2 International Organisation and Custom: From 1920 to Contemporary Perspectives

Introduction

The utility to the international legal system of custom is inextricably linked to its perceived efficacy as a source of law. For this reason the philosophical and operational contexts in which custom subsists conflate to impose on custom requirements whose combined dynamic is both complex and critical to the legitimacy of custom. Consequently, efforts to address custom's legitimacy deficiencies must examine also the potential influence on custom of the ideological and social context in which it operates.

International life, the matrix in which States create norms of customary international law is in a continuous state of evolution. Sometimes change is rapid, and sometimes slow. In particular, technological revolution as a national and international phenomenon continues to transform and affect cultures across the globe with previously unimagined ease. Increasingly, economic and political decisions made in Brussels, Tokyo or Washington determine events elsewhere. Cultural, social, political and even philosophical change in international life is not an option, but a condition of existence. Change confronts governments individually and collectively. Both their individual and collective responses result in a dynamic in international life that forms part of the matrix of custom. Increasingly States delegate and assign responsibilities to international organisations. This necessitates discovery of whether power to influence international processes, particularly the process of custom, is now shared not only among States, but also by other entities not referred to in article 38(1)(b). Increasingly, individuals *qua individuals* and individuals as collective private organisations and as business conglomerates are influencing and affecting international life with a

significance that was unthinkable half a century ago. Has international law's recognition of these new actors equally given them capacity to affect among other international processes, the process of custom? This is important for a discussion that seeks to reform custom because, as noted in the previous chapter, the formal source of customary international law[1] is the same one formulated in 1920 for the proposed Permanent Court of International Justice (PCIJ), and adopted in 1945 for the new International Court of Justice (ICJ) in spite of complaints by another committee of jurists that it was *woefully deficient.* The opportunity to update the formal sources of law from 1920 perspectives of international life to the more recent 1945 was not taken. In 1920 ideas about international life had not developed as much as they had a quarter of a century later (1945). Certainly, ideas have developed significantly half a century years later. But the same statute continues to direct the ICJ on what rules to apply to questions and disputes referred to it. Teleological interpretation of article 38(1)(b) alone is not sufficient to attend this challenge. Indeed, it may even have fathered some of the textual indeterminacies complained about custom. Formally, article 38(1)(b) regards States as the only subjects of the international community that contribute to the process of custom. In 1927 the PCIJ stated that:

> International law governs relations between independent States. The rules of law binding upon States emanate from their own free will as expressed in conventions or by usage generally accepted as expressing the principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to achievement of common aims.[2]

With its emphasis on State independence, and a seemingly uncapped will of the State, this statement neatly summarises early twentieth century perception of international law that, sovereignty of States was immutable. In 1933 Lauterpacht wrote that:

> Within the community of nations, the essential feature of the rule of law is constantly put in jeopardy by the conception of the sovereignty of States which deduces the binding force of international law from the will of each individual member of the international community.[3]

No-one else had the power to interfere with what States did within their territories. Varouxakis[4] writes that the younger Mill, whom students of international theory have in recent decades tended to regard as the

originator and exponent par excellence of the main versions of the theory of non-intervention, asserted the right of counter-intervention in cases where a foreign power had already intervened. Parry[5] attributes this kind of thinking about international law to the fact that then the numerical strength of States was comparatively small. The main function of international law was to keep States at peace one with another. Relationships with other States were mostly bilateral in nature, and focused on limited aspects such as peace, alliance, navigation and national boundaries. Proper interaction between individuals of different countries was rudimentary, if it existed at all. Besides, the Westphalian model[6] assumed that States would ensure order within their territories, and conduct effective relations outside their own jurisdiction with other States. It also presupposed the organisation of the world community into territorially separate, politically independent States. Since 1927, a number of developments have occurred. One of their effects appears to have been a compulsion of international law to reflect them. One is the establishment of supranational organisations (SOs),[7] inter-governmental organisations (IGOs)[8] and non-governmental organisations (NGOs).[9] Another is the effect on communication and information dissemination of the unprecedented revolution this century of communication technology. More and more, we realise that territorial boundaries are arbitrary, imaginary, and porous. The impact of mass media technology enables events occurring anywhere in the world to be beamed live into our living rooms via satellite television links. Equally, States, individuals, organisations and corporations conduct their affairs across the world with previously unimagined ease. It still remains to be seen how distribution of new and increasingly sophisticated information technology will impact custom. Unequal or uneven distribution might yet reveal the difficulties that result from a reliance by wealthy countries to satisfy the requirements of custom by utilising sophisticated communication technologies that alienate the poor countries whose silence on the issues might pass as acquiescence. If this happens, custom becomes a status symbol among judicially equal members of the international legal system. Unequal social and economic development among member - States of the United Nations is a fact. Allot writes that:

> That means that some human beings worry about the colour of the bed-sheets in their holiday-home in Provence or the Caribbean, while other human beings worry about their next meal or the leaking tin-roof of the hut which is their home.[10]

Creation of customary international law is heavily premised on States' ability to make claims and to accept, reject or acquiesce with other States' claims. Persistence with a particular view on the part of the instigating party/parties, and acquiescence with or acceptance of, or continued rejection of that view by other parties are the essential attributes in the process of custom. Therefore, it can be said that, the process of custom is centred on *communication.* Because of their social and economic inequity States have varying communication capacities. The revolution in information technology did not start at the same time for all countries, nor has it progressed at the same pace in all regions and between countries. International law has the full range of subjects, from those that cannot feed themselves, to those that regard luxury as a practical component of their lives. The latter appear to have greater access to the most recently developed information technology, while the former have either little access to it or none at all. Could this result in a two - tier process of custom, where the wealthy nations, relying on quick and effective methods of manifesting their claims about international law, or their rejection, acceptance or acquiescence with other States' particular claim, engage and carry through the process of custom above the heads of the poorer nations that may not have these sophisticated communication and information technologies? If this were allowed to happen, wealthy nations would be able in practice to create rules of customary international law whose enforcement obliged also the poorer and weaker nations who but for their poverty would have opposed the creation of such rules in the first place. If this happened, then the risk would be taken that poorer subjects of international law could argue that international law had become the preserve of their wealthier cousins, or that international law had assumed approaches that excluded its poorer subjects. Only a more even distribution of these technologies among all the subjects of international law would enhance the legitimacy of any rules that had relied for their creation on such technologies. These and other developments discussed below point to the strong probability that, generally, the 1920 presumptions about international law may now be invalid. Inevitably, their stronghold in the doctrine of "sources of international law" compels international tribunals to interpret[11] these sources creatively in order that the law reflects present realities of international life. This creativity risks textual determinacy in the doctrine of sources of international law.

The 1920 Committee of Jurists premised the formal source of custom[12] on notions of sovereignty[13] and non-interference. However, the meaning of any concept is strongly influenced by the prevailing civilisation

or context. A drastic change in the political environment may entail a new nuance to an old concept.[14] The history of the idea of sovereignty itself is characterised by both its saintly and beastly attributes.

Sovereignty's Temporal Fortunes

In the past sovereignty has been invoked to justify the notion of an indivisible, absolute political authority. It has been regarded as the principal index to statehood. It has been invoked also in defence of totalitarianism. In the second half of the Middle Ages territorial rulers used it to justify their quest to liberate themselves from the intrusions of the Pope and the Emperor. They also invoked it to consolidate their exclusive territorial jurisdiction as opposed to the overlapping jurisdiction of the medieval period.[15] Lapidoth[16] traces application of this concept as far back as the 16th century, to the works of Jean Bodin (1530 - 1596), who sought to reinforce the French monarchy against the feudal lords and to reject claims of the superiority of the Pope and the Emperor. Bodin maintained that sovereignty was: "*la puissance absolute et perpetuelle d'une Republique*" - the absolute and perpetual power of a republic. Regard should be paid to "absolute", by which he meant: "...the totality of legislative power and the lack of a higher earthly authority".[17] Needless to say, Bodin's ideas inspired and fired the state system in early modern Europe. However, Bodin's disciples turned sovereignty, the tool of liberation, into a weapon of subjugation. Whereas Bodin had bridled the sovereign by subjecting him/her to the laws of God and nature on the one hand, and by human laws common to all human beings on the other, Hobbes (1588 - 1679), insisted that sovereignty was beyond any form of limitation. Hegel's arguments (1770 -1831) clothed Hobbes' ideas with extra muscle. It was possible to use the concept of sovereignty to justify totalitarian and expansionist tendencies. Thus sovereignty the noble tool of freedom, like a double-edged sword would now also be used to deny others freedom. It was this prospect that caused the rejection of the concept by the majority of twentieth century lawyers who seemed to insist that sovereignty should be capped, limited, and counterbalanced against something else.[18] Only this way could the rights of citizens, as well as those of other States, be protected from errant sovereigns. Lasok observes that:

> Students of political thought are familiar with the rivalries for excellence between the concept of the sovereign State and federal ideas. From the

> Middle Ages right up to our time the State was regarded as the ideal self-sufficient unit, capable of securing protection and self-fulfilment of individuals. The nineteenth and the first half of the twentieth centuries witnessed the apotheosis of the sovereign State as the supreme and sublime goal of human organisation. Everything was to be subordinated to the State.[19]

Rousseau criticised sovereignty as being: "… at the same time uncertain in its content, inexact from the point of view of legal technique, contrary to social reality, and, lastly, dangerous by virtue of the practical consequences it is susceptible of setting in motion".[20] Kelsen and Scelle were anxious to substitute the concept of an international legal order for the concept of sovereignty. Rousseau wanted to substitute the concept of independence for sovereignty. By independence, he meant: "… exclusive autonomy, and comprehensiveness of competence".[21] Clearly, sovereignty has meant different things at different periods in the history of mankind. Different social, economic and political aspirations may require a change in the content of a concept. Sovereignty, or absolute autonomy of a society from external control, was very central in asserting the liberty that helped create the modern State system of Europe. Once the domination of the Pope and the Emperor had been disposed of, the concept as it had been understood did not have much else to stand for or oppose. The new meaning that Hobbes and Hegel sought to give to it found no favour at all among twentieth century jurists. The concept of sovereignty had to be redefined or else remain confined to the dusty shelves of history. Unless international tribunals' application suggests otherwise, article 38(1)(b) has remained frozen in the early twentieth century perceptions of sovereignty. Meanwhile, the process of custom may have embraced more dynamic modes of expression that may not be consistent with the formalism of article 38(1)(b).

Legal Aspects of Sovereignty

There are three aspects to sovereignty in modern international law. These comprise the external, the internal and the territorial aspects. The external aspect of sovereignty refers to the right of a State to determine its relations with other subjects of international law, without the control or restraint of another State.[22] It is this aspect of sovereignty that rules of international law primarily address. External sovereignty also reflects a more deeply-rooted ideological construct, namely, internal sovereignty. Internal sovereignty

refers to the State's exclusive right or competence to determine the character of its own institutions, to ensure and provide for their operation, to enact laws of its own choice, and to ensure their respect.[23] The territorial sovereignty of a State refers to the State's exclusive authority over all persons and objects existing on, under or above its territory.[24] Central to territory is the presence of a community whose members do not extend their allegiance beyond that of their sovereign. Thus, during the Second World War, the hosting by the United Kingdom of *"governments in exile"*[25] created the legal fiction that the countries these governments claimed to represent still existed as sovereign States, when they had neither a territory under their control, nor a population that gave its exclusive allegiance to them. This fiction was based on the hope that those governments would recover control of their former territories once the war was over. In the event, that hope was actualised. While what might have happened if events had conspired to produce a different result remains a matter of speculation, there is reason to suggest that that fiction would have been discarded, and the governments in effective control recognised. The East Timor Case[26] is instructive on this point.

In August 1975, Indonesia forcibly entered East Timor, throwing out the Portuguese authorities whom the United Nations had long recognised as the Administrator of this non-self governing territory (NSGT). Over the next twenty years, United Nations General Assembly Resolutions and Security Council Resolutions[27] condemned Indonesia's action, and instructed Indonesia to withdraw from East Timor for the Timor people to exercise their right to self-determination. Until October 1999 Indonesia remained in *de facto* control of East Timor. In that period several States including Australia did business with Indonesia rather than the supposed Administrator of the NSGT[28] - Portugal - whenever East Timor's rights were concerned.

Although the external aspect of sovereignty appears to be the only one implied whenever sovereignty is considered in international law, sovereignty is the sum total of all three aspects. Sovereignty so defined forms one of the fundamental principles in international law.[29] Article 2.1[30] of the UN Charter reads: "The Organisation is based on the principle of the sovereign equality of all its Members". One consequence of perceiving sovereignty in this fashion is that every sovereign power is a legal despot in the sense that they are free from legal constraints. While the idea of an all powerful State might have been very attractive for writers like Hobbes and Bodin in the sixteenth century,[31] it is difficult to find similar justification for that conception of sovereignty today. On the contrary,

there are insatiable political, social and economic reasons for a concept of sovereignty that distributes rather than centralises sovereign authority.[32]

The idea of an all-powerful State is difficult to justify normatively. The normative argument holds that because a clear distinction exists between State and society, the State is not the originator of all rights that existed in society because groups existed, and had rights, even before the evolution of the State. Pluralist writers point to the very real constraints which associations and groupings can place upon the freedom of the State. In these terms, decentralisation of power is desirable, while the concentration of authority in an omnipotent, centralised State tends to threaten liberty and to stifle creativity.[33] This has direct effect on international law, which is firmly anchored on the tap root of sovereignty and the secondary root of non-interference in internal matters. What follows next is an examination of the function and exercise in modern international law of the idea of sovereignty and its effect on the formal requirements of the process of custom. This analysis reveals a major problem with customs' textual determinacy.

Sovereignty in Modern International Law

The traditional conception of sovereignty[34] gave the view that States are the sole *dramatis personae* in the international legal system. Only they enjoy *locus standi* in international law. In the creation of rules of customary international law, the assumption obtained is that only State action counts as evidence that the formal requirements of custom have been satisfied. This assumption is premised on the view that international law is consensual in nature.[35] Such a perception of sovereignty is difficult to justify in international law today. To be a subject of a legal system implies three things. First, a subject has duties that make him/her accountable, according to the rules of the system, for any behaviour at variance with that allowed by the system. Second, a subject has *locus standi* to claim and enjoy the benefits afforded by the system that binds him/her. Third, a subject posseses the capacity to enter into contractual relationships with other legal persons recognised by their system of law.[36] In its advisory opinion in the Reparation for Injuries Case, the court made it clear that: "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights".[37] We need, therefore, to find out whether there now exist in international law, subjects that contribute to the process of custom other than States. Confirmation of this would contradict

the text of article 38(1)(b)'s implication that only State actors participate in the creation of rules of customary international law.

Without exaggerating the demise of State influence in the affairs of international life in the second half of the twentieth century, it is fair to say that international organisations, both governmental and non-governmental, have emerged not as challengers to States' authority, but as facilitators of States' functions in international life. Lasok writes that:

> The Second World War demonstrated the futility of conquests and the vulnerability of the sovereign State concept. The sovereign State could no longer guarantee the protection of the citizen and so the traditional concept of allegiance based on a *sui generis* contract broke down. Interdependence of States rather than independence became the key to post-war international relations, and was reflected in current trends of international law, especially in the ideology and structure of the United Nations. The slogan *si vis pacem para bellum* had to give way to the quest for justice among men and nations and *si vis pacem para pacem* had to become the order of the day.[38]

Modalities to expedite integration, interdependence, and the creation of communitarian values in the international community were established.[39] Cassese writes that:

> Instead of looking after certain areas of mutual interest individually, they have preferred to set up joint bodies charged with the carrying out of international action on behalf of all the participating States. .... inter-governmental agencies were endowed with autonomous powers, with rights and duties distinct from those belonging to each member State. This factor centred on the idea that to ward off the scourge of a Third World War, a strong network of international instrumentalities should be created so as to impose heavier and more far reaching restraints on States. However illusory and naïve this internationalist outlook may have been, there is no denying that it led to the proliferation of organisations and contributed to their increasing importance.[40]

Conceptually, international institutions and agencies provided the *modus operandi* for inculcating these communitarian values into international law. Depending on their role, existing agencies were strengthened by adding onto their legal powers to act, and also their responsibilities. New agencies, many of them with State-like qualities were also created, and are still being created.

Kwakwa writes that:

> There has been a rapid growth in the number of multilateral treaties which seek to regulate a much more extensive range of issues among States in areas of human rights, politics, economics and other social issues. The European nations are ceding some of their sovereignty to a common European Union; the African States are signing up for the African Charter on Human and Peoples' Rights which subjects their human rights practices to review by an African Commission on Human Rights; and under the Vienna Convention on Diplomatic Relations, States incur responsibility for action within their own territory arising from non-adherence to the principle of diplomatic immunity.[41]

Functionally, the role of these bodies has become so fundamental that there are very few international transactions that are not referred to an international organisation at some stage in their development.[42] Many international organisations have power to establish their own rules of operational procedure. For instance by article 60 of the American Convention on Human Rights, 1969, the Inter American Court of Human Rights is empowered to: "Draw up its statute, which it shall submit to the General Assembly for approval. It shall adopt its own Rules of Procedure". Article 39 of the Convention provides that: "The Commission shall prepare its statute which it shall submit to the General Assembly for approval. It shall establish its own regulations".[43] The General Assembly has always ratified the work of the professional experts it charges with such tasks. Usually, these experts are not governmental representatives but independent experts. In discharging their tasks they pay enormous regard to the purposes and objectives of these bodies. According to Farer, this provision was the basis upon which the team tasked with drafting the rules of procedure for the Inter American Court of Human Rights incorporated the right to conduct on-site visits to investigate alleged breaches of human rights. On the same basis, it was possible to include in the rules of procedure, the requirement that governments should actively publicise impending visits of the Commission, and actively urge their citizens to volunteer evidence and information to the Commission.[44] By article 44 of the same Convention: "Any person or group of persons, or any non-governmental entity legally recognised in one or more member States of the Organisation, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party". These and similar developments elsewhere appear to negate claims of the existence in modern international law of the near absolute concept of

sovereignty and non-intervention suggested by Cobden.[45] Article 104 of the United Nations Charter obliges each member State to accord to the Organisation within its territory, such legal capacity as may be necessary for the exercise of its functions.[46] The 1946 Convention on the Privileges and Immunities of the United Nations interpreted article 104 to mean that the United Nations posses juridical personality, with the capacity to contract, acquire and dispose of immovable and movable property, and to institute legal proceedings.[47] The Atomic Energy Agency has, through agreement with several Arab States, established a regional radioisotope centre. These examples suggest that, although international bodies are not equal to States, they have capacity to exercise some of the benefits extended to States. They also carry duties imposed upon subjects of the international legal system.[48] Particularly in the fields of Human Rights, Environmental protection and World Trade, the organisations created potentially can affect the process of custom.

Although difficulties in determining the manner of bequeathing legal capacity[49] to some engagements of international organisations remain, these point to the mode (how?) rather than to the ratio (why?). This suggests that there is a clear recognition by the international community, that these bodies have a fundamental role in international life. Therefore, it would be a very grave omission to disregard their effect on custom, as article 38(1)(b) appears to do.[50]

According to Lauterpacht: "… In itself, the attribution of legal personality means nothing. "Personality" - the quality of being a person - only possesses significance in terms of a specific system of law".[51] The significance of the notion of "legal personality" is a *conditio sine qua non* for the participation of an entity in a legal system. International organisations have legal personality on two levels, namely, the international level, and the level of the legal order of the host State. On the international level, two issues arise in respect of their legal personality. The first is concerned with the question "when" an organisation acquires legal personality? The second is concerned with the question "what" the consequences are of its possession of that status?

Muller writes that originally the idea of "legal personality" is a concept of private law. "It was designed to enable a group of persons to operate as one autonomous entity in pursuit of a certain goal. ... They were not considered real persons, but *persona ficta* - a conception of the law - and this conception of legal persons remained influential until far into the nineteenth century."[52] With the evolution of international law, this idea filtered from private law into public law. This raised the question whether

States could come together to create an entity with a separate legal personality, much like the individual subjects of private law could do at national level. The initial response was to allow such a grouping of States to act on the international level, through one of its members, just as the host State acted on behalf of the organisation on the domestic level. However, as international organisations developed both in number, and in the complexity of their functions, the idea that they deserved a distinct status in order to enable them to perform their functions fully and independently on both levels of their existence prevailed.[53] Thus while the instruments setting up international organisations do not, as a rule, authorise them to conclude treaties, a capacity that hinges on statehood,[54] the practice of international organisations, particularly in the law of treaties,[55] has grown extensively. This growth is much to the disappointment of those who argue that the capacity to conclude treaties is an act of sovereignty which international institutions and their organs do not possess. Whether the view is taken that possession by an institution of capacity to conclude treaties reflects its international personality, or that being an international legal person precipitates legal capacity, the fact is that modern international law recognises that international institutions[56] are capable of holding both legal personality and capacity to conclude treaties.[57] Because the practice of concluding treaties was formerly a preserve of statehood, and an exercise of a State's sovereignty, the emergence of international organisations that participate in this practice points to a fundamental change in the conception of sovereignty in modern international law. However, the unrevised 1920 formulation of custom in article 38(1)(b) does not appear to mirror this fact. Obviously, this adds to the lack of textual clarity of custom.

However, States participate in international affairs by virtue of their own full sovereign rights while international organisations do so only in accordance with those powers attributed to them by the States constituting them.[58] Non-governmental organisations enjoy those powers attributed to them by those States that recognise their function. We are here particularly concerned with inter-governmental organisations as it is to these that States often cede those of their sovereign competencies, the application of which may be instrumental to the creation of rules of customary international law. States attribute different competencies to different organisations, the main ones being the supranational and the traditional organisations.[59] A compelling distinction between the two types of organisations is the level of integration reached among the States constituting them. Traditional organisations such as the United Nations appear to occupy a step lower

than their supranational counterparts in that the competencies bequeathed to these organisations, perhaps because their objectives are not as cohesive as those evidenced in supranational organisations such as the European Union. We shall narrow our inquiry further to traditional international organisations because they provide the most examples. The European Union appears to be the only supranational organisation there is.[60] This has also given rise to the question whether or not EU law is part of international law.

An inquiry into the competencies, functions and powers of traditional international organisations soon reveals that traditional organisations:

1) do not have the capability of enacting binding decisions directly applicable to Member States and individuals,
2) have concurrent instead of exclusive competencies,
3) "do not limit the sovereignty of Member States, as only restrict their external freedom of action, by compelling them to do something and/or refrain from doing something else".[61]

Attribution to the United Nations of Sovereign-like Competencies

Two theories appear to dominate discourse on attribution of competencies to international organisations by the international legal system. The first is the theory of implied competence and second, the theory of enumerated competence. They both suggest that international organisations have a legal personality different and distinct from that of States. This has relevance to the way evidence of the creation of a rule of customary international law is determined because if international organisations have legal personality that enables them to influence the creation of rules of customary international law, then it theoretically can be argued that article 38(1)(b) is not entirely consistent with the practice of custom and that this inconsistency hinders the transparency of custom.

Implied Legal Competence of the United Nations

It has long been recognised that by creating an international organisation, States often cede those of their constitutional powers that form the content of the function and purpose of the new organisation. In its advisory opinion on Nationality Decrees Issued in Tunis and Morocco,[62] the PCIJ stated that

acceptance by a State of treaty obligations relating to a given subject has the effect of removing that subject from the purely domestic domain.[63] The ICJ has observed that the capacity of international organisations to conclude treaties is settled if specific provisions of the constituent instrument so authorise the organisation, or the purpose(s) and objective(s) of the organisation make it inconceivable that it could function without the capacity and ability to conclude treaties. In its Advisory Opinion of 11 April, 1949 Concerning Reparations for Injuries Suffered in the Service of the United Nations, the court stated that:

> Under international law, the organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.[64]

In its Advisory Opinion on Effects of Awards of Compensation Made by the United Nations Administrative Tribunal, the court pointed out that:

> While the UN Charter contains no express provision of judicial bodies or organs, and no indication to the contrary, its capacity to establish a tribunal to do justice as between the Organisation and the staff members arises by necessary intendment out of the Charter.[65]

These decisions echo, very strongly, the 1819 case of McCulloch v. Maryland[66] decided in the Supreme Court of the United States. In that case, Chief Justice Marshall stated that although the Federal Government of the USA only had "enumerated powers", these powers were limited to the literal provision of the constitution because the authority of the federation had not been thoroughly described in the fundamental Charter. Consequently, federal Government could have recourse to all the powers necessary for the exercise of those powers it constitutionally had been assigned. However, the exercise of any such "implicit powers" should have regard to the distribution of competencies between the States and the Union as provided for in the Constitution itself.[67] If it can be argued that it was ambiguity in the American Constitution on this point that enabled the court to invoke the theory of "implied powers", then application of this theory by international tribunals should be understood more readily because conclusion of most international treaties depends on wording issues of controversy in amorphous language to be determined at a much later point. The implied powers approach is inalienable to understanding of

international organisations because often their tasks are enumerated in a relatively small number of articles of a constitution. For instance, in sixteen brief articles, the Marrakesh Agreement setting up the World Trade Organisation (WTO) provides the *institutional* and *legal foundation* for the multilateral trading system that came into being on 1 January 1995.[68] Its functions include administering WTO trade agreements, serving as a forum for trade negotiations, handling trade disputes, monitoring national trade policies, providing technical assistance and training to developing countries and cooperating with other international organisations. Each of these functions appears so onerous that adequately to enumerate all the competencies attributed to the organisation in sixteen brief articles might amount to a miracle. But the fact is that all of them are dealt with in what the WTO Secretariat has described as a "… short text of 16 articles".[69] For Schermers the implied competence theory "… is so essential that its possible application can be safely assumed".[70] The range of possibilities the reception of this doctrine creates is not without consequence for the process of custom particularly because rules of customary international law can evolve through treaty, just as much as treaties can codify existing custom.[71] Constitutive treaties are regularly regarded as living documents with a life of their own, separate from that of their authors. This is evident in that international tribunals have moved from strictly applying traditional rules of interpreting texts, to the constitutional approach.[72] Teleological interpretations of constituent instruments of international organisations have assumed prominence in the jurisprudence of international tribunals.[73] An important consequence of this teleological enterprise, writes Martinez,[74] is that the place of the principle of effectiveness in international law has been reinforced. This principle directs that when two interpretations of the same article are possible, the right interpretation would be that which better ensures the fulfilment of the purposes of the international organisation. However, strictly speaking, the doctrine of implied powers can not escape the charge of *ultra vires.* The line between giving effect to the purposes of the organisation on the one hand, and rewriting or revising the constituent instrument establishing the organisation on the other, may not be so easily distinguishable. This problem is perhaps best portrayed in the ICJ's Advisory Opinion on Certain Expenses of the United Nations (article 17, Paragraph 2, of the Charter),[75] which is arguably the ICJ's most controversial case on the limits of the doctrine of implied powers. The question was whether the expenses that resulted from the United Nations peace operations in the Middle East (UNEF) and in the Congo (ONUC) constituted "expenses of the organisation" within the meaning of article

17.2 of the United Nations Charter. The fact was that these operations had been authorised not by the Security Council - the only organ competent to decide on issues regarding peace and security according to Chapter Seven of the Charter - but on the basis of resolutions taken by the General Assembly of the United Nations.[76]

Several States, notably France and the Union of Soviet Socialist Republics, opposed the General Assembly initiative, arguing that it had acted *ultra vires*. The ICJ decided first that the notion of the United Nations budget, provided for in article 17, referred to the whole organisation's expenses, and not only to those costs which could be considered regular ones. Second, the ICJ recognised the Security Council's exclusive competence to deal with peace and security matters but emphasised that the General Assembly, acting under articles 11 and 22, was competent to create commissions and subsidiary organs to supervise operational activities like those developed by means of the recruitment of UNEF and of ONUC. The ICJ held that the expenditures caused by the peace-keeping forces had nothing to do with Chapter VII of the Charter because these operations were necessary to fulfil the functions that the United Nations Charter had assigned to the General Assembly. The ICJ rejected the *ultra vires* argument. It stated that even if the decision to authorise the peace keeping operations would have been taken by the wrong organ, i.e. the General Assembly, instead of the Security Council, this would be a question of the internal distribution of functions between the organs of the United Nations which did not presuppose the non-validity of the act outside the organisation. The ICJ held that, the expenditures incurred were expenses of the organisation, and whose payment would be proportionally borne by all the member-States of the United Nations. The question that has dogged this decision is whether, in reaching this decision, the ICJ had merely interpreted the relevant provisions of the Charter, or that it had done more than that, i.e. revised the provisions of the Charter? If the ICJ had revised provisions of the United Nations Charter, had it not therefore acted *ultra vires* since it does not appear to have such authority?[77]

Enumerated Legal Competence of the UN

The second of these theories is that of enumerated competence. The United Nations Charter explicitly authorises the organisation to conclude agreements with member States on the provision of military contingents (article 43), and with Specialised Agencies for the purposes of bringing them into a relationship with the United Nations - (article 63). Articles 77

and 105 (3) enable the United Nations to conclude trusteeship agreements and conventions with member States. The United Nations has exercised these provisions to conclude numerous treaties with both States, and international organisations.[78]

Article 2(3) of the UN Charter binds member States to settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered. "International peace," "security," and "justice" are all relative terms whose inclusion in a treaty provision of this importance raises difficult questions. However, it cannot be denied that, substantively, this provision appears to prioritise the communal goal of interdependence over nationalist goals in international law. The fact that this provision is directed at sovereign and independent States also seems to suggest not the demise of the idea of sovereignty as such, but a repackaging of its content so that it exudes with the "nobler" values of cooperation and interdependence. In this sense the power of a State refers to a State's ability to work in concert with other States in pursuit of objectives which no nation alone is likely to achieve. This is a clear departure from the old idea that power meant a State's ability to impose its will over the wills of its rivals.

Article 2(4) of the United Nations Charter exhorts member States to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. This obligation renders unacceptable one of the extreme prerogatives of the traditional conception of sovereignty, the right to wage war. Fitzmaurice writes that until this provision:

> War, and the use of force generally did constitute in some sense a recognised method of enforcing international law; or, more accurately, a means whereby in the last resort a dispute between States as to their rights could be settled. It was a means of settlement or reinforcement analogous in the international field to the "blood feud" and or "ordeal by battle or single combat", by which, in a more primitive stage of national societies, disputes between individuals or groups were settled - and it has always been the case, and still is, that the international society tends to reflect national society at an earlier stage of development.[79]

There is no question that article 41 of the United Nations Charter substantially directs foreign policy of member States contrary to the second criterion of Martinez's characteristics of traditional organisations.[80] It

provides that the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.[81] Read alongside other provisions of the UN Charter, particularly article 25 which provides that the member States of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter, it appears that member States can be compelled by the Security Council to boycott particular States if the Security Council decides so to do. Even more, it seems possible that the Security Council can compel member States to assist in mounting armed attacks against a particular State. This leaves no room for neutrality, one of Switzerland and Nauru's main arguments against taking up membership with the United Nations to the present day.[82]

To sum up this discussion, international organisations with the capacity to exercise some of the benefits and duties previously reserved for States alone have emerged. These benefits include the capacity to negotiate and conclude treaties with States and other international organisations, and the right legally to enforce such agreements. They are able to play a role in making collective decisions for a group of like-oriented States and to bind these same States with those decisions. This can be adduced as evidence that States are no longer the only subjects of international law capable of manifesting the international will capable of engaging the process of custom, leading to acceptance, rejection or acquiescence to a claim by other specially affected States. It can also be adduced as further evidence that conception of the idea of sovereignty has shifted from the traditional one of centralised absolute power, to that which favours sharing out of constitutional and administrative authority between State organs and international institutions of their choice. This makes it difficult to hold on to a theoretical basis of custom that claims that only States contribute to the creation of rules of customary international law.[83] The development of positive international human rights has also weakened article 38(1)(b)'s theory of custom.

International Human Rights and Custom

It is probably correct that "human rights" has become the most quoted phrase in recent times. Journalists, politicians, workers, students, inmates and even children refer to it.[84] In those Western States where recognition of positive human rights espoused in several international and regional instruments has occurred more speedily, individual citizens appear to have acquired a new status in international law.[85] In other regions individual awareness of these positive rights is growing and increasingly manifesting itself in public yearning for specific guarantees of personal freedoms. The Universal Declaration of Human Rights (1948), the International Covenant for Civil and Political Rights (1966), and the International Covenant for Economic, Social and Cultural Rights (1966) have tremendous appeal especially in those regions where States have not taken adequate steps to create regional mechanisms sufficient to protect those rights. In Western Europe and the Americas where States have taken the initiative to bring the Universal Declaration of Human Rights closer to home, the European Convention on Human Rights which was adopted in 1950[86] and the American Convention on Human Rights 1969[87] are invoked incessantly by individuals seeking redress of alleged breach of their rights by governments. Whatever their motivations, new nations increasingly inscribe into their constitutions some of these positive human rights, much to their disappointment when citizens later invoke them in judicial proceedings against the State.[88] On a theoretical level, what all this activity points to is either an awareness of, or a genuine recognition by States that the positive basic human rights of individuals must be respected. The welfare of private citizens in any State is no longer the preserve of that State alone.[89] Oda writes that:

> The treatment by a State of its own nationals does not ordinarily and in the absence of specific treaty provisions involve any question of international law, and falls exclusively within the domestic jurisdiction of the State. Under customary international law, no State can make a claim on behalf of an alien injured by his own country. *However, the community of States has increasingly realised that the welfare of the individual is a matter of international concern irrespective of his nationality*.[90]

The principle on prohibition of intervention in the internal affairs of a sovereign State has been codified in numerous universal, regional and bilateral instruments. Article 8 of the Montevideo Convention on Rights

and Duties of States of 1933[91] provides that: "No State has the right to intervene in the internal or external affairs of another". Article 18 of the Organisation of American States[92] provides that: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State". Article 3 (1) of the Charter of the Organisation of African Unity of 1964[93] states that: "Member States affirm and declare their adherence to the principle of non-interference in the internal affairs of States". The United Nations Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States of 1970[94] states that:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.[95]

However, because the international legal system has stepped up its competence to concern itself with what private individuals do, and what happens to them,[96] these declarations should not be regarded literally. The anachronistic attitude attributed to the concept of sovereignty by article 2(7) of the United Nations Charter itself is questionable.[97] The United Nations Charter lists as one of its purposes, the promotion of, and encouragement to respect human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[98] It also charges member States to take joint and separate action in cooperation with the organisation to reach the aim of universal respect for, and observance of human rights.[99] Commentary on the meaning of this provision is replete with disagreement. One view is that this provision imposes a general duty on member States to respect human rights.[100] Another view is that because the United Nations Charter does not specify the rights to be protected, member States cannot accept any definite obligation in the field of human rights. If regard should be paid to subsequent United Nations Documents,[101] it is the former interpretation that should prevail.

Notwithstanding the prohibition to intervention in matters within a State's domestic jurisdiction contained in article 2(7) of the United Nations Charter,[102] the various organs of the United Nations have on several occasions considered alleged violations of individual human rights and acted on their findings. Relying on its authority to discuss any matters

within the jurisdiction of the United Nations Charter, the General Assembly of the United Nations has always deplored human rights violations wherever they occur. The execution by Nigeria of nine human rights activists on 10 November 1995 met with such condemnation. South Africa's long and dreary era of apartheid is catalogued by a number of condemnatory General Assembly and Security Council resolutions targeted at awakening her to her human rights obligations under article 56 of the United Nations Charter.[103] In 1962, the General Assembly requested member States to take measures, separately or collectively, such as the breaking off of diplomatic relations, closing their ports to all vessels flying the South African flag, and boycotting South African goods. It also requested the Security Council to take measures that would bring South Africa to compliance with this international standard.[104] The Security Council in 1963 condemned the government of South Africa's recalcitrance and called upon all governments to cease the sale and shipment of equipment and materials for the manufacture and maintenance of arms and ammunition to South Africa.

Increasingly, resort to the Human Rights Committee of the United Nations (HRC) by individuals seeking redress for perceived human rights violations by their governments also demonstrates the weakening of monolithic perceptions of sovereignty and a strengthening of the idea of shared sovereign competence. Established under article 28 of the ICCPR, the HRC has competence to determine claims regarding violations of rights granted under that covenant. Although decisions of the HRC are merely recommendatory,[105] often international opinion of a State is influenced strongly by the outcome of such recommendations where they have occurred. In recent times, economic assistance to developing countries has often been linked to each target country's human rights record. There is also a case for saying that the increasing workload of the HRC reflects its own success, which might also be taken as acceptance by States of its supervisory role on the implementation of the rights guaranteed in appropriate international instruments.

The regional human rights regimes for Europe, Africa, and the Americas all recognise the individual's right to pursue action for alleged human rights violations in institutions beyond national frontiers. The pre-requirement in all three systems that claimants should first exhaust all domestic remedies prior to petitioning external tribunals does not take away the individual's right to seek redress against a State beyond its own borders. Article 25 (1) of the European Convention on Human Rights[106] states that: "The Commission may receive petitions from any person, non-

governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this convention". Article 44 of the American Convention of Human Rights[107] provides that:

> Any person or group of persons, or any non-governmental entity legally recognised in one or more member States of the organisation, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State party.

Articles 55 and 56 of the African Charter on Human and Peoples' Rights[108] allows individuals similar rights. Cassese[109] does not make much of these rights. He argues that what these regimes confer on individuals are only procedural rights and not the more meaningful substantive rights:

> … that is the right to initiate international proceedings before an international body, for the purpose of ascertaining whether the State complained of has violated the treaty providing for substantive rights benefiting individuals. This right is usually limited to forwarding a complaint: the complainant is not allowed to participate in international proceedings. Once the international body has pronounced upon the alleged violation, the applicant is left in the hands of the accused State: cessation of, or reparation for the wrongful act will substantially depend on its good will.

With the exception of the European Union the international bodies responsible for hearing these petitions are generally not judicial in character. Therefore, the outcome of the whole process is not a judgment proper, but a mild act containing the views or recommendations of the body, usually a commission.[110] The fact is, though, that these so-called "procedural rights" obtain to individuals *qua individuals*. The effect on the development of international law of the exercise of these procedural rights is yet to be fully assessed. Suffice it to say that as individuals seek to enforce these procedural rights, a new dynamic in international law is created between the procedural rights on the one hand, and the substantive rights that they attach to. Potentially, this dynamic yields implied or purposive rights for the individual against the State. With all respect, Cassese's view that the non-judicial nature of the Commissions that hear these disputes compromises the derivative rights initially granted to individuals, and subsequently the capacity of the individual as a subject of international law viz. other subjects of the system, appears not to stress this

point. Further, there is no record of States refusing to comply with the recommendations of these Commissions. They are often quick to accept Commission recommendations although implementing them often takes considerable delay. In particular, developing countries appear keen to comply in order to create a pro-human rights image of their governments. The adoption in Rome in 1998 of the Statute of the International Criminal Court indicates also the growing recognition by States of the capacity of the individual *qua individual* to threaten international values and therefore to be regulated by it. The corollary of such a development would be to use the international legal system to protect the individual *qua individual* even more because if it can prosecute him/her *qua individual*, it should be able to protect him/her *qua individual*. Thus, while it might be true to say that compared to other subjects of the international legal system, the individual *qua individual* appears to exercise the least benefits and duties, s/he nevertheless has recognition in that system.[111] This recommends recognition of limited involvement of individuals *qua individuals* in the process of custom. As corporate bodies particularly in labour, trade and developmental issues, individuals' contributions to the creation of rules of international law are not at all insignificant.[112] Increasingly, international organisations and their organs, as well as individuals *qua individuals* are affecting international processes in a manner only remotely conceivable when the formal source of custom was first drafted in the early 1920s. To an extent they intervene in matters previously regarded as the preserve of sovereign States.[113] Therefore, the idea that sovereignty is absolute, and that only States contribute to the creation of rules of customary international law appears illusory in modern international law.[114] This inconsistency between theory and practice gnaws at the heart of custom's transparency and determinacy. Consistency in a doctrine, as we shall see in the next chapter, is the lynchpin of legitimacy.

Conclusion

While it is necessary to guard against exaggerating the demise of State power and with it the monolithic concept of sovereignty in modern international law, it is equally necessary to acknowledge that changes in international life after the Second World War have given capacity to new subjects of international law. While these new subjects may not be equal to States or even equal between themselves they appear capable of contributing to the process of custom. Another significant change is that

regarding perception of power and practice on sovereignty. Although these changes appear to affect ideas on which custom was premised from the very beginning, custom's premises remain unchanged. While nations remain the aristocrats of the international legal system, it is also true to say that they no longer enjoy the autonomous authority implied by the traditional perception of sovereignty on which the substantive definition of custom is predicated. In 1989, Shultz talked of: "… A wide array of shifting sovereign arrangements as a result of which the very borders of nations are no longer under genuine sovereign control".[115] "Dual", "divided", "residual", and "association", are only some of the words now commonly associated with sovereignty.[116]

There is not much evidence that these developments have been carried into the study of the doctrine of sources in the international legal system. Article 38(1)(b), which refers to the creation of customary international law, still regards States as the sole *dramatis personae* for the purposes of law creation. For this reason, if it can be proved that new bodies with legal capacity to exercise duties and benefits have since emerged in international law, then the theoretical base on which custom is premised becomes questionable. As we have seen in this chapter, particularly in the second half of the twentieth century, international organisations endowed with State-like power have emerged, individual citizens have been bequeathed with procedural rights that enable them to engage the international legal system.

The concept of power, a source of many of the enduring problems in international law, appears to have been redefined, setting aside the Hobbesian view which might also have influenced the formulation of the current definition of custom. A powerful State appears not to be one which seeks to vanquish others, but one that acts in concert with other States to achieve communitarian goals. There is need, therefore, to acknowledge in the theory of custom these and other related developments in international law.

Notes

[1] Article 38(1)(b) Statute of International Court of Justice 26 June 1945 San Francisco, UKTS 67 (1946) Cmnd. 7015; UNTS 993, 59 Stat. 1031.

[2] PCIJ's judgement in the Lotus Case (France v. Turkey) Permanent Court of International Justice Reports, (1927) Series A, No. 10, p.254.

[3] (1st edn.1933) *The Function of Law in the International Community*, reprinted 1966) Archon Books, Hamden/Connecticut p.3.

[4] Varouxakis, G. (1997) "John Stuart Mill on Intervention and Non-Intervention", *Millennium Journal of International Studies*, vol. 26 No.1, p.57.

[5] See Parry, C. (1968) "The Function of Law in the International Community", in M. Sorensen (ed.) *Manual of Public International Law*, Macmillan, New York, pp.8-26.

[6] See Simma, B. 1994 (ed.) *The Charter of the United Nations: a Commentary*, Oxford University Press, Oxford, p.974.

[7] Of which the European Union is the only available example. See Macleod et al. (1996) *External relations of the European Communities*, Clarendon Press, Oxford.

[8] See White, N. (1996) *The Law of International Organisations*, Manchester University Press, New York/Manchester.

[9] See Martinez, M. (1996) *National Sovereignty and International Organisation*s, Kluwer Law International, The Hague.

[10] Allot, P. (1989) "International Law and International Revolution: Reconceiving the World", *Josephine Ono Memorial Lecture*, Hull University Press, Hull, p.3.

[11] See in particular Haraszti, G. Some Fundamental Problems of the Law of Treaties, 1973, Akademiai Kiado, Budapest, pp.80-150.

[12] For commentary on the wording of article 38(1)(b) see Brownlie, I. (5th edn. 1998) *Principles of Public International Law*, Oxford University Press; D'Amato, A. (1971) *The Concept of Custom in International Law*, Macmillan, Oxford; Haraszti, G. (1973) *Some Fundamental Problems of the Law of Treaties*, Akademiai Kiado, Budapest; Higgins, R. (1994) *Problems and Processes: International Law and how we use it*, Clarendon Press, Oxford; Kwakwa, E. (1995) "Internal Conflicts in Africa: is there a Right of Humanitarian Action?" *African Yearbook of International Law*, p.9; Jennings, R. and Watts, A. (eds) (9th edn. 1992) *Oppenheim's International Law*, Longman: The Bath Press, Avon; Lauterpacht, H. (1933) *The Function of Law in the International Community*, Archon Books, Hamden/Connecticut; Olson and Groom (1991) *International Relations then and Now*, Harper Collins Academic, London; Parry, C. (1965) *Sources and Evidences of International Law*, Manchester University Press, Manchester; Villiger, M.E. (1997) *Customary International Law and Treaties: a Manual on the Theory and Practice of the Interrelation of Sources*, Kluwer Law International, The Hague/London/Boston.

[13] See Allot, P. (1989) "International Law and International Revolution: Reconceiving the World", *Josephine Ono Memorial Lecture*, Hull University Press, Hull; Bartelson (1995) J.A. *A Genealogy of Sovereignty*, Cambridge University Press, Cambridge; Gerster and Meyer (1985) "New Developments in Humanitarian Law: a challenge to the Concept of Sovereignty", *International and Comparative Law Quarterly*, vol. 34, p.267; Hinsley, H. (2nd edn. 1986) *Sovereignty*, Cambridge University Press, Cambridge; Lapidoth, R. (1992) "Sovereignty in Transition", *Journal of International Affairs*, vol. 45, p.325; Lasok, D. (6th edn. 1994) *Law and Institutions of the European Union*, Butterworths, London; Cassese, A. (1986) International Law in a Divided World, Clarendon Press, Oxford; Craig, P. (1990) *Public Law and Democracy in the United Kingdom and the United States of America*, Oxford University Press, Oxford; Heiberg, M. (1994) *Subduing Sovereignty and the Right to Intervene*, Pinter Publishers, London; Martinez, M. (1996) National Sovereignty and International Organisations, Kluwer Law International, The Hague; Mugerwa, N. (1968) "Subjects of International Law", in M. Sorensen (ed.) *Manual of Public International Law*, Macmillan, New York, p.247; Simma, B. (ed.) (1994) , *The Charter of the United Nations: a Commentary*, Oxford University Press, Oxford; Steinberger, H. (1987) "Sovereignty", in Bernhardt, B. (ed.) *Encyclopaedia of Public International Law*, vol. 10, p. 397; Ogden, S. (1974) "Sovereignty and International Law: the Perspective of the People's Republic of China", *New York University Journal of International Law and Politics*, vol. 7, p.1; Ushakov, N. (1969) "International Law and Sovereignty", in G.I. Tunkin (ed.) *Collection of Articles, Contemporary International Law*, Progress Publishers, Moscow, p.97; Varouxakis, G. (1997) "John Stuart Mill on Intervention and Non-Intervention", *Millennium Journal of International Studies*, vol. 26 No.1, p.57.

[14] For a more detailed discussion of the conception of Sovereignty in the ancient world, see Hinsley, H. ibid. p.22; Gerster and Meyer, ibid. p.267.

[15] See Steinberger, H. (1987) "Sovereignty", in B. Bernhardt (ed.) Encyclopaedia of Public International Law, vol. 10, p. 397.

[16] See Lapidoth, R. (1992) "Sovereignty in Transition", *Journal of International Affairs*, vol. 45, p.325, at p.326.

[17] Ibid.

[18] See Hart, H.L.A. (2nd edn. 1994) *The Concept of Law*, Clarendon Press, Oxford, Chpater 4.

[19] Lasok, D. (6th edn. 1994) *Law and Institutions of the European Union*, Butterworths, London, p.3.

[20] Quoted in Lapidoth, R. (1992) "Sovereignty in Transition", Journal of International Affairs 45 p. 325, at p. 327.

[21] Ibid.

[22] See for example, Mugerwa, N. "Subjects of International Law", in M. Sorensen (ed.) Manual of Public International Law, 1968, p.253.

[23] Ibid.

[24] On the inviolability of territorial sovereignty, see article 2.7 of the United Nations Charter, 26 June 1945, San Francisco, UKTS 67 (1946) 1UNTS xvi; Cassese, A. (1986) *International Law in a Divided World*, Clarendon Press, Oxford, p.78.

25 [25] Poland, Norway, The Netherlands, Belgium, Luxembourg, Yugoslavia, and Greece.

26 [26] Case Concerning East Timor (Portugal v. Australia) (1995) International Legal Materials, vol. 34 No.6, p.1583.

27 Ibid.

28 Ibid.

29 [29] For a thorough discussion on the fundamental principles governing international relations, see Cassese, A. (1986) International Law in a Divided World, Clarendon Press, Oxford, pp.126-165.

30 [30] United Nations Charter, 26 June 1945, San Francisco, UKTS 67 (1946) 1 UNTS xvi.

31 [31] Fear of the fragmentation of the newly formed States because of religious and other civil crises was always threatening. See Lapidoth, R. (1992) "Sovereignty in Transition", *Journal of International Affairs*, vol. 45, p.325, at pp.326-327.

32 [32] While in the remote past the King or Prince was considered as the sovereign, the American Declaration of Independence of 1776 favoured popular sovereignty. The French constitution of 1791 declared that sovereignty belonged to the nation. The English legal system talks of "The Queen in Parliament", or Parliamentary Sovereignty. On economic, social, and political justifications for divided sovereignty, see Kwakwa, E. (1995) "Internal Conflicts in Africa: is there a Right of Humanitarian Action?" *African Yearbook of International Law*, p.9, at pp.18 - 22.

33 [33] For a lucid discussion on the use of, and internal effects on a State system of power see Craig, P. (1990) *Public Law and Democracy in the United Kingdom and the United States of America*, Oxford University Press, Oxford, Chapter 6. The views of the pluralists are of course not uncontroversial. The undoubted merit of their argument lies, however, in the very fact that they focus on the reasons why sovereignty should, or should not be said to reside in a particular institution; and because they focus on the consequences which should, or should not flow from this ascription of power. While attention to other issues sparked off by pluralists can do much to enrich the debate, space precludes such an effort here.

34 [34] For a comprehensive discussion on the probablity that custom is premised on the doctrine of tacit consent in customary international law, see Brierly, J.L. (1958) *The Basis of Obligation in International Law*, Clarendon Press, Oxford; Cheng, B. "The Future of General State Practice in a Divided World", in R.S.J. MacDonald and D.M. Johnston (eds) (1983) *The Structure and Process of International Law*, Sweet and Maxwell, New York, p.520; McDougal et al. (1968) "Theories about International Law: Prologue to a Configurative Jurisprudence", *Virginia Journal of International Law*, vol. 8, p.188; Schachter, O. (1968) "Towards a Theory of Obligation", *Virginia Journal of International Law*, vol. 8, p.300; Virally, M. (1968) "The Sources of International Law", in M. Sorensen (ed.) *Manual of Public International Law*, Macmillan, New York, p.130; Walden, R.M. (1977) "The Subjective Element in the Formation of Customary International Law", *Israel Law Review*, vol. 12 No.3, p.344; See also Chapter One of this study.

35 [35] "The essence of a customary rule lies in the fact that it arises from the conduct of those whom it binds." Virally, ibid. p.130; see also Cheng, ibid. p. 520; Lauterpacht, H. (1933) *The Function of Law in the International Community*, Archon Books, Hamden/Connecticut, p.3; Villiger, M.E. (1997) *Customary International Law and Treaties: a Manual on the Theory and Practice of the Interrelation of Sources*, Kluwer Law International, The Hague/London/ Boston, p. 53.

36 [36] See Mugerwa, N. (1968) "Subjects of International Law", in M. Sorensen (ed.) *Manual of Public International Law*, p.249.

37 [37] Reparation for Injuries Suffered in the Service of the United Nations Case, International Court of Justice Reports, 1949, p.174, at p.178.

38 [38] Lasok, D. (6th edn. 1994) *Law and Institutions of the European Union*, Butterworths, London, p.4. Kunz captures both a universal disillusionment with the state of international law in 1945, and a zest among members of the international community to "rethink", or "reconstruct international law". See (1962) "The Changing Science of International Law", American Journal of International Law, vol. 56, p.488.

39 [39] See Bennett, H. (5th edn. 1991) *International Organisations, Principles and Issues*, Prentice Hall, New Jersey; Kunz, ibid.; Vignes, D. (1st edn. 1983) "The Impact of International Organisations on the Development and Application of Public International Law", in R.S.J. MacDonald and D.M. Johnston (eds) *The Structure and Process of International Law*, Sweet and Maxwell, New York p.809; Farer, T. (1995) "The Evolution of the Inter American System", *Paper presented at the Human Rights in the Americas Conference, 17 November*, The Institute of Advanced Legal Studies, London.

40 [40] (1986) *International Law in a Divided World*, Clarendon Press, Oxford, p.75. There is however, a minority which belittles the role of international organisations in international relations. Bennett writes that: "International organisations have been viewed, at one extreme, as the vanguard of an emerging world government and, at the other, as a an exercise in futility in fostering co-operation among sovereign States. Neither of these extreme views does justice to the role of international organisations in the present age. Today, the State, possessing ultimate power and authority, remains the primary political unit. Yet change, accommodation, and a proliferation of interstate and transnational contacts are the hallmarks of an increasingly interdependent world". (5th edn. 1991) *International Organisations, Principles and Issues*, Prentice Hall, New Jersey, p.2.

41 [41] (1995) "Internal Conflicts in Africa: is there a Right of Humanitarian Action?" African Yearbook of International Law, p.9, at p.21.

42 [42] See for example, Vignes, D. (1st edn. 1983) "The Impact of International Organisations on the Development and Application of Public International Law", in R.S.J. MacDonald and D.M. Johnston (eds) *The Structure and Process of International Law*, Sweet and Maxwell, New York p.809.

43 [43] American Convention on Human Rights, 22 November 1969 San Jose, PAUTS 36; International Legal Materials, vol. 9, p.673.

44 [44] (1995) "The Evolution of the Inter American System", *Paper presented at the Human Rights in the Americas Conference*, 17 November, The Institute of Advanced Legal Studies, London.

45 [45] Summarised in Varouxakis, G. (1997) "John Stuart Mill on Intervention and Non-Intervention", *Millennium Journal of International Studies*, vol. 26 No.1, p.57, at p.58.

46 [46] United Nations Charter, 26 June 1945, San Francisco, UKTS 67 (1946); 1 UNTS xvi

47 [47] See article 1. Section 1 of the Convention on the Prvileges and Immunities of the United Nations, 13 February 1946, London, UNTS 15; UKTS 10 (1950) Cmnd. 1803.

48 [48] On theories on internationational organisations, and how their proliferation in international life has helped reshape the concept of sovereignty and non-interference, see among others, Amerasinghe, C.F. (1994) "Interpretation of Texts in Open International Organisations", *British Yearbook of International Law*, vol. 45, p.175; Anand, R.P. (1986) Sovereign Equality of States in International Law", *Recueil Des Cours*, vol. 197 (II) p.13; Chen, T. (1951) *The International Law of Recognition*, Stevens and Sons, London; Conlon, P. (1995) "Lessons From Iraq Sanctions Committee as a Source of Sanctions Implementation Authority and Practice", *Virginia Journal of International Law*, 35 No.3, p.633; Craven, M.C.R. (1995) "What's in a Name? The Former Yugoslav Republic of Macedonia and Issues of Statehood", *Australian Yearbook of International Law*, vol. 16, p.199; Crawford, J. (1979) *The Creation of States in International Law*, Clarendon Press, Oxford; Crawford, J. (1976-77) "The Criteria for Statehood in International Law", *British Yearbook of International Law*, p.93; Fitzmurice, G. (1956) "The Foundations of the Authority of International Law and the Problem of Enforcement", *Modern Law Review*, vol. 19, p.1; Greenwood, C. (1992) "New World Order or Old? The Invasion of Kuwait and the Rule of Law", *The Modern Law Review*, vol. 55 No.2, p.153; Halderman, H. (1962) "Legal Basis For United Nations Armed Forces", *American Journal of International Law*, vol. 56, p.488; Koskienemi, M. (1995) "International Law in a Post-Realist Era*", Australian Yearbook of International Law*, vol. 16, p.1; Koskenniemi, M. (1989) *From Apology to Utopia: The Structure of International Legal Argument*, Finnish Lawyers Publishing Co. Helsinki; Lauterpacht, H. (1976) "The Development of the Law of International Organisations by the Decisions of International Tribunals", *Recueil Des Cours*, vol.152 (IV) p.377; Lauterpacht, H. (1948) *Recognition in International Law*, Cambridge University Press, Cambridge; Martinez, M. (1996) *National Sovereignty and International Organisations*, Kluwer Law International, The Hague; Bos, M. (1980) "Theory and Practice of Treaty Interpretation", *Netherlands International Law Review*, vol. 27, p.3; Muller, A. (1995) *International Organisations and their Host States, Aspects of their Legal Relationships*, Kluwer Law International, The Hague; Parry, C. (1949) "The Treaty Making Power of the United Nations", *British Yearbook of International Law*, vol. 20, p.108; Schneider, J (1963) *Treaty Making Power of International Organisations*, Rue Du Cardinal Lemoine, Paris; White, N. (1996) *The Law of International Organisations*, Manchester University Press, New York/Manchester; Higgins, R. (1963) *The Development of International Law Through the Political Organs of the United Nations*, 1963, Clarendon Press, Oxford; Zacher, M. W. (1970) *Dag Hammaskjold's United Nations*, Columbia University Press, New York/London; McDougal and Associates (1987)*Studies in World Public Order*, New Haven Press, New Haven; Kairys, D. (1982) *The Politics of Law: a Progressive Critique*, Pantheon Books, New York; Davies, M. (1996) *Delimiting the Law*, Pluto Press, London; Weatherill, S. (1995) *Law and Integration in the European Union*, Clarendon Press, Oxford; Kritsiotis, D. (1993) "The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-Defence in International Law", *International and Comparative Law Quarterly*, vol. 45, p.162.

49 [49] See Chinkin, C. (1993) *Third Parties in International Law*, Clarendon Press, Oxford, Chapter 4; Detter, T. (1962) "The Organs of International Organisations Exercising their Treaty-Making Power", *British Yearbook of International Law*, vol. 38, p.421; Seyested, F. (1964) "Is The International Personality of Intergovernmental Organisations Valid vis-a-vis Non-Members?" *Indian Journal of International Law*, vol. 4, p.233; Weissberg, G. (1961) *The International Status of the United Nations*, Oceana, Dobbs Ferry.

50 [50] In 1955, the International Law Commission (ILC) observed that the UN and all its international organisations of comparable capacity could own ships, and that the UN could register its own ships with the particular State whose flag the ship could then fly. This was meant to satisfy the requirements under article 4 of the Provisional articles on the regime of the high seas, by which ships carried the nationality of the State in which they are registered. They shall sail under its flag, and save in the exceptional circumstances expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction in the high seas. See UN Doc. A/CN. 4/103. At the adoption of the Convention on the Liability of Operators of Nuclear Ships (Brussels, May 1962) the Conference adopted a resolution which observed that the majority of States present at the Conference favoured the principle of allowing inter-governmental organisations to accede to the Convention, and to operate Nuclear Ships subject to that Convention. See Convention on The Liability of Operators of Nuclear Ships, 25 May 1962 Brussels, 1Ruster, p.405. See also Diplomatic Conference on Maritime Law, Standing Committee, Doc. CN-6/SC17

51 [51] (1976)"The Development of the Law of International Organisations by the Decisions of International Tribunals", *Recueil Des Cours*, vol. 152 (IV) p.377, at p.403.

52 [52] (1995) *International Organisations and their Host States, Aspects of their Legal Relationships*, Kluwer Law International, The Hague, p.70, fn.3.

53 [53] Ibid. pp.70-1. "In an Aide-Memoire attached to article 95 of the Treaty Establishing the Benelux Economic Union, Belgium, the Netherlands and Luxembourg declared that they did not intend the organisation to have international legal personality. In conformity with this practice, this organisation is represented in external matters by its member States." Ibid.

54 [54] Traditionally, and essentially, a treaty is an agreement between States, binding in virtue of the maxim pacta sunt servanda. See Chinkin, C. (1993) *Third Parties in International Law*, Clarendon Press, Oxford, pp.1-2; Koskenniemi, M. (1989)*From Apology to Utopia: The Structure of International Legal Argument*, Finnish Lawyers Publishing Co., Helsinki, p.105. On State recognition, see Crawford, J. (1979) *The Creation of States in International Law*, Clarendon Press, Oxford; Crawford, J. (1976-77) "The Criteria for Statehood in International Law", *British Yearbook of International Law*, p.93; Lauterpacht, H. (1948) *Recognition in International Law*, Cambridge University Press, Cambridge. Craven, M.C.R. (1995) "What's in a Name? The Former Yugoslav Republic of Macedonia and Issues of Statehood", *Australian Yearbook of International Law*, vol. 16, p.199. Two theories on the recognition of States are evident. One is that such an act is necessary for the creation of a State - the constitutive theory, favoured by among others, Lauterpacht. The second theory holds that such an act is not necessary in the formation of a State. It is merely declaratory of the fact that a State has

come to exist. Brierly favours the latter approach. See Brierly, J.L. (1958*) The Basis of Obligation in International Law*, Clarendon Press, Oxford.

55 [55] The European Communities have capacity to negotiate and conclude treaties that are binding on member States. See Groux and Lasok (1976) "Involvement with the EEC: Some Canadian Considerations", *McGill Law Journal*, vol. 22, p.575; Haigh, N. (1991) "The European Community and International Environmental Policy", *Journal of International Environmental Affairs*, vol. 3 No.3, p.163; Keohane and Nye (1987) "Power and Interdependence Revisited", *International Organisation*, vol. 41, p.725; Khabarov, S. (1995) "Introductory Note", *International Legal Materials*, vol. 34, p.1298; Macleod et al. (1997) *The External Relations of the European Communities*, Clarendon Press, Oxford; Maunu, A. (1995) "The Implied External Competence of the European Community after the ECJ Opinion 1/94 - Towards Coherence or Diversity", *Legal issues of European Integration*, vol. 2, p.115; Neuwahl, N. (1991) "Joint Participation in International Treaties and the Exercise of Power by the EEC and its Member States: Mixed Agreements", *Common Market Law Review*, vol. 28 No.4, p.717; The United Nations can negotiate and enter into binding agreements with host countries. See Reparation for Injuries Suffered in the Service of the United Nations Case, ICJ Reports, 1949, p.174; Schneider, J. (1963) *Treaty Making Power of International Organisations*, Rue Du Cardinal Lemoine, Paris.

56 Both inter-governmental and non-governmental.

57 [57] Parry, C. "The Treaty Making Power of the United Nations", *British Yearbook of International Law*, vol. 20 (1949) p.108, at p.110.

58 [58] See for instance Lasok, D. (6th edn. 1994) *Law and Institutions of the European Union*, Butterworths, London, pp.58-9.

59 [59] A common way of distinguishing international organisations. See Martinez, M. (1996) *National Sovereignty and International Organisations*, Kluwer Law International, The Hague.

60 [60] On which see especially de Witte, B. (1995) "Sovereignty and European Integration: the Weight of Legal Tradition", *Maastricht Journal of International and Comparative Law*, vol. 2 No.2, p.145; Macleod, et al. (1997) *The External Relations of the European Communities*, Clarendon Press, Oxford; McGoldrick, D. (1997) *International Relations Law of the European Union*, London/New York.

61 [61] Martinez, M. (1996) *National Sovereignty and International Organisations*, Kluwer Law International, The Hague, pp.71-2.

[62]Nationality Decrees in Tunis and Morocco Case PCIJ (1923) Series B No.4.

[63]Ibid. p.24.

64 [64] Reparation for Injuries Suffered in the Service of the United Nations Case, International Court of Justice Reports, 1949, p.174, at p.182.

65 [65] Advisory Opinion on Effects of Awards of Compensation made by the UN Administrative Tribunal, International Court of Justice Reports, 1954, pp.56-57.

66 Mc Culloch v. Maryland, 17 v. (4 Wheat) 316 4 I. Ed 579 (819).

67 Ibid.

68 [68] See generally The WTO Secretariat (1999) *Guide to the Uruguay Round greements*, Kluwer Law International.

69 Ibid. p.1.

70 [70] Schermers Quoted in Martinez, M. (1996) *National Sovereignty and International Organisations, Kluwer Law International*, The Hague, p.80.

71 [71] To be discussed in detail in later chapters. For now, see the judgement of the ICJ in the North Sea Continental Shelf Cases (NSCSC) (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands) International Court of Justice Reports, 1969, p.3, paragraph 71; Villiger, M.E. (1997) *Customary International Law and Treaties: a Manual on the Theory and Practice of the Interrelation of Sources*, Kluwer Law International, The Hague/London/Boston, pp.93-148

72 [72] See for instance Bos, M. (1980) "Theory and Practice of Treaty Interpretation", Netherlands International Law Review, vol. 27, p.3; Amerasinghe, C. F. (1994) "Interpretation of Texts in Open International Organisations", *British Yearbook of International Law*, vol. 45, p.175, at pp.182-190.

[73][73] See Reparation for Injuries Suffered in the Service of the United Nations Case, International Court of Justice Reports, 1949, p.174.

74 [74] (1996) *National Sovereignty and International Organisations*, Kluwer Law International, The Hague, p.78.

75 [75] Advisory Opinion on Certain Expenses of the United Nations (article 17, Paragraph 2, of the Charter) International Court of Justice Reports, 1962, p.151.

76 [76] Resolutions 1583 (XV) and 1590 (XV) of December 20 1960, 1595 (XV) of 3 April 1961, 1619 (XV) of 21 April 1961 and 1633 (XVI) of 30 October 1961 relating to the Congo, and in pursuance of SC Resolutions of 14 July, 22 July and 9 August 1960, and 21 February and 24 November 1961, and GA Resolutions 1474 (ES-IV) of 20 September 1960 and 1599 (XV) 1600 (XV) and 1601 (XV) of 15 April 1961; and the operations of the United Nations Emergency Force (UNEF) undertaken in pursuance of GA Resolutions 997 (ES-I) of 2 November 1956, 998 (ES-I) and 999 (ES-I) of 4 November 1956, 1121 (XV) of 24 November 1956 and 1263 (XIII) of 14 November 1958.

77 [77] For a detailed rehearsal of both sides of this argument, see Halderman, H. (1962) "Legal Basis For United Nations Armed Forces", *American Journal of International Law*, vol. 56, p.488.

78 [78] For a detailed analysis, see Schneider, J. (1963) *Treaty Making Power of International Organisations*, Rue Du Cardinal Lemoine, Paris, pp.54-67. For a definition of a treaty that incorporates capacity to participate of international organisations, see the final text of "Draft articles on the Law of Treaties", UN Doc. A/CN4/190, Art. 2 (1) (a) p.2.

79 [79] Fitzmurice, G. (1956) "The Foundations of the Authority of International Law and the Problem of Enforcement", *Modern Law Review*, vol. 19, p.1, at p.3.

80 [80] Martinez, M. (1996) *National Sovereignty and International Organisations*, Kluwer Law International, The Hague. See also de Witte, B. (1995) "Sovereignty and European Integration: the Weight of Legal Tradition", *Maastricht Journal of International and Comparative Law*, vol. 2 No.2, p.145; Macleod, et al. (1997) *The External Relations of the European Communities*, Clarendon Press, Oxford; McGoldrick, D. (1997) *International Relations Law of the European Union*, London/New York.

81 [81] See also Conlon, P. (1995) "Lessons From Iraq Sanctions Committee as a Source of Sanctions Implementation Authority and Practice", *Virginia Journal of International Law*, vol. 35 No.3, p.633.

82 [82] Arguing that during the Rhodesian crisis, Switzerland had vigorously opposed the suggestion that it was bound to apply sanctions under article 2(6) of the UN Charter, although it did take measures to prevent the use of Swiss territory for the avoidance of sanctions, see in particular Greenwood, C. (1992) "New World Order or Old? The Invasion of Kuwait and the Rule of Law", *Modern Law Review*, vol. 55 No.2, p.153, at p.160.

83 [83] See article 38(1)(b) Statute of International Court of Justice 26 June 1945 San Francisco, UKTS 67 (1946) Cmnd. 7015; UNTS 993, 59 Stat. 1031.

84 [84] See also Vincent, R.J. (1986) *Human Rights and International Relations*, Cambridge University Press, Cambridge pp.1-4.

85 [85] The Inter American Court of Human Rights, and both the European Commission on Human Rights and The European Court of Human Rights have become incessant hives of activity, with individuals seeking redress for what they regard as State violations of their human rights. See Macleod, et al. (1997) *The External Relations of the European Communities*, Clarendon Press, Oxford; McGoldrick, D. (1997) *International Relations Law of the European Union*, London/New York.

86 [86] 87 UNTS 103; ETS 5; UKTS 38 (1965) Cmnd. 2643. See Harris, et al. (1997) Law of the European Convention on Human Rights, Butterworths, London/ Dublin/Edinburgh, Chapter 1.

87 [87] American Convention on Human Rights, 22 November 1969 San Jose, PAUTS 36; International Legal Materials, vol. 9, p. 673.

88 [88] See for example *Azapo Case* where the applicants argued that South Africa's National Unity and Reconciliation Act 34 of 1995 violated their individual rights guaranteed under section 20(7) of South Africa's Provisional Constitution of 1994.

89 [89] On theories of non-interference, see Varouxakis, G. (1997) "John Stuart Mill on Intervention and Non-Intervention", *Millennium Journal of International Studies*, vol. 26 No.1, p.57; Ryan, C.M. (1997) "Sovereignty, Intervention, and the Law: A Tenuous Relationship of Competing Principles", *Millennium Journal of International Studies*, vol. 26 No.1, p.77.

90 [90] (1968) Oda, S. "The Individual in International Law", in M. Sorensen (ed.) *Manual of Public International Law*, Macmillan, London, pp.495-6. Emphasis added. On the argument that the justification of human rights abuse based on the old conception of sovereignty no longer suffices, see also Captori, F. 1st edn. 1983) "Human Rights: The Hard Road Towards Universality", in R.S.J. MacDonald and D.M. Johnston (eds) *The Structure and Process of International Law*, Sweet and Maxwell, New York, p.977.

91 [91] Convention on the Rights and Duties of States, 26 December 1933, Montevideo, 165 LNTS 19; PAUTS 37.

92 [92] Charter of the Organisation of American States and 1967 Protocol, 30 April 1948, Bogota, 119 UNTS 4; PAUTS 1.

93 [93] Charter of the Organisation of African Unity, 25 May 1963, Addis Ababa, 479 UNTS 39; International Legal Materials, vol. 2, p.766.

94 [94] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970) Annex to United Nations General Assembly Resolution 2625 (XXV). This declaration is frequently referred to by States and international tribunals as a codification of contemporary international law. See Reisman, M. (1988) "Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice", *Yale Journal of International Law*, vol. 13, p.171, at p.191.

95 [95] For allowable exceptions to this rule see Jennings, R. and Watts, A. (9th edn. 1992) *Oppenheim's International Law*, Macmillan Publishers, London, pp.439-51.

96 [96] See Komarow, G. (1980) "Individual Responsibility under International Law: The Nuremborg Principles in Domestic Legal Systems", *International and Comparative Law Quarterly*, vol. 29, p.21.

97 [97] Article 2.7 reads: "Nothing contained 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". United Nations Charter, 26 June 1945, San Francisco, UKTS 67 (1946) CD. 7015; 1 UNTS xvi

98 Article 1 paragraph 3, ibid.

99 Article 56 ibid.

100 [100] See for instance, the judgment of the International Court of Justice in Sei Fuji v. State of California, International Law Reports, 19 (1952) p.312.

101 [101] The Universal Declaration of Human Rights, 1948; The International Covenant on Civil and Political Rights, 1966; The International Covenant on Economic,Social, and Cultural Rights, 1966; and other regional Conventions.

102 [102] Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State. United Nations Charter, 26 June 1945, San Francisco, UKTS 67 (1946) CD. 7015; 1 UNTS xvi.

103 Resolution 917(X) of 6 December 1955; Resolution 1663(XVI) of 28 November 1961; Resolution 1761(XVII) of 6 November 1963.

104 SC Resolution. S/5471 of 4 December 1962.

105 See as examples, Carlton Linton v. Jamaica (Communication No. 255/1987) UN Doc CCPR/C/46/D/255/1987; IHRR Vol.1, No.1 (1994) p.73, paragraphs 9 and 10; Arvo Karttunen v. Finland (Communication No. 387/1989) UN Doc. CCPR/C/46/D/387/1989; IHRR Vol.1, No.1 (1994) p.78, paragraphs 8 and 9; Peter Chiiko Bwalya v. Zambia (Communication No. 314/88 UN Doc. CCPR/C/48/D/314/1988; IHRR Vol.1, No.2 (1994) p.84, paragraphs 6.7, 7, and 8; Lenford Hamilton v. Jamaica (Communication No. 333/1988) UN Doc. CCPR/C/50/D/333/1988; IHRR Vol.1, No.3 (1994) p.60.

106 87 UNTS 103; ETS 5; UKTS 38 (1965) Cmnd. 2643.

107 American Convention on Human Rights, 22 November 1969 San Jose, PAUTS 36.

108 African Charter on Human and Peoples" Rights, 26 June 1981 Banjul, OAU Doc. CAB/LEG/67/3/Rev 5.

109 (1986) International Law in a Divided World, Clarendon Press, Oxford, p.100.

110 Ibid.

111 See for instance McCormack, T.L.H. and Simpson, G.J. (1995) "A New International Criminal Law Regime", *Netherlands International Law Review*, vol. 42, p.177; "The International Law Commission's Draft statute for an Internal Criminal Court", Report of the International Law Commission on the work of its forty-sixth Session, 2 May - 22 July 1994, *General Assembly Official Records*, 49th Session, Supp. No. 10 (A/49/10).

112 Antitrust laws have exercised the energies of all the industrialised States, resulting in a massive array of national and regional statutes, all directed at this difficulty. international lawO Conventions have elevated the significance of both the individual as a worker with a humanity that international law has to protect; and also as an entrepreneur with legitimate interests that must be protected. See Wedderburn (3rd edn. 1986) *The Worker and The Law*, Penguin Books, Harmondsworth, Chapter 3. Kwakwa (1995) writes that: "The increasing globalization of the world economy in matters of trade, immigration and financial flows challenges the notion that decisions are made exclusively within defined territorial boundaries. Jobs within nations are increasingly dependent on economic factors beyond the control of States. Fluctuations in cross-boarder currency trading set narrow parameters within which domestic monetary policy can be carried out. Increased economic globalization has deprived governments of a say in financial flows and reduced them to managing the consequences of decisions made by speculators". "Internal Conflicts in Africa: is there a Right of Humanitarian Action?" *African Yearbook of International Law*, p.9 at p.19. Kaseke writes that Zimbabwe has never been in a worse economic crisis, some of it due to persistent drought, but most of it, according to economic commentators, caused by unrestrained government expenditure and mismanagement. "International Monetary Fund (IMF) officials are now occupying desks in important ministries, watching the purse strings to ensure that the government does not again blow its chances of finance." - "Business Leaders Paralyse Zimbabwe Government" (Sapa) zimnet@AfricaOnline.Com.

113 Intervention can take the non-violent form of public criticism of an act, or persuasion to adopt a position contrary to the one the subject is being dissuaded from. It can manifest itself through financial support of political parties and or military insurgents. It can also be economic, with a view to bending governments towards democracy. This mode of intervention is exercising itself in many of the third world countries presently. It can also be unilateral. Usually unilateral intervention assumes the application of military power. A single country (like the USA) did in Somalia in 1994, or a group of States (like the allied forces did in the Gulf Crisis with a view to restoring Kuwait's integrity in 1990) and sometimes it can be under the auspices of a regional institution (like NATO moved into the former Yugoslavia on 20 December 1995, to enforce the Dayton Peace agreement). The Times, "Prospects for Peace for the former Yugoslavia", 21 December 1995. Unilateral intervention can also be collective, as when the Security Council, or the UN directly sanctions it. For a detailed discussion on intervention in international law, see Damrosch, L.F. (1989) "Politics Across Borders: Non-intervention and Non-forcible Influence over Domestic Affairs", *American Journal of International Law*, vol. 83, p.1.

114 Pursuant to Security Council Resolution 688 of 5 April 1991, the allied forces created a safe haven for the Kurds in Iraqi, literally placing part of Iraqi's territory beyond its realm of influence. Although Iraqi protested against what it saw as a violation of its sovereignty, because of the absence of its consent to all this action, what was done was legal, because of the binding force of Resolutions of the Security Council.

115 (1992) "On Sovereignty", Lecture given to mark the 25th Anniversary of the National Academy of Engineering, Washington, DC, 4 October 1989, quoted in Lapidoth, R. "Sovereignty in Transition", *Journal of International Affairs*, vol. 45 p. 325, at p. 334.

116 "Souverainete" - association was the subject of Quebec's referendum in 1980, and the term was intended to imply political sovereignty coupled with association in areas of common interest, in particular, economic matters. - See Report of the Commission on the Political and Constitutional Future of Quebec, Belager - Campeau Commission, March 1991, p.28. See also de Witte, B. (1995) "Sovereignty and European Integration: the Weight of Legal Tradition", *Maastricht Journal of International and Comparative Law*, vol. 2 No.2, p.145; Macleod, et al. (1997) *The External Relations of the European Communities*, Clarendon Press, Oxford; McGoldrick, D. (1997) *International Relations Law of the European Union*, London/New York.