa is therefore claiming to have power over something that happened outside (extraterritorially) its borders. By doing this, South Africa intrudes upon Zimbabwe's territorial jurisdiction, as the cause of action arose in Zimbabwean territory.

1.2 JURISDICTION AND THE *LOTUS CASE*

No study of jurisdiction in international law can start without a consideration of the *Lotus case*, 1927 PCIJ Rep Ser A no 10. The court here laid down three principles which form the basis of jurisdiction in international law:

- A state may not exercise its jurisdiction **in the territory of another state** — unless there is a rule empowering it to do so.
- A state may exercise jurisdiction **in its own territory** over acts occurring elsewhere — unless there is an international law rule forbidding this (extraterritorial jurisdiction).
- In international law, the territoriality of criminal cases is not absolute.

As you will see if you analyse these three principles, the court allowed a virtually unlimited extension of a state's jurisdiction — extraterritorial jurisdiction reigned. Needless to say, this caused an uproar in the international community and a compromise solution was sought in terms of which the exercise of extraterritorial criminal jurisdiction could be limited. A solution was found in the following concept:

direct and substantial connection

States could extend their jurisdiction, provided that there was a direct and substantial connection between the state concerned and the events involved in the dispute. This is, of course, also rather a vague term and international law set about developing certain "principles" on which an acceptable connection could be based. These principles will be dealt with in the next study unit.



Practical exercise 1

While sailing on the high seas, a ship registered in state A collides with a ship registered in state B. B (the ship, not the state!) sinks with considerable loss of life. A (ditto!) picks up survivors, including B's master of the watch who was on duty when the collision occurred. A takes the survivors to its territory where the master of the watch is arrested, tried and convicted of culpable homicide. State B objects to state A exercising jurisdiction, because the collision did not take place in its territory. State B claims that only the flag state (itself, therefore) has jurisdiction over events on board a vessel on the high seas. State A claims that, as the events on B had an effect on its ship, A, and as A is part of its territory, it has jurisdiction.

Answer the following questions:

What case are these facts taken from?

What three principles did the Permanent Court of International Justice (PCIJ) lay down?

- (1)
- (2)
- (3)

What was the state of extraterritorial jurisdiction after these principles had been laid down?

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.....
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.....
.....

Hints:

There are a couple of points you don't know and should bear in mind:

- The high seas are the territory of no state; in other words, no single state exercises jurisdiction over the high seas.
- A ship has the nationality of the state in which it is registered (the flag state).
- For the purposes of jurisdiction, a ship on the high seas is regarded as territory of its flag state.

Hint: Remember, with cases, that, when you indicate the findings, you need to give the reasoning behind the court's decision. For example, merely stating that Turkey, in this example, had not violated international law, is not enough. You have to give the reason. This advice applies to all the cases you have to study.

STUDY UNIT 2

BASES FOR JURISDICTION IN INTERNATIONAL LAW

As we pointed out above, the criterion for the exercise of jurisdiction is "direct and substantial connection", and this is very wide. The international community has therefore developed certain, more specific criteria in terms of which the exercise of jurisdiction by a state will be acceptable.

There are six bases of jurisdiction.

2.1 TERRITORIALITY

A state has jurisdiction over all criminal acts occurring in its territory and over all persons committing such acts.

2.2 EFFECTS (SUBJECTIVE AND OBJECTIVE TERRITORIALITY)

A state has jurisdiction over acts performed outside its territory which have an effect in the territory.

2.3 STATE PROTECTION

A state has jurisdiction over foreigners who perform an act outside the state which endangers the safety of the state.

2.4 NATIONALITY

A state has jurisdiction over its own nationals wherever they act.

2.5 PASSIVE PERSONALITY

Where a foreigner violates rights of a state's national outside that state, the state of the national may claim jurisdiction over such foreigner. This basis is often used in instances of terrorism.

2.6 UNIVERSALITY

In the case of international crimes — crimes against humanity — any state may claim jurisdiction.

International crimes, over which universal jurisdiction is exercised, may be based either in custom or treaty. The traditional, customary law international crimes are piracy, war crimes and crimes against humanity. Genocide and torture also fall into this list, although they come from a treaty base.

International treaty crimes are genocide, apartheid, torture, hijacking, offences against the safety of maritime navigation (piracy), drug-trafficking and international terrorism.

With regard to terrorism, South Africa enacted the Protection of Constitutional Democracy against Terrorist and Related Activities Act of 2004. This Act gives effect to South Africa's international obligations in respect of the suppression of terrorism.

STUDY UNIT 3

ASSESSMENT

3.1 GENERAL

Don't be fooled by the length of this topic, for, from a practical point of view, it is very important. Dugard's exposition is fairly detailed, particularly in his treatment of South African case law. Be sure you know and understand it.

3.2 PRACTICAL EXERCISES



Practical exercise 2

Mr L Arceny, a South African, and Ms P Pocket, a British national, have set up home together in Knightsbridge (London). To finance the lifestyle to which they have become accustomed, they have devised a profitable criminal scheme. They travel between Britain and South Africa, robbing their fellow passengers.

Mr Arceny is caught stealing travellers' cheques from a fellow passenger on board a South African Airways flight between London and Johannesburg. At the time of the theft, the aircraft is flying over Kenya.

Ms Pocket, on the other hand, is caught stealing a pearl necklace from an old lady on a British passenger liner sailing between Southampton and Durban. At the time of the theft, the ship is on the high seas.

Explain, referring to case law, whether a South African court will have jurisdiction over Mr Arceny and Ms Pocket, and, if so, on what basis.



Practical exercise 3

The basic facts are the same as for exercise 2, but now Mr Arceny is on a British Airways flight which has been forced by bad weather to land in South Africa while flying to Windhoek (Namibia). He was taken onto the flight by a South African policeman after having been kidnapped in Britain and is wanted in South Africa to stand trial on charges of murdering his wife.

How would your answer differ from your answer to exercise 2?



Practical exercise 4

Mr PR Otolcol is a career diplomat attached to the diplomatic mission of Freedonia in Britain. He steals a typewriter from the mission. When he is charged in Freedonia, he claims that the state does not have jurisdiction, as the crime was committed in foreign territory.

Discuss whether Freedonia can claim jurisdiction, and on what basis.

Hint: Note that, contrary to popular belief (and the media!), a diplomatic mission remains the territory of the host state and is not the territory of the sending state.



Practical exercise 5

Analyse the role of, and problems associated with, the effects theory using relevant case law and foreign national (US) and national (SA) legislation.



Practical exercise 6

Write a legal opinion on universal jurisdiction, explaining its development, use and the crimes covered (both custom- and treaty-based) and indicating whether it is effective. Use relevant case law.



Practical exercise 7

Dugard states that wide jurisdictional powers are conferred on South African courts in respect of offences under the Protection of Constitutional Democracy against Terrorist and Related Activities Act. On what grounds may jurisdiction be exercised?

TOPIC 5

ENFORCEMENT OF INTERNATIONAL LAW

In this topic, we consider the following:

Study unit

- 1 Introduction
- 2 Measures not involving the use of armed force
- 3 Measures involving the use of force
 - 3.1 Self-defence
 - 3.2 The use of force authorised by the Security Council
 - 3.3 Hot pursuit
- 4 Settlement of disputes
 - 4.1 Introduction
 - 4.2 Non-adjudicatory methods of dispute resolution
 - 4.3 Adjudicatory methods of dispute resolution
 - 4.3.1 The International Court of Justice
 - 4.3.2 International criminal law: courts and tribunals
 - 4.3.2.1 General
 - 4.3.2.2 The ICTY and the ICTR
 - 4.3.2.3 The International Criminal Court
- 5 Assessment
 - 5.1 Introduction
 - 5.2 Practical exercises



Prescribed reading for topic 5:

- Dugard 3 ed chapter 22: The United Nations and the Maintenance of International Peace pp 480-500
- Dugard 3 ed chapter 23: The Use of Force by States pp 501-525
- Dugard 3 ed chapter 21: International Adjudication pp 455-477
- Dugard 3 ed chapter 10: International Criminal Courts pp 174-196

Optional reading material:

Should you wish to acquire more knowledge of, and insight into, the matters discussed in this topic, you may consult the other two sources used in the compilation of the present topic:

Slomanson WR (2007) *Fundamental perspectives on international law*

- pp 445-507 (chapter 10: Use of Force)
- pp 389-426 (chapter 9: Arbitration and Adjudication)

Wallace RMM (2005) *International law 5 ed (London: Sweet & Maxwell)*

- pp 313-340 (chapter 12: Arbitration and Judicial Settlement of International Disputes)

STUDY UNIT 1

INTRODUCTION

As you already know, international law prescribes rules, which its subjects must follow. It is important, therefore, to know what steps may be taken against those who do not comply with the existing norms. So, what will happen if a state does not comply with the provisions of a treaty to which it is a party? What do we do about a military commander who has turned a blind eye to atrocities committed by his subordinates during the conduct of hostilities? We have already alluded to the fact that enforcement of public international law can be tricky because there is no international court which has compulsory jurisdiction and because, even when judgments have been handed down, there is no international or universal executive authority which can be tasked with the enforcement of these judgments. (See topic 1 where we discuss the difference between international and national law.) This is a consequence of the fact that international law rules are, for the most part, based on consent. Thus, international law has on more than one occasion been criticised for its lack of an “effective” enforcement mechanism. Enforcement mechanisms (or measures or procedures) do however exist and, in this chapter, we will introduce you to the most important ones. As for their effectiveness, we will let you be the judge.

In the past, we used to classify the various enforcement measures as those involving self-help (ie, when states decide whether there has been a violation of international law and, having determined that there is such a violation, take certain action in order to address the violation) and those involving outside agencies (eg when two states submit their dispute to the International Court of Justice (ICJ)).

However, these two broad categories are often intertwined and most measures contain elements of both, although to a different degree. So, let us introduce you to these measures briefly and then, at the end of this topic, you can attempt to classify them yourself.

STUDY UNIT 2

MEASURES NOT INVOLVING THE USE OF ARMED FORCE

The first important point is that states must settle their disputes peacefully. Article 2(3) of the United Nations (UN) Charter provides:

All members shall settle their international disputes by peaceful means in such a manner that international peace, and security, and justice are not endangered.

At the same time, Article 2(4) contains a general prohibition on the use of force, which, lately, has been interpreted to include economic coercion. Ideally, states should be able to resolve their disputes by means such as mediation, arbitration or international adjudication, all of which are discussed at the end of this topic. However, this is not always possible, so let us have a look at other measures which do not involve the use of armed, or military, force. We will have a look at the following:

- diplomatic action
- retortion
- reprisal

- embargos
- boycotts
- economic sanctions.

The first step for most states would be to take some form of diplomatic action against the offending state, such as recalling their diplomats from the territory of the offending state and expelling the recalcitrant state's diplomats from their own territories. A breakdown in diplomatic relations may, however, happen for political reasons — there need not necessarily have been a violation of an international law rule. Furthermore, diplomatic actions vary in intensity from approaching the other state with a particular request (eg an attempt at rectification) to complete severance of diplomatic relations.

A state can also perform another (valid and lawful) act aimed at stopping the offending state's unlawful action. For example, it could decide to ban all exports from its territory to that of the offending state. This is known as retaliation.

Another option available to the injured state is reprisal. In this instance, the state that has suffered as a result of the breach of international law performs an action which at first glance appears to be unlawful (such as freezing all of the violator state's assets found in its territory). However, because the injured state has retaliated against the other state's illegal action, the act of reprisal will be permissible. It will be considered "lawful reprisal", provided that:

- it is indeed in response to a prior illegal act
- it is carried out in the light of restoring equilibrium in international relations
- it is proportionate to the injury sustained
- it has been used as a last resort, which means that the injured state must have first attempted rectification.

Unilaterally, the injured state may impose an embargo on the violator, or resort to a boycott — in other words, it will try to stop all commerce with the violator. In this context, a boycott has a wider range than an embargo.

Lastly, economic sanctions may be imposed. The term "sanctions" in its narrow sense denotes the collective action by a group of states against the violator. In other words, the injured state and its allies will collectively ban commercial activity with that state.

Sanctions, as well as boycotts and embargoes, may be recommended by an international organisation, such as the UN. Under Chapter VI, the Security Council (SC) may address disputes which do not yet threaten international peace and security, but which are likely to do so if they remain unresolved. Article 34 provides that the SC may investigate any dispute so as to determine if its continuance is likely to endanger the maintenance of international peace and security. Alternatively, a member of the UN may bring such a dispute to the attention of the SC (or the General Assembly (GA)). If the SC has established the nature of the dispute to be such, it is empowered by Article 36(1) to recommend appropriate measures or procedures in order to remedy the situation. For example, in response to the racially discriminatory policies of apartheid South Africa, a number of recommendations were adopted. Among the measures recommended were the imposition of an arms embargo, the suspension of investment in South Africa and the restriction of sports and cultural relations with South Africa. We should also note that the SC may, in addition, address the situation by making settlement proposals (Art 37).

Please remember that Chapter VI deals with a peaceful settlement of disputes and that the recommendations by the SC carry the same weight as GA resolutions, that is, such recommendations are not binding.

Chapter VII, on the other hand, makes provision for action with respect to:

- threats to the peace
- breaches of the peace, and
- acts of aggression.

Of its own accord, or acting after a referral by the GA or a UN member, the SC may determine the existence of the conditions mentioned above and may make recommendations, or decide on other measures, in order to maintain or restore international peace and security (Art 39).

In terms of Article 41, the SC may decide on measures such as the interruption of economic relations, the severance of diplomatic relations and the interruption of communications with the recalcitrant state and may call upon the UN members to apply these measures.

STUDY UNIT 3

MEASURES INVOLVING THE USE OF FORCE

3.1 SELF-DEFENCE

You are by now familiar with the provisions of Article 2(4) of the UN Charter, namely that:

All members shall refrain in their relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the purpose of the United Nations.

As with every rule, there are, of course, exceptions. One such exception is an act carried out by a state in self-defence. To this end, Article 51 of the Charter provides:

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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

This Article contains a number of crucial points:

- The act in the exercise of the right to self-defence must be reported to the SC.
- The action is therefore valid only until the SC acts.
- The purpose of the use of force must be clear, namely to defend oneself.
- The force exercised in self-defence must be proportionate to the posed threat.

There is uncertainty as to whether the right to self-defence can be exercised only if an armed attack occurs (ie, whether Art 51 amounts to an exclusive and complete formulation of the right) or whether Article 51 allows anticipatory self-defence (ie, whether the words "inherent right" indicate that the article 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).

3.2 THE USE OF FORCE AUTHORISED BY THE SECURITY COUNCIL

This is the second exception to the prohibition on the use of force. Article 42 (Chapter VII) of the UN Charter provides that, if the peaceful measures resorted to under Article 41 (which we have already mentioned) fail, the SC may take action by air, sea or land forces. The use of such forcible measures is a last resort and must be necessary for the restoration, or maintenance, of international peace and security.

There is no military force available to the SC, so, in effect, an action taken under Article 42 amounts to an authorisation by the SC of the use of force by member states. For example, when Iraq invaded Kuwait in 1990, member states were authorised to “use all necessary means” which would ensure the Iraqi withdrawal.

You must also take note that peacekeeping operations which involve contingents from member states are created on the basis of agreements between the UN and the contributing state and the UN and the host state. As such, they do not amount to enforcement actions (provided that the host state has indeed consented). If such consent is lacking and an action is nonetheless taken on the territory of the “host” state, it would amount to an enforcement action and must meet the requirements of Chapter VII.

3.3 HOT PURSUIT

In its true meaning, “hot pursuit” is a doctrine which forms part of the law of the sea. In cases where a ship violates the laws and regulations of a given coastal state, the latter is allowed to pursue and arrest the “violator” ship on the high seas. The term has also been used to describe “follow-up” operations carried into another state’s territorial lands. As you might have guessed, this would violate Article 2(4) of the UN Charter and would be deemed illegal, unless it could be justified as an act carried out in self-defence or as a reasonable reprisal.

STUDY UNIT 4

SETTLEMENT OF DISPUTES

4.1 INTRODUCTION

Strictly speaking, the settlement of disputes is not an **enforcement** measure. The decision/judgment/arbitral award is not automatically enforced upon the “guilty” state and there is no guarantee that the latter will comply. However, this topic focuses on the recourse available to the injured state when international law rules have been broken. Resolving the dispute by peaceful means is more than merely an ideal solution for the states involved; it is in fact an obligation (remember Art 2(3) of the Charter?).

We have also mentioned the provisions of Article 33(1) (Chapter VI of the Charter),

which provides that the parties to a dispute which, if continued, is likely to endanger international peace and security must seek a solution by (amongst others) negotiation, enquiry, mediation, conciliation, arbitration or judicial settlement. Article 36(3) provides that, if the SC is to make recommendations under this article, it should “take into consideration” that legal disputes should, as a general rule, be referred by the parties to the ICJ.

You should also recall the provisions of Article 41 (Chapter VII) of the Charter in terms of which the SC may decide on non-forcible enforcement measures (aimed at restoring and maintaining international peace and security) which should be employed in order to give effect to its decisions and may call upon members to apply these measures. It was under this article that the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Former Yugoslavia were established. Be careful to distinguish them from the International Criminal Court, which was established in terms of a treaty. We look at all three at the end of this topic.

There are also other specialised courts, tribunals and committees created under a particular treaty regime and/or for a particular region. Examples include the Dispute Settlement Body established under the umbrella of the World Trade Organization, the European Court of Human Rights and the Human Rights Committee, which supervises the implementation of the provisions of the International Covenant on Civil and Political Rights (the ICCPR). The Human Rights Committee may, for example, consider petitions from individuals (in terms of its First Optional Protocol) or amicably settle disputes between member states (under an optional system). Settlement of disputes in international law is a vast topic. Unfortunately, time does not allow us more than a brief mention of some of the abovementioned procedures and forums that have been designed/established to settle international disputes.

4.2 NON-ADJUDICATORY METHODS OF DISPUTE RESOLUTION

In most cases, should there be a disagreement between two states, they will initiate a process of negotiations with a view to arriving at an agreement. In fact, it is obligatory for them to do so — the existence of such an obligation was reiterated by the ICJ in the *North Sea Continental Shelf* cases. Furthermore, the parties must conduct themselves in a manner which would render the negotiations meaningful and (in the words of the court):

which will not be the case when either of them insists upon its own position without contemplating any modification of it.

The negotiation(s) will usually be carried out via diplomatic channels. Negotiation is often listed in treaties as the first resort in the event of a dispute arising. If there is a third party that endeavours to bring the disputing states to the negotiating table, we talk about what is known as “good offices”. The third party will, in addition, suggest a general settlement framework.

The process of mediation also involves a third party, but, in this instance, the third party is actively involved in an attempt to reconcile the positions and claims of the rival states. Within the African region, South Africa has played an important role in this regard — think of the peacemaking efforts of our various presidents in the DRC, the Ivory Coast, Zimbabwe, etcetera.

Another method is conciliation, in which case a conciliation commission examines the claims of the parties and makes proposals aimed at a friendly resolution. If they

can't agree, the commission compiles a report setting out its observations, conclusions and recommendations. The content of this report is, however, not binding on the parties.

A commission of enquiry is a fact-finding commission that endeavours to examine witnesses and/or visit areas where the rules of international law have allegedly been violated so as to establish the facts surrounding a dispute.

Lastly, the states may also decide to resort to arbitration. Arbitration has been defined by the International Law Commission as:

[the] procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted.

The Permanent Court of Arbitration is a body which came into existence in terms of the Hague Conventions for the Pacific Settlement of International Disputes (1899 and 1907). Its function is to establish a body of eminent jurists (listed by various state parties to the Convention) from which states can select arbitrators to settle their disputes. It continues to exist today for state parties and obviously depends on the willingness and consent of state parties to the Convention to submit to arbitration. They must furthermore agree:

- on the identity of the arbitrators
- on the content of the legal question(s)
- on what rules of law will apply to the dispute (they are not necessarily rules of public international law)
- on the time frame within which the award must be made
- that the award will be final and binding.

This agreement on these aspects is contained in a document referred to as the *Compromis*.

4.3 ADJUDICATORY METHODS OF DISPUTE RESOLUTION

4.3.1 THE INTERNATIONAL COURT OF JUSTICE

The International Court of Justice (ICJ) is the judicial organ of the UN and its procedures are governed by the ICJ Statute. The bench consists of 15 judges representing "the main forms of civilization" and the principal legal systems of the world. The judges are elected by the GA and the SC and they hold office for nine years. It is the court that elects the President of the ICJ. She/he holds office for three years and has a casting vote.

Nine judges constitute a quorum and all decisions are by majority vote of the judges present.

The judges are expected to recuse themselves if they have been involved as counsel to one of the parties to the dispute, or in some other capacity. However, the mere fact that their state of origin is one of the parties will not, on its own, constitute grounds for recusal. In fact, a state may appoint an ad hoc judge, who is one of its nationals, to sit on the case. Belgium, for example, appointed Christene van den Wyngaerd as a judge ad hoc in the *Arrest Warrant case*. Two types of proceedings may be brought before the ICJ:

1. Contentious proceedings where there is a dispute between two (or more) state parties. In these cases, the court will hand down judgment which will be binding

- on the parties. (Remember Art 59 and what we said about precedent in international law in topic 1)
2. Proceedings requiring advisory opinions on questions of international law referred to it by existing UN organs or by the UN's specialised agencies. These opinions are not binding.

Article 34 of the Statute provides that only states may be parties in cases before the ICJ, although the court may request organisations to place information before it.

Another important issue is that of jurisdiction. It is very important to remember that states must agree to the ICJ's jurisdiction. Article 36(1) provides that the ICJ will have jurisdiction in all cases:

which states in a dispute may agree to and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force.

States may submit an existing dispute to the ICJ once they have reached a special agreement (*Compromis*) to that effect. The court may also be able to exercise jurisdiction which is implied (*forum prorogatum*). This happens when one state has initiated proceedings and has agreed to the court's jurisdiction, while the other state has not expressed its consent, but has acted in a way from which consent may be inferred. Furthermore, Article 36(2) provides that:

[T]he state parties to the present Statute may at any time declare that they recognise as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

This article allows for states to accept the court's jurisdiction by way of declaration. Such acceptance may be unconditional, but it is usually subject to conditions and operates on the basis of reciprocity vis-à-vis certain states, on the basis of a given subject matter and for a limited period of time. Thus a state which has made such a declaration may bring another state (which has accepted the same obligation) before the ICJ.

Lastly, the judgments of the court are binding only on the parties involved — in other words, there is no precedent system.

4.3.2 INTERNATIONAL CRIMINAL LAW: COURTS AND TRIBUNALS

4.3.2.1 GENERAL

When discussing the international legal personality of individuals, we mentioned that there are international courts and tribunals which have the jurisdiction to try persons accused of committing war crimes, crimes against humanity or genocide. Examples include the post-World War II Nuremberg and Tokyo Tribunals, as well as the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the hybrid Sierra Leone Tribunal. The international community has, therefore, toyed with the idea of a permanent international criminal

court for quite some time. This became a reality in 2002. Some of these courts and tribunals are discussed below.

4.3.2.2 THE ICTY AND THE ICTR

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by SC Resolution 827/1993. The International Criminal Tribunal for Rwanda (ICTR) was created by virtue of SC Resolution 955/1994. Both courts were set up in terms of Article 41 of the UN Charter. They are ad hoc tribunals and were established for temporary, specific purposes, namely to try the individuals responsible for the atrocities committed in Former Yugoslavia and Rwanda respectively. The tribunals share an appeal chamber and their statutes are, for the most part, identical.

The ICTY has jurisdiction to try genocide, war crimes and crimes against humanity. The ICTR has jurisdiction over genocide, crimes against humanity and violation of the rules of non-international armed conflict. Both tribunals enjoy jurisdictional primacy; in other words, national courts have concurrent jurisdiction, but, in case of conflict, the dispute will be brought before the ICTY or ICTR.

4.3.2.3 THE INTERNATIONAL CRIMINAL COURT

The year 1998 saw the finalisation of the Rome Statute of the International Criminal Court ("The Rome Statute"), which came into force on 1 July 2002. The International Criminal Court (ICC) does not have jurisdiction over international treaty crimes as was originally envisaged, but only over:

- genocide (Art 6), which includes the killing of, or the causing of serious bodily or mental harm to, members of a particular ethnic, racial or religious group
- crimes against humanity (Art 7), which include atrocities (eg torture, rape, enslavement) which have formed part of a widespread, systematic practice directed against the civilian population, regardless of whether they were carried out in times of war or peace
- war crimes (Art 8), which include grave breaches of the Geneva Conventions committed during international armed conflict, as well as other serious violations of the laws and customs applicable in armed conflicts not of an international nature (though excluding situations of internal disturbances and tensions).

In addition, the ICC has jurisdiction over the crime of aggression, which has not been defined as yet.

In terms of Articles 12–15 of the Rome Statute, the ICC may hear a case only if:

- the accused is a national of a state party (nationality)
- the crime has been committed in the territory of a state party (territoriality)
- a non-party state accepts the court's jurisdiction, provided that the crime was committed within its territory, or by that state's national
- the UN SC acts under Chapter VII and refers a situation to the prosecutor.

Another point you must remember is that, in terms of Article 17 of the Rome Statute (and in contrast with the ICTY and ICTR), the ICC has complementary jurisdiction, that is, it will have jurisdiction only if the state concerned is unwilling or unable to prosecute.

As far as South Africa is concerned, it is a party to the Statute and has incorporated its provisions by virtue of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

STUDY UNIT 5

ASSESSMENT

5.1 INTRODUCTION

As before, here are your formative assessment exercises for this topic. While doing them, try to link up with the topics you have studied before and so gain a more holistic impression of the course.

You are encouraged to go beyond the prescribed work for the course.

5.2 PRACTICAL EXERCISES



Practical exercise 1

Evaluate all of the enforcement mechanisms discussed above to determine whether, and to what extent, they would appear to be contrary to the *nemo iudex in sua causa* principle.



Practical exercise 2

On 11 September 2001, Islamic extremists flew two passenger aircraft into the World Trade Center in New York, United States of America, destroying the heart of Manhattan and killing thousands of innocent American civilians. The United States retaliated by declaring "war" on terrorism and bombing Afghanistan, where the leaders of the Islamic group were living.

Assess the appropriateness of the American response in terms of the requirements set by international law for the following enforcement measures:

- (a) reprisals
- (b) self-defence.



Practical exercise 3

State X holds 50 nationals of state Y hostage in its territory. Despite repeated approaches from state Y, X refuses to release the hostages. In an attempt to secure the release of the hostages, Y first stops exports of certain goods to state X. This is ineffective and Y then freezes all state X's assets in state Y. This, too, proves futile. Y then places a total ban on all exports to, and imports from, X, cuts off all assistance and expels X's diplomatic representatives from its territory, at the same time recalling its own envoys from state X. State Y calls on its allies to do the same. This, too, fails to secure the release of the hostages, so state Y's allies resolve jointly to stop all exports to state X.

Identify and discuss briefly each enforcement measure that has to date been applied. Indicate what further steps, if any, state Y may try in order to ensure the safety and release of its nationals held unlawfully in state X.



Practical exercise 4

Compare the establishment and jurisdiction of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court.



Practical exercise 5

State A and state B are neighbouring states. The border of state A has become the stronghold of a certain militant organisation (Z) sponsored by state X, which state harbours strong anti-state B sentiments. The government of state A claims to be too weak to disarm Z. Members of the latter keep on acquiring weapons and building strongholds on the border. One day, some of Z's members kidnap two soldiers from state B. State B invades state A and bombards the border area and its surroundings, hoping to bring Z to its knees. Evaluate the lawfulness or otherwise of state B's actions.

TOPIC 6

INTERNATIONAL LAW IN MUNICIPAL LAW

In this topic, we consider the following:

Study unit

- 1 Introduction
 - 1.1 A word of caution
 - 1.2 Background
 - 1.3 Public international law under the Constitution of the Republic of South Africa: direct and indirect application

- 2 Direct application: treaties in South African law
 - 2.1 Introduction
 - 2.2 Treaties pre-1993
 - 2.3 Treaties under the Interim Constitution, Act 200 of 1993
 - 2.4 Treaties under the Constitution of the Republic of South Africa, 1996
 - 2.4.1 International agreement
 - 2.4.2 Section 231(1) – 1996
 - 2.4.3 Section 231(2) – 1996
 - 2.4.4 Section 231(3) – 1996
 - 2.4.5 Section 231(4) – 1996
 - 2.4.6 Section 231(5) – 1996

- 3 Direct application: customary international law in South African law
 - 3.1 Introduction
 - 3.2 Customary international law under the Constitution of the Republic of South Africa, 1996
 - 3.3 The role of the courts in the application of section 232
 - 3.3.1 General characteristics of customary international law identified by the courts pre-1993 (Constitution)

- 4 Indirect application: section 39
 - 4.1 Introduction

- 4.2 Section 39 of the Constitution
- 4.3 What is the international law in section 39(1)?
- 4.4 Where do you find international human rights law?
 - 4.4.1 International documents: treaties
 - 4.4.2 Municipal courts' interpretation of their own human rights clauses
 - 4.4.3 Customary international human rights law
 - 4.4.4 Soft law
- 4.5 Section 39(2)
- 4.6 Solving an international human rights law problem

- 5 Indirect application: section 233

- 6 Assessment



The following sources must be studied:

- sections 39, 231, 232 and 233 of the Constitution of the Republic of South Africa
- Dugard 3 ed chapter 4 read with the South African examples he discusses in chapter 19, which you studied in topic 2
- Dugard 3 ed chapter 25 pp 556-568, when dealing with section 39 of the Constitution
- Botha & Olivier "Ten years of international law in the South African courts: reviewing the past and assessing the future" (2004) 29 *South African Yearbook of International Law* 42-77

STUDY UNIT 1

INTRODUCTION

1.1 A WORD OF CAUTION

We are not going to beat about the bush here.

- This is a very important part of the course. You are expected to know it in detail, to be able to apply all the provisions to practical situations, and to be able to compare them, analyse them and discuss them from a practical and theoretical point of view.
- The provisions of the Constitution dealing with international law are among the most difficult in the Constitution. We are not saying this to put you off, but rather to ensure that you take this topic seriously and give it enough time and attention.
- There will be a substantial question on this section of the work in the examination. This question, whether in the form of a problem or a more theoretical question, will require that you understand and apply the constitutional provisions, not merely reproduce them.

1.2 BACKGROUND

When a presiding officer is called upon to decide a case, he/she must be able to find the legal principles somewhere that he/she is to apply in resolving the problem. Generally, the system he/she is called upon to apply is his/her own national law. In the case of a South African court, therefore, the basis for the court's decision will be found in Acts of parliament, common law (Roman-Dutch law) and/or precedent. This presents no problems.

What, however, if the rules involved are not purely those of a particular country or legal system, but originate in and are part of international law? On what basis does the judge then apply these rules in preference to, or together with, the rules of his/her own jurisdiction? Whether, and to what extent, a judge may apply international law in his/her municipal system depends to a large extent on the status that system accords international law. If international law is regarded as part of a state's national law, there is no problem and the court may apply it alongside legislation, common law and precedent. If, however, the state regards international law and national law as two distinct "systems", we have a problem. There must be some process by which the court is authorised to apply the rules of one system within the other. You will understand, therefore, why it is important to determine the relationship between international and national law.

Before the position of international law was addressed in the Constitution, a clear distinction existed between the position of treaties and that of customary international law. Treaties had to be legislatively transformed into South African law before they applied nationally. This was an expression of the position in English law and was based largely on precedent. The leading case here is *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 3 SA 150 (A).

Custom was more of a problem and the courts and writers grappled with how this law could be used by the courts, and how it interacted with the various elements of South African law when it did apply. This aspect is considered by Dugard (3 ed 47–54) and provides an interesting background to your study of the current position.

You should be aware of the three theories governing the relationship between

international and national law. These are monism, dualism and harmonisation. Although their practical relevance is now limited, they do provide a rich ground for theoretical analysis. For example, is the approach advocated by the Constitution essentially monist, dualist or something in between — as we asked in the last examination.

1.3 INTERNATIONAL LAW UNDER THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA: DIRECT AND INDIRECT APPLICATION

When the interim Constitution (Act 200 of 1993) came into operation on 27 April 1994, it heralded a new phase for international law in our country. For the first time, international law was expressly recognised in a constitution. It was, in fact, more than recognised; it was given an essential role. Just as we were coming to grips with the 1993 provisions, the Constitution of the Republic of South Africa came into operation on 4 February 1997, further strengthening the role of international law in our law. The end result is that no lawyer, practising in whatever capacity, can today function effectively without a basic knowledge of international law.

Before we examine specific provisions of the Constitution dealing with international law, a few general points about the function accorded international law in the Constitution must be noted.

In the Constitution, international law has been accorded a dual role. In the first place, there are those provisions which empower the courts to apply the rules of international law as law; in other words, the courts apply international law directly. Here we will concentrate on treaties (s 231) and custom (s 232).

International law, however, is also given a second, and perhaps a more important, function as a tool for the interpretation of provisions in the Constitution (s 39) or of legislation in general (s 233).

In the first instance, we are dealing with a direct application of international law principles, either because they are part of our law (custom) or because they have been brought into our law by a specific procedure (treaty). In the second instance, however, the courts are not applying international law as such. What they are doing is testing South African law against international law to determine the meaning of the provisions of our law. In some instances, international law is merely “advisory” (s 39); in others, it determines the meaning which the provision should bear (s 233). The content of existing South African law is determined by reference to international law.

In either event, you as a practitioner must be in a position either to understand and apply international law (if you are the presiding officer) or to understand and present it (if you are appearing for the state or the defence).

To recap, the application of international law in South African law falls into two broad categories:

- (1) direct application of international law principles, and
- (2) application as part of the interpretive process.

STUDY UNIT 2

DIRECT APPLICATION: TREATIES IN SOUTH AFRICAN LAW

2.1 INTRODUCTION

The major source of international law is, of course, treaties. The position of treaties in our law was always relatively straightforward. The general rule which applied virtually without exception was that, for treaties to become part of our national law and so be available to the courts, they had to be enacted into our law by legislation.

The interim Constitution (1993) radically changed our law with regard to treaties. The provisions are not models of clarity, as you will see below. However, if you thought this was complicated, it is nothing when compared with "the can of worms" opened by current (1996) constitutional provisions. While we wait for court decisions interpreting these provisions, what we say must of necessity be speculative.

This is one of the instances in which you are required to know the preconstitutional position, the position under the 1993 Constitution and the position under the 1996 Constitution. We are not trying either to confuse or punish you by requiring this of you. The reason lies in section 231(5), which provides as follows:

The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

A treaty (international agreement) which was binding on the Republic when the 1996 Constitution took effect (on 4 February 1997) could, of course, have been concluded in the "bad old days" before treaties were governed by the Constitution, or it could have been concluded under the 1993 Constitution. It is therefore necessary to know which treaties were binding and how they became so under each of these systems.

2.2 TREATIES PRE-1993

Before the interim Constitution came into operation, the negotiation and signature of treaties was a prerogative act of the executive in which the legislature and the courts played no part. This meant that, if the executive concluded a treaty with a foreign state which affected the lives of the citizens of South Africa, it was in effect making law. What then of the separation of powers?

For this reason in South African law (as in English law), the executive could bind the state internationally by concluding a treaty, but that treaty would have no effect in the state's national law unless it had been incorporated into South African law by legislation. In this way, the rights of the citizen were protected, in that treaties, too, went through the legislative process before they were available to the courts. However, it was the executive which decided whether or not a treaty would be presented for incorporation.

The principal case on the need to incorporate treaties is:

Pan American World Airways Incorporated v SA Fire & Accident Insurance Co Ltd 1965 3 SA 150 (A)

where the court held that:

[I]n this country the conclusion of a treaty ... by the South African government with any other government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our law except by legislative process ... In the absence of any enactment giving [its] relevant provisions the force of law, [it] cannot affect the rights of the subject.

How does this transformation of an international instrument binding only on the international plane into a piece of South African legislation with national effect take place? There are three principal methods:

- (1) the provisions of the treaty are rewritten in an Act of parliament — see, for example, the Civil Aviation Offences Act 10 of 1972
- (2) the treaty is enacted as a schedule attached to an Act of parliament — see, for example, the Diplomatic Immunities and Privileges Act 74 of 1989
- (3) an Act of parliament may provide that a treaty will be incorporated by publication in the *Government Gazette* — see, for example, section 108 of the Income Tax Act.

An interesting question arising here is whether mere publication of a treaty can be regarded as incorporation. In *S v Tuhadeleni* 1969 1 SA 153 (A), it was argued that the publication of the Mandate for South West Africa in South West Africa's equivalent of the *Government Gazette* amounted to incorporation. The Appellate Division held that it did not. However, in *Binga v Cabinet for South West Africa* 1988 3 SA 155 (A), the Appellate Division, without deciding the issue, was prepared to accept for purposes of the case that the Mandate had been incorporated.

2.3 TREATIES UNDER THE INTERIM CONSTITUTION, ACT 200 OF 1993

Before we start discussing this in earnest, please be very careful to distinguish between the provisions of the 1993 Constitution, which we are discussing now, and those of the 1996 Constitution, which we will be discussing next.

The 1993 Constitution dealt with international law, both treaty and custom, in a single section, namely 231. The 1996 Constitution splits the two. Treaty is still in section 231, but custom is in section 232.

This can be confusing. For example, the incorporation of treaties under the 1993 Constitution takes place under section 231(3), whereas in the 1996 version it takes place under section 231(4). Section 231(4) in the 1993 Constitution deals with custom, while, in the 1996 Constitution, custom falls under section 232. So, check which Constitution you are working with when you read cases, and particularly when you are answering questions. If we were to ask a question on custom as it applies at present, and you start "raving" about section 231(4), we cannot give you credit.

Sections 231(2) and (3) govern the position with regard to treaties in terms of the interim Constitution (1993). These sections read as follows:

231(2) Parliament shall, subject to this Constitution, be competent to agree to the ratification of or accession to an international agreement negotiated and signed in terms of section 82(1)(i).

231(3) Where Parliament agrees to the ratification of or accession to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution.

As with our previous constitutions, the President negotiates and signs international agreements (s 82(1)(i)). Now, however, section 231(2) provides that parliament (ie, both the National Council of Provinces and the National Assembly) decides on the "ratification of or accession to" treaties. (Remember what these two terms mean? — you studied them in topic 2.) This gives parliament a role which it did not formerly have. The internal effect of treaties is now in the hands of the legislature rather than the executive as under the previous dispensation.

Ratification here takes two forms. First, there is "international ratification". This applies to those treaties which, apart from signature, also require ratification to bring them into force internationally. This does not, however, give the treaty national application. It is "constitutional ratification", which is provided for in section 231(3), which brings the treaty into effect in South African law.

This ratification — although falling short of the formal, preconstitutional statutory incorporation — must nonetheless be "expressly so provided".

National/constitutional ratification — which you will remember is the step which makes the treaty available to a South African court — occurs when parliament "expressly so provides". Now, how does parliament do this? Needless to say, internationalists in the country were divided on this question:

- One group (including Dugard and Botha) felt that the situation had been liberalised and that a mere declaration by parliament was sufficient to meet this criteria. This is also the procedure in fact followed by parliament in a number of cases.
- Another group (Devine being the main protagonist) claimed that it represented a maintenance of the status quo (the existing position) and that parliamentary legislation was still required.

As there have been no reported cases dealing with this point, the question remains open. You should be aware of the different interpretations, however, as (who knows) you may be the lawyer required to argue the point in some future case!

Another result of the treaty provisions in section 231 (1993) is that a distinction will now have to be made between pre- and post-Constitution treaties. Pre-Constitution treaties do not require parliamentary approval, but do require statutory incorporation. Post-Constitution treaties require parliamentary approval, but not statutory incorporation. This is a distinction which should be borne in mind when raising a treaty falling under the interim Constitution before a court.

One further point should be mentioned in regard to treaties under section 231. The section mentions only treaties requiring ratification. There are, however, treaties which do not require ratification and which come into force internationally on signature alone. As regards these, we are left in the dark.

2.4 TREATIES UNDER THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

The 1996 Constitution devotes a separate section, section 231, to “International agreements”. This section reads as follows:

231

- (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 a reasonable time.
- (4) Any international agreement becomes law in the Republic when it is enacted into 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 this Constitution took effect.

2.4.1 INTERNATIONAL AGREEMENT

Before we tackle this mouthful, one subsection at a time, some comments on the use of the term “international agreement” instead of “treaty” are necessary.

The meaning of “international agreement” is addressed in *Harksen v President of the RSA A394/99* (CPD) and in *Jürgen Harksen v President of the RSA 41/99* (CC). In an extradition case, it was claimed on behalf of Harksen, who was appealing his extradition to Germany, that the term “international agreement” was wider than the term “treaty” and included informal agreements between states. Although the Cape Provincial Division held that the term could include informal agreements (without really defining them), this was rejected by the Constitutional Court. In terms of the Constitutional Court decision, therefore, “international agreement” as occurring in section 231 is to be understood to mean “treaty” as defined in Article 2(1) of the Vienna Convention on the Law of Treaties (VC).

Let us now “attack” section 231, bit by bit!

When studying section 231, make a distinction in your mind between those provisions relevant for determining whether a treaty **binds South Africa on the international plane** and those relating to whether a treaty has **legal effect domestically**, that is, whether a domestic court can directly apply such a treaty. Subsections (1), (2) and (3) are relevant for determining whether a treaty binds South Africa on the international plane. Section 231(4), on the other hand, tells us when a treaty that is binding on South Africa internationally becomes law in South Africa. With that in mind, let us set off on our adventure.

2.4.2 SECTION 231(1) – 1996

This section sets out who may negotiate and sign treaties. You will remember that, under the 1993 Constitution, this function was allocated to the President subject to

section 82(1)(i). This gave rise to considerable problems with treaties negotiated by one person and signed by another, both on different dates before and after the 1993 Constitution came into force.

In practice, the President does not negotiate treaties and signs very few personally. This power is delegated to the Department of Foreign Affairs or line-function minister in charge of the topic covered by the treaty. (See topic 2 where we discussed Article 7 of the VC.) The 1996 section acknowledges this fact and does away with the problems raised by the 1993 Constitution.

2.4.3 SECTION 231(2) — 1996

This section deals with what Dugard terms “international ratification”; in other words, the process by which a treaty becomes binding for South Africa on the international plane.

The 1996 provision simplifies its 1993 counterpart by replacing the terms “ratification” and “accession” with “approval”. It also addresses the way in which this is to be done, namely by resolution in both houses of parliament.

Please note that, although both houses of parliament approve the process, this is not the same as the adoption of legislation which is subject to all the procedures prescribed in the Constitution under “National Legislative Process” — section 73 and further. Therefore, approval under section 231(2) does not bring the treaty into effect in our national law — if it did, why would we have 231(4)?

2.4.4 SECTION 231(3) — 1996

Here is where complications set in and the fun starts!

First, we must distinguish between four types of treaty:

- (1) technical treaties
- (2) administrative treaties
- (3) executive treaties
- (4) treaties requiring neither ratification nor accession.

Secondly, what makes these treaties different is that they bind the Republic on the international plane without approval by the National Assembly and the National Council of Provinces. In other words, what Dugard terms “international ratification” under the interim Constitution is not required for these four types of treaty. We are therefore back where we started, with parliament being excluded from the treaty-making process and with the executive alone deciding on the conclusion of this type of treaty.

Problems arise when one attempts to define the treaties concerned. Most of the treaties I have encountered could be termed “technical”, depending on one’s frame of reference. There is certainly no clear category of “technical treaties” in international law. The term “administrative” is not much better — isn’t the Statute of the International Court of Justice (ICJ), for example, essentially an administrative treaty? What about administrative sections within a general treaty (eg the enforcement mechanisms in the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESC), etc.)? The same holds true of executive agreements, although here, at least, there is a recognisable category.

Treaties not requiring ratification or accession — in other words, treaties which come into force internationally on signature alone — are at least clearly distinguishable, as they will generally state that they come into effect on signature or else that they require ratification.

In practice, section 231(3) treaties are approached as two categories.

First, there are technical, administrative or executive agreements. These are regarded as agreements of a routine nature flowing from the day-to-day activities of government departments. Moreover, they generally also have no budgetary implications for the country. The problem remains, however, that it is the department concerned which makes the primary decision on what it regards as day-to-day! The potential for manipulation and abuse is self-evident. However, where there is doubt as to whether a treaty should be regarded as technical, administrative or executive, the policy is rather to adopt the section 231(4) procedure (see below).

As students often have difficulty with these concepts, let's try to explain this by means of an example.

The Minister of Education (or perhaps it should be Public Works!) concludes a treaty with the United States (US) in terms of which the US undertakes to provide R5 million for upgrading South African rural schools. The parties agree that the money will be made available as and when the Minister identifies a school in need. This is a normal assistance treaty and will become part of our law only once incorporated under section 231(4), which we will be considering below.

The Minister identifies one school in Mpumalanga in March which requires upgrading. The next one she encounters is in KwaZulu-Natal in December, and the next in Limpopo in June of the following year. In each instance, she approaches the US for the necessary funds. Strictly speaking, each request and consent is a treaty and could, in strict terms, be subject to the full treaty process were it not for section 231(3).

But look more closely at these last three "treaties" — they are in essence administrative, they flow from the day-to-day activities of the Department of Education, and, given the provisions in the original treaty (the Minister will identify the schools), they are routine. They also involve no financial burdens for the state (and, so, for you and me). Therefore, it is to no-one's detriment if they are merely approved by the two houses without going through the whole incorporation rigmarole!

The second category is treaties not requiring ratification. This is a relatively simple determination, in that a treaty will generally provide whether or not ratification is required. If the treaty is silent on this point, the intention of the parties will be decisive. In fact, most bilateral treaties will fall into this category. As the majority of the treaties concluded by the state are bilateral, the "international ratification" of a treaty in terms of section 231(2) will not apply to most — but not all — bilateral treaties. For example, an extradition treaty is generally bilateral and would in theory not require ratification under section 231(2). However, the Extradition Act 67 of 1962 has been amended to provide for ratification in terms of section 231 of the Constitution. In this case, therefore, the intention is to require ratification and parliamentary approval is thus required in the case of extradition treaties.

This is, however, not a free-for-all as may initially appear. There is some measure of control over these treaties, in the sense that they are required to be laid before both houses of parliament within a reasonable time. Although this is a relatively "weak"

control, it does mean that opposition parties will be in a position to ask questions about the agreements and that some measure of public awareness should result.

Remember that this section deals only with how a treaty binds the Republic on the international plane. IT HAS NO EFFECT ON THE APPLICATION OF THE TREATY BY THE MUNICIPAL COURTS.

2.4.5 SECTION 231(4) — 1996

This section deals with the way in which a treaty negotiated by the executive and approved by parliament (or laid before both houses in the case of our four “special” treaties above) becomes law in the Republic; in other words, with the process necessary to transpose a treaty from the international plane to the national plane.

I must admit that some students have floored me here in their answers to exam questions on the municipal application of treaties — I simply don’t know what to do to get this point into your heads, so I’m now trying small, bold print that you have to squint at to read!!

These students insist on claiming (righteously and with great conviction) that section 231(3) treaties do not need to be incorporated and find municipal application on signature and “laying” before parliament. THIS IS WRONG!!

Section 231(4) is perfectly clear where it states that ANY (that’s right, ANY, which means ALL) treaty (therefore also those under 231(3)) must be incorporated by national legislation (that’s a law)!!

There is one exception in the form of self-executing treaties, as you will see below. However, section 231(3) treaties can’t be self-executing, as you will also see below.

PLEASE GET THIS INTO YOUR HEAD AND KEEP IT THERE!!!

Here we have seen something of an “about-face” from the position under the 1993 Constitution. All academic argument (and pleas for a streamlined method) on what “expressly so provided” means fell on deaf ears and the **status quo** before 1993 has been restored. All treaties become law and are enforceable by municipal courts only once they have been “enacted as law by national legislation” — disappointing, but you can’t ask for anything clearer!

Therefore, what we said in 2.2 of study unit 2 applies once more — *Pan American* rules!

Be sure you know it!

The section allows for one exception in the case of a self-executing provision of an agreement that has been approved by parliament. Such a provision will be law in the Republic without the need for national legislation, provided that it is not inconsistent with the Constitution or an Act of parliament.

The concept of the self-executing treaty is wholly foreign to our legal system (and to the British system which we have traditionally followed). It is an American concept which has now been “dragged” into our law at the eleventh hour of the constitution-writing process.

A self-executing treaty is defined by Shearer (*Starke’s international law* 1994 at 75) as follows:

[A treaty] which does not in the view of the American courts expressly or by its nature require legislation to make it operative within the municipal field, and that is to be determined by regard to the intention of the signatory parties and to the surrounding circumstances.

We can, of course, replace “the American courts” with “the South African courts” in this passage. Therefore, a South African court will have to examine whether or not a particular provision in a treaty before it, either by the nature of the provision or expressly, does not require legislation to bring it into operation municipally.

To determine this, the court will have to examine:

- the intention of the signatories
- the surrounding circumstances.

The difficulty in establishing whether a provision in a treaty is self-executing can be illustrated with reference to two US Supreme Court decisions. The self-executing provision doctrine can be traced back to *Foster and Elam v Neilson* 27 US 253, 7 L.Ed 415 (1829) decided in the US Supreme Court. Chief Justice Marshall held that Article 8 in the Treaty of Amity between the US and Spain was not self-executing. In a subsequent case, *United States v Percheman* 32 US 51, 8 L.Ed 604 (1833), interpreting the Spanish version of the same treaty, the very same judge (Marshall) found Article 8 to be self-executing.

If there were any doubt that the interpretation of treaties as provided for in the VC (see topic 2 above) is now firmly part of our law, this has now settled it. Whether it is wise to lumber the courts with what may well prove an impossible burden at this stage in our history, is debatable. That the courts will in fact be faced with a formidable task can be illustrated by the following hypothetical situation.

The self-executing clause applies only to treaties approved by parliament (once it has been approved by parliament — section 231(2)). Therefore, one may conclude that the four categories of treaty which appear in section 231(3), and which bind internationally without parliamentary approval, do not fall within the ambit of section 231(4). (They have, after all, not been approved by parliament.) If a party therefore claims (and note that this can be in any court) that a treaty is self-executing, the judicial officer will have to determine the following:

- (1) Whether the treaty has been concluded and binds South Africa through parliamentary approval.
- (2) Whether the treaty falls within one of the four exceptions in section 231(3), in which case it binds without parliamentary approval.
- (3) If it falls within one of these exceptions, then it cannot (presumably from the wording) be self-executing.
- (4) If it doesn't fall within one of the exceptions, he/she will then have to:
 - (a) determine the intention of the signatories
 - (b) examine the surrounding circumstances.
- (5) From this, he/she will have to examine whether the treaty contains any provision which requires legislation to make it operative municipally.
- (6) He/she will also have to examine the nature of the treaty to see whether treaties of that kind require legislation to make them operative municipally (this would entail a vast comparative study!).
- (7) As if this were not enough, he/she then has to determine whether the treaty conflicts with the Constitution.

- (8) He/she also has to examine whether it conflicts with an Act of parliament — and, in this regard, he/she will also have to consider section 233, which we will discuss presently.

All we can do at this stage is wish our judiciary luck — Solomon's task was nothing compared with theirs! There is currently a judgment pending in the Constitutional Court dealing with self-execution. Once it is available, we will let you know the outcome!

Should you wish to read more on self-executing treaties (but this is not prescribed), see Elias Ngolele, "The content of the doctrine of self-execution and its limited effect in South African law" (2006) 31 *South African Yearbook of International Law* 141–172.

2.4.6 SECTION 231(5) — 1996

This is a typical succession provision which you will find in most constitutions.

In the light of what we said of succession to treaties in topic 2, do you think that this was really necessary? Is South Africa post-1996 a different entity in international law, or is it just the same entity in more acceptable clothes? Dugard gives an interesting account of South African "succession through the ages". Be sure to read it.

STUDY UNIT 3

DIRECT APPLICATION: CUSTOMARY INTERNATIONAL LAW IN SOUTH AFRICAN LAW

3.1 INTRODUCTION

You will remember (We hope!) that customary international law is made up of norms binding on the state as a result of its actions or of tacit consent. It is therefore not something which you can find in some handy publication indexed under a convenient title. Finding customary international law is hard work — and applying it is just as hard! That is what we are going to do in this topic.

3.2 CUSTOMARY INTERNATIONAL LAW UNDER THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

In the 1996 Constitution, customary law has earned a section all to itself.

Section 232 reads as follows:

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

In terms of this provision, all customary international law is part of our law, provided that:

- the custom must **not conflict with the Constitution**, and
- the custom must **not conflict with an Act of parliament**.

This is a fairly straightforward arrangement, which, most agree, reflects the position in our law before the adoption of the constitutions where the courts had determined that international law is “part of our law” — therefore an essentially monist approach (see topic 2).

One point worth considering here is that no mention is made of South Africa’s participation in the development of the customary rule or its consent to an existing custom. This was, in fact, required under the 1993 Constitution, which qualified the custom which was law by using the phrase “which binds the Republic”. Does this mean that South Africa can no longer “persistently object” to a customary rule? Here one must consider what the court in fact does when it establishes whether or not a rule of customary law exists. The court must apply the Article 38 (ICJ) criteria of *usus* and *opinio iuris* to establish the existence of a rule of customary international law. It may be argued that the persistent objector principle is in fact embodied in international practice which has developed around one, or both, of these criteria. Therefore, its exclusion from section 232 is largely meaningless, as it will be there as a customary rule in any event.

Finally, it must be noted that section 232 provides simply that customary international law is “law” in the Republic, without any qualification about where it fits into the hierarchy or pattern of law before the Constitution was adopted. The conclusion is therefore that customary international law is on an equal footing with common law and (non-conflicting) statutes and must be applied as such by the courts.

3.3 THE ROLE OF THE COURTS IN THE APPLICATION OF SECTION 232

Customary international law is law in the Republic. Therefore, the courts must apply customary international law if it is relevant to the case before them. Obviously, if one is dealing with an Act of parliament or a common law rule which bears no connection to international law (eg the liability of a director in terms of the Companies Act or the liquidation of a company), it will not be necessary to embark on a time-consuming and futile ramble through international law to find principles that don’t exist. But, where international law may be involved, customary international law will have to be considered and its application mooted.

However, before the court can apply customary international law, it will have to establish whether there is in fact such a rule. This it will do by applying the requirements for custom, as it has always done. It will therefore have to determine whether the rule on which reliance is placed meets the *usus* and *opinio iuris* requirements set for the formation of custom. If it does, the court will be dealing with customary international law and, as it is law, must apply it, provided that it does not conflict with the Constitution or an Act of parliament.

As we pointed out above, one of the implications of section 232 is that decisions on customary international law before the enactment of the Constitution are still persuasive in the courts. Below are a few of the general characteristics of customary international law established in the cases through the years.

3.3.1 GENERAL CHARACTERISTICS OF CUSTOMARY INTERNATIONAL LAW IDENTIFIED BY THE COURTS PRE-1993 (CONSTITUTION)

There are a few general points on customary international law in South African municipal law which should be noted:

- **Proof:** As international law is not foreign law (*South Atlantic Islands case* above and s 232 of the Constitution, 1996), the court may take judicial notice of it. This is done through a comparative examination of the international law sources (*S v Petane* above).
- **Standard of acceptance:** The courts apply the international law requirements of *usus* and *opinio iuris* to determine the existence of customary international law. In the past, there was some difference of opinion about whether the existence of a customary rule requires “universal” acceptance or merely “general” acceptance. So, we find the following: *Nduli v Minister of Justice* — Rumpff CJ demanded universal acceptance, a test more stringent than that applied by international law itself; *Inter-Science Research* — Margo J corrected this to general acceptance; *S v Petane* — Conradie J approved the general acceptance established by Margo.
- **Custom versus domestic law:** Is customary international law subordinate to legislation and our common law? The question of **legislation** is the simpler of the two. If there is a conflict, legislation will prevail, although the presumption that the legislature does not intend violating international law applies (*Ex parte Adair Properties (Pvt) Ltd* 1967 2 SA 622 (R)). (See, however, the embodiment of this presumption in s 233 of the 1996 Constitution discussed below.)
- **Custom and common law:** In the case of a conflict between customary international law and South African common law, guidance is found in *Leibowitz v Schwartz* 1974 2 SA 661 (T). Here, the court dealt with the problem as if it were considering two conflicting common law rules.
- **Custom and precedent:** Our domestic law is made up not only of common law and legislation, but also of precedent. Must the courts follow a precedent which conflicts with customary international law? In the *Inter-Science Research* and the *Kaffraria Properties* cases, the courts found that they were not obliged to follow the outmoded precedent set in *De Howorth v SS India* 1921 CPD 451 with regard to the doctrine of absolute sovereign immunity.
- **Custom and act of state:** The act of state is a complicated doctrine which you need only know in broad outline at this level of study. Basically, an act of state is an act performed by the executive in the exercise of its prerogative powers. In the case of international law, this will generally (though not always) be the prerogative to conduct the foreign affairs of the country. What happens here is that the executive acts in the foreign affairs arena (it recognises a foreign state, grants diplomatic status, etc.) and the courts do not interfere, as it is considered a matter uniquely within the knowledge of the executive. As “our state cannot speak with two voices ... the judiciary saying one thing, the executive another” (*Government of the Republic of Spain v SS Arantzazu Mendi* 1939 AC 256 (HL)), the courts will here refer to a certificate issued by the relevant department.

Has the Constitution affected these findings?

The question of proof. There is now no doubt that customary international law is South African law. What was said of proof in the *South Atlantic Islands* case stands.

Standard of acceptance. This, too, remains true. The standard is general acceptance as in international law itself.

Custom versus domestic law. As regards

- legislation — customary law is subject to contrary Acts of parliament (subject to what was said above regarding s 233), but not to subordinate legislation
- common law — the two are equally “law” — section 232 makes no distinction and creates no hierarchy in this regard (the approach in *Leibowitz v Schwartz* is therefore confirmed)
- precedent — section 232 does not make customary international law subject to domestic precedent (the approach in *Inter-Science* is therefore strengthened).

In fact, to talk of custom **versus** domestic law is incorrect, as custom **is** domestic law!

Custom and act of state

In terms of the decision of the Constitutional Court in *Khalfan Khamis Mohamed v President RSA* 2001 3 SA 893 (CC), which followed the Constitutional Court decision in *President RSA v Hugo* 1997 4 SA 1 (CC), it was held that the head of state’s prerogative powers have not survived the Constitution. It would consequently appear that an act of state will not enjoy precedence over customary international law, particularly where the customary rule concerns human rights (Chapter 2 of the Constitution).

The role of customary international law in the “new” South African dispensation has served before the courts on a few occasions. The most important case (or series of cases) in this regard is the “Harksen trilogy”:

Harksen v President of the RSA 1998 2 SA 1011 (CPD) — *Harksen I*
Harksen v President of the RSA A394/99 (CPD unreported) — *Harksen II*
Jürgen Harksen v President of the RSA 2000 2 SA 825 (CC) — *Harksen III*

In all three cases, the role of the VC as an expression of customary international law in South African municipal law was considered. Although the courts were reluctant to find that all the provisions of the Convention represent customary international law, it is clear in all three instances that, in terms of section 232 of the Constitution, customary international law is available to, and must be applied by, South African municipal courts.



Practical exercise 1

South Africa is not formally a party to the VC, but has declared that it regards the treaty’s provisions as binding. Treaty interpretation is governed by Articles 31 and 32 of the VC. You are the advocate for the defence in a case before a South African municipal court where the interpretation of a treaty is at issue. You argue that the court must interpret the treaty in terms of the VC. The advocate for the state, on the other hand, argues that, because South Africa has not formally signed the VC, its provisions are not relevant in a South African court.

EXPLAIN, with reference to the Constitution of the Republic of South Africa, 1996, why you feel the court is entitled to make use of the interpretation.

Hints:

- Are we dealing with treaty or with custom?
- Is South Africa party to the VC?
- No. Therefore the basis can’t be treaty.
- Where did the provisions of the VC come from?

- Does the term "codification" mean anything to you?
- Therefore the VC is actually a collection of what?
- What is the role of custom in our law?
- Test the VC against these requirements.
- Does it comply?
- And so?

STUDY UNIT 4

INDIRECT APPLICATION: SECTION 39

4.1 INTRODUCTION

As we pointed out at the beginning of this topic, the Constitution accords international law two roles. We have considered direct application in the previous two study units and you know exactly how to work with it — not so?

It is now the turn of indirect application. Remember, this is where the courts don't actually apply the international law provisions themselves — so there is no need to make them part of our law as such. They do, however, use international law to give meaning to, or check the meaning of, provisions in South African law. International law therefore "sneaks" into our legal system through the back door so to speak and, once here, becomes an integral part of our national law through the application of the precedent system. As we also pointed out, indirect application may indeed have a more profound effect on the fabric of our legal system than direct application. It is certainly what affects our courts the most at this stage.

4.2 SECTION 39 OF THE CONSTITUTION

Section 39 of the 1996 Constitution, headed "Interpretation of Bill of Rights", reads:

- 39 (1) When interpreting the Bill of Rights
- (a) a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) **must** consider international law; and
 - (c) may consider foreign law.
- (2) 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.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Our first task is to analyse this section. In this regard, note the followings points:

- **A court, tribunal or forum**
- **must** promote the values of a democratic society, and
- **must consider international law**, and
- and **may** consider **foreign law**.

Dealing first with the first phrase above, we note that the command to consider international law is not restricted to the courts. It will therefore apply not only to all courts, but also to any tribunal or any forum. This widens the scope for the use of international law considerably. It now includes work forums under the Labour Relations Act, for example, and commissions of inquiry, etcetera. The point we are trying to make here is that you must not think that the adjudication of human rights, and therefore the application of international law, is something remote which is restricted to the Constitutional Court. Most of the judicial tribunals in the country — and therefore the people appearing before these forums (and that means you!) — will have to work with these concepts.

Secondly, you must note that this is not a polite request to the courts. As you will remember from Interpretation of Statutes, the use of the term “must/shall” has a specific meaning. It means that the provision is peremptory, that is, the courts must consider these principles (see, eg, *Gcwabe* 1979 4 SA 986 (A)). However, applying the same principle later in the section, you will see that the courts **may** have regard to foreign law.

It is very important to note that the section does **NOT** provide that the courts must **apply** public international law, but only that they must **have regard** to it. In other words, the court is applying South African law, but it is under an **obligation** to consider whether the South African law it applies is in line with international law on the same point. From the practitioner’s point of view, this doesn’t really make so much difference. You will still be expected to present the position under international human rights law so that the presiding officer can “have regard to” it.

As you have probably come to expect, however, things are not quite so simple! The court may be instructed to consider international law in this section, but what international law is not specified. We deal with this in more detail under the next heading. For present purposes, there is one point that I want to get across to you. This relates to our general statement above that the court is obliged to consider, and not apply, international law in terms of section 39. The secret is that it is the general rule, but is not entirely accurate. According to Chief Justice Mahomed in *S v Makwanyane* 1995 3 SA 391 (CC) — one of the first, and still very important, Constitutional Court decisions — the international law that must be considered is that resulting from Article 38 of the Statute of the ICJ — therefore, the traditional sources of international law. In other words, we are dealing with treaty, custom, general principles and precedent/writers.

Now, what have you just learned about the direct application of international law? Yes, indeed, treaties incorporated under section 231 (4) and self-executing treaties are law in our country. Can a court merely “consider” the law of the land, or must it apply this law? Of course it must apply the law. Therefore, if we are dealing with international law embodied in an incorporated or a self-executing treaty, the court must apply it and not merely consider it. Are we still on the same page?

What about custom? The same applies here. Provided that the custom is not contrary to the Constitution or an Act of parliament, it is law in the Republic and it, too, must be applied.

In short, therefore, the general rule is that, in terms of section 39, international law must be considered, but need not be applied. Where, however, this international law is law in the Republic on the basis of other sections in the Constitution, this obligation to consider may indeed be an obligation to apply.

Are you perfectly clear on this? Read it through a few more times and, if you are confused, contact us!

Now, to work with this section, you must be able to answer three basic questions:

- (1) What is the “international law” intended in this section?
- (2) Where can it be found?
- (3) How do you use it in a practical situation?

4.3 WHAT IS THE INTERNATIONAL LAW IN SECTION 39(1)?

In modern legal systems, human rights are generally embodied in a constitution and, as you know, a constitution is a piece of municipal legislation. The logical question arising is: Is international human rights law (IHRL) not therefore governed by municipal rather than international law? The answer is, as so often: “Yes and no”. The days are long past (as South Africa has discovered to her cost) where human rights and their abuse could be regarded as a purely domestic concern. What started off as the constitutional rights of a specific municipal system of law expanded to form constitutional rights shared by a number of countries and finally became what Henkin (*The age of rights* (1990) 13–14) has described as “a universal conception and a staple of international law”. IHRL may be described as:

a separate branch of international law deriving from the constitutional will of states and aimed at the protection of the individual in the face of sovereign power.

It is perhaps wise at this point to stress that an individual claiming his/her internationalised rights under the Bill of Rights has not been magically raised to the status of a public international law subject. His/her claim remains a municipal one operating on the municipal law level. The application of international human rights within a municipal system is activated and controlled by the rules of that municipal system which determine to what extent international law may or may not be applied. It is the interpretation of that claim by the courts — the fleshing out of the claim — which is international. IHRL “supplements and monitors” the rights which accrue to the individual under municipal law. The section refers to international law in general, that is, to all international law.

We have touched upon this briefly above. However, while all international law can be taken into account, we are working within the framework of the Bill of Rights. So, if there is a body of international law which deals specifically with this aspect — and there is, and it’s called international human rights law (IHRL from now on) — the logical starting point in your investigation is this IHRL.

4.4 WHERE DO YOU FIND INTERNATIONAL HUMAN RIGHTS LAW?

What we are looking for here are the sources of IHRL. These correspond to a large

extent to the sources of general international law. There are however certain shifts in emphasis.

- (1) There are certain **basic international documents** which have to a greater or lesser extent influenced one another and which, together, make up modern-day IHRL. Most of these are treaties (the Universal Declaration being the notable exception). As with general international law (Art 38(1)(a)–(d) of the Statute of the ICJ), our primary source is therefore “treaty”.

As stated above, however, in the case of IHRL, there are specific treaties which are generally recognised as the source documents. The principal documents are:

- the Charter of the United Nations (UN)
- the Universal Declaration of Human Rights (UDHR) (which is **not** a treaty!)
- the International Covenant on Civil and Political Rights (ICCPR)
- the International Covenant on Economic, Social and Cultural Rights (ICESC)
- the European Convention for the Protection of Human Rights and Fundamental Freedoms (EC)
- the American Convention on Human Rights
- the African Charter on Human and Peoples’ Rights (Banjul Charter)
- other regional charters (eg the Helsinki Accords, the Arab Charter, etc. — however, for our purposes, these are less important).

To these documents one must add the other sources, namely:

- (2) decisions of **municipal courts** interpreting comparable bills of rights within their own countries (Art 38(1)(c) of the ICJ)
- (3) **customary** public international law (Art 38(1)(b) ICJ)
- (4) what is termed **soft law** (Art 38(1)(d) ICJ).

We will look at these one at a time.

4.4.1 INTERNATIONAL DOCUMENTS: TREATIES

The logical first step is to compare our bill of rights with the human rights documents above to determine which it most closely resembles. This will then be the primary document to which you will turn for guidance. However, you will soon discover that the various documents have borrowed heavily from one another, with the result that it is often not possible to say categorically that right A comes from the UDHR, while right B comes from the ICCPR. Some rights occur in all human rights documents, while others are found in none of the traditional sources. The advantage of entering the bill of rights arena some 40 years after the “show” started is, of course, that you have so much more to choose from. Furthermore, your bill of rights is up to date. In fact, it is often way ahead of the approach to human rights in other, traditionally more liberal, countries. Although the South African bill reflects this diversity and cannot be regarded as a clone of any one document, we feel it is strongly reminiscent of, and most closely analogous to, the ICCPR. However, given the leading role which South Africa is set to play in Africa, we may expect an “Africanisation” of international law, and particular attention should therefore be paid to the Banjul Charter.

Naturally, gazing perplexedly at the provisions of the various international documents in which rights are recorded is not really going to get you much further. The important task is to establish the meaning of the various rights in the context of these documents. To do this, two principal sources may be tapped.

These sources may be loosely classified as sources ancillary to the international

human rights documents and sources arising from the documents. Both serve to assist a municipal court to arrive at a meaning for the specific right which is in step with international sentiment.

a Sources ancillary to the documents — external sources

We need not spend too much time on sources ancillary to the documents. Suffice it to say that, in interpreting treaties (and, by analogy, any international agreement), an approach more liberal than that traditionally followed by South African courts is allowed (see Arts 31 and 32 of the VC in topic 2 above). You should therefore examine: the preparatory work leading up to the treaty; the actual negotiations; the comments and policy options expressed by various states both before and after the adoption of the treaty; subsequent agreements explaining the application of the treaty; etcetera.

b Sources arising from the documents — internal sources

Far more important for practical purposes are the sources created by these international human rights documents themselves which deliver authoritative interpretations of the various rights entrenched in the agreements. A detailed discussion of the functioning of these bodies is not expected at this stage, but the most important of the bodies will be mentioned briefly.

UN Charter and conventions

Although the Charter is not a bill of rights, recognition and protection of basic human rights are a cornerstone of the organisation. Apart from the ICJ, which is the judicial arm of the UN and has adjudicated on human rights issues from time to time, there are a number of UN organs dealing with human rights. I will mention only the Human Rights Committee, a committee established in terms of the ICCPR which comments on the scope of the articles of the Covenant and expresses “views” on complaints submitted by individuals who feel that their rights under the Covenant have been violated (see study unit 3 above).

European Convention for the Protection of Human Rights and Fundamental Freedoms

The decisions of the European Court of Human Rights (ECHR), which was established to enforce the rights enshrined in the Convention, provide useful guidance on the scope of rights occurring in both the Convention and our Bill of Rights.

American Convention on Human Rights

In terms of this convention, too, two bodies have been established to ensure compliance with the human rights embodied in the Convention. These are the Inter-American Commission and the Inter-American Court on Human Rights.

African Charter on Human and Peoples’ Rights (Banjul Charter)

After a slow start, the African system is up and running and will obviously be of major significance to South Africa as part of the African continent.

The Charter has two bodies for the enforcement of international human rights set out in the Charter. These are the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights.

These, then, are the bodies created to oversee and enforce the application of the major international law treaties in which present-day human rights can be found. In terms of

section 39 of the 1996 Constitution, it is the duty of a court to have regard to these as part of IHRL.

At the risk of boring you, please note once again that the “internal sources” or “sources arising from the documents” are not the documents themselves. Instead, they are the decisions/recommendations of the bodies set up in terms of the documents to enforce the rights embodied in the documents.

The internal sources of the European Convention (EC) are therefore the decisions/recommendations of the European Court of Human Rights (ECHR) and not the Convention! (This may seem obvious, but I promise you that at least half of all students of whom I have asked this in the past have answered EC. No comment!)

4.4.2 MUNICIPAL COURTS' INTERPRETATION OF THEIR OWN HUMAN RIGHTS CLAUSES

The second, and very important, source of IHRL is the interpretation accorded to the various rights enshrined in the bill of rights by the national courts of other countries in whose bills of rights the right in question also occurs.

Please note that the decisions of foreign courts (eg of Namibia, Canada, America, Germany, or wherever) are not international law. They are FOREIGN LAW. They are an ancillary or secondary source which tells you how a foreign court which applies its own law (as opposed to an international court which applies international law) sees the rights established in the international documents and pronounced on by the various international courts and commissions. These decisions are handy AIDS to the interpretation of IHRL, but they do not on their own establish IHRL. It is therefore not enough to look only at foreign case law — and this is also not what section 39 “orders” us to do.

We do not have to look far for examples. Our neighbours, Zimbabwe and Namibia, both followed the constitutional bill of rights trail on independence. Both, too, had emerged from repressive regimes (one less permanently than the other!) which could by no stretch of the imagination have been said to have had flourishing rights cultures. However, in both instances, the judiciaries have risen to the occasion and have delivered a series of judgments which serve as striking examples of what can be done with the correct attitude.

In Zimbabwe, the judgments of Gubbay JA in *S v Ncube* 1988 2 SA 702 (SC) and *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General* 1993 4 SA 239 (ZSC) and that of Dumbutshena CJ in *S v A Juvenile* 1990 4 SA 137 (ZSC) serve as examples.

In Namibia, the judgment by Hendler J in *Namibian National Students' Organisation v Speaker of the National Assembly for South West Africa* 1990 1 SA 613 and that of Mahomed AJA in *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 3 SA 76 (NmSC) deserve consideration.

Outside of Africa you should keep a close watch on developments in Canada and

India. Both countries have emerged from a colonial past and are involved in establishing human rights cultures based on entrenched bills of rights.

4.4.3 CUSTOMARY INTERNATIONAL HUMAN RIGHTS LAW

We have already dealt with the formation, nature and binding force of customary international law in some detail in topic 2. Customary IHRL must meet these same conditions. However, because we regard IHRL as a separate branch of general public international law with sources of its own, we distinguish between customary international law in general (which is a very important source) and customary international human rights law. For present purposes, it may merely be noted that, to my mind, there is no notable, general, customary international human rights law. The seminal decision in *Filartiga v Pena Irala* (1980 *International Legal Materials* 966) made it clear that the development of customary international human rights will take place on a right-by-right basis. The usefulness of customary international law within a bill of rights structure is limited. It would appear that, in the face of an entrenched bill of rights, the role of customary law is secondary. However, Lillich states that:

[C]ustomary international human rights law ... has not been rendered redundant. In the first place, it can be used both to inform and flesh out various provisions in the Bill of Rights. Secondly, it can be invoked as an independent rule or decision in situations where the Bill of Rights offers no or less protection.

In this sense, the role of customary IHRL is similar to the role of international law within our Bill of Rights. It fleshes out, or gives content to, the right — with the important difference that treaty (and, in particular, the “internal sources”) takes precedence over custom.

PLEASE NOTE that we are not saying that custom as a source of general international law is unimportant. We are saying that custom is not a particularly dominant source of the separate branch of international law known as IHRL, which is largely convention-based.

For those who don't regard IHRL as distinct from general international law, the role of custom is of course very important. It would then fall under the general discussion of custom. You must decide for yourselves which view you support. However, isn't it always safer to have two strings to your bow?

Furthermore, it should be borne in mind that, even if one does distinguish between customary IHRL and general customary international law, the former remains a species or genus of the latter. In other words, customary IHRL is still customary international law. As you saw above, customary international law is part of our law (with a status equal to legislation, common law, etc. — it is subject only to the Constitution and, in theory, an Act of parliament). What does this mean in practical terms?

The function of a judge is to apply “the law”. The function of a South African judge is to apply South African law. If a rule of IHRL (eg the prohibition of torture — the *Filartiga* case) has been proved to have developed into a rule of customary international law, this rule is then part of “the law” and **must** be **applied** by the judge (and not merely considered). In this sense, the role of customary international law in section 39 is stronger than the role of international law in general.

4.4.4 SOFT LAW

Soft law should be understood to include all those sources which do not traditionally give rise to enforceable law as such. Here one thinks of: non-binding General Assembly resolutions; the opinions of writers and commentators on human rights; directives issued by administrative tribunals; practice in international organisations; guidelines or draft resolutions issued by bodies such as the International Law Commission; and the like. Soft law should not take precedence where there is “hard law” dealing with a particular right, but, where soft law constitutes the only, or the most relevant, information on a particular right, its importance will, of course, increase proportionately. It can also be very useful in interpreting developments in hard law and bringing it into line with current reality. The importance of soft law within the South African context emerges clearly from the Constitutional Court’s approach in *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).

4.5 SECTION 39(2)

Just because section 39(1) is the provision most regularly before the courts does not mean that we can forget section 39(2). You will (may?) remember that this section provides:

39(2) 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.

Although this section is headed, “Interpretation of the Bill of Rights”, it is not restricted to the Bill — in fact, it applies to any legislation and to the development of the common law and customary law. It is also addressed to courts, tribunals and forums. Now, as you will see, international law is not mentioned specifically in this section (as it is in s 39(1)). But what is the basis of the “spirit, purport and objects” of the Bill of Rights which must be promoted? Yes, the Bill is based largely on the ICCPR (see above), which is international law, isn’t it? So, if you are promoting the “purport” and the aims of the Bill, you are in fact promoting international law, aren’t you? The bottom line is that, in developing common law and customary law, and in interpreting any legislation, international law must therefore be taken into account.

In *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC), the Constitutional Court, in the process of developing the common law as required by section 39(2), referred to the EC and to case law decided by the ECHR. It appears, therefore, that international law is also relevant when the courts are charged with the development of common law to reflect the spirit, purport and objects of the Bill of Rights. Needless to say, what was said about finding international law in the context of section 39(1) applies equally to the use of international law in the context of section 39(2).

4.6 SOLVING AN INTERNATIONAL HUMAN RIGHTS LAW PROBLEM

You have passed International Law (and a few other less important subjects!) and are now an attorney (or an advocate, as you couldn’t find articles!). Sebo was caned at school for not doing his homework and for telling his teacher that, because he finds corporal punishment degrading, he cannot be caned. His father approaches you and you have to argue the point in court. How will you set about convincing the court that

Sebo's human rights have been violated under international law, as you are required to do under section 39?

Step 1: Determine whether the right involved appears in Chapter 2. You will be surprised to learn that you do this by reading Chapter 2 of the Constitution! You find the "right" in section 10, section 12(e) and, because of Sebo's age, section 28(d).

You have established that there is a right which can be violated. You have established that it is a Chapter 2 right. What does this mean for your approach to the case? It means that section 39 of the Constitution governs the interpretation of the right.

What does section 39 provide? It provides that the court **must have regard to** international law and, more especially, IHRL. This means that you must present the court with the position under IHRL.

Step 2: Go to the international documents forming the basis of IHRL and establish whether the right occurs in them. You should now turn to the actual texts of the documents and see if there are any specific differences between their provisions and the South African Bill of Rights. For example, our right-to-life provision differs from that in the ICCPR. This must be taken into account in assessing the international case law on the right to life as embodied in the ICCPR.

What have you done so far? You have established the existence of the right in South African law (step 1). You have established the existence of a corresponding right in international law and have noted any differences between the two (step 2). You have also established which sections of the international documents you should consider. Have you established the public international law which you must present to the court? **No, you haven't.** Therefore, we move on to step 3.

Step 3: Study the recommendations of commissions and the decisions of courts established under the international documents (internal sources above). This is where you will find the international law which you are required to present to the court. Both commission recommendations and court judgments may be used, but, of course, the judgments will bear greater weight.

Step 4: Consult foreign case law as a source of IHRL. Here you would follow much the same process as above, except that, instead of examining the international documents to find the corresponding provision and checking the two for differences, you would examine the various states' bills of rights.

The obvious example in Sebo's case (you'd forgotten him hadn't you?) is the Namibian cases listed above.

Step 5: Customary IHRL is also a source and must now be considered. Here you will see whether the particular human right in question (degrading punishment) complies with the international requirements for the formation of custom (*usus* and *opinio iuris*) and can now be said to constitute a customary rule which will bind states, even in the absence of their being party to the international documents. If you are able to prove this, you could (and should, in my view) then argue that, in terms of section 232, the court must apply, and not only consider, international law.

Step 6: Consider whether there is any “soft law” which could contribute to your understanding of the issue. Here one thinks of commentaries by writers, non-binding resolutions (eg of the General Assembly or other international bodies such as the International Law Commission).

You then bring all these steps together and present the “international law applicable to the right” to the court with full confidence. It may not help little Sebo much, but the result will be that no other little Sebos will be subjected to corporal punishment.

(Yes, we are aware of the fact that corporal punishment has in fact been outlawed by legislation but we like the example!)

Please note that my approach to this topic is, of necessity, mechanistic. We can't possibly expect you to conduct an in-depth examination into every single right and so determine the “actual” position in South African law. This is undertaken in the elective, specialised course on International Human Rights. As a compromise, therefore, what I have tried to do is explain the mechanism or process you must follow in order to establish the “facts”. This is also all I expect of you in the examination. You must be able to recognise the violation of a human right, tie it to the Constitution and to international law, and explain what you would do in court. Try it in the exercise that follows.



Practical exercise 2

Ms Treatment is a very competent senior lecturer employed in the Unisa Law Faculty. A vacancy for a professor arises in her department (not Public, Constitutional & International Law of course!) and she applies for the post. Despite being by far the best qualified candidate, she does not get the post. She learns that, although she was top of the shortlist, her appointment was vetoed when it was learned that, outside of working hours, she is a practising transvestite (Yes, women can be transvestites — look in the dictionary if you don't believe me!) who regularly mimes to the songs of Helmut Lotti.

Ms Treatment visits you, claiming that her constitutional rights under Chapter 2, section 9(3) of the Constitution, have been violated. She tells you of a friend of hers with similar inclinations who was successful in a claim before the ECHR, and of another who was similarly successful before the German Constitutional Court (*GCC*).

Explain, in the light of the facts above, the relative weight which a South African court should attach to the decisions of the ECHR and the *GCC* in terms of the Constitution of the Republic of South Africa, 1996.

Hints:

- What section of the Constitution is involved?
- What must the court consider or apply?
- What type of court is the ECHR?
- Where does it get its powers from?
- What type of court is the *GCC*?
- What is the nature of a decision by the ECHR?
- Does this differ from a decision of the *GCC*?

- What would you do if there were no corresponding right in the international documents or other states' bills of rights?
- Where would you then look for IHRL?
- What if there were no customary rule either?
- Stumped, hey! Go back to topic 2 and consider Article 38(1)(c). PS: Don't go into detail about the specifics of the right in the Bill of Rights — it is merely there as a label.

STUDY UNIT 5

INDIRECT APPLICATION: SECTION 233

We come now to the final section we will be considering in this “marathon session” — much to your relief, I am sure. This is section 233, which, to my mind, is one of the most underrated and neglected (by those presenting cases as well as by the courts) sections in the Constitution. Correctly handled, this section can be a powerful tool by means of which you can win cases!

Section 233 reads:

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**.

As I see this provision — and here the courts may take a more restrictive approach when they get round to considering it in depth — it is extremely wide.

- It refers to “any” legislation (in other words, all legislation).
- It applies to “every” court (in other words, all courts from the magistrate’s court to the Constitutional Court).
- It refers to “any reasonable” interpretation (in other words, not necessarily the “most” reasonable or the “more” reasonable).
- And this applies in preference (again) to “any” other interpretation which isn’t consistent with international law.

Therefore, when a court is interpreting an Act of parliament, this section, which appears to be an interpretation provision, in fact “orders” (must) the court to prefer — in other words, to apply — the international law interpretation of the concept/term/phrase or whatever it is considering — a true “wolf in sheep’s clothing” for anti-internationalists.

This, then, brings us to the end of our consideration of the role of international law in South African national law under the Constitution (or at least those aspects we will be considering in detail). In the next section, we give you an idea of what you should now be able to do.

STUDY UNIT 6

ASSESSMENT

Well, this is “crunch time”. Here is what we feel you should be able to do now that you have studied the work. Because this was a long and involved topic, we included some practical exercises in the study units themselves. This was largely to break the monotony of uninterrupted learning and to allow you to “check along the way” that all was still under control.

You should now be able to complete these exercises without too much difficulty. Below are a few more for you to attempt.

It is time to be honest with yourselves and to see what you have learned in this topic and, if you have not learned enough, to go back and do it again (and again). If you are really stuck, ask us for help!



Practical exercise 3

The Constitution of the Republic of South Africa 1996, provides for both the direct and the indirect application of international law.

Explain this statement using sections 39, 231, 232 and 233 of the Constitution.



Practical exercise 4

The two principal theories explaining the relationship between international law and national law are monism and dualism.

Explain what is meant by each of these approaches and indicate clearly what the practical effect is of following a monist or dualist approach.

Analyse sections 39, 231, 232 and 233 of the 1996 Constitution and indicate whether you regard each a monist or dualist.



Practical exercise 5

Compare the use by the courts international law in terms of sections 39 and 233 of the 1996 Constitution.



Practical exercise 6

Explain the role of international law in the application of section 39(2) of the 1996 Constitution.

SECTION B

There are four topics in this section.

One examination question will be set on each of the four topics in this section.

Each of the four questions will count 25% of your examination mark at the end of the semester.

You will be required to answer one question from section B.

TOPIC 1

TERRITORY IN INTERNATIONAL LAW

In this topic, we will consider the following:

- 1 Introduction
 - 1.1 Intertemporal law
 - 1.2 *Uti possidetis*
- 2 Traditional methods of acquisition/loss
- 3 Territorial acquisition in South African law
 - 3.1 Introduction
 - 3.2 Possible constitutional implications for territorial acquisition/loss
 - 3.2.1 The acquisition of territory as a prerogative act
 - 3.2.2 Acquisition based on treaty
 - 3.2.3 Where acquisition is based on legislation
 - 3.2.4 Where the acquisition/loss affects Chapter 2 rights
 - 3.2.5 The effect of section 233
 - 3.3 Territorial acquisition before Act 108 of 1996
- 4 Assessment



The following material must be studied:

- Dugard 3 ed chapter 8
- Anyangwe C "African border disputes and their settlement by international adjudication" (2003) 28 *SAYIL* 29
- *Van Deventer v Hancke & Mossop* 1903 TS 401
- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 ICJ Rep 136 (available at www.icj-cij.org under the 2004 case list)

STUDY UNIT 1

INTRODUCTION

You need only look around you to see that territory remains a contentious issue in modern international law. Conflict between Israel and the Palestinian Liberation Organisation (PLO) over the Golan Heights and East Jerusalem is ongoing, while closer to home both Lesotho and Swaziland have made claims to parts of South Africa.

In assessing modern claims to territory, the concept of intertemporal law is of vital importance.

1.1 INTERTEMPORAL LAW

One of the major characteristics of territorial disputes is that they generally relate to events that occurred in the past — sometimes only a few decades ago and sometimes literally centuries ago. The problem, of course, is how to judge, in 2009, something that happened in the 1800s. Do you apply today's "wisdom" to yesterday's actions? This is where the principle of intertemporal law comes into play.

The concept is based in the findings of Max Huber in the *Island of Palmas (United States v Netherlands)* case (1928) 2 RIAA 829.

Two principles emerge from this case:

- (1) You judge the case in terms of the law applicable at the time of acquisition of territory, not the law applicable when the dispute arises or must be settled.
- (2) A distinction must be made between the creation of rights and the existence of rights. The creation of a right is judged by the law at the time of its creation; the continued existence of a right is governed by evolving law.

In practical terms, this means that, under Huber's first principle, a dispute arising in 2009 over acquisition of territory in 1825 must be governed by the law as it stood in 1825. Bearing this in mind, do you see anything illogical in his second principle? I hope so. In terms of his second principle, the first can be totally "wiped out", as it is generally the continued existence of the right which will be at issue before the court. Huber's second principle must therefore be applied with great circumspection if chaos is not to ensue.

1.2 UTI POSSIDETIS

This is a relatively simple principle, but which relates to intertemporal law. Briefly, it means that colonial boundaries, however arbitrary they may be, must be respected. The reason for the rule is purely practical. If all states were now able to question their boundaries, the world — and Africa in particular — would be plunged into chaos (or greater chaos).

Of course, this rule is not really "fair" and it conflicts with the right of peoples to self-determination. This was acknowledged in the *Frontier Dispute* case 1986 ICJ Rep 554 where, in a dispute between Mali and Burkina Faso, the court stated that *uti possidetis* "freezes the territorial title" and allows self-determination only within the borders defined by the former colonial powers.



Practical exercise 1

In international law, the concept of territory is inextricably linked to three, often contradictory, concepts: intertemporal law, *uti possidetis* and the right to self-determination.

Analyse these three concepts and discuss the statement above critically, indicating how the concepts interact and whether they can be reconciled. Use practical examples to illustrate your arguments.



Practical exercise 2

As Anyangwe indicates in "African border disputes and their settlement by international adjudication", African states are no strangers to border disputes, despite their apparent acceptance of the principle of *uti possidetis*.

Using the prescribed article by Anyangwe, discuss this statement critically.

STUDY UNIT 2

TRADITIONAL METHODS OF ACQUISITION/LOSS

Traditionally, the acquisition of territory in international law is approached through a consideration of the five principal methods by which territory could be acquired in Roman law. These are set out in table form in the following diagram. This gives you only the key concepts; the rest you will find in Dugard. You also need to establish, for yourself, the validity of these various methods of acquisition in 21st century international law.

DIAGRAM Acquisition of territory

Cession	Annexation	Occupation	Prescription	Accretion
<p>1 Transfer of sovereignty from one state to another.</p> <p>2 Both must have animus (intention) to transfer and acquire.</p>	<p>Acquisition of sovereignty over territory of another by military conquest.</p> <p>1 Conqueror must have intention of acquiring sovereignty.</p> <p>2 Territory must be totally subjugated.</p>	<p>Acquisition of sovereignty by appropriation of territory belonging to no one.</p> <p>1 Must occupy territory.</p> <p>2 Animus.</p> <p>3 Land must be <i>terra nullius</i>.</p> <p>4 Occupier must exercise governmental functions.</p>	<p>Acquisition of sovereignty through continuous and undisturbed possession for a long period. Note that there is no specific period in international law.</p>	<p>State automatically owner of land added to its territory by natural accretion. Distinguish between <i>alluvio</i> and <i>avulsio</i>.</p>



Practical exercise 3

The central concept running through all forms of territorial acquisition is sovereignty. Map the different manifestations/expressions of sovereignty in each of the following methods of acquisition: occupation, annexation/conquest, cession, and prescription. Evaluate the viability of each in terms of international law in 2009.



Practical exercise 4

One of the seminal cases explaining the acquisition of territory through annexation/conquest is *Van Deventer v Hancke & Mossop* 1903 TS 401. Explain the circumstances leading to this case and the validity of the court's finding in terms of international law. (Where have you encountered this case before?)



Practical exercise 5

Define the concept *terra nullius* and explain its importance in early international law using examples drawn from South African history and cases to support your discussion.



Practical exercise 6

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory 2004 ICJ Rep 136 is the latest pronouncement on annexation by the International Court of Justice (ICJ). Explain Israel's actions as an example of annexation and evaluate the court's response.

STUDY UNIT 3

TERRITORIAL ACQUISITION IN SOUTH AFRICAN LAW

3.1 INTRODUCTION

Dugard does not deal with this aspect under a separate heading. There are, however, references throughout the work you have already studied. Consider these in the light of the framework below.

Although we feel that the Constitution of the Republic of South Africa 1996 has potentially changed matters considerably, until we know what the courts will do, you must still be able to discuss the nature of territorial acquisition in South African law, as well as the relevant case law applicable before the new Constitution came into operation.

Traditionally, the acquisition of territory in South African law has been regarded as an act of state. This means that it is a discretionary act of the executive in pursuance of its prerogative to conduct foreign affairs. Under the previous dispensation, and in accordance with English law principles which have traditionally constituted our "common law" as regards international law, whether or not to extend or restrict our territory, and the conditions under which this is done, were at the sole discretion of the executive.

The role of the courts in this regard was merely to determine the will (intention) of the executive and give effect to it. The courts could not apply public international law if this conflicted with the assumed (or stated) intention of the executive.

You will notice that this has all been written in the past tense! This is because the Constitution has the potential to change the position radically.

3.2 POSSIBLE CONSTITUTIONAL IMPLICATIONS FOR TERRITORIAL ACQUISITION/LOSS

As the acquisition of territory is based essentially on an executive act or prerogative, one must consider whether the prerogative powers have survived the new Constitution.

As the acquisition of territory is usually based on a treaty, the provisions in the Constitution governing the conclusion and international and municipal application of treaties must be considered.

Where the acquisition/loss of territory is based on a purely legislative measure, the question whether this measure may be tested by the courts must be considered.

The effect of section 2 of Act 108 of 1996 — which classifies the Constitution as the supreme law and makes all law or conduct that is inconsistent with the Constitution invalid — must be considered.

Where the acquisition/loss of territory affects human rights, the provisions of section 8(1) must be considered.

The effect of section 233 of Act 108 of 1996 must also be considered.

3.2.1 THE ACQUISITION OF TERRITORY AS A PREROGATIVE ACT

There is as yet no hard-and-fast answer to the question whether the prerogatives have survived the Constitution. One school argues that, as the Constitution has not expressly abolished the prerogatives, they continue to exist as part of the common law. There is no objection to this reasoning, provided that it is seen against the background of the Constitution as the supreme law of the land. This means that, where a prerogative conflicts with the Constitution, it must give way. On the other hand, some argue that the prerogatives have been incorporated into, and have been replaced by, the Constitution and no longer have a role to play in our law.

The truth probably lies somewhere between the two extremes. It is not always practical for the executive to be subject to the legislature in the conducting of foreign affairs. On the other hand, as our history has shown, the citizenry must be protected against an unfettered executive. What will probably happen 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.

3.2.2 ACQUISITION BASED ON TREATY

Here you must consider the requirements set by the Constitution for the conclusion of a valid treaty (see topic 6). In particular, attention should be paid to section 231, which sets out how a treaty acquires municipal application. As a treaty ceding territory is not necessarily “administrative”, “executive” or “technical”, its municipal application will be subject to the adoption of an Act of parliament. This Act will be justifiable before the courts.

3.2.3 WHERE ACQUISITION IS BASED ON LEGISLATION

Here the legislation will be subject to the normal testing powers of the courts with regard to its constitutionality or otherwise. The courts will consequently be doing considerably more than merely determining the will of the executive and applying it.

3.2.4 WHERE THE ACQUISITION/LOSS AFFECTS CHAPTER 2 RIGHTS

It is not particularly difficult to imagine a situation where the loss of territory will affect the rights of the inhabitants of the country. Most relevant here will be the right to property. In such a case, the courts will be compelled to consider the Act depriving the individual of his/her rights in the light of section 39 of the Constitution.

3.2.5 THE EFFECT OF SECTION 233

Perhaps the most persuasive argument can be made out under section 233 in terms of which all legislation (including legislation affecting a loss/acquisition of territory or incorporating a treaty providing for acquisition/loss) must be interpreted to accord with any possible international law interpretation. Not only may the court consider the substance of the act of state, but it must also test it against international law interpretations.

Be this as it may, at present it is all speculation and we will simply have to wait and see what the courts will do. It is therefore essential that you study the traditional approach which has applied to date.

3.3 TERRITORIAL ACQUISITION BEFORE ACT 108 OF 1996

The acquisition of territory is an act of state by the executive in the exercise of its prerogative to conduct foreign affairs (*Van Deventer v Hancke & Mossop* 1903 TS 401). In this regard, the executive exercises an absolute discretion.

What, then, is the role of the courts if problems arise around the act of acquisition? The court must first of all determine the will of the executive and, having done so, must give effect to it (*Post Office v Estuary Radio* 1967 3 All ER 663).

How do the courts determine the executive will? This is determined from statements made by the executive, from treaties concluded or from any other relevant circumstances (*In re Southern Rhodesia* 1919 AC 211). Where there is any doubt, the court should request a certificate from the Department of Foreign Affairs (called an executive certificate) and this will be binding on the court.

If the court is bound to apply its determination of the will of the executive or, still more restrictively, the provisions of the executive certificate, it stands to reason that the role of international law is severely limited (in fact, it is non-existent). The court cannot test the validity of the acquisition or loss against international law requirements.

An interesting question which arises is: What happens if territory is acquired subject to conditions? In a treaty, state A agrees to cede part of its territory to state B on condition that B pays adequate compensation to the inhabitants of the territory. Can the courts of state A enforce the compensation against state B?

Two questions arise:

- (1) Can the courts consider the conditions?
- (2) Can the courts enforce the conditions?

The answer to the first question is: Not only can they, but they must — but only to determine the will of the executive in extending its territory.

The answer to the second question is that they cannot — the conditions are part of an unincorporated treaty, which, as you will remember, is unenforceable before municipal courts. However, if (as suggested above) a violation of a fundamental right can be construed, the courts may well be compelled to consider and pronounce upon the conditions. Whether they will in fact be able to enforce them remains a moot point.



Practical exercise 7

In a formal cession agreement between states A and B, state A cedes part of its territory to state B subject to the condition that B will pay R10 000 per hectare to all those inhabitants of the territory who lose land as a result of the transfer. In a subsequent Act of parliament, however, state B incorporates the treaty of cession into its law, but undertakes to pay only R5 000 per hectare. To date it has paid nothing. X, whose land was expropriated, approaches the court, claiming R1 000 000 (for 100 hectares) from B in accordance with the formal undertaking in the agreement of cession.

Can the court enforce X's claim for R1 000 000?

Can the court order B to pay any amount?

Explain fully, showing the difference between the bases of the respective claims.

NOW: *Has the Constitution changed things in this regard?*

Hints:

- What are the requirements for cession? (Not really — just checking; this isn't part of the answer!)
- What is the cession agreement?
- Therefore the condition is part of what type of agreement?
- Can these agreements be enforced by a court?
- What must first be done?
- Has this been done?
- Why was the Act adopted?
- Can the court enforce the R5 000? Why?
- What effect does section 39 of the Constitution have on the situation?
- What effect does section 2 of the Constitution have on the situation?



Practical exercise 8

In the case of *Van Deventer v Hancke & Mossop* 1903 TS 401, the court stated the following:

In its dealings with other states the Crown acts for the whole nation, and such dealings cannot be questioned or set aside by its courts. They are acts of state into the validity or invalidity, the wisdom or unwisdom, of which domestic courts have no jurisdiction to inquire.

Examine critically the continued validity or otherwise of this statement in the light of the provisions of the new Constitution of the Republic of South Africa 1996.

Hints:

- What is the prerogative?
- Has it survived?
- Why?
- Why not?
- Section 2 of Act 108 of 1996/section 8(1) of Act 108 of 1996/section 233 of Act 108 of 1996/and so?

STUDY UNIT 4

ASSESSMENT

We have built the formative assessment exercises into the text in this topic.

The summative assessment (in other words, the exam!) will follow a similar format and will cover the work you have done in the summative exercises.

However, remember that our aim with section B is to empower you to work more independently and from a variety of sources, so we actually expect you to read the additional sources we refer you to and to show in your answers that you have mastered the ideas they embody.

TOPIC 2

IMMUNITY AS AN EXCEPTION TO JURISDICTION: STATE/ SOVEREIGN IMMUNITY

In this topic, we consider the following:

Study unit

- 1 Introduction
- 2 Sovereign or state immunity
 - 2.1 Development and theories
 - 2.2 The Foreign States Immunities Act 87 of 1981
 - 2.2.1 Waiver (s 3 of Act 87 of 1981)
 - 2.2.2 Commercial transactions (s 4 of Act 87 of 1981)
 - 2.2.3 Contracts of employment (s 5 of Act 87 of 1981)
- 3 Diplomatic and consular immunity
 - 3.1 Introduction
 - 3.2 Diplomatic immunity
 - 3.3 Consular immunity
- 4 Immunity, human rights and international crimes
 - 4.1 Introduction
 - 4.2 Head of state immunity
- 5 Assessment



Compulsory reading:

- Dugard 3 ed pp 238-265
- International Court of Justice case 2002: *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* 2002 ICJ Rep 3:
 - (a) Judgment
 - (b) Dissenting opinion of Judge ad hoc Van Den Wyngaert(The case is available at www.icj-cij.org under the 2002 case list.)
- Legislation:
 - SA Foreign States Immunities Act 87 of 1981
 - SA Diplomatic Immunities and Privileges Act 37 of 2001

STUDY UNIT 1

INTRODUCTION

You have studied topic 4, which deals with jurisdiction, and it is accepted, for this elective topic, that you understand jurisdiction well. This topic will give you an in-depth look at immunity from jurisdiction while we examine sovereign immunity and diplomatic immunity.

Immunity is one of the practical applications of international law which arises fairly frequently in the courts and which, with the increase in diplomatic missions in South Africa, can be expected to increase. Although a state may exercise jurisdiction over all events and people in its territory, there are certain cases where it chooses not to do so, for various (generally political) reasons.

Here you must draw an important distinction. Although it is often said that the state does not have jurisdiction over foreign sovereigns, this is not strictly true. The state does have jurisdiction and the foreign state is liable for its actions, BUT the state either chooses or formally agrees not to exercise its jurisdiction in certain circumstances. This "choice" may be based on reciprocity or comity between nations (in crude terms, you scratch my back and I'll scratch yours!), or may be more formally constituted in the form of legislation (eg the Foreign States Immunities Act, the Diplomatic Privileges Act, etc.).

STUDY UNIT 2

SOVEREIGN OR STATE IMMUNITY

2.1 DEVELOPMENT AND THEORIES

As the name suggests, sovereign immunity arose from the fact that the acts of the sovereign (king) of one state could not be questioned in the courts of another sovereign (king). When the king was "depersonalised", it came to mean that the acts of one state would not be challenged in the courts of another. The basis was originally found in sovereign equality and comity.

Just as the nature of immunity changed with the shift from sovereign (in the "kingly" sense) to state, so, too, state immunity shifted with the evolution of the role of the state within the international community. Today, sovereign immunity applies to the head of a foreign state, its government and its government departments. This shift is illustrated by two conflicting theories on which immunity was based:

- the theory of **absolute** sovereign immunity
- the theory of **restricted** sovereign immunity.

In terms of the absolute immunity theory, a state was immune from the courts of another state in respect of all acts it performed. Needless to say, as states became global commercial players, the absolute theory had the potential for complete havoc as far as the unfortunate individual who contracted under these terms was concerned. When it came to paying the bills, all the state had to do was claim immunity and the individual could go no further. Things had to change.

In response to this unrealistic state of affairs, the theory of restricted immunity was developed. In terms of the theory of restricted immunity, states remain immune as far as governmental public activities (*acta iure imperii*) are concerned, but are not immune when they perform commercial activities (*acta iure gestionis*).

Dugard argues that restricted immunity has probably acquired the status of customary international law with the adoption of the United Nations (UN) Convention on Jurisdictional Immunities of States and Their Property. The Preamble to the Convention states that the jurisdictional immunities of states and their property are generally accepted as a principle of "customary international law". This Convention approves restricted immunity in respect of commercial transactions.

The history of the two theories can be well traced through South African case law, which closely paralleled the English law development. This development in the courts was taken up by the legislature and the Foreign States Immunities Act 87 of 1981 was adopted to govern the immunity of states.

2.2 THE FOREIGN STATES IMMUNITIES ACT 87 OF 1981

Unfortunately, the ambit of the course does not allow an in-depth study of the entire Act. We have therefore decided to highlight the basic principle underlying the Act and then to "home in" on three practical situations covered by the Act.

The Act was adopted to regulate the circumstances in which a state will be able to raise immunity before a South African court. As is so often the case with legislation, the Act is negatively phrased. In other words, the Act starts from the premise that a foreign state is immune from the jurisdiction of a South African court (therefore has absolute immunity), except in instances specifically listed in the Act (restricted immunity).

A state will not be allowed to raise immunity before a South African court in a number of cases. We will now consider three of these cases.

2.2.1 WAIVER (s 3 of Act 87 of 1981)

A state will **not** be immune where it waives (relinquishes) its immunity. The waiver must be **express**. This can be affected in three ways:

- (1) In writing before the cause of action arises — for example a clause is inserted in a contract of sale in terms of which the state undertakes not to raise immunity in the case of problems arising from the contract. **(Remember this if you ever have to draw up a contract between an individual and a foreign state!)**
- (2) Expressly and in writing after the dispute has arisen.
- (3) Tacit waiver or waiver by implication is possible, but a strong degree of proof of the intention of the state will be required — for example the foreign state institutes the action.

An important point to remember when dealing with the waiver of immunity is that a waiver of immunity from trial **does not include** a waiver of immunity from enforcement of any judgment resulting from the court proceedings. This must be made separately **(something else to remember when drawing up contracts and waivers involving states!)**

2.2.2 COMMERCIAL TRANSACTIONS (s 4 of Act 87 of 1981)

This is the most important exception embodied in the Act. The first question arising is, of course, the following: What is a commercial transaction? Here the Act provides that a commercial transaction is:

- (1) any contract for the supply of services or goods
- (2) 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
- (3) 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.

Like most definitions, this one, too, raises as many questions as it answers! The obvious question is: What is meant by "otherwise than in the exercise of sovereign authority"? The exercise of sovereign authority is what we have classed above as *iure imperii*. There are two ways to determine whether an act represents an exercise of sovereign authority:

- (1) you can look at the purpose of the act
or
- (2) you can look at the nature of the transaction embodied in the act.

The general rule in the Foreign States Immunities Act (FSIA) is that one uses the **nature** of the act rather than its aim to determine whether or not it can be classified as *imperii* and therefore support a claim to immunity. However, the American case of *Victory Transport Inc v Comisaria General de Abastecimientos Y Transportes* 35 ILR 110 laid down certain acts which can be regarded as *imperii*:

- internal administrative acts
- legislative acts
- acts related to the armed forces
- acts related to diplomatic activity
- public loans.

2.2.3 CONTRACTS OF EMPLOYMENT (s 5 of Act 87 of 1981)

The last section we will examine in detail is that dealing with contracts of employment.

South African courts **will exercise jurisdiction** — the foreign state will **not** be immune where:

- the contract is concluded in South Africa, **and**
- the work must be completed entirely or in part in South Africa, **and**
- when the contract was concluded, the individual (including companies, etc.) involved was a South African citizen or was resident in South Africa, **and**
- when the action is instituted, the individual is not a national of the foreign state.

South African courts **will not exercise jurisdiction** — the foreign state **will** be immune where:

- the parties agree that their disputes will be heard by a foreign court, **or**
- the proceedings relate to the employment or activities of diplomatic, consular,

administrative, technical or service personnel of a foreign mission (either diplomatic or consular).

STUDY UNIT 3

DIPLOMATIC AND CONSULAR IMMUNITY

3.1 INTRODUCTION

Diplomats and consuls are state agents appointed to represent their states in foreign countries for specific purposes.

Diplomats, by and large, represent their state, protect the interests of their nationals, conduct negotiations between their government and the government of the host state, report on conditions in the host state and promote friendly relations.

Consuls, on the other hand, promote trade, protect nationals, issue passports and visas, etcetera. The functions of the two may overlap. There may, however, be only one embassy in a foreign state, but there may be a number of consulates.

In international law, the protection of diplomats and consuls is laid down in two treaties:

- (1) the Vienna Convention on Diplomatic Relations 1961
- (2) the Vienna Convention on Consular Relations 1963.

In South Africa, these matters are regulated by the Diplomatic Immunities and Privileges Act 37 of 2001 (DIPA), which came into effect on 28 February 2002. This Act repealed the Diplomatic Immunities and Privileges Act 74 of 1989. The Act gives effect to the two Vienna Conventions, which South Africa has acceded to. The Vienna Conventions are appended to the Act as schedule 1 and schedule 2 respectively. In addition, following parliamentary approval for accession to the Convention on the Privileges and Immunities of the United Nations 1946 and to the Convention on the Privileges and Immunities of the Specialised Agencies 1947 on 26 and 27 June 2001, South Africa deposited its instruments of accession to these conventions on 27 August 2001. Being a party to these conventions, South Africa took the necessary steps to give domestic legal effect to the provisions by incorporating them in the DIPA as schedules 3 and 4. (Remember what we said in topic 6 about the ways in which a treaty can be incorporated into our national law?)

3.2 DIPLOMATIC IMMUNITY

In terms of section 3(1) of the DIPA, the Vienna Convention on Diplomatic Relations 1961 applies to all diplomatic missions and members of such missions in the Republic.

The first question arising is: Why should diplomats and their embassies need immunity? If you look at the functions of an embassy mentioned above, you will soon realise that international chaos could erupt if the host state were able to have full access to, for example, assessments of its actions by the sending state's diplomatic personnel. It could also, in certain circumstances, be difficult for the embassy to fulfil

its protective function without immunity. The reason behind diplomatic immunity is therefore to enable the mission to perform its functions.

Diplomatic immunity is generally divided into two “legs”:

Diplomatic premises	Person of the diplomat
<ul style="list-style-type: none"> • May not be entered by host state without the permission of the ambassador. 	<ul style="list-style-type: none"> • A diplomat may not be arrested or detained (it’s a criminal offence to do so!).
<ul style="list-style-type: none"> • Premises, furniture, property, cars, etc., may not be searched, requisitioned, attached or sold in execution. 	<ul style="list-style-type: none"> • He/she is absolutely immune from criminal jurisdiction.
<ul style="list-style-type: none"> • Embassy archives, correspondence, post bags, etc., may not be opened, searched, detained. 	<ul style="list-style-type: none"> • He/she is immune from civil jurisdiction unless: real action for immovable property held in personal capacity; matters of succession in private capacity; professional or commercial activities outside of official functions.
<ul style="list-style-type: none"> • NB: Diplomatic premises remain part of the host state’s territory — they are not part of the sending state (despite what you may read in the media!). 	<ul style="list-style-type: none"> • This immunity extends to the diplomat’s family.

The technical and administrative staff of an embassy (in other words, not the ambassador and other diplomats) also enjoy immunity, but not to the same extent. Their immunity covers only civil or administrative liability arising from official acts performed in the course of their duties.

As with sovereign immunity, diplomatic immunity can also be waived subject to the same requirements set out above.

3.3 CONSULAR IMMUNITY

In terms of section 3(2) of the DIPA, the Vienna Convention on Consular Relations 1963 applies to all consular posts and members of such posts in the Republic.

The reasoning behind consular immunity is the same as that behind diplomatic immunity. However, because a consulate has less status than an embassy, the extent of its immunity is reduced accordingly. Again, one finds the distinction between consular premises and the person of the consul, his/her family and consular staff.

- **Consular premises** enjoy the same immunities as those (listed above) enjoyed by embassies.

- **Person of the consul** — a consul, his/her family and staff
 - may be arrested for “grave crimes” (not defined!)
 - are immune only as far as “acts performed in the exercise of consular functions” are concerned.

STUDY UNIT 4

IMMUNITY, HUMAN RIGHTS AND INTERNATIONAL CRIMES

4.1 INTRODUCTION

You now have a solid knowledge of foreign-state immunity and of diplomatic and consular immunity.

We now come to a more complex and recent development regarding immunity. In topic 3, you were introduced to the individual in international law and to the development of human rights. International criminal law also has a role to play here. Human rights violations clash with the doctrine of immunity. Just as immunity has to give way to commercial concerns, so international developments indicate that human rights violations and criminal law are eating away at the foundations of immunity.

Both criminal and civil proceedings are discussed by Dugard, but we are going to focus only on criminal proceedings. What happens when a warrant of arrest is issued by a foreign state in respect of an incumbent head of state (or senior government official such as a Minister of Foreign Affairs)? What happens if that head of state is a former head of state? Can the head of state/or former head of state be arrested in a foreign state with the aim of bringing him to trial in a third state?

The founding documents of international courts (such as the Rome Statute) make it clear that no immunity attaches to heads of state or government, or to senior government officials. The principle of non-immunity for international crimes applies equally to incumbent heads of state and former heads of state.

However, on the national level, things aren't as simple as they should be. Although the ideal would be for national courts to apply a rule of non-immunity as well, it doesn't always work out that way — the International Court of Justice (ICJ) in the **Arrest Warrant** case held that customary international law still recognises immunity in respect of international crimes for senior government officials before national courts.

4.2 HEAD OF STATE IMMUNITY

At this point of the proceedings, we are going to look at **head of state immunity** in terms of foreign and international law, and then under South African law.

A distinction is drawn between immunity *ratione personae* (immunity that attaches to the person because of his/her status or office) and immunity *ratione materiae* (immunity that relates to acts performed in an official capacity). Immunity *ratione personae* attaches to senior state officials while they are still in office. Immunity *ratione materiae* attaches to official acts and can be invoked by both serving and former officials in respect of acts performed while they were in office.

The following foreign cases illustrate recent state practice:

- *R v Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte (No 3)* 1999 2 All ER 97 (HL) — the *Pinochet* case

Pinochet, a former Chilean head of state, was arrested, while on a visit to Britain, in terms of an extradition request by Spain. He claimed that he enjoyed absolute immunity from the extradition proceedings. The House of Lords found that a serving head of state was entitled to absolute immunity, but that a former head of state was entitled to immunity only for acts performed in the “exercise of his functions as head of state”. Where the acts complained of (here mass torture and human rights violations) were not acts which fell within the office of a head of state, he no longer enjoyed immunity.

- The *Ghaddafi case: Cour de Cassation* 13.3.2001 (2001) 12 *European Journal of International Law* 595

A complaint was filed in the French *Cour de Cassation* against Ghaddafi, the Libyan leader. It was claimed that the Libyan government was involved in the bombing of a UTA aircraft in September 1989 which caused the death of 156 passengers and 15 crew members, including French citizens. The complaint was filed by an NGO (non-governmental organisation) and some relatives of the victims. However, the French prosecutor filed a motion for the annulment of the proceedings on the basis of the principle of the immunity of heads of state. The court in this instance accepted the plea of immunity and declined jurisdiction.

With growing international pressure for heads of state to be liable for their actions, the recent resolution, “The Immunities from Jurisdiction and Execution of Heads of State and Heads of Government in International Law”, adopted by the Institute of International Law is interesting. At the moment, the provisions of the resolution comprise a source of non-binding “soft law” (remember topic 2?). The resolution, which claims to be based on present state practice, aims at ensuring that the head of state can exercise functions and responsibilities in an effective manner. The immunities are restricted to the minimum. The head of state remains subject to private law that protects creditors and other individuals. It also provides that the head of state has no immunity regarding the misappropriation of his/her own state’s assets. Other states are also placed under an obligation to assist with the restitution of such assets to the state to which they belong.

The main provisions of the resolution are the following:

- For the period during which they are in office, heads of state or government enjoy personal inviolability and absolute immunity from criminal jurisdiction.
- A former head of state or government enjoys inviolability or immunity solely in respect of acts which are performed in the exercise of official functions (*ratione materiae*).
- It is expressly stated that he/she may be prosecuted for:
 - acts constituting a crime under international law, or
 - misappropriation of the state’s assets or resources.

This resolution is still regarded as soft law and has not yet achieved customary international law status.

In **South African legislation**, section 4(1) of the DIPA provides that a **head of state** is immune from the criminal and civil jurisdiction of the courts of the Republic and enjoys such privileges as:

- (a) heads of state enjoy in accordance with the rules of customary international law;

- (b) are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state; or
- (c) may be conferred on such a head of state by virtue of section 7(2).

Secondly, in section 4(2), a special envoy or representative from another state, government or organisation is immune from the criminal and civil jurisdiction of the courts of the Republic and enjoys such privileges as:

- (a) a special envoy or representative enjoys in accordance with the rules of customary international law;
- (b) are provided for in any agreement entered into with a state, government or organisation whereby immunities and privileges are conferred upon such special envoy or representative; or
- (c) may be conferred on him or her by virtue of section 7(2).

Seems simple, doesn't it? But wait — things are never as simple as they seem. South Africa, when it incorporated the Implementation of the Rome Statute of the International Criminal Court of 2002 in section 4, provided that:

Despite any other law to the contrary, including customary and conventional international law, the fact that a person —

- (a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official:

...

is neither —

- (i) a defence to a crime; nor
- (ii) a ground for a possible reduction of sentence once a person has been convicted of a crime.

Dugard states that this would seem to mean that a head of state or government will not be able to plead immunity in respect of the crimes recognised by the Rome Statute.

In addition, the terms of the DIPA clearly state that heads of state enjoy immunity from civil and criminal jurisdiction in accordance with the rules of customary international law. Should these rules change (eg if the resolution that we discussed earlier changes from soft law to customary law), then we could possibly see the acceptance of restrictive rules of immunity and the defence of human rights winning the day.

STUDY UNIT 5

ASSESSMENT

What you need to know/to be able to do:

Make sure that you study this topic in detail and do not confuse state/sovereign immunity and diplomatic/consular immunity.

Concepts:

absolute immunity
restricted immunity
sovereign immunity
actus iuris gestionis
actus iure imperii
diplomatic immunity
head of state immunity
Vienna Conventions – be able to apply the provisions.



Practical exercise 1

In *Liebowitz v Schwartz* 1974 2 SA 661 (T), the court recognised two bases for the immunity of states. Discuss these in detail.



Practical exercise 2

Write a legal opinion, using case law, showing how the restricted approach to sovereign immunity came to be accepted in South African courts. (All the cases that you need for this exercise are in Dugard.)



Practical exercise 3

X, a South African painting contractor, enters into a contract with the Zimbabwean government to paint the Zimbabwean embassy in Pretoria. He completes the job satisfactorily. When he claims payment in terms of the contract, Zimbabwe, which is experiencing a "cash flow" problem at the time, refuses to pay. When X sues Zimbabwe for payment, Zimbabwe claims immunity, as the contract is an act performed by the state and therefore not justifiable by a South African municipal court. Using these facts, explain what the outcome of the case would be if (1) the absolute immunity theory is applied, and (2) the restricted immunity theory is applied.



Practical exercise 4

Using case law, analyse the practical problems with, first, acts related to the armed forces and diplomatic activity, and, secondly, with the concepts of acts *iure imperii* and *iure gestionis*.



Practical exercise 5

Contrast the approach of the majority decision of the ICJ in the *Arrest Warrant* case with that of the minority decision by ad hoc Judge Van Den Wyngaert.

TOPIC 3

HUMANITARIAN LAW

In this topic, we will consider the following:

Study unit

- 1 Introduction
- 2 Brief historical background
- 3 The law of The Hague
- 4 The law of Geneva
- 5 Nuclear weapons
- 6 Humanitarian intervention
- 7 Assessment



Compulsory reading material:

- Dugard 3 ed chapter 24 "Humanitarian Law" pp 526-545
- The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)
- The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)
- The Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)
- The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)
- Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)
- 1977 Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

The four Geneva Conventions, as well as the two additional protocols, are available at www.icrc.org

- *Prosecutor v Tadi (Jurisdiction)*, case number IT-94-1-AR 72 (1996) 35 ILM 32

Also available at www.icty.org

- *Legality of the Threat of Use of Nuclear Weapons* 1996 ICJ Reports 257

Also available at www.icj-cij.org

- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 ICJ Reports 136

Also available at: www.icj-cij.org



Additional reading material:

Should you wish to acquire more knowledge of, and insight into, the topics discussed in this topic, you may consult the other sources used in the compilation of this topic:

- Slomanson WR (2007) *Fundamental perspectives on international law* pp 497-522
- Barrie GN "Forcible intervention and international law: legal theories and realities" 1999 (4) *South African Law Journal* pp 791-809
- Kalshoven F (2001) *Constraints on the waging of war* (Geneva: International Committee of the Red Cross) pp 10-18
- Shaw MN (2003) *International law* 5 ed (Cambridge: Cambridge University Press) pp 1054-1081
- Stemmet A "From rights to responsibilities: the international community's responsibility to protect vulnerable populations" 2003 (12) *African Security Review* pp 117-123

STUDY UNIT 1

INTRODUCTION

International humanitarian law seeks to moderate the conduct of armed conflict and the suffering it causes. It extends protection to both the combatants and the people not involved in the armed conflict.

It is important that, at this early stage, you distinguish between *ius ad bellum* (the law governing the right to go to war or the use of force by states, which has been discussed elsewhere) and the *ius in bello*. The latter branch of international law governs the conduct of hostilities during armed conflict. Here, we find rules such as those concerning the treatment of civilians, the treatment of prisoners of war, and the treatment of the sick and the wounded. We will also deal with the various forms of prohibited warfare.

Broadly, humanitarian law may be divided into:

- the “law of The Hague”, which regulates primarily the carrying out of military operations so that the latter are conducted in a humanitarian manner
- the “law of Geneva”, which focuses on the protection of the victims of armed conflicts.

These two branches will be discussed separately below. You must, however, remember that both branches of humanitarian law come into play in cases of armed conflict. Therefore, they cannot be studied in isolation. As the International Court of Justice (ICJ) remarked in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the two branches are so closely interrelated that they are considered to have formed a single, complex system.

Before we begin, there are two issues which must be clarified.

First, you must know what “armed conflict” means. The International Criminal Tribunal for Former Yugoslavia stated in the *Tadic* case that armed conflict exists when:

- armed force is used between states, or
- such force is used between governmental authorities and organised armed groups, or
- organised armed groups within a state resort to armed force.

Humanitarian law applies to both international and internal conflicts, even though this was not always the case.

Secondly, you must always keep in mind a **fundamental** rule in humanitarian law, namely the basic **distinction** drawn by humanitarian law between combatants and civilians.

Combatants are:

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

Civilians may not be targeted during armed conflict. The belligerents must distinguish between military targets and civilian targets and must aim at the former. Furthermore, the principle of proportionality requires that, when an attack is likely to cause civilian

casualties or damage which is not proportionate to the expected military advantage, even military objects may not be attacked.

Civilians may not engage in armed conflict. If they do, they are liable to be criminally punished.

Combatants are obliged to distinguish themselves from the civilian population if they want to retain the status of combatants. They must carry their arms openly during military engagement.

The above rules now form part of the “law of Geneva”, to which we will return later.

STUDY UNIT 2

BRIEF HISTORICAL BACKGROUND

History is unfortunately abundant with examples of cruelty committed during armed conflict: the slaughter of enemy prisoners, rape, torture, pillaging of towns — the shameful list of atrocities is endless. At the dawn of the birth of modern international law — the Peace of Westphalia in the 17th century — the concept of “just war” was already ingrained in the international legal order. The corollary of this concept was that if one were justified in going to war with one’s enemies, then the latter had been unjust and were therefore not entitled to humane treatment. Fortunately, however, the collective human conscience would not continue to tolerate wartime atrocities indefinitely — at least in principle.

As to what exactly the watershed moment was that spearheaded the development of humanitarian law is open to argument and will perhaps always be a point of contention. However, a few such moments may be mentioned:

The American Civil War took place from 1861 to 1865. In 1863, the US President (on the side of the North) promulgated what was termed the Lieber Code, also known as Instructions for the Government of Armies of the United States in the Field. The Code contained rules on land warfare relating to the conduct of hostilities, the treatment of prisoners of war, the treatment of the civilian population in time of war, and the treatment of the wounded. The Code was designed for, and was applied to, an internal conflict, but nevertheless served as a model for later 19th century attempts by the international community to codify the law pertaining to the laws and customs of war.

In the meantime, the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was adopted in 1864. This development followed as a result of the pioneering work of Henry Dunant. The young Swiss banker was appalled by the brutality of the battle of Solferino and the fact that thousands of combatants had died due to a lack of medical attention. Dunant’s work also prompted the creation of the International Committee of the Red Cross. This is a non-governmental organisation which, to this day, provides relief to victims of armed conflict.

In 1868, in St Petersburg, the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grams Weight came into being. The Declaration aimed at ousting a particular projectile that caused graver wounds and suffering to its victims than an ordinary rifle bullet.

The Lieber Code of 1863 had a strong influence on the Declaration of Brussels

drafted at the international conference held there in 1874. The Declaration did not acquire binding force, but was a stepping stone on the road towards the codification of the laws and customs of war on land.

Another initiative of the Russian government resulted in the First Hague Peace Conference of 1899. The participants at this conference wanted to create conditions which would forestall future wars. Not all the aspirations of the delegates were realised (eg the idea that it should be compulsory for states to submit their disputes to international arbitration did not eventuate). However, the Conference did see the adoption of the Convention with Respect to the Laws and Customs of War on Land and its annexed Regulations. Its text was, as you have already guessed, inspired by the Lieber Code, the Declaration of Brussels of 1874 and the St Petersburg Declaration of 1868. This was the first successful attempt by the international community to codify the comprehensive rules of warfare.

The year 1899, the year in which the First Hague Peace Conference was held, was another watershed moment — it was the year in which Frederick de Martens (the Russian minister and international law scholar) drafted the famous “De Martens” clause, which provided that:

Until a more comprehensive code of rules of war is prepared ... the people and belligerent parties are under the protection of principles of the law of nations stemming from the customs adopted by the civilized peoples, from the rights of humanity and public conscience.

This clause would later be incorporated in the Geneva Conventions of 1949 (discussed below). The Final Act of the First Hague Peace Conference of 1899 proposed that a subsequent conference be held to discuss matters on which no agreement had been reached.

Forty-four states attended the conference held in 1907. They were unable to reach a general agreement on arms limitation, but, nevertheless, 13 conventions were adopted at the conference. The one that is most relevant for our purposes (1907 Hague Convention IV) is discussed below. This convention is the “heir” of the 1899 Convention. The International Military Tribunal at Nuremberg in 1946 recognised the 1907 Hague Convention IV as “declaratory of customary international law”.

A third Hague peace conference, as proposed in the Final Act of the Second Hague Peace Conference, was never held, mainly as a result of the outbreak of World War I. At the end of World War I, the League of Nations was established with a view to maintaining international peace. The focus was therefore not on the rules of warfare, but on attaining peace. Nevertheless, the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, deserves to be mentioned. The road to its drafting had already been paved by the 1899 Hague Regulations, which had prohibited the use of poison or poisoned weapons. World War I, however, had seen the use of other means of chemical warfare (such as chlorine and mustard gas) and the international community thus realised the pressing need for regulation in this regard.

The 1949 Geneva Conventions, created after the suffering and atrocities of World War II, have their roots in the 1907 Hague Regulations and the 1929 Geneva Conventions (dealing with the protection of prisoners of war, the wounded and the sick). These conventions were supplemented by two Additional Protocols of 1977.

In 1954, the United Nations Educational, Scientific and Cultural Organization (UNESCO) held a conference at which The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was adopted.

Other international instruments applicable to the field of humanitarian law include the following:

- 1972 Convention Prohibiting the Production and Stockpiling of Bacteriological Weapons
- 1980 Geneva Convention on the Prohibition or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects
- 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction
- 1997 Ottawa Convention on the Prohibition of the Use, Production and Transfer of Anti-Personnel Landmines and on Their Destruction

STUDY UNIT 3

THE LAW OF THE HAGUE

As you already know, this branch of humanitarian law deals with the conduct of military operations. More specifically, it deals with the rights and duties of belligerents (the term is defined below) and their choice of weapon. A balance must be struck between the demands of military necessity and the need to minimise human suffering.

The Hague Regulations (Regulations Respecting the Laws and Customs of War on Land) are annexed to the Fourth Convention for Respecting the Laws and Customs of War on Land (1907 Hague Convention IV) and are now accepted as part of customary international law. In terms of article 1 of this convention, the instructions issued by a state party to its armed forces must conform to the Hague Regulations.

The Hague Regulations are divided into three sections:

- Section I: "On Belligerents"
- Section II: "Hostilities"
- Section III: "Military Authority over the Territory of the Hostile State"

Let us take a more in-depth look at the content of the Hague Regulations.

You may struggle to find the text of the Hague Regulations (although you are encouraged to and will be commended for doing research to this end). Therefore, the summary provided below is relatively detailed and will be sufficient (in conjunction with the other prescribed materials) for examination purposes.

Section 1: Belligerents

Chapter I describes the term "belligerents" as including not only armies, but also militia and volunteer corps fulfilling the following conditions:

- They are commanded by a person responsible for his subordinates.
- They have a fixed, distinct emblem recognisable at a distance.
- They carry arms openly.
- They conduct their operations in accordance with the laws and customs of war.

The inhabitants of a territory not under occupation who, on the approach of the enemy, spontaneously take up arms to resist the invading troops, without having time to organise themselves so as to meet the above requirements, are regarded as belligerents, provided that they carry arms openly and respect the laws and customs of war.

The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.

Chapter II of the Hague Regulations deals with prisoners of war and, amongst other things, provides as follows:

- Prisoners of war are in the power of the hostile government and not of the individuals (or corps) who capture them.
- They must be treated humanely.
- With respect to board, lodging and clothing, prisoners of war must be treated on the same footing as the troops of the government that captured them, unless the belligerents have otherwise agreed.
- Disciplinary action may be taken against them in the case of insubordination.
- Individuals who follow an army without belonging to it (newspaper correspondents, reporters, contractors) and fall into the enemy's hands are entitled to be treated as prisoners of war, provided that they are in possession of a certificate from the military authorities of the army which they were following.
- Relief societies for prisoners of war may be admitted to the places of internment.
- Prisoners of war enjoy complete liberty in the exercise of their religion, on condition that they comply with the measures of order and police issued by the military authorities.
- After the conclusion of peace, repatriation of prisoners of war must be carried out as quickly as possible.

Chapter III states that the obligations of belligerents with respect to the sick and the wounded are governed by the Geneva Convention (ie, the 1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, which replaced the 1864 Geneva Convention).

Section 2: Hostilities

Chapter I deals with the means of injuring the enemy and with sieges and bombardments. This chapter **limits** the right of belligerents in the adoption of means of injuring the enemy. (This principle was later reaffirmed in Resolution XXVII of the 20th International Conference of the Red Cross in Vienna in 1965 and in UN GA Res 2444.) The following are prohibited:

- Employment of poisoned or poisonous gases.
- The treacherous wounding or killing of individuals belonging to the hostile nation or army. Treacherous mode of acting may include the improper use of a flag of truce, or the national flag/military insignia of the enemy, or the improper use of the distinctive badges of the Geneva Convention (armlet with a red cross or a red crescent).
- The killing or wounding of an enemy who has surrendered voluntarily after he has laid down his arms or has no means of defence. (This rule may be interpreted as including the Geneva Convention's prohibition on the killing of prisoners of war and bridges the gap between the moment a person lays down his arms and the moment he is effectively taken prisoner.)

- The employment of arms, projectiles or materials which have been designed to cause unnecessary suffering.
- The destruction and seizure of the enemy's property, unless this is demanded by the necessities of war.
- Attacks on, or bombardment of, **undefended** towns and villages. Where bombardments are to take place, officers in command of the attacking force must warn the authorities that their forces will commence bombardments, except in cases of assault. Necessary steps must be taken to spare (during bombardments) historical monuments, hospitals, places of worship, etcetera, provided that they are not used for military purposes.
- Pillages of towns or places are prohibited in all circumstances.

Chapter III deals with flags of truce. According to this chapter, persons who have been authorised by one of the belligerents to enter into communications with the other and who bear a white flag (eg a trumpeter, drummer or flag bearer and accompanying interpreter) must not be violated.

In terms of Chapter IV, capitulations must take into account the rules of military honour.

Chapter V governs armistices. An armistice suspends military operations. A general armistice suspends the military operations of belligerent states everywhere. A local armistice suspends them as between fractions of the belligerent armies and within a fixed radius. If operations are to be resumed (eg where the duration of the armistice is not specified), the enemy must be warned. Armistices must be communicated officially to the competent authorities and the troops. If the armistice is violated, hostilities will resume. If the armistice is violated by private persons acting on their own initiative, the injured party will be entitled to demand punishment of the offender (and perhaps compensation), but hostilities will not resume.

Section 3: Military authority over the territory of the hostile state

A territory is considered occupied when it is actually placed under the authority of the hostile army. The occupier must take all the measures in his power to restore and ensure, as far as possible, that there is public order and safety. It must respect the laws in force in the country. The occupying power is **not allowed to**:

- Force the inhabitants of the occupied territory to furnish information about the army of the other belligerent, or about its means of defence.
- Compel the inhabitants of the occupied territory to swear allegiance to the hostile power.
- Violate the inhabitants' family honour and rights, or their lives. Their religious convictions and practice must be respected.
- Commit acts of pillage.
- Inflict penalties upon the population for the acts of individuals for which it cannot be regarded as responsible.
- Demand requisition in kind and services from municipalities or inhabitants, except for the needs of the army of occupation. Such requisition must, however, be in proportion to the resources of the country.
- Take private property without making compensation at the end of hostilities. (Institutions dedicated to religion, charity and education must be treated as private property.)
- Seize or destroy historic monuments, or works of art and science.

STUDY UNIT 4

THE LAW OF GENEVA

The law of Geneva protects combatants who are no longer engaged in conflict, as well as civilians who are not taking part in hostilities. There are four Geneva Conventions (1949), as well as two Additional Protocols (1977) that are optional. These are listed below. Many of the principles contained in them may be traced back to the law of The Hague. (Remember, you cannot completely disentangle the two branches.)

You must always bear in mind the fundamental principles of humanitarian law, which we mentioned at the start of this topic and which must be complied with during the conduct of hostilities: the principles of distinction (between civilians and combatants) and the principle of proportionality. Naturally, they are also codified in the law of Geneva. For example, article 48 of Additional Protocol I provides:

[T]he parties to the conflict shall at all times distinguish between the civilian population and the combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Article 52(2) of the same Protocol stipulates:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and those whose total and partial destruction, capture or neutralisation, in the circumstances ruling at the times, offer a definite military advantage.

We have emphasised time and again that humanitarian law aims to protect and guarantee the humane treatment of people who are not taking part in the hostilities — civilians, captured soldiers, the wounded — and who are in a vulnerable position during times of armed conflict. The Geneva Conventions and Protocols provide for the protection of these different “categories” of vulnerable people. We will therefore have a look at the gist of the law of Geneva.

Please note that you are required to read the four Geneva Conventions and the two Additional Protocols and to summarise their provisions yourselves. The information below is merely an overview and is not sufficient for examination purposes.

The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) sets out the protection afforded to members of armed forces who have fallen sick or have been wounded.

The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) deals with the protection given to the wounded, sick and shipwrecked members of naval forces.

The Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) contains the rights granted to all prisoners of war. You will also find many of these rights in the Hague Regulations. Most importantly:

- Prisoners of war are held solely to prevent them from rejoining the army of the enemy.
- They must be treated humanely.
- They must be repatriated at the cessation of hostilities.

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) is concerned with the protection of the civilian population during wartime. Civilians:

- May not be tortured or subjected to other forms of cruel and inhumane punishment.
- May not be subjected to intimidation, collective punishment, hostage-taking or reprisals.
- May not have their property destroyed, unless such destruction has been necessitated by military operations.
- May not be deported to the territory of the occupying power.
- Must have their person and religious freedom respected.
- Must, if wounded or sick, be the object of particular protection and respect.

Common article 3 to all four conventions applies to cases of **any** armed conflict **not of international character**. It provides that each party accept that persons who do not take part in hostilities must be treated humanely and must not be subjected to discrimination. In addition to the prohibitions on the torture, hostage-taking and violation of the dignity of such persons, due process rights are guaranteed in the passing of sentences and carrying out of executions. Remember this article, as we will revisit it shortly.

The Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) affords protection to those who have become victims in wars against racist regimes and in wars of self-determination. National liberation movements are required to deposit a declaration with the Swiss Federal Council accepting the obligations of the law of Geneva.

This protocol also provides that combatants are obliged to distinguish themselves from the civilian population while engaging in an attack or preparing for it. At the very least, they must carry their arms openly if they wish to retain their combatant status. If the status of a person is unclear, he must be treated as a prisoner of war (and therefore protected under the Third Geneva Convention) until his status has been determined by a competent tribunal.

The Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) extends protection to victims of **internal conflicts**.

At this point, it must be mentioned that common article 2 of the Geneva Conventions rendered the law of Geneva applicable to states engaged in armed conflict as between themselves, that is, to **international armed conflicts**. Protocol II applies to **internal** conflicts. The requirement is that these armed conflicts must take place within a state where:

- there is an **armed opposition** and this opposition is **in control of territory**, and
- the opposition is thus empowered to conduct **continuous** and **sustained** military operations.

Protocol II supplements common article 3 mentioned above and also restricts it. Why? Because:

- Protocol II applies only if a state has chosen to become a party to it.
- It does not apply to **sporadic**, internal disturbances and riots (whereas you will

remember that common article 3 applies to any **armed conflict of non-international** character, without the additional qualification of control of territory by the dissidents).

Grave breaches of the Geneva Conventions are deemed to be war crimes. Nazi officials who took part in the atrocities of World War II were prosecuted after the war ended.

The field of international criminal law has developed from the prosecution of war criminals during the Nuremberg trials (for crimes committed during international armed conflict) to the creation of the ad hoc International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. The latter saw the prosecution of those who had committed acts of genocide and crimes against humanity during an internal armed conflict. The International Criminal Court situated in The Hague was established in 2002. It has jurisdiction to try the most serious crimes of concern to the international community as a whole, namely genocide, crimes against humanity and war crimes. The emerging body of international criminal law is a fascinating topic, but falls outside the scope of this topic.

STUDY UNIT 5

NUCLEAR WEAPONS

In 1993, South Africa adopted the Non-proliferation of Weapons of Mass Destruction Act, by virtue of which the government is committed to take steps to prevent the proliferation of weapons of mass destruction and to prohibit all nuclear explosions and tests. This is the position in South Africa, but not all states share in this goal. (Perhaps Iran, Pakistan and North Korea would be apt examples, but you are, of course, free to disagree.)

What is the position in international law on the question of nuclear weapons and their use? You will remember that there is a general prohibition on weapons which cause unnecessary suffering. However, the extent of the ban on nuclear weapons is not always clear. A number of related treaties exist, for example:

- 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons on the Sea Bed and the Ocean Floor and the Sub-Soil Thereof
- 1997 Treaty of Pelindaba (African Nuclear-Weapon-Free Zone Treaty).

In 1996, in the ICJ advisory opinion on *The Legality of the Threat or Use of Nuclear Weapons*, the ICJ stated:

- Threat/use of nuclear weapons is neither specifically authorised nor universally prohibited in international law (be it treaty or custom).
- Threat or use of force by means of nuclear weapons which is contrary to article 2(4) of the United Nations (UN) Charter and does not meet all the requirements of article 51 is unlawful.
- Threat or use of nuclear weapons should be compatible with the requirements of international law applicable to armed conflict and other related treaty obligations.
- In general, the threat or use of nuclear weapons is contrary to the rules of international law, especially humanitarian law, but it cannot be decided with absolute certainty whether such use would be lawful in extreme circumstances of self-defence, where survival of the state is at stake.

- There is an obligation on states to pursue and conclude negotiations leading to nuclear disarmament in all internationally regulated aspects.

STUDY UNIT 6

HUMANITARIAN INTERVENTION

This section might seem better suited to a discussion on the use of force in international law, but one should not compartmentalise law in general and international law in particular. So, let us have a brief look at the ongoing debate surrounding the dubious right to, or arguable need for, humanitarian intervention.

It is uncertain whether forcible intervention by a state can be justified on humanitarian grounds. You should know by now that article 2(4) of the UN Charter prohibits the threat or use of force against the territorial integrity or political independence of any state. Furthermore, article 2(7) prohibits intervention in a state's essentially domestic matters. In general, force may be resorted to only if:

- there has been prior authorisation by the Security Council (SC) acting under Chapter VII of the UN Charter (after it has confirmed the existence of a threat to the peace, breach of the peace or an act of aggression), or
- a state acts in self-defence **within the meaning** of, and the **requirements** laid down by, article 51 of the UN Charter.

Some academics have suggested that humanitarian intervention is an exception to the rule of non-intervention. This statement must, however, be qualified.

Humanitarian intervention by individual states has been abused in the past and is of dubious legality. However, according to Barrie, when it is conducted by states **collectively**, it is acceptable as being a basic rule of organised society. There is emerging opinion and practice to the effect that, when a state breaches the fundamental human rights of its nationals and thus shocks the conscience of humankind, humanitarian intervention may be justified.

Stemmet is another author who has discussed the various viewpoints that have developed around the debate on the justification (or not) of humanitarian intervention. He points out that some scholars follow the approach defending the traditional position, namely that human rights developments have not had sufficient influence on the importance and interpretation of article 2(4) of the UN Charter so as to render humanitarian intervention legal in the eyes of international law. Other academics justify such intervention on moral rather than legal grounds: intervention is allowed only in occasional, extreme cases of human suffering.

Below is a summary of the requirements (as enumerated by Stemmet), all of which must be fulfilled before humanitarian intervention can take place lawfully:

- (1) **Gross human rights violations** (amounting to crimes against humanity) are being committed by the state's central authorities themselves, or with their support; alternatively, the authorities are too weak to prevent the commission of such acts.
- (2) The Security Council (SC) is **unable** to take coercive action because of the exercise of veto powers.
- (3) States **collectively** decide, with the support of the majority of UN member states, to attempt to put an end to the atrocities being committed.
- (4) The force is used **only** to stop the atrocities and restore respect for human rights.

The 1999 NATO (North Atlantic Treaty Organization) bombing of Kosovo was said to have been conducted for humanitarian reasons. The 2000 Kosovo Report prepared by the Independent International Commission on Kosovo stated the following:

[T]he NATO campaign was illegal, yet legitimate. Such a conclusion is related to the controversial idea that a “right” of humanitarian intervention is not consistent with the UN Charter if conceived as a legal text, but it may, depending on the context, nevertheless reflect the spirit of the Charter as it relates to the overall protection of people against abuse.

Notably, the 2001 Report of the International Commission on Intervention and State Sovereignty recognises that the primary responsibility for the protection of its people lies with the state itself. However, where the population is seriously harmed during internal war, insurgency, repression or state failure and that state is unwilling, or unable, to stop or prevent such a harm, then “the principle of non-intervention yields to the international responsibility to protect”.

STUDY UNIT 7

ASSESSMENT



Practical exercise 1

Read the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 ICJ Reports 136 and explain why the court rejected Israel's claim that the Fourth Geneva Convention was inapplicable to the territories of the West Bank and Gaza.



Practical exercise 2

Read the case of *Prosecutor v Tadic (Jurisdiction)*, case number IT-94-1-AR 72 (1996) 35 ILM 32, and summarise the judgment, focusing on the issue whether, and to what extent, humanitarian law applies to both internal and international armed conflict.



Practical exercise 3

The United States has refused to treat Taliban combatants captured in Afghanistan (and detained in Guantanamo Bay) as prisoners of war. Would this be in line with the principles of humanitarian law? Explain why/ why not. Would your answer differ if you had to apply those principles to the same attitude adopted by the United States towards members of Al Qaeda?



Practical exercise 4

Write an essay discussing the significance of the distinction between civilians and combatants during the conduct of hostilities.



Practical exercise 5

State A and state B are neighbouring states that have been at loggerheads for years. The government of state B is intimidated by state A's continued "gunboat diplomacy". The latter is clearly manifested in the continued presence of armed forces at the border, which, in state B's opinion, is way beyond state A's reasonable defence requirements. The continued deployment of troops and acquisition of chemical weapons unnerve state B. State A's actions are perceived as hostile and state B decides it is time to launch a pre-emptive strike. State B bombards the area at the border and its surroundings. Roads, bridges and towns are destroyed. Many of state A's civilians, including a number of women, children and old people, are killed. Although state B distributes pamphlets urging members of the civilian population to leave, they do not have enough time to evacuate their homes and many consequently perish during the attacks.

Evaluate state B's actions in the light of what you have learnt from this topic.

TOPIC 4

STATE LIABILITY

In this topic, we consider the following:

Study unit

- 1 Introduction
- 1.1 Basic concepts
- 1.2 Direct and indirect state liability
 - 1.2.1 Direct state liability
 - 1.2.2 Indirect state liability
- 1.3 Imputability/attribution
- 2 International Law Commission's draft articles on state responsibility
- 3 State liability and the individual
 - 3.1 Introduction
 - 3.2 Nationality as the connecting factor
 - 3.3 Does the state have an enforceable duty to act?
 - 3.4 Treatment of foreigners
 - 3.4.1 Physical injury or threat of physical injury
 - 3.4.2 "Injury" to the property of foreigners
 - 3.5 Nationalisation under the Constitution of the Republic of South Africa
- 4 Remedies
- 5 Assessment



Compulsory reading material:

Dugard 3 ed chapter 13

Crawford J "The ILC's draft articles on diplomatic protection" (2006) 31 *South African Yearbook of International Law* 19-51

The following South African cases:

- *Nduli v Minister of Justice* 1978 1 SA 893 (A)
- *S v Ebrahim* 1991 2 SA 893 (A)
- *Kaunda v President of the Republic of South Africa* 2004 10 BCLR 1009 (CC) — be sure to read the separate judgments as well, particularly that of Justice O'Regan
- *Van Zyl v Government of RSA* 2007 SCA 109 (RSA)
- *Crawford von Abo v Govt of RSA* Case No 3106/2007 (TPD) 24.7.2008

STUDY UNIT 1

INTRODUCTION

1.1 BASIC CONCEPTS

State liability is one of the most practically relevant topics you will study this year. It is important to remember that we are dealing with international law. In other words, unless we are dealing with a crime against humanity — one of the “international crimes” — we are not concerned with the liability a state may incur towards its own subjects. This is a matter of municipal law.

If the South African government expropriates my farm under a land-redistribution policy, my remedy lies in South African law, not in international law. If, however, it nationalises the farm belonging to my neighbour, Schultz, who happens to be a German national, without paying compensation, it is a matter of international law — not because the state has violated Schultz’s rights as an individual, but because it has violated Germany’s right in its national.

What is state liability and when does it arise?

State liability arises when one state violates international law in its dealings with another state.

State liability is the consequence that results from a disturbance of the equilibrium in international relations between two states, or between a state and the international community as a whole. International law is called into play to restore the balance.

What is meant by a violation of international law? International law must here be seen as either a treaty or a customary rule. In the case of a treaty, things are fairly simple — much the same as municipal law breach of contract. A customary rule is, however, a different matter. Here, a distinction is drawn between obligations “essential to the general interests of the international community” and obligations which are less far-reaching. The former are regarded as international crimes; the latter as international delicts. You dealt with international crimes in section A, topic 5, when we considered the enforcement of international law. So, in this topic, we concentrate on the “other half”: the liability of a state for delicts having an international connection.

1.2 DIRECT AND INDIRECT STATE LIABILITY

A distinction should also be drawn between direct and indirect state liability. Note that, although there are certain procedural differences between the two forms of state action involved, when it comes to ultimate liability the result is the same whether the state is found directly or indirectly liable.

1.2.1 DIRECT STATE LIABILITY

A state is directly liable when it (obviously acting through its agents) violates an international law obligation it owes to another state. This may be, for example, by violating the territorial sovereignty of another state (seizing a person in the foreign state without permission), damaging its property (shooting down a foreign state’s

aircraft) or injuring its diplomats (holding them hostage, torturing them, etc.). Dugard cites the following cases. Can you explain the violation in each case?

- *Rainbow Warrior case* 1987 26 ILM 1346
- *Corfu Channel case* 1949 ICJ Rep 4 and 244
- *United States Diplomatic & Consular Staff in Tehran case* 1980 ICJ Rep
- *Trail Smelter case* 1935, 3 UNRIAA 1945
- *Case Concerning Avena and Other Mexican Nationals* 2004 ICJ Rep 12
- *Military and Paramilitary Activities in and against Nicaragua* 1986 ICJ Rep 14

1.2.2 INDIRECT STATE LIABILITY

Indirect state liability arises principally in two instances:

- the state injures the person or property of a foreign national within its territory, or
- the state does not itself act in the positive (or negative!) sense but fails to prevent the harmful act, or fails to minimise the harm done to the “victim”.

If a claim is instituted in an international forum for injury to an individual, is this not perhaps a contradiction of our earlier claim that the individual is not a subject of international law? The answer is to be found in the *Panevyezys-Saldutiskis Railway Case* 1939 PCIJ Rep Ser A/B No 76.

[I]n taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights, the right to ensure in the person of its nationals respect for the rules of international law.

As pointed out above, there is no difference in the result of direct or indirect liability. The difference lies in the fact that, before a state may assert a claim for one of its nationals as a result of injury in another state, that national must first exhaust available local remedies. In the case of direct liability, the state need not exhaust local remedies. (Why do you think this is so?)

The form of liability which a state may incur is not cast in stone. The *Tehran Hostages case* (above) offers an interesting example of how a state’s liability may change as circumstances develop.

Action 1

Iranian students stormed the US embassy in Tehran and took a number of diplomats and civilians from various nations hostage. At this stage, the Iranian government had incurred no liability, as the actions of individuals do not give rise to liability for their state.

Action 2

However, things went one step further and, instead of coming to the assistance of the hostages, the Iranian government did nothing. In this, it violated an international obligation to protect the embassy and its personnel. The liability of the Iranian government here was indirect, in that it was not based on a positive action, but rather on a failure to act.

Action 3

Things got even worse when the Iranian government came out in support of the

actions of the students. Its indirect liability changed to direct liability through its ratification of the initial act of the students.

1.3 IMPUTABILITY/ATTRIBUTION

Obviously, a state cannot itself act; the actual physical action must be performed by some person. If you look at the *Iran Hostages* case, you will see that the state was initially not liable for the original act of the students, but was later in fact liable. What, then, is the basis on which a state can be liable for certain acts, yet not be liable for others?

This brings us to the principle of imputability, or what Dugard calls “attribution”. Imputability is the process by means of which certain acts performed by individuals are ascribed to the state — they are taken to be acts by the state itself. For a state to be liable, the actor must be a state organ or an individual acting in his/her capacity as an employee of the state. In simple terms, there must be a sufficient nexus (link/connection) between the actor and the state.

In principle, all state organs and officials may incur liability for the state where they act in their official capacity. This applies to all branches of the state: the legislature, the judiciary and the executive, including both local and central authorities. In similar terms, the acts of an individual acting in his/her individual capacity cannot be imputed to the state.

However, as we saw in the *Iran Hostages* case, where the acts of an individual are accompanied by an act or omission by the state, the state may indeed incur liability. The most common forms of this act or omission are those where:

- the state encourages individuals to attack foreigners
- the state fails to take “reasonable care” to protect foreigners
- there is a clear failure to punish the individuals
- a foreigner is denied access to the courts to claim redress
- the state obtains an advantage from the illegal act of the individual
- the state expressly ratifies the act of the individual.

In South African law, all the aspects of liability and imputability came together, and were placed in more correct perspective, in the case of *Nduli v Minister of Justice* 1978 1 SA 893 (A).



Practical exercise 1

X, a member of an extremist right-wing group, is wanted in South Africa to face charges of terrorism. Feeling that his arrest is imminent, he flees to Swaziland, where he settles. The Swazi authorities are aware of his presence in the country and allow him to remain there on a temporary residence permit. There is a valid extradition treaty between South Africa and Swaziland.

The South African police officer in charge of the case approaches his Swazi counterpart and asks if he can enter the country to capture X. The Swazi official refuses, saying that the correct procedure under the extradition treaty should be followed. The South African officer conveys this news to his men and tells them that they may not seize X in Swaziland.

Despite these instructions, A and B, two constables, enter Swaziland one night in their police vehicle and, in uniform, grab X and bring him back to South Africa where he is arrested and charged.

Analyse the facts given and discuss fully whether South Africa has incurred liability towards Swaziland, and, if so, what form this liability takes and on what basis it rests.

Would your answer differ if: A and B were brothers whose father had been murdered by X; they had entered Swaziland on tourist visas, ostensibly to play in a golf tournament at the Royal Swazi Sun; and, when they grabbed X, they were in civilian clothes?

STUDY UNIT 2

INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY

The International Law Commission's "Draft Articles on Responsibility of States for Internationally Wrongful Acts" were adopted in 2001. (See GAOR 56th Session, Supp 10 (A/56//10.) This may be accessed at: www.un.org/documents/ga/docs/56/a56586.pdf

This section of the work presents no particular problems. If you read the Draft Articles together with the prescribed sections in Dugard, you will understand what is going on.

You are expected to supplement Dugard's summary of these provisions (pp 271–281) with a reading of the actual document. What is the current status of these Draft Articles — remember the emerging sources of international law in topic 2?



Practical exercise 2

Here you should be able to discuss the approach advocated in the Draft Articles on Responsibility of States for Internationally Wrongful Acts regarding the following aspects:

- when wrongfulness will be excluded
- necessity as a ground for excluding state liability for a wrongful act
- serious breaches of peremptory norms (our old "friends" *ius cogens* and obligations *erga omnes*)
- countermeasures as an answer to a charge of state liability.

In a summative assessment exercise, we could vary the question and the number of marks allocated by isolating one or more of the elements above, or we could ask them all!



Practical exercise 3

South Africa and Zimbabwe have concluded a bilateral treaty in terms of which the two states allow one another's aircraft to fly over and into one another's territory. Alarmed by the ever-deteriorating human rights situation in Zimbabwe — which South Africa now regards as approaching the proportions of genocide, but certainly as gross violations of the human rights of Zimbabwean citizens — South Africa bans all Zimbabwe's rights to fly within South African

airspace. Zimbabwe claims that South Africa, through violating an international obligation imposed by treaty, has incurred liability towards it for the losses it has suffered.

South Africa claims that, although it has breached a treaty obligation, this is justified by Zimbabwe's far more serious violation of an international norm owed to all nations.

Discuss the validity of the claims made by both South Africa and Zimbabwe.

STUDY UNIT 3

STATE LIABILITY AND THE INDIVIDUAL

3.1 INTRODUCTION

In the previous study units, we considered when one state may incur liability towards another as a result of the actions of an individual. Here, we look at the other side of the coin: When may the acts of a state against a foreign individual within its territory give rise to liability against the individual's state, and when may that state act against the offending state?

Obviously, there must be some nexus (connection) between the individual and the state which seeks to protect him/her. This connecting factor is found in the nationality of the individual concerned.

3.2 NATIONALITY AS THE CONNECTING FACTOR

Before a state can act on behalf of an individual who has suffered as a result of an international wrong in the territory of another state, the individual must be a national of the state. Nationality is generally in itself a sufficient nexus, but not invariably so. Problems may arise in the event of multiple nationality.

The standard case in this regard is the *Nottebohm case* 1955 ICJ Rep — make sure that you understand what was decided here.

Also make sure that you are able to establish (and argue) the nationality of both natural persons (you and me) and legal persons (companies, corporations, trusts, etc.).

Having established that there is a sufficient connection between the foreign individual and his/her state to enable it to act on his/her behalf, we shall now examine two examples of such action.

OK, we have now established two things:

- There has been a violation of international law (in one of its forms).
- The person who has suffered has the nationality of the state which is asked to act/wishes to act against the violating state.

There are two other things we must now establish:

- Does the state have an enforceable duty to act?
- What conditions must be met before it acts?

3.3 DOES THE STATE HAVE AN ENFORCEABLE DUTY TO ACT?

Diplomatic protection has become something of a “hot potato” in South Africa during the past few years.

Here, you must integrate the following sources which we prescribed at the beginning of this topic:

- Dugard, and in particular 290 ff
- Prof James Crawford’s article in Vol 31 of the *South African Yearbook of International Law*
- *Kaunda v President of the Republic of South Africa* 2004 10 BCLR 1009 (CC) — be sure to read the separate judgments as well, particularly that of Justice O’Regan
- *Van Zyl v Government of RSA* 2007 SCA 109 (RSA) — this is the appeal from the case Dugard discusses in his work, so read what he says of the TPD decision in the light of the SCA finding.
- *Crawford von Abo v Govt of RSA* case 3106/2007 (TPD) 24.7.2008



Practical exercise 4

Through an analysis of South African case law, discuss fully what is meant by diplomatic protection, when the need for this protection may arise, what forms the protection can take, whether the state can be compelled to render such assistance, and, if so, the extent of this obligation. Lastly, assess whether the South African approach as evidenced in the *Kaunda*, *Van Zyl (Swissborough)* and *Von Abo* cases is in line with contemporary international law.

3.4 TREATMENT OF FOREIGNERS

3.4.1 PHYSICAL INJURY OR THREAT OF PHYSICAL INJURY

One of the most common instances in which liability arises is where one state maltreats the national of another state. As a general rule, it is true that states may admit whom they wish to their territory. However, even though a state is sovereign within its own territory, this does not mean that it can do exactly as it pleases. Certain minimum standards for the treatment of individuals, particularly foreigners, must be met. There are two standards against which the state’s action towards foreigners are tested. These are:

Minimum national standard	Minimum international standard
Mainly Third World/developing states	Mainly Western states
Treat foreigners the same as your own subjects	Treat the individual as a reasonable man would expect in a civilised state
Advantage clearly determinable	Problem: the test is essentially subjective

If a state violates the required standards in its treatment of the national of another state within its territory, it will have committed an international delict and will be liable to compensate the other state.

Note that the state institutes the action on its own behalf — it is the state's interest in its national which has been violated. Should compensation be awarded, the compensation is paid to the state and not the individual. It is then for that state to pay the compensation over to its national. There is, however, no legal obligation on the state to do so. Whether a state can be compelled by its national to act on his/her behalf was discussed under diplomatic protection above — what we are dealing with here is the practical application of diplomatic protection and the conditions which must be met before a state will act, if it indeed decides to do so.

On the other hand, one must consider the Calvo doctrine — or Calvo clause — with regard to a contract between a state and an individual. Under this doctrine, a clause is inserted into the contract in terms of which the individual undertakes to restrict any claim he/she may have to local remedies and not invoke the diplomatic protection of his/her state. This has been universally condemned by Western nations, which see it as allowing the individual to sign away the rights of the state.

Logically, however, if the individual may not renounce the rights of the state, surely he/she should also have a right to call upon the enforcement of these rights?



Practical exercise 5

On 10 March 1998, Robert McBride, a South African diplomat was arrested in Maputo in connection with allegations of gunrunning. He was held in a Maputo jail in an undersized cell under appalling conditions along with 50 Mozambican detainees for some two months without charges being brought and without him being allowed to contact his legal representative or the South African diplomatic or consular representatives.

Would you say that South Africa has a claim against Mozambique for the treatment of its national? Could McBride's wife compel the South African government to act on her husband's behalf?

Hints:

- Has an international norm been violated?
- What criteria can be applied to determine this?
- What is the basis of South Africa's interest?
- Can the state be compelled to act?
- If so, on what basis?
- If not, why not?

3.4.2 "INJURY" TO THE PROPERTY OF FOREIGNERS

A distinction must be drawn between the expropriation of your own national's property and the nationalisation of the property of a foreign national within your territory. The first concerns municipal law and the second international law.

Nationalisation is not prohibited by international law. There are, however, certain basic requirements for a nationalisation to be valid in terms of international law. These are the following:

- the nationalisation must not be discriminatory
- the nationalisation must be for public purposes
- compensation must be paid.

The first two requirements are relatively straightforward. State X cannot nationalise only the property of German nationals in its territory, while leaving equivalent property belonging to French nationals intact. This would be discriminatory and would incur international liability. The public purposes requirement is rather vague. Nationalisation must be for the good of the country as a whole — it must be part of a “grand scheme” for the upliftment of the nation.



Practical exercise 6

The new South African parliament is situated in Midrand, halfway between Johannesburg and Pretoria. The problem is that most of the ministers live either in Pretoria or Johannesburg. As a result, they keep arriving late for debates, or don't arrive at all.

Generally, transport problems are offered as the excuse. The government decides that all members of parliament must be provided with new cars to ensure that they will be on time. If they were to buy these on the open market, the cost would be prohibitive. They therefore decide that they will nationalise BMW's operations in South Africa so as to provide each MP with a new BMW. When questioned, the government claims that the nationalisation serves a public purpose, as the smooth running of parliament is in the national interest.

Now look at this situation:

As part of its land-redistribution scheme aimed at redressing the wrongs of the past and redistributing the country's resources fairly, the government nationalises a massive vegetable farm belonging to a Portuguese national. The land is amalgamated with neighbouring state ground and divided up into subsistence-farming units which are given to the previously dispossessed population. Contrast these two sets of facts and you will have mastered the “public purpose” requirement.

You will not be surprised to learn that the most contentious of the requirements for valid nationalisation is that relating to compensation. It is here that the North/South, Western/Third World divide is most evident. The question hinges on what is understood by prompt, adequate and effective compensation — and, of course, particularly on the question of adequate compensation. What the relatively affluent Western nations regard as adequate (full market value) does not necessarily coincide with what a poor, Third World nation will regard as adequate. In this regard, study:

- UN Resolution on Permanent Sovereignty over Natural Resources, GA Res 1803 (XVII) 1962
- Charter of Economic Rights and Duties of States, GA Res 3281 (XXIX) of 1974.

You will see that the Economic Charter refers to “all circumstances that the [nationalising] state considers pertinent”. As a result of the “colonial hangover”, in terms of which the colonising powers and their nationals were seen to move into a country, make a “fast buck” and leave smiling all the way to the bank, one of the major factors which Third World states take into account in assessing compensation is the benefit which the person (natural or otherwise) has already received from its investment. In other words, the market value of the property is set off against the

profits which the owner has already received from his/her investment. This may again be set off against any benefits which have accrued directly to the community (and the state) through the enterprise (eg training, housing, education and upliftment schemes implemented by the owner). This is termed the "benefits theory".

3.5 NATIONALISATION UNDER THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

Rights to property are addressed in Chapter 2 of the 1996 Constitution, where section 25 provides in part as follows:

- (1) No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of a law of general application
 - (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all the relevant circumstances, including
 - (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;
 - (c) the market value of the property;
 - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - (e) the purpose of the expropriation.



Practical exercise 7

In view of the fact that section 39 requires that, in interpreting the provisions of Chapter 2, regard must be had to public international law, assess the validity of section 25 in the light of the international law requirements set for the nationalisation of property belonging to foreigners. Which of the standards does the section support?

Hints:

- What criteria are set in activity 5 above by the UN resolutions?
- Is there a universal standard on which all agree?
- If not, what standards are there?
- Do these standards qualify as international law?
- Under which of the sources would you place them?
- What did you say "soft law" was again?
- Now test section 25 against each of these standards.
- Which is it closest to?
- Do you agree that this is a fair standard?

STUDY UNIT 4

REMEDIES

The last aspect we will be considering under state liability are the remedies available to a state.

The purpose of state liability is, as we said at the outset of the topic, to restore an imbalance in the international community caused by the state's violation of an international law rule. Ideally, this should be done by a return to the **status quo** before the international delict was committed. Unfortunately, this is often not possible and so we fall back on the trusty solution to most things: money!

A state which is internationally liable for injury to another state must compensate that state. Here is where the distinction between direct and indirect liability comes into play. If we are dealing with direct liability, there is no need for the state offended against to first exhaust all available local remedies. It can go straight to the relevant international tribunal. Where we are dealing with indirect liability (in other words, a national of the state wishing to claim compensation has been injured), the individual concerned must first exhaust (or at least attempt to exhaust) all local remedies available. Only once this has been done may the international tribunal be approached, not by the individual but by his/her state of nationality.

Another aspect which must be considered is whether fault, either in the form of intent or negligence, is required before a state will be liable. De Groot indeed required fault for liability, but the modern tendency is towards absolute liability: the commission of an internationally wrongful act results in liability. This is particularly relevant to the latest developments in environmental law where the state incurs liability for cross-border pollution. If fault is indeed required, you are back at the old problem you encountered in Interpretation of Statutes: how do you determine the will of an amorphous object like the state?

The leading case on the question of liability and compensation is the *Chorzow Factory (Indemnity) case* 1928 Ser A no 17.

STUDY UNIT 5

ASSESSMENT

Again, I have included a number of formative assessment exercises in the text.

Remember that, in this section (B) of the guide, we are looking for evidence that you have studied and digested both Dugard and the additional prescribed material. Our questions in the exam, therefore, while following the format of the formative assessment exercises, will also be designed to reflect this requirement.

In either a discussion question or in the resolution of a problem, you will therefore be required to integrate all the sources into your answer — it is, after all, 25% of the course!

STUDENT ASSESSMENT OF GUIDE LCP401H

OPTIONAL

Name

Student number

Technical aspects

1. Did you find the guide easy to read and work with?
2. What did you think of the layout?
3. Did you find the exercises helpful or annoying?
4. Would you like to see more diagram-/table-type explanations?
5. Any suggestions on how the guide should look?

Content

1. Are you satisfied with the topics covered in sections A and B?
2. Are there any other topics you would like to see included in section B?
3. Do you feel that any of the topics in either A or B should be swapped around?
4. Do you feel that what you have learned is practically relevant?
5. Is the approach in the guide detailed enough (and, no, we can't do away with the textbook!)?
6. Did you find any specific topic particularly difficult/easy?
7. Do you feel there is a balance between the topics?
8. Do you feel there was enough/too much additional reading, particularly case law? (Do please be realistic and compare this with your other final-year LLB modules.)
9. Were you bothered by the fact that the guide was written by three different people? Did you notice?
10. Do you feel that you have gained from studying this course?
11. Did you enjoy/hate the course?
12. Would you recommend the course to a colleague (although you all have to do it anyway!)?
13. Do you think you have passed the course?
14. Have you done the course before?
15. If your answer to 14 is "Yes", do you think we are getting better or worse? Please explain why.

You may answer any/all of these questions in any form you like. The main thing is to let us know how you experienced the subject and how this experience can be improved.

Thanks

Neville Botha; Mirelle Ehrenbeck; Polina Dlagnekova

