

Oppenheim Revisited: An Australian Perspective*

D W Greig⁺

The 35 years or more that passed between publication of the eighth edition of *Oppenheim* and the appearance of the ninth have seen enormous changes to the scope and density of international law. When Lauterpacht produced the eighth edition, he apologised for the fact that despite "drastic cuts both in the bibliographies and otherwise in the text and footnotes, the length of the present volume exceeds that of its predecessor by nearly 150 pages". The period since the seventh edition had been a mere seven years. Given both the time lag since the eighth edition and the added dimensions to international law, it is hardly surprising that the 1072 pages of 1955 have become the 1672 pages of 1992, notwithstanding the fact that material on international organisations (taking up pp 370-448 and the Appendix on pp 977-1029) has been removed with a view to the present editors providing, at a later stage, a new Volume III to deal more comprehensively with the law of international institutions. As it is, the increased size of Volume I, *Peace*, has necessitated its appearance as two separate books. Because of the apparent need to retain the format of the original, however, both books are titled as "Volume I", despite the fact that Volume I obviously now comprises two volumes. Given that the international organisation material is regarded as appropriate for a separate volume, there seems no obvious reason why each book should not be given a separate volume number. If it is felt absolutely necessary that the volume numbered II should deal with the material from "War, Disputes and Neutrality", at least as a compromise the books of Volume I could be referred to as IA and IB, particularly as each book does include a number of different "parts" so that it is not possible to identify the two volumes simply as parts 1 and 2.

Before commencing a discussion of the contents of the ninth edition, it is worth mentioning another very obvious point. The editors share an enviable perspective on contemporary international law. Both are products and representatives of international law in Cambridge. In the case of both men, their national perspective was given a broad internationalist flavour by subsequent experience, Sir Robert Jennings as a long-serving member of the International Court and at present its President; Sir Arthur Watts from his

* Being a review of Oppenheim L, *International Law*, 9th ed by Jennings RY and Watts A (Longman Group UK Ltd, Harlow, England, 1992), pp lxxxvi + 1333 + Index. Page references in this review are to this edition of *Oppenheim* unless otherwise stated.

+ Professor of Law, Australian National University, Canberra.

dealings with other States and their representatives as a member and eventually as Head of the Legal Branch of the Foreign and Commonwealth Office.

There are a number of changes of emphasis to the new edition. While providing invaluable references for further information or research on the enormous range of topics covered in the "volume", the editors have also employed the footnotes to provide more detailed analysis of some of those topics in expansion or explanation of the main text. If there is to be any criticism of this approach it is simply that, in other areas, while there are additional references, there is little or no warning as to possible alternative views in derogation of what is stated in the text. While it is true that the practitioner or researcher will pick up the possible divergences from the additional material, the reader of the text alone will not be put upon notice. Some examples of this danger will be apparent from the more detailed discussion of various aspects of the volume which follow. Another shift in emphasis is highlighted by the editors themselves. The previous editor, Lauterpacht, made no attempt to identify the audience of the eighth edition, whether academics and their protégés, or practitioners in foreign offices or before international tribunals. Perhaps Lauterpacht would have regarded them all as students of international law. The new *Oppenheim* reflects the increasing divide: it is primarily a practitioner's book. To be fair to the editors, they take a somewhat different view, explaining their position as follows:

We have also retained the practice of a liberal use of footnotes, which has been such a distinctive factor of "Oppenheim". This reflects one of the principal characteristics of "Oppenheim" which we have sought to preserve and enhance wherever possible. That is its status as a practitioner's book, rather than as an academic treatise.¹

It is the present reviewer's opinion that this is to misinterpret the position. When the eighth edition was first published, it was widely used by students, and was well within their financial resources. The new edition, at 395 pounds for the two books of Volume I, is beyond the pockets of most academics, let alone of their students. However, the editors' view does raise the question of whether there is such a distinction between a practitioner's work and an academic treatise (as opposed to a student text, the requirements of which raise quite different issues).

Apart from the inclusion of a wealth of references to authority, writings or practice in the footnotes, which can be as much a feature of academic literature as of a work for practitioners, it is difficult to follow exactly what the editors intended to signify by the contrast between an academic treatise and the present work. As far as the text itself is concerned, it may be that "academic" means a more theoretical approach. The likelihood that this is a correct implication of the editors' meaning is borne out by their limited treatment of a number of matters the jurisprudential discussion of which in the

1 Pages xii-xiii.

literature is substantially greater. For example, the examination of sources seems almost perfunctory. To an extent, this can be attributed to the absence of detailed treatment in the text in the *Oppenheim* format, but it also seems to be partly a consequence of the editors' judgment that certain issues are of little practical significance.

The results are, however, questionable. For example, the legal effects of General Assembly resolutions are largely dealt with in a footnote,² while the text on the same page deals in a cursory fashion with the completeness of the sources set out in article 38.1 of the Statute of the International Court, suggesting that "the collective actions of the international community within the framework provided by international organisations" have been employed by the court within the compass of article 38 of its Statute and that, if this were not so and these activities were to constitute "a separate source of law, the resulting rules would not be applicable by the Court within the framework" of that article.³ This is a surprising suggestion. The editors admit the possibility that "there may come a time when [such activities] will acquire the character of a separate source of law". Indeed, given the general competence of the world community to develop new rules, to accept or deny the validity of claims to territory or statehood etc, it hardly seems likely that the power to decide how to determine these questions (and particularly the first) is denied to that community. Nor is there any reason to read article 38.1 as signifying that a court, whose function is to decide disputes submitted to it "in accordance with international law", can *only* apply the sources set out therein, or engage in casuistry in order to apply rules based upon equity or derived from General Assembly resolutions to the dispute. Nevertheless, it was presumably the apparent need felt by members of the court to read article 38 in this restrictive way which was the reason for the chameleon like appearance of certain General Assembly Resolutions in the *Nicaragua* case,⁴ sometimes as akin to State practice,⁵ at other times as evidence of *opinio juris*,⁶ all in the context of rules of "customary law". Perhaps we might at this point add our own footnote by mentioning that page 29 note 18, referring to various articles dealing with the aspects of the *Nicaragua* judgment relating to the nature of customary international law, could include the valuable analysis provided by Charlesworth in this *Year Book*.⁷

It may be, of course, that a re-examination of the law-making authority of the international community, and the inadequacies of the sources described in article 38, are matters too academic for a practitioner's work. But one wonders whether a similar excuse can legitimately be offered with regard to the early

2 Page 46, n 1 continued.

3 Pages 46-47.

4 ICJ Rep 1986, p 3.

5 Pages 106-07.

6 Pages 100-02.

7 Volume 11 (1991), p 1, under the title of "Customary International Law and the Nicaragua Case".

discussion of *jus cogens*.⁸ The editors refer to well-known candidates for categorisation as rules of the *jus cogens*, for example the law of the United Nations Charter concerning the prohibition of the use of force by States and the right of peoples not to be denied self-determination. While treaties in derogation of such principles may well be void in accordance with article 53 of the Vienna Convention on the Law of Treaties, it is, as the editors appear to admit, unclear whether these principles operate, and what their effect would be, in areas other than treaty law. Nevertheless, the editors then proceed to suggest that, presumably therefore, no act done contrary to such a rule can be legitimated by means of consent, acquiescence or recognition; nor is a protest necessary to preserve rights affected by such an act. True it may be that a victim's consent to its invasion and the enslavement of its people will not provide the aggressor with a defence to the censure of the international community but the community itself can legitimise the conduct, or at least the consequences of what might originally have constituted an international illegality, for example, India's seizure of Goa or, perhaps in time, Indonesia's takeover of East Timor.

It is possible to give a different emphasis to the political dynamic. One of the problems with the *jus cogens* approach is that it is presented as a rule of automatic application. Thus, by article 39 of the Charter, the Security Council is required to ("shall") determine that there has been a breach of the peace or act of aggression if certain facts are present. In practice this has seldom occurred, the reaction to the invasion of Kuwait by Iraq standing in sharp contrast to the Council's treatment of many earlier events, including Iraq's entry into Iranian territory at the commencement of the Gulf War between those two States. Does this mean that the prohibition on the use of force is only a presumptive norm? Does it mean that, in the absence of a Security Council ruling, States are free to adopt their own stance to such a situation? In this context it is perhaps a pity that the Australian government's position with regard to East Timor is not given greater prominence, as it felt itself free, in the absence of a Security Council resolution to the contrary, to recognise *de jure* the incorporation of that territory as part of Indonesia.⁹

The editors display a degree of circumspection on this point when they consider it again in the context of the recognition of States and governments. They follow a statement of the Stimson doctrine with the observation that:

The development from such a unilateral declaration of policy to an international legal obligation to withhold recognition of illegal conduct has been hesitant and incomplete. States do not in practice acknowledge any general obligation under international law permanently to withhold recognition of illegal acts or their consequences. They more usually act on the view that, while they may refrain from recognising the consequences of illegal conduct, the illegality of an act and any consequential invalidity of its results may, in

8 Pages 7-8.

9 See the statement of 20 March 1986 by the then Minister for Resources and Energy, Senator Gareth Evans: (1991) 11 *Aust YBIL* 262-63.

general, be wholly or partially cured by an individual or collective act of other states who, by an express act of recognition, may thenceforth treat as valid the new situation notwithstanding the initial illegality of the act on which it is based.¹⁰

This passage is an amplification of what appeared in the previous edition¹¹ from which is also taken the statement that "recognition has also been sought and given where the validity of the title claimed by a State has been doubtful or controversial".

This pronouncement and the preceding passage give the impression that they still represent the law in 1992, as opposed to that pertaining in the 1930s or 1950s, particularly when the words "in general" in the passage have a footnoted exception in the case of contrary obligations arising out of the Charter with regard to Rhodesia and Namibia. However, almost immediately, the editors assert that the "illegality of resort to the threat or use of force against the territorial integrity or political independence of any State is now firmly established by Article 2 of the Charter of the United Nations and now has the character of *jus cogens*".¹² The section on State practice¹³ deals with a range of familiar examples, though the editors seem to retreat from the above position almost as soon as they assert it in their prefatory remarks to the practice section:

Although non-recognition has been accepted as appropriate, it has not been inevitable, particularly if the illegal act appears in practice to have become irreversible. The principles *ex iniuria jus non oritur* and *ex facto jus oritur* conflict; the former plays an essential part, but, in an international community with weak enforcement procedures, there has been little practical alternative to allowing the latter to prevail in the long term.¹⁴

Oppenheim-Lauterpacht were confirmed promoters of the constitutive nature of recognition as far as Statehood was concerned: "A State is, and becomes, an International Person through recognition only and exclusively".¹⁵ There was, however, no discussion of constitutive and declaratory "theory", though it was admitted that many writers did "not agree with" the above opinion.¹⁶ Despite the shift towards declaratory theory tempered by a denial of Statehood as a matter of law in a case where its creation involved an international illegality, the editors largely avoid the issue, partly in the manner already outlined, and partly by suggesting that the problem "is largely theoretical because state practice is inconclusive and may be rationalised either way".¹⁷

10 Pages 184-85.

11 Page 142.

12 Page 186.

13 Pages 186-97.

14 Page 186.

15 Eighth ed, p 125.

16 Ibid.

17 Ninth ed, p 129.

While declining to participate in the theoretical debate, the editors acknowledge the political freedom that States wish to retain for themselves in deciding upon the validity or acceptability of particular claims to Statehood. This is preferable to the unrealistic approach of some writers who, by downplaying the significance of recognition in this context, seem to deny the existence of any determinative role for the international community.¹⁸ Paradoxically, one even finds such writers advocating a lax application of some of the traditional criteria of Statehood (for example, as to a defined territory or an established government), while regarding the acts of the Security Council and General Assembly in admitting an applicant to membership of the United Nations as declaratory of a situation predetermined by those legal criteria.¹⁹

It is, however, possible to rationalise the relevant practice differently. The requirements of Statehood can be regarded as providing a basis for declaratory theory and its objective (legal) quality. However, the international community also exercises a constitutive power based upon more subjective (political) factors. Thus, even if an entity emerging from the process of decolonisation had not been prepared adequately for independence and lacked effective governmental structures and may therefore have failed to qualify for Statehood according to objective declaratory principles, it would have been politically unacceptable that its status as a State should have been denied. Its admission to membership of the United Nations was thus the subjective constitutive judgment of the international community on the matter. This interpretation of the relevant practice would obviously not be acceptable to the editors when they write:

A decision to admit a new member to the United Nations represents the attitudes of the individual member states towards the new community and does not involve a collective act of recognition of the new member as a state by a central organ of the international community.²⁰

One could surmise, however, that notwithstanding the rather tentative opinion expressed by the former editor in the eighth edition,²¹ the present reviewer's rationalisation may not have been without appeal to him in light of his constitutive predilection towards the recognition of States.

There is perhaps a similarity between the editors' reluctance to acknowledge the *de facto* role of the United Nations in the creation of States and their suspicions of the General Assembly's assertion of authority in relation to non-self-governing territories. Their doubts are expressed as follows:

18 See the present writer's review of Dugard J, *Recognition and the United Nations* (1987) in (1992) 12 *Aust YBIL* 296.

19 *Ibid*, p 300.

20 Page 177.

21 Pages 147-48, n 7.

The General Assembly and the Committee of Twenty-Four have in some respects stretched to the limit – and even beyond – the legal powers conferred on the Assembly by the Charter, and their activities in this respect are not free from criticism. They have done so principally by building on the provisions of the Charter which refer to self-determination and to the promotion of human rights, and by asserting a connection between continued colonialism and the threat to international peace. Although the Charter did not provide adequate procedures for the implementation of Chapter XI, it was legitimate for the Assembly to establish suitable procedures. However, there is less justification in this part of the Charter for, for example, equating self-determination with independence, for extending the obligations of members of the United Nations in relation to information to be supplied and otherwise by, for instance, enlarging the scope of information to cover matters of constitutional development or the measure of progress achieved in the direction of self-government or independence; for requiring the "immediate" termination of colonial situations irrespective of the extent to which the territory is ready and able to assume the obligations of sovereignty; or for fixing arbitrary dates by which a colonial situation is to be "terminated" by delivery of the territory to another state contrary to the expressed view of the territory's inhabitants as to their interests which the Charter itself states "are paramount"; or, generally, for eroding the significance of Article 2(7) of the Charter in this context virtually to the point of disappearance.²²

It is certainly to be regretted that the various examples of alleged "overstepping the mark" by the Assembly are not identified by individual footnote references. Moreover, the counter-case could more strongly be put that the Assembly has, not surprisingly, been unsympathetic to colonial powers which have sought, so it could have appeared to the Assembly, to plead their own misdeeds in not promoting the political advancement of their colonial territories as a justification for further delaying the independence of the territories in question.

The editors' apparent playing down both of the political significance of the General Assembly's role and of its quasi-legislative function may be viewed from a different perspective. It was, after all, the International Court which sanctioned the existence of a wide discretion vested in the United Nations and its principal organs when it said in the *Expenses* case:

... When the Organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organisation.

If it is agreed that the action in question is within the scope of the functions of the Organisation but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organisation. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not

necessarily mean that the expense incurred was not an expense of the Organisation.²³

In other words, individual States may have little or no basis for complaint if the issue concerns a matter of the internal competence of rival or alternative United Nations organs. Where it is a question of the United Nations itself exceeding its competence vis-à-vis individual States, an objection might have a greater chance of success. However, it may still be possible for the Organisation to justify its assertion of competence, as a matter of practice or as a legitimate interpretation of the Charter. For example, the supervisory functions asserted by the Assembly over South Africa as the Mandatory Power with respect to South West Africa, following the winding up of the League of Nations in which alone such authority was vested, was sanctioned neither by the Charter nor by the Resolution on Mandates passed by the Assembly of the League on 18 April 1946.

It was an assertion of competence by the United Nations General Assembly of which the International Court approved in a series of advisory opinions. However, in the third of these,²⁴ the court accepted a divergence from the limits upon the Assembly's authority as defined in the first of its opinions.²⁵ Fundamentally the correctness of this series of opinions depends upon the authority (of the Assembly as an organ) of the international community to remedy the defect caused by the court's refusal to hold that article 77 of the Charter imposed upon States an obligation to bring mandated territories, not proceeding almost immediately to independence, into the Trusteeship System,²⁶ thus creating a gap in the arrangements for the international supervision of such territories. Yet, unlike their critical stance with regard to the Assembly's activities concerning non-self-governing territories in general, the editors are accepting of the Assembly's role in relation to the former South West Africa.²⁷

It is true that South West Africa had an international status by virtue of the Mandate arrangements made after the First World War, which included the agreement with South Africa that survived the winding up of the League of Nations. However, the failure by colonial powers to augment para 1(c) of article 77²⁸ left an enormous gap in the Charter scheme for protecting and

23 ICJ Rep 1962, p 151 at 168.

24 *Hearings of Petitioners* case, ICJ Rep 1956, p 23.

25 *Status of South West Africa* case, ICJ Rep 1950, p 128 at 138, where the court said that the "degree of supervision to be exercised by the General Assembly should not ... exceed that which applied under the Mandate System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations". Individual petitions had never formed part of the Council's supervisory functions yet they were sanctioned by the court. The other advisory opinion was the *Voting Procedure* case, ICJ Rep 1955, p 68.

26 *Status of South West Africa* case, ICJ Rep 1950 at 139-40.

27 Pages 301-02.

28 According to article 77.1:

promoting the rights of colonial peoples. Admittedly, the Charter provisions for dealing with non-trust territories were skeletal, but they were, as a matter of legitimate interpretation, open to subsequent development. This possibility seems to be more justifiable than the Assembly's creation of a supervisory system for a mandated territory for which the Charter made, as has already been mentioned, no provision whatsoever. Yet, to this latter extension of the Assembly's authority, the editors raised no objection even though, in the *Hearings of Petitioners case*,²⁹ the court had approved a means of supervision which went beyond anything employed by the Permanent Mandates Commission and the Council of the League.

Chapter 3 deals with the position of States as international persons.³⁰ It commences with a reference to the principles of international law concerning friendly relations as laid down in General Assembly resolution 2625(XXV) of 1970 upon which the ethic of international cooperation is to be based.³¹ A further introductory comment to the principal attributes of Statehood is contained in the section on the "economic rights and duties of states".³² Unlike Resolution 2625 which, being "prepared within the framework of the United Nations after extensive inter-governmental discussion, and ... adopted by acclamation and without dissenting vote by the General Assembly", contains seven principles of "pre-eminent value in contemporary international law",³³ the sequence of resolutions passed during 1974 on this significant aspect of

The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

- a. territories now held under mandate;
- b. territories which may be detached from enemy states as a result of the Second World War; and
- c. territories voluntarily placed under the system by states responsible for their administration.

29 Note 24 above.

30 Page 330.

31 Pages 334-35.

32 Pages 335-39.

33 The principles are set out as follows (pp 334-35, footnotes omitted):

- (1) States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.
- (2) States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.
- (3) The duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter.
- (4) The duty of states to cooperate with one another in accordance with the Charter.
- (5) Equal rights and self-determination of peoples.
- (6) Sovereign equality of states.
- (7) States shall fulfil in good faith the obligations assumed by them in accordance with the Charter.

international relations, culminating in the Charter of Economic Rights and Duties of States,³⁴ are regarded by the editors with caution. The legal effect of these resolutions "is uncertain" because the Declaration and Program of Action were subject to "expressed dissent on a number of important points by some states", and "the Charter was adopted by 120 votes in favour, six against with ten abstentions", those 16 non-affirmative votes representing developed States which would be directly affected by many of the provisions of the Charter. "Accordingly, these three resolutions represent (save insofar as they restate existing rules of international law) formally expressed aspirations of the international community rather than legally binding rights and obligations".³⁵

The point could reasonably be made that the right to development should not be relegated to one sentence³⁶ with a footnote reference to some of the relevant literature. This seems to be out of proportion to the amount of footnote space devoted to the case law of common law countries relating to State immunities, given the cardinal importance of economic development and its promotion to third world countries. Moreover, there is perhaps some inconsistency in the editors' treatment of these different General Assembly resolutions compared with their earlier reservations regarding any law-making role for the Assembly. Despite those reservations, their comments on the Declaration on Friendly Relations³⁷ appear to acknowledge the existence of such a possibility. But how does one differentiate between this instrument and the Charter of Economic Rights and Duties of States which was articulated in a similarly legislative fashion? If the answer is that the outcome depends, if a resolution is to have that effect, upon the unanimity or virtual unanimity of the support of United Nations members for the instrument in question (which implicitly seems to be the basis of the editors' distinction between the 1970 Declaration on Friendly Relations and the 1974 Charter), this is to accept a new form of international law-making. But what of a resolution having a law-making intent, which fails to command virtually universal assent? Does it not represent international law for the majority, so that a dispute amongst those like-minded States would be settled in accordance with the resolution's prescriptions? Of course, in the economic area, given that most matters of contention are between the owners or controllers of capital on the one hand and those seeking access to it on the other, it is likely that one of the disputants will be from the group of States which has not expressed its support for the relevant prescriptions, and can hardly be regarded as bound by them.

34 The Resolutions were a Declaration on the Establishment of a New International Economic Order, GA Res 3201(S-V1) (1974); a Program of Action on the Establishment of a New International Economic Order, GA Res 3202(S-V1) (1974); and the Charter of Economic Rights and Duties of States, GA Res 3281(XXIX) (1975).

35 Page 338.

36 Pages 338-39.

37 See above p 235.

However, whether the outcome of a particular dispute is by agreement or through litigation, it is likely to involve some degree of compromise between the two standpoints. It is, in any case, difficult to be quite so dismissive of the legislative intent of a majority of States as to classify the contents of the 1974 Charter merely as "aspirations".

It might have been helpful at this juncture to have introduced the concept of "soft law". Admittedly, the concept has its drawbacks, particularly in so far as it fails to distinguish between rules prescribing or proscribing certain conduct, but not intended to be, or become, binding in a formal legal sense, and rules that are intended to become legally binding but which are not yet so, or are only so for some, but not yet for all, States. Despite this ambiguity (it might be helpful to designate rules in the latter category as "inchoate" rather than "soft" to reduce confusion, though it is possible to envisage a situation where rules in the former category later come to be regarded as legally normative), the appellation "soft" law is a useful tool to give a measure of recognition to undertakings or declarations which do have normative content or intent, whether at the political or legal level. At any rate, there is something to be said for giving various attempts by international organisations or conferences (of which the Charter of Economic Rights and Duties of States is but a possible example) a preliminary and provisional classification as soft law, even if later practice shows that they are not, or no longer, treated as a basis for the regulation of international conduct.

Chapter 3 demonstrates the major problem faced by the editors in being constrained by the format of the existing *Oppenheim*. The chapter outlines various aspects of Statehood, including the concept of sovereign equality, the dignity of that status, the right of self-preservation, including the protection of a State's territory and independence, and the correlative obligation not to intervene in the affairs of other States. Some matters did not require substantial enlargement (for example, the issue of the dignity of a State) and others could be more extensively treated elsewhere (for example, self-defence as an aspect of self-preservation which would obviously need to be dealt with in a new version of Volume II of the old *Oppenheim*). But what of the enormous expansion of material on the immunities of States and their instrumentalities which had occurred since the topic formed a relatively small adjunct to the sovereign equality of States in the previous edition? As a result of retaining the existing format a sizeable portion of the text and even more of the copious footnotes³⁸ are taken up with this "aspect" of the equality of States in international law.

In terms of information provided this segment is indeed a *tour de force*, although there does seem to be a degree of unevenness in the amount of analysis or explanation provided. For example, the issue of what constitutes a waiver of immunity is given quite detailed treatment,³⁹ though from an

38 Pages 341-63 out of pp 339-79.

39 See p 353, n 38.

Australian perspective some comment would have been helpful on the not altogether comprehensible section 10 of the Commonwealth Foreign States Immunities Act 1985. In contrast, there is little attempt to explain *why* the differences have arisen in the jurisprudence of a number of European States in distinguishing between acts *jure imperii* and those *jure gestionis*.⁴⁰ Given the difficulties many of us experience in dealing with unfamiliar concepts, it might have been an idea to have said a little about the origins of the distinction in marking the division between the jurisdiction of the administrative courts and of the ordinary courts in civil law countries.⁴¹ The dividing line has been blurred by the significance attached in France to the notion of *service public* and the effects of this principle are to be seen especially in Italy, which had formerly been a country where the nature rather than purpose distinction had been firmly identified and applied.

Another aspect of the law of State immunity which illustrates a degree of unevenness in the weight accorded to it is that of counter-claims. For some reason the treatment of the topic largely ignores the distinction between a claim arising out of the same subject matter and a set-off which is a defence that allows a party to protect itself on wider grounds, but only to the amount of the claim being made in the action.⁴²

Nevertheless, the chapter is on many of the matters covered an invaluable treasure chest: on the act of State doctrine;⁴³ on the question of whether and the extent to which that doctrine is restricted where the act involves a breach of international law;⁴⁴ and on violations of the territorial and personal authority of a State⁴⁵ where the controversial issue is addressed of whether a State will exercise criminal jurisdiction over persons seized illegally on its behalf from the territory of another State. If there is any criticism to be made it would be with regard to the sequence of the various sections inherited from previous editions. For example, the last-mentioned segment is followed by short discussions of restrictions upon independence⁴⁶ and upon territorial authority,⁴⁷ and a longer treatment of the duty upon a State to prevent subversive activities on its territory directed against other States.⁴⁸ The text then takes something of a diversion via restrictions upon a State's personal authority,⁴⁹ abuse of rights,⁵⁰ and protection of the environment,⁵¹ before

40 See pp 362-63 where many of the "apparently inconsistent conclusions" are identified.

41 See the treatment of this issue in Leech N, Oliver C, and Sweeney J, *The International Legal System: Cases and Materials* (1973), pp 322-25.

42 See p 354, esp n 44.

43 Pages 365-71.

44 Pages 371-76.

45 Pages 385-90.

46 Pages 390-91.

47 Pages 391-93.

48 Pages 393-406.

49 Pages 406-07.

50 Pages 407-10.

dealing with the issues of self-preservation,⁵² self-defence⁵³ and the prohibition of intervention.⁵⁴ From there, after an interlude under the title of "intercourse",⁵⁵ the chapter reverts to matters relating to the scope of municipal jurisdiction,⁵⁶ and closes with a section on the non-enforcement by municipal courts of foreign public law.⁵⁷

While this sequence is dictated by the *Oppenheim* tradition, it is a pity that the editors were constrained by it. Similarly, with regard to the following chapter on State responsibility. While it is true that this is an "attribute of statehood", it has more connection with the "transactional" relations of States dealt with at the end of the second of the two books which comprise "Volume I" of the new *Oppenheim*. A move of State responsibility to this part of the volume would have other advantages. It would help balance the emphasis of that later section which, as it presently stands, is principally concerned with the treaty relations of States. It would also mean that aspects of State responsibility concerning the nationality of claimants are considered after, and not before, the main discussion of the concept of nationality and allied topics.⁵⁸

The editors' treatment of the nationality of claims rule in Chapter 4 raises a number of questions. For example, they state the principle of the *Nottebohm* judgment⁵⁹ as requiring "that a state may not espouse a claim on behalf of a person who has its nationality but has no real and effective link with that state, at least if the claim is against another state with which he does have such a link".⁶⁰ To this assertion is added a footnote that the *Flegenheimer* claim⁶¹ has the effect of "limiting this requirement of an effective link to cases involving a claimant with more than one nationality".⁶² The significance of this comment could be made clearer. In fact, of course, in the *Nottebohm* case, the claimant no longer had any nationality other than that of Liechtenstein, having lost his German citizenship by German law by the act of acquiring another nationality. What the Commission in the *Flegenheimer* case was saying was that it did not like the implications of the International Court's judgment in *Nottebohm* and did not regard it as laying down any rule of international law. In the words of the Commission:

But when a person is vested with only one nationality, which is attributed to him or her either *jure sanguinis* or *jure soli*, or by a valid naturalisation

51 Pages 410-15.

52 Pages 416-17.

53 Pages 417-27.

54 Pages 428-51.

55 Pages 451-55.

56 Pages 456-88.

57 Pages 488-98.

58 Pages 846-86.

59 ICJ Rep 1955, p 4.

60 Page 514.

61 (1958) 25 ILR 91 at 147-50.

62 Page 514, n 9.

entailing the positive loss of the former nationality, the theory of effective nationality cannot be applied without the risk of causing confusion. It lacks a sufficiently positive basis to be applied to a nationality which finds support in a state law. There does not in fact exist any criterion of proven effectiveness for disclosing the effectiveness of a bond with a political collectivity, and the persons by the thousands who, because of the facility of travel in the modern world, possess the positive legal nationality of a State, but live in foreign States where they are domiciled and where their family and business center is located, would be exposed to non-recognition, at the international level, of the nationality with which they are undeniably vested by virtue of the laws of their national State, if this doctrine were to be generalised.⁶³

When the editors deal with issues of dual nationality, they rely primarily upon articles 4 and 5 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930⁶⁴ as "probably to be regarded as rules of customary international law".⁶⁵ With regard to three of the propositions they deduce therefrom,⁶⁶ the editors are able to cite a range of authority in support of what they assert. In the case of an individual having the nationality of both applicant and respondent States, article 4 is, on the face of it, applicable and article 5 appears to be irrelevant. However, where the applicant State is able to establish that its nationality is the real and effective, or dominant, one, "the principle underlying Article 5 ... points to the opposite conclusion. This conflict between the rules reflected in Article 4 and 5 has often been resolved by allowing the latter to prevail in cases where the effective nationality of the claimant state is clearly established."⁶⁷ The editors go on to apply the effective nationality principle to the situation where that nationality is of a third State to deny the claimant State standing to present the claim under their proposition (3):

A national of the claimant state is also a national of some other state (not the respondent state), with which he is also most closely connected: Article 4 is not applicable, and the rule reflected in Article 5 suggests that the claim be disallowed since the effective nationality is of a state other than the claimant state.⁶⁸

63 Note 61 above, p 150.

64 According to article 4:

A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.

By article 5:

Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognise exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.

65 Page 516.

66 Pages 516-17.

67 Page 516, citing, *inter alia*, the *Merge* claim (1955) 22 ILR 443 at 455.

68 Pages 516-17.

It is this proposition for which the editors cite no authority. It is questionable for a number of reasons. In the first place, it is highly unlikely that such an interpretation would have been placed upon the Convention at the time it was made. The *Salem* case,⁶⁹ decided only two years later, accepted it as a "rule of international law ... that in a case of dual nationality a third power is not entitled to contest the claim of one of the two powers whose national is interested in the case by referring to the nationality of the other power".⁷⁰ Admittedly, the law may have changed in the intervening 60 years but such evidence as there is suggests that doubts exist as to the appositeness of the 1930 Convention,⁷¹ rather than the *Salem* decision. Moreover, while the Commission in the *Flegenheimer* claim was dealing with the position under the Peace Treaty with Italy of 1947, its observations seemed to accept the continuing correctness of the *Salem* decision when it said:

The theory of effective or active nationality was nevertheless limited in its application by the principle of the unopposability of the nationality of a third State, which, in an international dispute caused by a person with multiple nationalities, permits the dismissal of the nationality of the third State, even when it should be considered as predominant in the light of the circumstances.⁷²

The editors' view is also open to doubt because the principle is stated so broadly, being expressed in such a way as to encompass the situation where an applicant State, despite having real connections with the individual concerned, would be barred from presenting a claim because of the existence of more substantial connections between the individual and a third State, the nationality of which he or she also possesses. Not only does this seem unreasonable *per se*, but it is a rule which does not fit comfortably with the underlying principle, quoted approvingly by the editors,⁷³ that, in taking up a claim on behalf of one of its nationals, a State is asserting its own right to ensure respect for the rules of international law. Moreover, in a world increasingly concerned for the protection of human rights – economic as well as personal or political – it seems strange to advocate a rule which might well curtail the possibilities of redress for an individual and to allow a transgressor State to shelter behind such an artificial defence.

When the issue of local remedies is reached, the rule is stated in a way which may not satisfy all readers:

Where a state has treated an alien in its territory inconsistently with its international obligations but could nevertheless by subsequent action still secure for the alien the treatment (or its equivalent) required by its obligations, an international tribunal will not entertain a claim put forward on behalf of that

69 (1932) 2 UNRIAA 1161.

70 Ibid, at 1188.

71 See the comments of the Iran–United States Claims Tribunal in *Case No A/18* (1984) 5 Iran–US CTR 251 at 260–61.

72 Note 61 above, p 149.

73 Page 512.

person unless he has exhausted the legal remedies available to him in the state concerned.⁷⁴

The limitation to territory would not seem to be an essential element, though some voluntary connection on the part of the injured person with the transgressor State would seem to be necessary, a factor that note 2 does not directly address, though some of the references do. Of more concern is the inclusion of the words "but could nevertheless by subsequent action still secure for the alien the treatment (or its equivalent) required by its obligation". This can scarcely mean that "as long as it is not too late to fulfil the obligation", because the local remedy can include performance of an equivalent obligation such as an award of damages in lieu. Nor does it make much sense to speak in terms of the State taking "action" as it is for the alien to take action to enable the State to remedy the breach of obligation that has already occurred. If the words mean "as long as there is available a legal remedy that appears to provide a means of redress under the law of the State concerned", then this intention could be made much clearer. There must surely be a link between the "action" which will secure the redress and the remedy that must be exhausted.

With regard to the question of what constitutes an exhaustion of the remedies available, the editors assert:

Effective exhaustion of the local remedies requires the alien not only to have recourse to the substantive remedies available to him, but also to avail himself of the procedural facilities at his disposal under the local law.⁷⁵

The principal case referred to in support of this proposition, or more particularly the last part of it, is the *Ambatielos* arbitration.⁷⁶ Certain assumptions have to be made about the facts of this case, notably that there had already been a breach of an international obligation by the United Kingdom government towards *Ambatielos* and that the action he had commenced in the English courts had been an attempt on his part to satisfy the local remedies rule. After his action failed at first instance, he sought to introduce a new witness who could have given evidence at the trial, but had not been called. Given the findings of fact by the trial judge, there was no point in *Ambatielos* pursuing the normal process of appeals. On the face of it, the case was similar to that of the *Finnish Ships*,⁷⁷ in which it was held that, as there was no possibility of the claimants obtaining a reversal of the findings of fact by the Admiralty Board, which had the status of a court of first instance, local remedies had, in effect, been exhausted. In *Ambatielos*, however, a majority of three of the five-member tribunal held that they had to regard the evidence as essential to the claimant's case so that he had, by his own conduct, deprived the courts of the opportunity of providing him with

74 Pages 522-23.

75 Page 524.

76 (1956) 12 UNRIAA 83.

77 (1934) 3 UNRIAA 1479.

justice. Accordingly, the claim against the United Kingdom by Greece could not proceed as *Ambatielos* had failed to allow the local remedies available to operate effectively.

This decision seems to place a heavy onus upon a claimant not only to seek redress in the local courts, but to present the claim effectively. A misjudgment on his or her part will not only deprive that person of a remedy under municipal law but it will also create a barrier to any remedy under international law as well. The extent to which this outcome is acceptable is linked to two other matters dealt with in the same part of the book. The first concerns the question of how one classifies the original act of the respondent State upon which the claim is based. The second is related to the burden of proof.

As far as the first matter is concerned, the editors suggest that it is "more of theoretical than practical significance whether the local remedies rule is a condition for the existence of international responsibility or is merely a procedural condition governing the enforcement of responsibility which has already arisen".⁷⁸ Nevertheless, one is left with a lurking suspicion that the theory may have practical importance in the context of the present discussion. If one accepts that there has already been a breach of an international obligation by the State concerned, then the onus should be upon that State to put things right. As long as the claimant makes a reasonable attempt to give it such an opportunity that should be all that the local remedies rule requires. On that basis, *Ambatielos* should have succeeded: his failure to take advantage of the remedy may have been misjudgment (though he may not have succeeded in any case) but it was not the result of any perversity or bad faith on his part.

If one accepts the approach of the International Law Commission, however, the rule would be categorised as being "to enable the state to avoid the [future] breach of an international obligation by redressing, through a subsequent course of conduct adopted on the initiative of the individuals concerned, the consequences of an initial course of conduct contrary to the result required by the obligation".⁷⁹ In other words, it would appear that no breach of obligation can occur until the State fails, through appropriate use of its local remedies, to achieve the result required by the obligation. While this alternative version of the situation need not lead to a different conclusion in a case similar to *Ambatielos*, it is more likely that the outcome on those facts would be reinforced. As there is not yet any breach of obligation by the State concerned at the time of its original involvement in the situation, must there not be some fault on its part in not enabling the claimant to achieve a satisfactory outcome before responsibility can arise? It was hardly the fault of the British government that *Ambatielos*' action failed.

The outcome of cases of this kind can also be influenced by how the onus of proof is regarded. According to the editors:

78 Page 524, n 5.

79 (1977) II Pt 2 *Yb ILC* 47, quoted p 524 n 5.

It is for the state claiming that local remedies have not been exhausted to demonstrate that such remedies exist; and if they are shown to exist, it is for the opposing party to show that they were exhausted or were inadequate.⁸⁰

On the face of it, the decision in *Ambatielos* could be explained along these lines: the United Kingdom was able to show that remedies existed and Greece was unable to show that it had exhausted them. This still belies the question of what "exhausted" means. Moreover, the two-stage approach may not be adequate. There is the problem of what the first party has to establish with regard to remedies existing – do they have to be remedies capable of giving redress in this actual situation or just in circumstances of this sort? The answer would appear to be the latter, thus imposing upon the second party the onus of showing that none was available on these facts. This *Ambatielos* was unable to demonstrate: the facts had not necessarily been fully established so that there was no way of telling what the result might have been. What occurred in the unusual circumstances of *Ambatielos* suggests, however, that the two-stage process may not always be satisfactory. In a straightforward case, this approach is fair enough: in *Finnish Ships*,⁸¹ the United Kingdom could point to the avenue available through the Admiralty Board, and it was then for Finland to show that the remedy had been tried unsuccessfully. It would seem that the latter possibility was open to the Greek government in *Ambatielos* so that there should, in fact, be a third stage in which it would have been for the British government to show why the attempt to exhaust the available remedies was unsatisfactory. In other words, it would have had to show that there had been some breach of duty owed to the respondent government in *Ambatielos*' failure to adduce the evidence at the trial. As a simple case of misjudgment in how to handle the proceedings could not reasonably constitute such a breach (after all the onus should still ultimately have been with the British government to remedy or to avoid breaking an international obligation), *Ambatielos* should have succeeded.

The first book of Volume I (IA!) ends with two sections dealing with the responsibility of a State for acts of private persons. This inevitably involves some discussion of the *Tehran Hostages* case.⁸² The editors accept the distinction drawn by the International Court between the circumstances at the time of the original seizure of the embassy and consulates and the subsequent support and approval given by the Iranian government to the militants' actions. With regard to the initial stage, the court held that, though Iran was responsible for a failure to provide the premises with adequate protection, it bore no responsibility for the actual attack launched by the militants on the premises. It was only later that the government's approval of the militants' continued presence on the premises, and their holding of the American personnel, converted the acts of the militants at that stage into acts for which Iran was directly responsible. Curiously enough, neither in this context, nor

80 Page 526.

81 Note 77 above.

82 ICJ Rep 1980, p 3 (p 551 n 7; p 552).

indeed elsewhere in the two sections, is there any discussion of the doctrine of ratification. It is clear in other contexts that this doctrine has a role to play in international law.⁸³ In one sense it was of relevance to the present case as the Iranian authorities did subsequently accept the acts of the militants as their own. It is an interesting question whether ratification, as under Anglo-Australian law, can relate back to the moment when the alleged agent first acted.⁸⁴ The crucial requirement under this doctrine at common law is that the agent should have purported to act on behalf of a particular principal.⁸⁵ Even if this requirement is replicated in international law, it could well have been satisfied in the *Tehran Hostages* case. It could be argued that, as the militants were claiming to act on behalf of the people of Iran, their acts could be ratified, and were in fact ratified, by the subsequent and emphatic endorsement of their actions by the Iranian authorities. In other words, Iran was, in these circumstances, also responsible for the actual seizure of the premises as a result of the subsequent ratification of all the militants had done on the people's behalf.

The second book (Volume 1B) commences with an examination of the territory of States, dealing successively with various aspects or extensions of that territory (for example rivers, canals, territorial sea and contiguous zones, gulfs and bays, straits, archipelagoes etc). Some sections are able to identify a more definite legal situation than others. The classic example of a situation of paramount uncertainty is the (almost submerging) law of "international" rivers. Despite various encouraging or confident noises about "a body of customary law and practice in this matter",⁸⁶ the fuller picture provided by the editors is both more realistic and less heartening. Thus one is left with an apparent choice between the Helsinki Rules adopted by the International Law Association in 1966 as constituting "general rules of international law applicable to the use of the waters of an international drainage basin except as may be provided otherwise by convention, agreement or binding custom among basin States",⁸⁷ and the International Law Commission's concept of an "international watercourse system".⁸⁸ Both are based upon the notion of equitable and reasonable utilisation, but the real problem is that of dealing with pollution, the editors ending with the comment that "one can only hesitate

83 For example, in relation to the acquisition of territory through acts of private individuals purporting to act on behalf of the State, see pp 677-78 and 686-87.

84 A rule operating in its most extreme form in *Bolton Partners Ltd v Lambert* (1989) 41 Ch D 295: see Greig DW and Gunningham N, *Commercial Law*, 3rd ed (1988), pp 20-22.

85 *Keighley Maxsted & Co v Durant* [1901] AC 240, or at least to have been acting as an agent and to have been able, if called upon to do so, to identify the principal on whose behalf the agent was acting: see Greig and Gunningham, *ibid*, pp 23-24.

86 Page 584.

87 Article I, quoted p 586.

88 Page 588.

to assert that there are rules of established customary law dealing with the specific problem of river pollution".⁸⁹

The discussion of acquisition of territory the reader might find rather disappointing. It seems a little disjointed and lacks an overall thread. It is perhaps a pity that more was not made of the issue raised in the very cautious observation that the development of State practice "has, in the last few decades, reached the stage where the scheme of separate modes may be beginning to be outgrown; except, of course, where situations belonging to former times sometimes still come into question".⁹⁰ The reason why this comment is so cautious is that the classical modes of acquisition were seldom applied by international tribunals.⁹¹ In so far as they did rate an express mention it was more often than not to deny their applicability to the facts of the dispute.⁹² Moreover, as the editors point out, in the *Island of Palmas* case,⁹³ "Judge Huber recognised that there is a core requirement of peaceable possession common to the modes of occupation and prescription; and that in respect of a given claim this could well be decisive, so dispensing with any need to establish whether the origin of the possession were an occupation of *terra nullius* or the beginning of a period of acquisitive prescription".⁹⁴ In fact, as a number of writers have commented, the process of title building (consolidation) varies from one situation to another. The editors quote from De Visscher,⁹⁵ though in fact that jurist regarded consolidation merely as an alternative process to occupation or prescription. It is better regarded as a modern replacement for some never entirely satisfactory concepts derived largely from Roman law.⁹⁶

89 Page 589.

90 Page 708.

91 The *Clipperton Island* case (1931) 26 AJIL 390, being a rare exception.

92 For example, the denial that territory could be regarded as *terra nullius* and open to occupation in the *Eastern Greenland* case (1933) PCIJ Ser A/B No 53, by Norway; in the *Minquiers and Ecrehos* case, ICJ Rep 1953, p 47, by either party; or in the *Western Sahara* case, ICJ Rep 1975, p 3, by Spain.

93 (1928) 2 UNRIAA 829.

94 Pages 708–09.

95 *Theory and Reality in Public International Law*, English translation by Corbett P (1968), p 209, quoted p 709.

96 See Schwarzenberger's observation in *International Law*, Vol 1, 3rd ed (1957), p 292:

The analysis of the problem in historical perspective puts the emphasis on historical consolidation of title as a process. Moreover, it underlines the two typical characteristics of titles to territory. It brings out their initial relativity and the growing multiplicity of their constituent elements in their movement towards absolute operation.

Such a historical analysis also explains the unsatisfactory character of any attempt to put the operative rules into the strait-jacket of private law analogies.

Consolidation is a process whereby the law is changed or established and the same is true with regard to title to territory.⁹⁷ The issue of whether the rule or title has been consolidated depends upon an assessment of all the circumstances. For this reason the editors are correct in showing a healthy scepticism as to Fitzmaurice's view⁹⁸ that the concept of a critical date was a rule of international law requiring "time to stop at that date".⁹⁹ In the *Eastern Greenland* case,¹⁰⁰ it was easy to identify as the critical date the day in 1931 when Norway issued its claim to a portion of the eastern coast of Greenland, so that it was necessary to ask whether it was at that moment *terra nullius* or already under Danish sovereignty. It was, of course, not so much the date but the answer to the question which was critical to the outcome of the case. If, however, the dispute had festered and had not been submitted to international adjudication for another 30 or 40 years, however important that earlier date and the answer to the question might still be, they would not necessarily be determinative. The tribunal could not ignore what had happened to the territory in the intervening period, especially if Norway had succeeded in establishing a degree of control over the disputed territory in apparent derogation from what might have been the position in 1931. The year 1931 could no longer be regarded as the critical date, though it would still have remained significant and the answer to the question as to sovereignty at that time could still, in the absence of countervailing activities by Norway, have been determinative. From this point of view, the statement in the *Taba* arbitration,¹⁰¹ that events "subsequent to the critical period can in principle also be relevant, not in terms of a change of the situation, but only to the extent that they may reveal or illustrate the understanding of the situation as it was during the critical period",¹⁰² is open to question. Where the subsequent events do suggest a change, either it is that period which must be regarded as critical, or it must at least form part of a longer critical period.

The editors point to the fact that, even assuming the traditional modes still exist, international tribunals take account of a variety of factors (that sound very much like the building blocks of consolidation) which the editors, following Munkman,¹⁰³ suggest include "recognition, acquiescence and preclusion; possession and administration; affiliations of inhabitants of disputed territory; geographical considerations; economic considerations;

97 See the present writer's "Reflections on Consent" in (1992) 12 *Aust YBIL* 125 at 157 *et seq.*

98 Admittedly presented in argument on behalf of the United Kingdom before the International Court, so there can be no certainty that he believed in the correctness of the proposition!

99 *Minquiers and Ecrehos* case, ICJ *Pleadings*, Vol ii, p 64; quoted p 711.

100 (1933) PCIJ Ser A/B, No 53.

101 (1988) 80 ILR 226 at 284.

102 Quoted p 711, n 6.

103 "Adjudication and Adjustment - International Judicial Decision and the Settlement of Territorial and Boundary Disputes" (1972-73) 46 *British Year Book of International Law* 1 at 95-116.

historical considerations".¹⁰⁴ It may be true that, as Shaw has written,¹⁰⁵ recognition "is the primary way in which the international community has sought to reconcile illegality or doubt with political reality and the need for certainty", but in practice the "recognition" has usually been indirect. It would take the form of a general acceptance, rather than express recognition, of title (if apparently perfected). Prior to that stage, the gamut of inchoate title, spheres of influence and protectorates¹⁰⁶ was designed to give a degree of stability to the legal order during the later stages of colonial expansion. These did not involve a recognition of title as such, but rather of the entitlement of the would-be acquirer to extend its sovereignty to the area in question (as in the *Eastern Greenland* case in which various States that might have been interested in the disposition of the territory made statements giving Denmark a free hand with regard to its acquisition¹⁰⁷). Ultimately, despite the primacy given to the traditional modes, and their apparently reluctant acceptance that "the scheme of separate modes may be beginning to be outgrown",¹⁰⁸ the editors, almost as if they have convinced themselves, assert under the heading of the "attitude of the international community" that it "has been seen above how the classical scheme of modes and roots of title has evolved into a more elaborate system of consolidation of title over a period of time, and involving the interplay of a variety of different factors and considerations, as well as actual possession".¹⁰⁹

The editors could be less cautious. Occupation does not have to be described as present law but as a historical relic, the emphasis from the outset being upon the contemporary importance of the recognition of the consequences of consolidation. From any point of view, the acquisition of territory, small islands or territories apart, was inevitably a lengthy process if it was based upon something akin to the prescription or occupation of private law and not upon discovery and assertion of title alone. As to what the requirements were, the law undoubtedly went through a series of changes in response to the conflicting demands and ideologies of the colonial powers.¹¹⁰

Originally, at the commencement of the expansion of Europe in the second half of the fifteenth century, Spain and Portugal sought and obtained Papal

104 Page 710.

105 *Title to Territory in Africa: International Legal Issues* (1986), pp 23–24, quoted p 710.

106 Similarly, decisions such as the *Island of Palmas* (1928) 2 UNRIAA 829, and *Eastern Greenland* (1933) PCIJ Ser A/B, No 53, were part of this process in that they allocated territory between the only two possible claimants by reference to which State had the better claim, however slender its basis: see Greig, "Territorial Sovereignty and the Status of Antarctica" (1978) 32 *Australian Outlook* 117.

107 See PCIJ Ser C, No 63, p 1151 *et seq.*

108 Page 708.

109 Page 715.

110 Explained below. See also Greig, "Sovereignty, Territory and the International Lawyer's Dilemma" (1989) 26 *Osgoode Hall LJ* 127 at 140–63.

support and authorisation to legitimate their actual and future claims based principally upon discovery. The counter-theory, first advanced by the English and the Dutch in the late sixteenth and early seventeenth centuries, was that title by prescription (as it was termed) required actual possession of the territory being claimed. This formula was obviously designed to combat the Pope's dispensation for acquisition by discovery alone. However, the use of "prescription" as the relevant process may have had a more subtle motive. The claims of the Iberian States appeared to disregard totally the rights of the indigenous populations of the territories to which those claims related. At that stage, at any rate, it served the interests of the second wave of European explorers to seem to be upholders of the rights of native peoples. In legal theory, however, prescription by adverse possession would not only override Iberian claims but it could provide the colonial power with a means to supplant the rights of other persons, including the local inhabitants, to the territory in question.

In time, occupation of *terra nullius* and the playing down of the rights of the indigenous population of the *terra* in question best suited the interests of all the colonial powers. Even so, the occupation of international law could hardly be identical to the taking of possession by a single act of a *res* with the intention of acquiring *dominium* over it of its Roman law counterpart. For a variety of reasons – the size of the territory being acquired, its remoteness to the territory of the colonial power, and the lack of resources available to the nineteenth century State – even an extension of time during which the occupation could be perfected was unsatisfactory as far as the colonisers were concerned. So the concept of possession was artificially extended, a development of which the editors are critical,¹¹¹ though their objections may not be entirely justified. In the very case to which they refer at the end of the relevant section, the decision in *Eastern Greenland*,¹¹² the Permanent Court endorsed a shift to territorial acquisition by decree when it replaced all reference to possession by a reference to the exercise or display of authority in the following passage: "a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign and some actual exercise or display of such authority". The court went on to say that:

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.¹¹³

111 Pages 690–91.

112 (1933) PCIJ Ser A/B, No 53 at 45–46.

113 *Ibid*, at 46.

In addition, State practice supported the acquisition of territory in this way, Australia's own colonisation being a classic illustration of a taking by decree rather than by establishing possession in any meaningful sense over the land as a whole.

With regard to the history of European expansion, international law is often accused of subordinating the rights of indigenous peoples to the demands of the colonial powers. In particular, the point is made that the rights of peoples were ignored by the fiction that the territory which they inhabited could nevertheless be regarded as *terra nullius* and therefore subject to the control and law of the colonising State from the inception of its rule. The consequences of this fiction have been a central issue to the claims of Aboriginal people in this country and similar issues have arisen in North America. Yet the matter is scarcely given more than a few passing references by the editors,¹¹⁴ which provide only a hint of the agonies of law, politics and changing morality underlying the following passage from a longer segment quoted¹¹⁵ from the *Western Sahara* case:

When a territory has been in the past acquired and settled by a strange power, whether by occupation, conquest or some form of cession, a question has sometimes arisen later about the possible survival of rights of the original and native inhabitants; usually amounting to claims to rights in tracts of land. This is partly, perhaps even principally, a question of municipal and constitutional law. But international law arguments are also frequently involved and there is a considerable jurisprudence on the matter, especially from North America and from Australasia.¹¹⁶

The book appeared too early to include the High Court's (r)evolutionary decision in *Mabo v Queensland*,¹¹⁷ recognising the continuing existence of native title and associated rights to land in certain circumstances.¹¹⁸

Given the large number of municipal decisions which the editors employ in their treatment of State immunities, space could have been found for a greater citation of North American authority dealing with the position of native peoples.¹¹⁹ It is true that these cases deal with the municipal law of the

114 Appearing fleetingly on pp 678, 687, 978.

115 Page 687, n 4.

116 ICJ Rep 1975, at 39.

117 (1992) 175 CLR 1.

118 The only Australian case mentioned is *Coe v Commonwealth* (1978) 24 ALR 118, though, for some reason, it is given the citation of a Canadian decision: *Burnell v International Joint Commission* which has nothing to do with native rights! On the pre-*Mabo* position the references should have included *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

119 The range of case law and literature is enormous, but a sample could be given: Hurley, "Aboriginal Rights in Modern American Case Law" [1983] 2 CNLR 9; Bartlett, "Survey of Canadian Law: Indian and Native Law" (1983) 15 *Ottawa LR* 431; Slattery, "Understanding Aboriginal Rights" (1987) 66 *Can Bar Rev* 727; and see also *Delgamuukw v British Columbia* (1991) 3 WWR 97 at 337 *et seq*; Berman, "The Concept of Aboriginal Rights in the Early Legal History of the United States" (1978) 27 *Buffalo LR* 637; Newton, "At the Whim of the

country concerned, but international legal issues are rarely far away.¹²⁰ The relationship between the rules of international law and those of constitutional law has often been regarded as a central factor in the struggle to provide protection for the rights and interests of such people. This was as true of the attempts to control the excesses of the early Spanish colonists in America¹²¹ as it has been of the movement for Aboriginal land rights in the Australia of the latter part of the twentieth century.¹²² It is at least arguable that, to a large extent, the downplaying of the status of indigenous peoples and the emphasis upon occupation as a means of acquiring title even of territories having such a population, were of greater significance to the law of the colonial power in relation to the people and territory it had acquired, than to the process of acquisition under international law.

It was not a matter of major concern in dealings between colonial powers whether they acquired territory by occupation or prescription, by cession or conquest: the important matter was the existence of factors, including a degree of control over the territory sufficient to justify the claim, a reality reflected in the leading cases on territorial acquisition.¹²³ It was only when it became a question of transposing the acquisition of title under international law into its consequences for municipal law that distinctions between the various modes of acquisition became so important.

Occupation was based upon the perception, in the case of a populated territory, that the people concerned lacked any recognisable social, legal and political order so that, in municipal terms, there was a legal vacuum which was filled by the automatic application of the law of the colonisers. With regard to Australia, of course, this involved the general reception of English law, including, presumably, the principle that all land was held of the Crown.¹²⁴ Only in a case of cession or conquest was there a pre-existing

Sovereign: Aboriginal Title Reconsidered" (1980) 31 *Hastings LJ* 1215; Shattuck PT and Norgren J, *Partial Justice: Federal Indian Law in a Liberal Constitutional System* (1991).

- 120 See Shattuck and Norgren, n 119 above, p 24 *et seq*; Williams, "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World" (1990) *Duke LJ* 660 at 672-76; Lawrey, "Contemporary Efforts to Guarantee Indigenous Rights under International Law" (1990) 23 *Vand JIL* 703; *Delgamuukw v British Columbia* (1991) 3 *WWR* 97 at 205 *et seq*.
- 121 See Marks, "Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de Las Casas" (1992) 13 *Aust YBIL* 1.
- 122 See Hocking, "Colonial Laws and Indigenous Peoples: Past and Present Law Concerning the Recognition of Human Rights of Indigenous Peoples in British Colonies with Particular Reference to Australia", in Hocking B (ed), *International Law and Aboriginal Human Rights* (1988), p 3; Balkin, "International Law and Sovereign Rights of Indigenous Peoples", *ibid*, p 19.
- 123 *Island of Palmas* case (1928) 2 *UNRIAA* 829; *Eastern Greenland* case (1933) *PCIJ Ser A/B*, No 53.
- 124 *Cooper v Stuart* (1889) 14 *App Cas* 286; *Milirrpum v Nabalco Pty Ltd* (1971) 17 *FLR* 141.

order which continued in existence except to the extent that it was negated or replaced by the legislative acts of the new sovereign.

The questions of whether Australia was acquired on the basis that it was *terra nullius*, and what consequences flowed from such a finding, were raised in *Mabo v Queensland*.¹²⁵ The difficulty for the plaintiffs was that there had been nothing which could be regarded as a cession of the Torres Strait Islands on which they lived, a fact which they shared in common with the other native inhabitants of Australia; nor was there anything amounting to or that had been regarded as a conquest of the islands or of the mainland. The islands had simply been annexed and Queensland legislation applied to them.

It would have been sufficient for the decision in the plaintiffs' favour if the court had decided that, as a matter of Australian law, even if title to land had become vested in the Crown, the Crown's rights were nevertheless subject to the pre-existing rights of the native peoples. This was indeed the path adopted in differing ways in the judgments of Deane and Gaudron JJ and of Toohey J. However, Brennan J, with whom Mason CJ and McHugh J agreed, accepted that the position under Australian law was in some way dependent upon the position under international law. In other words, as long as the perception of Australia as being *terra nullius* at the time of the First Fleet persisted, Australian law was precluded from placing restrictions upon the Crown's rights in the form of beneficial land rights for the protection of the indigenous population. To avoid this, Brennan J rejected the possibility that the concept of *terra nullius* should any longer be applied to territories such as Australia which had an existing population at the time of settlement:

If the international law notion that inhabited land may be classified as *terra nullius* no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be "so low in the scale of social organisation" that it is "idle to impute to such people some shadow of the rights known to our law" (*Re Southern Rhodesia* [1919] AC 211 at 233-34) can hardly be retained.... The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.... Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.¹²⁶

Much of the difficulty could have been avoided by a clearer demarcation of the province of municipal law from that of international law.¹²⁷ But, in any case, it was a travesty of reality to regard title to Australia as having been created by occupation alone, or indeed to view the rights of the British to New

125 (1992) 175 CLR 1.

126 *Ibid*, at 41-42.

127 A principle now accepted in the *Mabo* case (1992) 175 CLR 1 at 44 per Brennan J.

Zealand as having been established exclusively by cession.¹²⁸ As far as the latter was concerned, the arrangements with native tribes were but a part of the picture. Also involved in the process of consolidation were the reactions of other States both initially and subsequently, and the means whereby the authority of the colonial power was extended to the territory in question. Thus, for example, it is unrealistic to suggest that, in light of the subsequent history, a distinction should be drawn in international law between the acquisition of the North and South Islands of New Zealand because the former was dependent upon an act of cession, in the form of the Treaty of Waitangi of 1840, and the latter upon occupation. That Treaty and the settlements which followed were part of the process whereby a title was established, valid as against other possible claimants, to New Zealand as a whole.¹²⁹

The section on occupation ends with segments on the polar regions and the Antarctic Treaty. There are references to the "discussion" early in the twentieth century "whether the North Polar region could be the object of occupation",¹³⁰ and to the "theory that a different standard of physical occupation is required in these climes", leading to "artefactual claims based on a so-called sector principle",¹³¹ followed by the comment that this "principle, without more (such as some administration or occupation), is not generally accepted as being of itself a sound basis for territorial title".¹³² However, apart from a long list of publications relating to "the acquisition of sovereignty over Polar regions",¹³³ there is little clue as to how the claimant States have attempted, by various actions, to substantiate their claims and, in justification, to explain how the classical rules and precedents as to the acquisition of territory might be applied. While the existence of article IV of the Antarctic Treaty is noted,¹³⁴ there is no reference to the fact that activities under the umbrella of the Treaty can adversely affect non-parties, while those activities could perhaps justify a composite claim by the Antarctic Treaty powers as a group to be entitled to exercise control over the mainland of the continent, its ice shelves and perhaps its surrounding waters. It would be a moot point

128 See Evatt, "The Acquisition of Territory in Australia and New Zealand" [1968] *Grotius Soc Papers* 16.

129 Similarly, with regard to *Western Sahara*, ICJ Rep 1975, p 12, the means of acquisition was not cession because a mere agreement between Spain and the local rulers could hardly in itself have displaced the legal ties that existed between their tribes and the neighbouring entities. The "process" factor was also reflected in the way in which territorial acquisition was said to be based upon a valid "root of title", which by definition had to be perfected by some subsequent act (eg, cession created the basis of title, but the agreement still had to be performed and that title confirmed, and not overborne, by subsequent events; "occupation" of territory followed by extension of control over the territory in question).

130 Page 692.

131 Page 693.

132 Ibid.

133 Pages 693-94, n 3.

134 Pages 694-95.

whether that authority was based upon some form of condominium, and whether the *dominium* in question was absolute (that is equivalent to joint sovereignty), or subject to rights of reasonable user by other members of the international community.¹³⁵

Chapter 6 on the high seas in fact incorporates various limitations upon the traditional freedoms¹³⁶ in the form of the continental shelf,¹³⁷ fishery zones and the exclusive economic zone,¹³⁸ marine scientific research,¹³⁹ the international seabed area and deep sea mining¹⁴⁰ and the protection and preservation of the marine environment.¹⁴¹ In this range of topics more than most, it is difficult to decide how much historical background should be provided (for example the rise of the freedom of the seas,¹⁴² the origins of claims to make use of the continental shelf,¹⁴³ or the concept of fishery zones as precursors to the EEZ.¹⁴⁴ One minor comment that might be made is that although the Truman proclamation relating to the continental shelf of 1945 and the more extensive claims of various Latin-American States are mentioned at the same time,¹⁴⁵ the parallel fisheries proclamation is not mentioned, except for an afterthought in a footnote,¹⁴⁶ until later.¹⁴⁷

The tortuous recent changes of direction on maritime delimitation are well recorded in relation to the continental shelf¹⁴⁸ and the EEZ.¹⁴⁹ One cannot avoid the feeling of being rather "left up in the air" at the end of the discussion of the *Gulf of Maine* case,¹⁵⁰ and the *Guinea/Guinea Bissau Maritime Delimitation* arbitration.¹⁵¹ The discrepancies are well identified but where

135 For such a suggestion see the present writer's "Territorial Sovereignty and the Status fo Antarctica" (1978) 32 *Australian Outlook* 117. Rights of reasonable access for its nationals (generations of whom had used the coastal strip and waters off the east coast of Greenland), which Denmark was intent on preventing for the future, was the reason why Norway, in 1931, felt impelled to protect their interests by asserting a claim to part of Eastern Greenland as *terra nullius* in the *Eastern Greenland* case (1933) PCIJ Ser A/B, No 53. One would hope that today, particularly in the context of Antarctica, international law is capable of providing a more equitable solution in the interests of the individual States concerned and the world community as a whole.

136 Pages 726-31.

137 Pages 765-82.

138 Pages 782-807.

139 Pages 807-11.

140 Pages 812-16.

141 Pages 816-25.

142 Pages 720-23.

143 Pages 765-67.

144 Pages 784-88.

145 Pages 768-69.

146 Page 771, n 3.

147 Page 785.

148 Pages 776-82.

149 Pages 804-07.

150 ICJ Rep 1984, p 246.

151 (1985) 27 *ILM* 635.

does that leave the law? Does the notion of a single maritime boundary supplant entirely or only in part the concepts and factors that were determinants in setting the continental shelf boundary between neighbouring States? And what of the relationship between pre-existing and settled areas of continental shelf and the requirements for EEZ delimitation? And, on a somewhat different point, what of States that have established claims to areas of continental shelf under the definition in the 1958 Convention but which would lose their right of free access by virtue of article 82 of the Law of the Sea Convention 1982 should that come into force?¹⁵²

Following a brief chapter on outer space, Chapter 8 turns to the position of individuals in international law. As one would expect, the space devoted to the topic has increased from the eighth edition¹⁵³ to the ninth,¹⁵⁴ particularly in the area of the international protection of human rights from 1955¹⁵⁵ to 1992.¹⁵⁶ There are a number of features of this part of the book of particular value. Of special note is the section on the position of aliens after reception.¹⁵⁷ The chapter is extensive in its coverage, and, as elsewhere, in the range of literature it cites. In the context of refugees, Australia, despite its enormous contributions to resettlement, does not rate a mention, even with regard to boat people! One would have thought that some Australian literature could have been included.¹⁵⁸

The section in this chapter dealing with extradition is another of the many examples of the remarkable range of illustrations, practice and writings cited by the editors. Nevertheless, it could have been made clearer that the need for the requesting State to make out a *prima facie* case for surrender is not so pervasive as the text seems to suggest.¹⁵⁹ It is very much a routine requirement in common law systems, but not so in civil law countries which usually require little more than "information as to the allegations against the fugitive".¹⁶⁰ This is not the only source of problems. In a federal State such as

152 See p 776.

153 Pages 636-53.

154 Pages 846-1030.

155 Pages 736-53.

156 Pages 983-1030.

157 Pages 903-39.

158 See p 891, n 1, last paragraph. For example, Schaffer (Balkin), "South-East Asian Refugees - The Australian Experience" (1981) 7 *Aust YBIL* 200, written at an early stage of the maritime exodus from that region. For additional references to more particular problems the following could also have been cited: Fonteyne, "Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees" (1983) 8 *Aust YBIL* 162; Coles, "Temporary Refuge and the Large Scale Influx of Refugees", *ibid*, p 189; Schaffer (Balkin), "The Singular Plight of Sea Borne Refugees", *ibid*, p 213.

159 Page 958.

160 Statement of Attorney-General Bowen on 25 March 1985 when introducing the Extradition (Foreign States) Amendment Bill 1985, text in (1991) 11 *Aust YBIL* 398.

Australia, the requirements to be established in pre-trial proceedings before an accused can be committed for trial can vary from one State or province to another. Accordingly, the Australian government decided that it was necessary "to unify throughout Australia the test to be applied by courts in determining whether evidence supplied by the requesting country is sufficient to justify the trial of the person sought".¹⁶¹

The new scheme is contained in the Extradition Act 1988 (Cth). It establishes a simplified procedure under section 19(2) whereby a person is eligible for surrender if the supporting documents have been produced to the magistrate, if the conduct constitutes an offence in the "extradition country" (as the requesting State is called), would have constituted an offence in the part of Australia where the proceedings are being conducted and if the person concerned is unable to "satisfy the magistrate that there are substantial grounds for believing that there is an extradition objection in relation to the offence".¹⁶² However, section 11 allows modification of the Act by regulation in relation to certain countries, more specifically by the imposition of a "sufficient evidence" requirement in proceedings resulting from an extradition request from a country to which such modified arrangements apply.¹⁶³ This is, in effect, a requirement of *prima facie* evidence that the case is one that should go to trial or further inquiry by a court, though the means of striking a balance between the various tests within Australia and the sort of standard usually applied in common law countries is the rather convoluted drafting of section 11(5).

The other significant difficulty in the extradition arrangements between common law and civil law countries (of which France and Germany¹⁶⁴ are no more than two among many examples) is the fact that criminal jurisdiction in civil law countries is based upon the nationality rather than the territorial principle. Accordingly, as the primary principle is that the courts of the national State should try individuals for crimes wherever committed, such countries will usually refuse – and often by constitutional requirement will be bound to refuse – to extradite their own nationals. As this policy will be reflected in extradition treaties, the result may be viewed as unsatisfactory from a number of points of view, not least being the fact that a State such as Australia would be prepared to surrender one of its own nationals to a country which would refuse such a request itself. To redress this imbalance, the 1988 Act allows the prosecution of Australian citizens with respect to conduct outside Australia, if that conduct would, had it been engaged in within a State or Territory, have constituted an offence against the law of that State or

161 Statement of Attorney-General Bowen on 28 October 1987 introducing the Extradition Bill 1987 into Parliament, text in (1991) 11 *Aust YBIL* 406.

162 An extradition objection is defined in terms of the political offence exception in s 7(a) as extended to various other matters in subsequent lettered paragraphs, and is similar to s 6 of the British Extradition Act of 1989.

163 Section 11(4).

164 Pages 955–56.

Territory, and, if extradition had been sought by an extradition country, the request had been refused because the person was an Australian citizen at the time of such conduct and the Attorney-General had been satisfied that the extradition country would have refused an extradition request in respect of one of its own nationals upon that ground.¹⁶⁵

The segment on the international protection of human rights gives a broad survey of the various instruments which have done so much to push the rights of the individual to the centre stage of international relations and law. With regard to the position in Africa with which Chapter 8 concludes,¹⁶⁶ the references could have included D'Sa, "The African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Action".¹⁶⁷

Occasionally, while not losing one's sense of appreciation for the enormous amount of material referenced by the editors, the reader does have the feeling that some of the commentary in the footnotes could more appropriately be placed in the text. In Chapter 10 on diplomatic envoys, there is a lengthy description of the *Tehran Hostages* case,¹⁶⁸ in which the International Court affirmed the principle of the inviolability of diplomatic premises.¹⁶⁹ The important and uncertain issue of the extent to which, if at all, a receiving State may act in derogation from this principle if it is abused is dealt with at some length, but only in a footnote.¹⁷⁰

Similar issues arise with regard to the relationship between receiving and sending States over the right of "so-called diplomatic asylum".¹⁷¹ Perhaps more might have been made of the distinction between temporary refuge on humanitarian grounds which seems to have become widely established in international practice and the more extensive power to grant diplomatic asylum favoured amongst Latin-American States. In this context, the events of 1973-75 in Santiago, following the overthrow of President Allende, could have been given greater prominence.¹⁷² Not only were the embassies of Latin American countries filled to overflowing, but various Western countries gave temporary refuge to supporters of the former regime, or arranged asylum for them in the premises of one of the Latin American States. Australian attempts in 1974-75 to have the institution of diplomatic asylum considered by the General Assembly made little progress. Overall, it may be a matter of personal preference how one interprets the haphazard practice. The editors give preference to the position of the receiving State,¹⁷³ and are equivocal about the

165 Section 45.

166 Pages 1029-30.

167 (1987) 10 *Aust YBIL* 101.

168 ICJ Rep 1980, p 3.

169 Pages 1078-79.

170 Pages 1080-81, n 30.

171 See pp 1082-85, with a discussion of the *Asylum* case, ICJ Rep 1950, p 266, on pp 1085-86.

172 See p 1084, n 11.

173 Pages 1083-84.

extent to which "asylum on grounds of urgent and compelling reasons of humanity" might operate as a modification of that position.¹⁷⁴

Chapter 11 deals with the rules of international law relating to consuls. In the editors' discussion of the vexed question of the scope of consular immunity, a number of differing propositions are advanced. The outcome in a marginal case may well depend on which one is regarded as the primary principle. Take the issue of whether the Australian authorities, federal or State, could have arrested Zoran Matijas, a security officer at the Yugoslav consulate in Sydney, for an offence arising from his firing a shot, during an attempt by a number of protesters to climb into the consular premises, which struck and injured a young person, Joseph Tokic, in the crowd at the gates of the premises. According to the editors:

(1) "[C]onsular officers ... are not amenable to the jurisdiction of the judicial or administrative authorities of the receiving state in respect of acts performed in the exercise of consular functions",¹⁷⁵ a principle stated in article 43 of the Vienna Convention on Consular Relations 1963.

(2) "[C]onsuls are, in principle, subject to the jurisdiction of the receiving state, and this exception in respect of acts performed in the exercise of consular functions is due less to any personal immunity from jurisdiction possessed by consular personnel than to the immunity from the jurisdiction of the receiving state which the sending state has in respect of its acts."¹⁷⁶

(3) It "has been asserted that a consul does not enjoy immunity from criminal jurisdiction under customary international law".¹⁷⁷

(4) In part, the above principle "may reflect the view that no act which is a criminal offence can properly form part of a consul's functions: this is certainly likely to be true of serious crimes, although there is more room for doubt where lesser offences are concerned".¹⁷⁸

(5) Consular officers "are not liable to arrest or detention pending trial except in the case of a grave crime and pursuant to a decision of a judicial authority",¹⁷⁹ a rule laid down in article 41.2 of the Convention.

(6) Nor, except in such a case, can "their personal freedom ... be restricted (as by committal to prison) otherwise than in execution of a judicial decision of final effect".¹⁸⁰

In these principles, and indeed in the provisions of the Convention, there is a degree of ambivalence. Leaving aside for the moment the issue of what constitute consular functions, it is arguable either:

174 Pages 1084–85.

175 Page 1144.

176 *Ibid.*, see (1961) II *Yb ILC* 117.

177 Page 1145.

178 *Ibid.*

179 Page 1146.

180 *Ibid.*, see article 41.2.

- (a) that the general principle is one of immunity in respect of those functions, whether from civil or criminal jurisdiction (no limitation is expressed in article 43), and that arrest in respect of a grave crime can only apply with regard to an act not connected with those functions; or
- (b) that the provisions must be read subject to pre-existing customary international law in case of ambiguity and that the absence of immunity in respect of criminal jurisdiction, at least with respect to grave crimes, under customary law is borne out by the fact that article 41 precedes article 43 in the text of the Convention and (therefore) has priority over it.

It has to be admitted that both contentions are sustainable. If, however, the position under customary law was as stated by proponents of (b), it is surprising that the rule was not more clearly reserved in relation to article 43. A more likely explanation is that, even if that had once represented customary law, the expanding functions of consuls, and the blurring of the dividing line between the work of consular and of diplomatic officers,¹⁸¹ were leading to a change in that law, though the final outcome of the change had not yet crystallised at the time the Convention was drafted.¹⁸² It is this factor which explains the uncertainties in the text of the Convention.

The blurring of functions was reflected in the circumstances of Matijas. The view that the commission of an act amounting to a serious crime is nevertheless immune from local jurisdiction depends entirely upon the definition of a consular function. Article 5 of the Convention describes, in a series of sub-paragraphs,¹⁸³ the traditional duties that consuls might perform,¹⁸⁴ including:

"(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law",

and then adds, in recognition of their changing nature:

"(m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in international agreements in force between the sending State and the receiving State".

Is it the case, as the Australian and Yugoslav governments seemed to accept, that a security officer one of whose tasks is to protect, by the use of a gun if necessary, the consular premises is exercising a consular function in

181 *Ibid*, see article 41.2.

182 See the statement by special Rapporteur Zourek at the UN Conference on Consular Relations (1963), *Off Rec*, Vol 1, p 134.

183 Sub-paragraphs (a)-(l).

184 See generally pp 1139-41.

doing so? With regard to article 5(a), the sending State presumably has an interest in the security of the premises and it is international law which sets the parameters of this power. With regard to (m), while it is not necessarily a function entrusted to the consular post by the sending State, it could be said that normally protection of the premises is left to the receiving State, but, in this case, the sending State also allocated performance of part of this task to its own officer and, apparently, no objection was made by the receiving State. Given the hostile environment in which some embassies operate, it is not surprising that their staff include persons with responsibilities for security who would undoubtedly be entitled to immunity and not just for acts performed as part of their functions, whether as diplomatic staff or as administrative and technical staff.¹⁸⁵ However, experience suggests that, in a hostile environment, consular premises may be as much at risk as an embassy.¹⁸⁶ Where a consulate is housed in the embassy the security function (as well as, in many cases, consular functions) would normally be performed by diplomatic or other staff within the embassy. Where a consulate is established elsewhere in a country, all activities would normally be carried out by officials of the consulate and it would be strange if international law did not recognise security as being amongst them.

The question that the facts of the Sydney consulate case also raise is who is to decide whether an act falls within, or is outside, consular functions. In the case of a diplomatic official, there is no problem as his or her person is inviolable and the immunity much wider in scope; in the case of a consular officer, there is no absolute inviolability and the immunity is limited. Accordingly, the answer would seem to be that it is for the courts of the receiving state to determine whether the officer is, in respect of the act in question, entitled to immunity. Changing circumstances may make this path unacceptable to a sending State, as was the case with regard to Matijas as far as the Yugoslav government was concerned. He remained in the consulate and the latter refused to surrender him to the New South Wales authorities for arrest under a warrant that had been issued. The principle of inviolability undoubtedly extends to consular premises in so far as they are used exclusively for the work of the post,¹⁸⁷ this exclusivity principle also appearing in the definition of such premises in article 1.1(j) as the "buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purpose of the consular post".¹⁸⁸

The unsatisfactory nature of this definition, together with the assertion of the view that Matijas' action had nothing to do with a consular function, led, so it was reported, to the bizarre suggestion that the local police could still have arrested him in some parts of the consulate. The reasoning behind such advice would probably have been something like this. If there is sleeping

185 See p 1108.

186 As in the *Tehran Hostages* case, ICJ Rep 1980, p 3.

187 Article 31.1.

188 Page 1147 and n 3.

accommodation on the premises, this can have nothing to do with the functions of the post because not even the private residence of a consul is inviolable under the Convention. Moreover, it could even be argued that as Matijas' presence there was not a consular function, the place where he was located was not being used exclusively for that purpose. It is undoubtedly true that the exclusivity principle does create a major problem for anyone contending for the inviolability of premises. Let us assume that the premises do contain proper sleeping quarters which are used principally for visiting officials from the government and the private sector of the sending State. This is not exclusive use for a purpose associated with the post's functions. If the accommodation is also used by consular officials sleeping there to protect or enhance the security of the premises, this would seem to constitute a consular function. Even with regard to Matijas' sojourn, this could be regarded as the provision of protection to the interests of a national of the sending State under article 5(a). Where the defect in the definition would come in would be if it could be shown, for example, that the sleeping quarters had, on occasion, been used by private guests of members of the consular staff whom they had not been able, or willing, for some reason, to accommodate at their private residence. The exclusivity test would not be satisfied, the inviolability would be lost, and an arrest could be made.

Fortunately, for the most part, consular relations are not conducted upon such a basis. Taking advantage of this possible loophole would hardly enhance relations between the sending and receiving States. In relation to Matijas, wiser counsel prevailed. To resolve the impasse, the Australian government gave the Yugoslav government an ultimatum on 1 December 1988 that either Matijas should be surrendered to the local police by 6 pm on 2 December 1988, or the consulate would be closed and all its staff be required to leave Australia by 6 pm on 5 December 1988. No surrender took place and the Australian government therefore carried out its threat to close the Sydney consulate, all the staff thereof being declared *personae non gratae*. It might be mentioned that the last issue to arise concerned the implementation of Australia's obligation under article 26 of the Convention to enable the staff of the consulate to depart from the country on the termination of their functions. In a country with a unitary system of government no problem can arise because the executive can ensure that the obligation is performed. In this case the New South Wales government was still pressing for Matijas' arrest. There was, in other words, a difference in the policy adopted by the two executives. As article 26 had not been enacted as part of Australian law, there was no municipal obligation upon the New South Wales authorities to allow free passage to Matijas to enable him to leave the country. In the event, they deferred to the wishes of the Commonwealth government so that Australia could comply with its international obligation.

It is possible to regard the law relating to consular immunity either as, based upon some perception of the pre-1963 customary law, in a state of static uncertainty as a result of the 1963 Convention, or as allowing for more

extensive immunities as befits the greater complexity of relations and the increasing dangers faced by all State representatives in overseas posts at the hands of the host government or other groups operating in the country concerned. In the same way that there are strong reasons for not attempting by agreement to curtail diplomatic immunities,¹⁸⁹ so there are increasing grounds for reading the scope of consular functions extensively rather than narrowly. The view adopted by the Australian government would therefore seem preferable to the less wise alternatives that were proposed.

Chapter 13 addresses what it refers to as "international transactions in general", by which is meant various bilateral or multilateral activities (consultations, negotiations and conferences) and various unilateral acts (declarations, notifications, protests and renunciations). More could have been made of the factors giving rise to a binding unilateral declaration than an entire page devoted (footnotes apart) to a lengthy extract from the International Court's judgment in the *Nuclear Tests* cases.¹⁹⁰ It is no easy task to determine whether the necessary intention to be bound exists if the declaration is not linked to some recognised process of undertaking an obligation, as with acceptances of the jurisdiction of the International Court under article 36.2 of its Statute (when, *pace* Judge Lauterpacht in the *Norwegian Loans* case¹⁹¹ and in the *Interhandel* case,¹⁹² the intention should be regarded as overriding and interpreted accordingly). It is reasonable to ask why the State concerned decided to act in this way, particularly if there is a parallel or similar treaty obligation that could have been undertaken by adherence to the treaty. This was the position of France which had refused to become a party to the Nuclear Test Ban Treaty 1963, under the terms of which a party would have been precluded from conducting nuclear tests in the atmosphere.

However, as it is likely that a unilateral act is more readily modified than the assumption of a treaty obligation (article IV of the 1963 Treaty notwithstanding),¹⁹³ France's attitude may be readily understood. A similar reluctance on the part of the three sponsoring powers, the Soviet Union, the United Kingdom and the United States, resulted in the absence from the Nuclear Non-Proliferation Treaty 1968 of any security guarantees by these nuclear weapon States to States which, under the Treaty, had renounced the

189 See the present writer's comments "The Abuse of Diplomatic Privilege" [1984] *Australian Int Law News* 447; for a discussion of the recommendations of the House of Commons Foreign Affairs Committee in their Report of 12 December 1984, see Higgins, "The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience" (1985) 79 *AJIL* 641, referred to p 1098, n 3.

190 ICJ Rep 1974, p 253 at 267-68 (p 1191).

191 ICJ Rep 1957, p 9 at 117-20.

192 ICJ Rep 1959, p 6 at 95-119.

193 The text of the Treaty is in (1963) 57 *AJIL* 1026. Article IV, appearing at 1027, provides in part that each party to the Treaty "shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardised the supreme interests of its country".

right to acquire a nuclear umbrella of their own. To placate States in the latter group and to encourage participation in the Treaty, the Security Council adopted resolution 255 which, *inter alia*, welcomed "the intention expressed by certain States that they will provide or support immediate assistance, in accordance with the Charter, to any non-nuclear weapon State party to the Treaty ... that is a victim of an act or an object of a threat of aggression in which nuclear weapons are used". The reference was to the accompanying declarations, in identical terms, made by the Soviet Union, the United States and the United Kingdom, that "aggression with nuclear weapons, or the threat of such aggression, against a non-nuclear weapon state would create a qualitatively new situation in which the nuclear-weapon States which were permanent members of the United Nations Security Council would have to act immediately through the Security Council to take the measures necessary to counter such aggression or to remove the threat of aggression" and which affirmed the declarant State's "intention, as a permanent member of the United Nations Security Council, to seek immediate Security Council action to provide assistance, in accordance with the Charter, to any non-nuclear-weapon State party" to the Treaty "that is a victim of an act of aggression in which nuclear weapons are used."¹⁹⁴ A number of factors suggest that these declarations were intended to be binding (though the extent of the commitment may not have been large¹⁹⁵), such as the reference to the "intention" of the declarants in the Security Council resolution; the context in which the declarations were made, including the demands of the States to which the declarations were principally directed; and the more specific undertakings later made on behalf of each of the three States at the General Assembly's Tenth Special Session devoted to Disarmament in 1978.¹⁹⁶

Volume I ends (as does Volume IB also!) with two chapters dealing with treaties: Chapter 14, which covers certain preliminary matters and the general law of treaties, and Chapter 15, which deals with what it terms "important groups of treaties". The former chapter takes a normal approach, commencing

194 The text of resolution 255 is given in (1968) 7 *ILM* 895, the security guarantees appearing at 903.

195 For a brief comment, see the present writer's "The Interpretation of Treaties and Article IV.2 of the Nuclear Non-Proliferation Treaty" (1978) 6 *Aust YBIL* 77 at 107-09.

196 For example the UK representative to the UN said on 28 June 1978 (part of the text in Goldblat J, *Arms Control Agreements: A Handbook* (1983), p 212; for parts of the text of the Soviet and US statements, see *ibid*, p 211):

I accordingly give the following assurance, on behalf of my Government, to non-nuclear weapon States which are parties to the Non-Proliferation Treaty or to other internationally binding commitments not to manufacture or acquire nuclear explosive devices: Britain undertakes not to use nuclear weapons against such States except in the case of an attack on the United Kingdom, its dependent territories, its armed forces or its allies by such a State in association or alliance with a nuclear weapon State.

See also the Final Document of the Session, para 59, text in (1978) 17 *ILM* 1017 at 1024; and Dahlitz J, *Nuclear Arms Control* (1983), pp 61-66.

with matters of definition and proceeding through the issues dealt with in the Vienna Convention of 1969. The only definitional aspect that does cause surprise is the assertion that, as the "agreement must be governed by international law", so "agreements subject to some national system of law will not constitute treaties, even though the parties are states".¹⁹⁷ Neither the text nor any footnote canvasses the possibility that an agreement might be of a dual nature, constituting both a treaty arrangement giving rise to rights (and obligations) under international law and having certain consequences under municipal law. Indeed agreements dealing with the disposition or allocation of property which can only operate municipally, but negotiated at the international level, may well have these characteristics. Thus, for example, the agreement between the United States and the Federal Republic of Germany, entered into by an exchange of notes of 16 December 1966, with regard to certain paintings from the Weimar Museum¹⁹⁸ should surely have been so regarded. While the agreement was (held to be) designed to operate at the municipal level, there is no reason to suppose that, for example, the United States would not have been entitled to regard a failure to carry out the terms of the arrangement by the Federal Republic as a breach of an international obligation.

The editors seem to take a very clear stand on the status of memoranda of understanding when they write:

Where states wish to record certain matters in writing, but wish to do so in a manner which is not intended to create legal rights and obligations and does not constitute a legally binding agreement, ... they may conclude a memorandum of understanding.¹⁹⁹

While the editors thus support the view of the Department of Foreign Affairs and Trade in Canberra, the footnote which is referred to in that passage²⁰⁰ admits that the International Law Commission had taken the opposite point of view.²⁰¹ It would seem to be doubtful, therefore, whether the use of such a designation necessarily establishes an intention not to create international obligations.²⁰²

The paragraph dealing with effects of a treaty prior to its entry into force²⁰³ seems to have been redrafted in the course of gestation in such a way that the words "apart from such cases, which depend upon the express agreement of the states concerned ..." are separated from the relevant cases by the sentence:

197 Page 1200.

198 Discussed by Mann, "Another Agreement between States under National Law?" (1974) 68 *AJIL* 490 (referred to p 1200, n 7).

199 Pages 1202-03.

200 Pages 1209-10, n 8.

201 (1966) II *Yb ILC* 188.

202 See the comments of the present writer in "Reflections on Consent" (1992) 12 *Aust YBIL* 125 at 135-36.

203 Pages 1238-39.

An unratified treaty may also constitute evidence of a rule of customary international law, or of the intentions and knowledge of the contracting parties at the time of signature; furthermore, if a treaty's provisions reflect rules of customary international law they may be applied, even before the treaty enters into force, as a convenient expression of the customary rules.²⁰⁴

It would have been as well to have placed this and the material to which it refers²⁰⁵ in a footnote, partly because it is a different issue and partly to maintain what was, presumably, the original sense of the text.

The paragraph ends with a bland acceptance of the obligation contained in article 18 of the Vienna Convention. By this provision, a signatory to a treaty subject to ratification, and a State which has ratified a treaty which has yet to enter into force, are both "obliged to refrain from acts which would defeat the object and purpose" of the treaty. There are a number of problems, practical as well as theoretical, as to the nature and scope of this obligation. The shift from the concept of a moral obligation to act in good faith, favoured in the Harvard Draft on the Law of Treaties,²⁰⁶ and initially by the International Law Commission,²⁰⁷ to the imposition of a legal duty, was promoted by Lauterpacht,²⁰⁸ and subsequently accepted by the Commission.²⁰⁹ Yet, the situation is not so clear cut in practical terms. The cases which lend support to the existence of a legal obligation cover the situation in which the treaty had been ratified and later entered into force; and where therefore it was possible for a party to contend that it had been deprived of what it regarded as its full entitlement under the treaty by acts committed by the other party²¹⁰ between signature and ratification.²¹¹

The existence of an obligation to protect the rights of a party to a treaty which comes into operation is acceptable enough. But what if the treaty is not ratified by the offending State? Article 18 limits the operation of the obligation by stating that it continues until (a), in the case of a State which has signed, but has yet to ratify, a treaty, the State "shall have made its intention clear not to become a party to the treaty", or (b), in the case of a State which has expressed its consent to become bound by the treaty pending its entry into force, for as long as "such entry into force is not unduly delayed". With regard to situation (a), as there is no obligation upon a signatory State to proceed to ratification, conduct on its part in derogation from the treaty's object and purpose might well constitute a clear indication of its intention not to become a party to the treaty. Thus, unless the State in question, notwithstanding its

204 Ibid.

205 Notes 4-6.

206 (1935) 29 *AJIL Supp* 655 at 781.

207 (1951) I *Yb ILC* 39-42.

208 (1953) II *Yb ILC* 109-10.

209 (1956) II *Yb ILC* 113, 121.

210 Although the case law dealing with the issue has arisen primarily in relation to bilateral treaties, such a situation could arise under a multilateral treaty: see the examples given in the Harvard Draft, n 206 above at 781-82.

211 See p 1239, n 7.

antipathetic behaviour towards its obligations under the treaty, does proceed to ratification, it might be difficult for other signatories or parties to obtain any practical benefit from the obligation contained in article 18.²¹²

The effects of reservations give rise to a number of complex issues, some of which are not alluded to, or at least not in a way that provides much guidance to an inquiring reader. Take, for example, the questions of whether an impermissible reservation is totally void and, if it is, whether it can destroy the validity of the instrument of ratification or acceptance containing it. The Convention is defective in that it contains no direct (and certainly no clear) indication as to the consequences of impermissibility. It is true that article 21 refers to the consequences of a reservation "established *with regard to another party* in accordance with articles 19, 20 and 23", but the inclusion of the words emphasised detracts from the inference that might otherwise arise of impermissibility resulting in general invalidity.

As to what might be deduced from the wording of articles 19 and 20, there may be a distinction between reservations that are prohibited by virtue of article 19(a) and (b), and those which are incompatible with the object and purpose of the treaty under article 19(c).²¹³ There are a number of reasons for suggesting why this may be so. In the first place, whereas paras (a) and (b) seem to establish objective standards whereby to assess the validity of a reservation, the requirements referred to in para (c) could well be primarily subjective. This perception of the position is borne out by the tenor of the International Court's opinion in the *Genocide* case,²¹⁴ when, having said that "it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making a reservation on accession as well as for the appraisal by a State in objecting to the reservation",²¹⁵ went on to observe that "each State which is a party to the Convention is entitled to appraise the validity of the reservation, and it

212 Article 18 gives no guidance as to the position implicit in the circumstances just described where it could be argued by a party which subsequently ratifies that it had already made clear its intention not to ratify. On the face of it, the obligation as described in article 18 comes to an end, so that acts in derogation of the treaty's object and purpose are no longer proscribed. If, however, article 18 were a misdescription, or did not cover the entirety, of a rule of customary international law that a State ratifying a treaty undertakes full performance notwithstanding anything it may have done in the interim, the principle upon which the case law was based would still be available to the disappointed party.

213 According to article 19:

A State may, when signing, ratifying, accepting, approving, or acceding to a treaty, formulate a reservation unless:

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

214 ICJ Rep 1951, p 15.

215 *Ibid*, at 24.

exercises this right individually and from its own standpoint".²¹⁶ The only possibility of the compatibility standard having an objective content would be if the dispute were submitted for settlement "on the jurisdictional place".²¹⁷

This subjective element is also present in article 20.4, which appears to make the operation of article 19(c) dependent upon the reactions of other participants in the treaty. By article 20.4(a), "acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States", and by (c) "an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation". These paragraphs cannot apply to reservations falling within article 19(a) or (b) because the opening words of article 20.4 exclude the operation of the ensuing sub-paragraphs where the treaty "otherwise provides", and the circumstances referred to in article 19(a) and (b) are examples of cases where the treaty does otherwise provide.

The question would remain as to whether the subjective element would be replaced by an objective assessment of the application of article 19(c) if, to use the language employed in the *Genocide* case, the matter is placed on the "jurisdictional plane". The answer may not be in line with the court's former opinion. The scheme of the Vienna Convention is to place the role of judge as to the validity of reservations in the hands of participating States. Not only can they accept or reject a reservation, but they are also empowered to deny the validity of an act of acceptance containing a reservation if they so wish, though the onus is upon them to take such a step.²¹⁸

The editors express a contrary view, regarding the acceptance of an impermissible reservation as ineffective, except in the "unlikely" case of its acceptance by all other parties to the treaty.²¹⁹ However, although there may be legitimate differences as to the interpretation to be placed upon articles 19-21 of the Vienna Convention, a number of other factors weigh against the editors' approach. Initially, the reaction of the International Law Commission to the court's "compatibility test" was to dismiss it as too subjective.²²⁰ Subsequently, the Commission's opinion changed. As its final report on the Law of Treaties recorded, it was agreed that "the Court's principle of compatibility with the object and purpose of the treaty is one suitable for adoption as a general criterion of the legitimacy of reservations to

216 Ibid, at 26.

217 Ibid, at 27.

218 According to article 20.4(b):

an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting state.

219 Pages 1243-44.

220 (1951) II *Yb ILC* 130-31.

multilateral treaties and of objection to them".²²¹ At the same time, it was recognised that application of the compatibility test would in a majority of situations be left to the discretion of States faced with a reservation and that, ultimately, they could protect their position through the option open to them of objecting to the reservation and declaring that, as a result, the treaty was not in force between themselves and the reserving State.²²² Indeed, this essentially *ad hoc* view of the law is borne out in State practice. There are examples of denials of the validity of reservations by States which do not object to the entry into force of the treaty in question, which therefore takes effect by virtue of article 20.4(b).²²³ Even more striking are cases where incompatibility is alleged in an objection to a reservation, but an express declaration is added that this is not to prevent the treaty in question entering into force between the objecting and reserving States.²²⁴

The final point to be made about reservations concerns their effects on the terms of the treaty, dealt with briefly by the editors and principally in terms of article 21 of the Vienna Convention.²²⁵ The main problem with this regime is that, as far as reservations are concerned which exclude, in whole or in part, a particular provision in a treaty in its application to the reserving State, it makes no difference whether the reacting State accepts or rejects the reservation: the reserving State will not be affected by the provision in question to the extent of its reservation. The only option apparently open to a reacting State is the extreme step of expressing its objection and declaring the treaty in question as not in force between the two States.

Attempts have been made to redress this balance by a number of States when faced with a reservation to which they have taken particular exception. When the objecting State wishes to preserve the rule in the treaty to which a reservation has been made, it will attack the validity and effectiveness of the reservation. A variety of formulae have been used for this purpose. Some States have chosen to express the view that they do not "regard" or

221 (1966) II *Yb ILC* 205.

222 *Ibid.*, pp 205–06.

223 See the range of reactions by the Soviet Union between 1972 and 1986 to the reservations of a number of Arab countries to the Vienna Convention on Diplomatic Relations 1961, texts in *Multilateral Treaties Deposited with the Secretary-General* (1990) ST/LEG/SER. E/8, pp 62–63; see also the reaction of Poland in 1975 to the reservation of Bahrain to the same Convention, *ibid.*, p 62.

224 See the objections to the reservations by Yemen to the International Convention on the Elimination of All Forms of Racial Discrimination 1965 by Denmark, *ibid.*, p 116; Finland, *ibid.*; France, *ibid.*; Mexico, *ibid.*, p 117; Netherlands, *ibid.*; Sweden, *ibid.* There have also been occasions when reacting States have denied the operation of a part of a treaty to which a reservation relates, while accepting that the treaty is otherwise in force: see the objections to the Syrian and Tunisian reservations to the Vienna Convention on the Law of Treaties 1969 by Japan, *ibid.*, p 816; Netherlands, *ibid.*, pp 816–17; Sweden, *ibid.*, p 817; and the United States, *ibid.*, pp 818–19.

225 Page 1247.

"recognise" as "valid" the reservation in question.²²⁶ In some cases this has been augmented by a reference to the reservation's "incompatibility with the objects and purposes" of the particular convention.²²⁷ There are many examples of the use of the wording that the objecting State does not regard a "statement" as "modifying any rights or obligations" under the provision to which it relates. Such expressions are usually employed to signify the reacting State's view that the declaration of the "reserving" State is only an interpretative statement (which would raise quite different issues, though such statements are given only a fleeting mention by the editors²²⁸), but formulae of this sort have, less commonly, been used in relation to something specifically referred to as a "reservation".²²⁹ It has to be admitted, however, that it is not at all easy to assess what effect such stratagems might have in minimising the advantage which a reserving State has under the express provisions of the Vienna Convention.

Perhaps more could be made of the various schools of treaty interpretation, not least because the general rule of interpretation contained in article 31 of the Vienna Convention²³⁰ is not necessarily the total acceptance of the textual approach that the editors assert.²³¹ Even if that was the intention of the International Law Commission in drafting such a text, the wording is sufficient to give some comfort to supporters of both the intentions and the

226 See, in relation to the Convention on Diplomatic Relations 1961, the objections of Australia, n 224 above, pp 57-58; Canada, *ibid*, p 58; Denmark, *ibid*, p 59; France, *ibid*; Hungary, *ibid*, p 60; Ireland, *ibid*, p 61; Mongolia, *ibid*; New Zealand, *ibid*, p 62; Ukraine, *ibid*; Soviet Union, *ibid*, p 63; United Kingdom, *ibid*.

227 See, in the context of the same Convention, the objections of Czechoslovakia, *ibid*, p 59; France, *ibid*, p 60; Hungary *ibid*; Japan, *ibid*, p 61; Mongolia, *ibid*; Poland, *ibid*, p 62; Soviet Union, *ibid*, p 63, and, with regard to the Convention on the Elimination of All Forms of Racial Discrimination 1966, the objection of Mexico, *ibid*, p 117. Occasionally this formulation, or something akin to it, is used on its own; sometimes in conjunction with a reference to the impermissibility of the reservation, see, also in relation to the former Convention, the objection of Belgium, *ibid*, p 58; Czechoslovakia, *ibid*, p 59; Federal Republic of Germany, *ibid*, p 60; and, with regard to the latter Convention, the objections of Australia, *ibid*, p 115; Belgium, *ibid*; Denmark, *ibid*, p 116; Federal Republic of Germany, *ibid*, p 117; Netherlands, *ibid*; New Zealand, *ibid*; and Sweden, *ibid*.

228 Page 1242, n 3.

229 See the reaction of Australia to the reservation by Yemen to the Convention on Diplomatic Relations 1961, n 224 above, pp 57-58; and of Ireland to the reservation by the People's Republic of China to articles 14 and 16 of that Convention, *ibid*, p 61.

230 According to article 31.1:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose.

231 Page 1271. See Schaffer (Balkin), "Current Trends in Treaty Interpretation and the South African Approach" (1981) 7 *Aust YBIL* 129, which is well worth noting and not just for its comments (*ibid*, p 139) on this specific issue.

object and purpose schools.²³² Moreover, the scope of the provision is sufficiently broad to allow McDougal to console himself with the thought that, though the United States' attempt to remove the hierarchy established between articles 31 and 32 failed at the Vienna Conference,²³³ a contextualist could still operate within the margins established by article 31.²³⁴ Indeed, it is just as well that article 31 can be used to justify both a limited and an expansive view of a treaty's meaning, given the range of circumstances to which it is to apply – to informal bilateral arrangements, as well as to large-scale multilateral conventions, including the constitutions of major international organisations, the needs and aspirations of which may have departed significantly from the intentions of the original framers or even the strict meaning of the text which they designed.

The section dealing with the remedies of termination or suspension of a treaty by one party in response to a material breach of the treaty by the other, or another, party accepts without comment the extraordinary view of the International Law Commission and the Vienna Conference that the reacting State has a total discretion whether to exercise this power with regard to the whole, or only to part, of the treaty. While there are historical reasons why this should once have been the probable rule, there are good reasons, not least the complexity of many modern treaties, why this should no longer be the case.²³⁵

There is a range of factors suggesting that the scope of the right to suspend or abrogate should be limited: McNair gave the example of the Treaty of Versailles 1919 which contained a whole range of different treaty regimes, including the Covenant of the League of Nations, the constitution of the International Labour Organisation, the internationalisation of the Kiel Canal, the demilitarisation of the Rhineland, and so on. It should not be supposed that a breach relating to one part of that Treaty, however material in that context, could have justified a suspension or even termination under article 60.2(a) of the whole. Even with regard to treaties which deal with a single topic, they may do so from different points of view, so that a breach may affect only one aspect of the treaty's operation. In the *Diversion of Water from the River*

232 As "context" is not necessarily limited by article 31.2, and can include the course of negotiations between the parties (see the *Aegean Sea* case, ICJ Rep 1978, p 3), and as the object and purpose can presumably be ascertained from the same sources, including the *travaux préparatoires* (as long as they are not used as direct evidence of meaning, a use limited by article 32), article 31.1 does not have to be regarded as a reaffirmation of textualist orthodoxy.

233 For the US view, see McDougal's statement of 19 April 1968, reproduced in (1968) 62 *AJIL* 1021.

234 It was certainly the view of Gross, "Treaty Interpretation: The Proper Role of an International Tribunal" [1969] *Proc ASIL* 108 at 116 *et seq*, that the contextual view was not excluded by articles 31 and 32: "the ILC draft makes it entirely possible for any externalised objective, expectation or intention to be considered by a tribunal" (at 120).

235 See McNair AD, *The Law of Treaties* (1961), pp 474–75.

Meuse case,²³⁶ the Permanent Court regarded the Treaty of 1863 between Belgium and the Netherlands as constituting a single whole as far as its interpretation was concerned,²³⁷ and concluded that there had been no breach of its provisions. However, with regard to the consequences of any breach, there is much to be said for the approach of Judge Altamira who discerned three different groups of provisions, one concerning water supply to and navigation on certain canals, another relating to the carrying out of certain works on the waterways, and the third with navigation on the River Meuse itself, and then commented that:

every one of the obligations, whether common to the two contracting parties or peculiar to one of them, contained in the Treaty, is essential in respect of the type of interests to which it relates ... each article of the Treaty requires the precise fulfilment of that part of the agreement between the contracting States which it represents.²³⁸

This "relativity" is limited by two allied concepts, those of proportionality and materiality. Proportionality of response lies at the heart of valid retaliatory action under international law. It is seen in its most familiar role in relation to the right of self-defence,²³⁹ but it is a principle of general application across the whole range of counter-measures: a party is entitled to take such measures, as long as they have "some degree of equivalence with the alleged breach".²⁴⁰ Indeed, the idea behind the materiality requirement is that there should be some degree of equivalence between the remedy available (termination or suspension of a treaty) and the seriousness of the breach.²⁴¹ Thus, as finally adopted, article 60 of the Vienna Convention, having stated in para 1 that the right of termination or suspension is available in cases where there has been a material breach, continued in para 3 to define such a breach as consisting of:

- (a) a repudiation of the treaty not sanctioned by the present Convention; or
- (b) the violation of a provision essential to the accomplishment of the object and purpose of the treaty.

The curious aspect of this definition is that it does not in fact cover the seriousness of a breach as a ground for termination or suspension, but limits the power by reference to (a) what is in effect a refusal to perform the treaty at

236 (1937) PCIJ Ser A/B, No 70.

237 See pp 21, 23.

238 Page 38.

239 See the *Nicaragua* case, ICJ Rep 1986, p 14 at 94. The scope of action that might be accommodated within this requirement might be wide, particularly in relation to self-defence: see Dinstein Y, *War, Aggression and Self-Defence* (1988), pp 216-19; but even in other contexts it has a degree of flexibility: see the *Air Services Agreement* case (1978) 54 ILR 304 at 339-41.

240 *Ibid*, at 338.

241 See the International Law Commission's Final Report on the Law of Treaties, (1966) II *Yb ILC* 255: the Commission "was unanimous that the right to terminate or suspend must be limited to cases where the breach is of a serious character".

all (or at least any further), and (b) breach of a "fundamental" provision in the treaty. As a breach of such a provision may itself be slight or major, the effect of the drafting might be quite contrary to the proclaimed objective of the International Law Commission, particularly as a serious breach of a less important provision will not give rise to a right to terminate.²⁴²

The possibilities arising from this drafting also appear to be inconsistent with the principle of proportionality, to the extent that one wonders whether the International Court would feel obliged to apply article 60 in a case of a relatively minor breach of a provision, however important that provision might appear to have been to the parties. In the *Air Services Agreement* case,²⁴³ there was perhaps an indication of a lack of enthusiasm for the concept of materiality as defined in the Vienna Convention. Pan-Am, as a designated carrier under the agreement between France and the United States, decided to operate its route from the West Coast of America to Paris via London in a more economical way by transferring passengers going on to Paris to a smaller aircraft in London. The French authorities claimed that this was not permitted under the agreement and then prevented passengers disembarking from the smaller aircraft when it reached Paris. In retaliation, the United States CAB issued an order prohibiting Air France from operating certain services to the United States for as long as the embargo on the Pan-Am service was maintained. This order did not take effect as the matter was submitted to arbitration. Although the issue of materiality was canvassed by the parties in their pleadings,²⁴⁴ it was ignored by the tribunal in assessing the legitimacy of the American reaction. The tribunal adopted the view that, for any breach of an international obligation, in this case the denial of American rights under the agreement, which it held included the right of Pan-Am to operate the service in question in the manner chosen by the airline, a party was entitled to take counter-measures as long as they satisfied the requirement of proportionality. As to this factor, the tribunal concluded that it could not be shown that the requirement had not been satisfied.

It is not easy to estimate the significance of this decision in the absence of any comment by the tribunal on the relevance of the materiality standard. At one level the decision recognises the obvious fact that article 60 is not the exclusive basis for responding to treaty breaches. As article 74 of the Vienna Convention stipulates, the provisions of the Convention are not to affect the ordinary rules relating to State responsibility, a provision which makes clear

242 This situation is similar to that existing in Anglo-Australian contract law though the courts have recognised the unsatisfactory consequences of concentrating on the nature of the term broken (whether it is a "condition" of the contract), and the need instead, or in addition, to take account of the gravity of the breach irrespective of the nature of the term: see Greig DW and Davis JLR, *The Law of Contract* (1987), pp 1206-13.

243 (1978) 54 ILR 304.

244 See Damrosch, "Retaliation or Arbitration or Both? The 1978 United States-France Aviation Dispute" (1980) 74 *AJIL* 785 at 789-91.

that, as a minimum, the right to seek reparation in respect of a breach of a treaty obligation is maintained. However, the arbitral decision goes further and sanctions a suspension of rights in response to a prior breach by the other party that might not be classifiable as material within the Vienna Convention's definition. This is a different matter because it appears to conflict with article 42.2 of the Convention, according to which:

The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of the treaty.

There seems to be no obvious way out of this difficulty. It is true that the Vienna Convention was not in force between France and the United States, but the International Court in the *Namibia* case²⁴⁵ had expressed no doubt that the rules laid down in the Convention "concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject". It may be that this proposition is correct with regard to termination and that it is the reference to suspension as well in article 42.2 which is an inaccurate rendition of customary international law. Certainly, suspension of rights or their threatened suspension is a familiar pattern in more serious disputes between States over air routes and landing rights. Either the States concerned regard the power of suspension as generally available, irrespective of the gravity of the breach (or of the importance of the provision broken), or air transport and service agreements would have to be regarded as a *lex specialis*.

The discussion has strayed from the issue of whether a breach, even if material, gives the other party an unlimited discretion whether to terminate or suspend "in whole or in part". The evidence in support of this reading of the Vienna Convention is difficult to counter. Thus article 44.2 prescribes that a "ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty ... may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in Article 60". While article 44.3 provides that if "the ground relates solely to particular clauses, it may be invoked only with respect to those clauses" in the circumstances then described, it is apparent from para 2 that this sensible limitation has no relevance to the position under article 60. Furthermore, the belated attempt by the United Kingdom to have deleted the words "or in Article 60" from para 2 failed.²⁴⁶

This outcome defies the criterion of proportionality which article 44 otherwise represents and which should be expressed in article 60. It is also doubtful whether the discretion built into the latter provision is a true

245 ICJ Rep 1971, p 16 at 47.

246 See Sinclair I, *The Vienna Convention on the Law of Treaties*, 2nd ed (1984), p 198, n 28.

reflection of State practice. There has been a more widespread use of suspension, as a general counter-measure by a State protesting against a breach of a treaty by another party, than article 60 would seem to allow. In addition, States themselves would appear to recognise the benefits of preserving treaty relationships by limiting their reactions to part, rather than to the whole, of a treaty. In the *Tacna-Arica* arbitration,²⁴⁷ it is significant that the issue to be determined was not the continued validity of the Treaty of Ancon 1883 between the parties in the light of alleged "Chileanisation" of the provinces, but whether the provisions of article 3 of the Treaty were still in effect requiring a plebiscite to be held in the two provinces.

The decision on the issue is acknowledged as a justification for the requirement in article 60 of the Vienna Convention that only a material breach justifies a right of termination. The arbitrator held:

that if abuses of administration could have the effect of terminating such an agreement, it would be necessary to establish such serious conditions as the consequence of administrative wrongs as would operate to frustrate the purpose of the agreement, and, in the opinion of the Arbitrator, a situation of such gravity has not been shown.²⁴⁸

It is particularly significant that, if this was indeed an example of materiality in action, the materiality was limited solely to the purpose of "the agreement", that is article 3 of the Treaty rather than the Treaty as a whole. This possibility is not reproduced in article 60 which defines materiality in terms of "the violation of a provision essential to the accomplishment of *the* object and purpose of *the* treaty",²⁴⁹ In neither this definition, nor in the discretion entitling a party not in breach to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part, is there any possibility of limiting the extent of the discretion by reference to the extent of the breach. If there is any comfort to be gained from this wording it is that article 60 can be interpreted in such a way as to exclude any right of termination or suspension on this ground at all. The provision broken must be material to the treaty as a whole so that materiality with regard to part only of the instrument will not be a basis for invoking article 60.

Despite the endorsement by the International Court of the Vienna Convention as representing customary international law, parts of the Convention are unsatisfactory, even defective. A number of provisions give rise to problems which are not just theoretical. It is a common complaint among government lawyers in this country that the Convention simply does not answer many of the practical issues with which they are faced. It is a pity therefore that the principal chapter on treaties places so much emphasis on the Convention without signifying some of the difficulties which its provisions generate.

247 (1925) 2 UNRIAA 921 (p 1301, n 4).

248 *Ibid*, p 944.

249 Emphasis supplied.

It may be that this review has demanded more of the editors than they could possibly have provided within the framework to which they were restricted by the *Oppenheim* format. It is likely that there will be occasions on which a reader will have a sense of deprivation, of being denied access to the highly informed views of the editors. Even if they felt unable to digress in the text because of the *Oppenheim* structure, the point remains that the copious footnotes could have been more than compendia of where to find additional information, and might have, more frequently, signalled the existence of divergent approaches and the preference of the editors.

As to the distinction between a practitioner's book and an academic treatise, it is not one which the present reviewer would endorse. International law is scarcely determinate enough, as a number of the issues canvassed in this paper amply demonstrate, to exclude a significant degree of latitude to the judge or writer in deciding upon or defining the relevant rule, and the conclusion arrived at by either of them will need to be justified by reference to theory as well as to practice. The skills of the editors, as judge and jurist, are too often concealed by the limited discussion of alternative views of the law and by the absence, in many contexts, of any theoretical justification for the principles being advanced.

Nevertheless, the new *Oppenheim* is an achievement of which the editors can justifiably be proud. The writing of the text alone would have been attainment enough, but the editors have also provided a treasury of additional reading that practitioner and researcher alike will find of inestimable value. With regard to the text itself, it will remain a source of quotation and inspiration in the work of international tribunals. Not just for that alone, the present editors are the worthiest of successors to the previous editor.

If a final comment is allowed, the present reviewer would like to make an apology for adopting the description, employed in the new *Oppenheim*, of the writers as "editors". They are, in the best sense of the term, authors of much of the text and many of the footnotes and their role and achievement should not be disguised by the former appellation.

